

State of U.P. Vs. Gauri Shanker

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Court : Allahabad

Decided On : Oct-30-1972

Reported in : 1973CriLJ910

Judge : K.N. Srivastava and ;P.N. Bakshi, JJ.

Appellant : State of U.P.

Respondent : Gauri Shanker

Judgement :

P.N. Bakshi, J.

1. Gauri Shanker son of Pancham Lal and Radhey Shiam Son of Ghanshiam Das were prosecuted under Sections 7(1)/16(1)(a)(i) of the Prevention of Food Adulteration Act by the ,Sub Divisional Magistrate Kalpi by his judgment dated 21.4.1965. They were sentenced to a fine of Rs. 1,000/- and to rigorous imprisonment for nine months. They filed an appeal against their conviction which was allowed by the Sessions Judge by his order dated 18.10.1967, whereby the case was remanded for retrial. Both the accused were thus retried for the aforesaid offence. Radhey Shiam was acquitted by the 1st class Magistrate Jalaun by his judgment dated 21st May 1968 of the offences for which he has been charged and convicted Gauri Shanker under Section 7(1)/16(1)(i) of the Prevention of Food Adulteration Act and sentenced him to a fine of Rs. 1000/- and 9 months' rigorous imprisonment. Gauri Shanker filed an appeal before the

Sessions Judge Oral. By his judgment dated 12th October 1968 the Sessions Judge has allowed the appeal and set aside the conviction and sentence recorded against Gauri Shanker. The State has now filed the present appeal against the acquittal of accused Gauri Shanker.

2. The case for the prosecution is that on 30th July 1964 Sri Basant Singh was Food Inspector of Municipal Board Oral At about 3 PM. on that date he went to the Oil Mill of Radhey Shyam. He found Gauri Shanker at the shop. It may be mentioned at the outset that the appellant is both a manufacturer and a retail seller of oil. The Food Inspector purchased 1 Pao of mustard oil (Kail Lahi Ka tail) for Re. 1/-. Receipt in token of the payment of the price Ex. Ka-1 was taken by the Food Inspector from the accused Gauri Shanker. The Food Inspector informed Gauri Shanker that the oil was being purchased as a sample for analysis by the Public Analyst. This information was conveyed to Gauri Shanker through the writing Ex. Ka-2 which, bears the signature of Gauri Shanker and two witnesses. The Food Inspector after making the purchase divided the oil into three equal parts and put it into three different bottles. The sample was taken in the presence of Mukhtar Ahmad Ansari and Sri Krishna. The samples were closed labelled and sealed in the presence of the accused. One bottle of the sample was handed over to the accused and out of the remaining two bottles one was sent to the Public Analyst for his report. In the opinion of the Public Analyst the sample did not conform to the standards prescribed for mustard oil (Kail Lahi ka tail) in the following respects:

(a) Butyro-refractometer reading at 40°C exceeds the maximum limit of 60.5.

(b) Saponification value exceeds the maximum limit of 176.0.

(c) Iodine value exceeds the maximum limit of 108.8. The sample is also said to contain a small proportion of linseed oil viz. 9.72 per cent.

On the receipt of this report the Food Inspector obtained the sanction of the District Medical Officer of Health Jalaun at Oral for the prosecution of the accused. Having obtained sanction he submitted a charge-sheet Ex. Ka-4 against the accused. The accused was thereupon, tried as mentioned above.

3. The accused Gauri Shanker pleaded not guilty. It is important to note that the defence originally taken up by Gauri Shanker was that he had extracted linseed oil in his oil crusher and subsequently he extracted mustard oil in the same crusher, as such there could be mixture of linseed oil with mustard oil. On this basis he denied having committed any offence. When however, the conviction of the accused was set aside in appeal by the Sessions Judge and the case was remanded for retrial, Gauri Shanker gave up his earlier defence plea. He took up the defence that the oil from which a sample had been taken from his shop belonged to a customer and as such he had not committed any offence. It is this subsequent defence plea with which we would be concerned in the present case.

4. The prosecution in support of its case examined Basant Singh Food Inspector P.W. 1 Mukhtar Ahmad Ansari P.W. 2 and Sri Krishna P.W. 3 another manufacturer and seller of oil. Sri Mukhtar Ahmad Ansari P.W. 2 was declared hostile by the prosecution as he came out with the statement that the sample in question had not been taken by the Food Inspector in his presence. We are thus left only with the testimony of Basant Singh P.W. 1 and Sri Krishna P.W. 3. We shall now deal with the testimony of these two witnesses.

5. According to the statement of Sri Basant Singh Food Inspector he visited the oil mill of Radhey Shyam at about 3 P.M. on 30th July 1964. He found Gauri Shanker sitting at the retail shop. He informed Gauri Shanker that he had come to take a sample of Kali Lahi oil for the purposes of examination. He purchased 1 pao of Kali Lalhi oil and paid Rs. 1/- as its price. He obtained the signature of the accused on Ex. Ka-1 and Ex. Ka-2 which are the receipts for payment and the notice regarding taking of sample. The sample thus taken by him was divided equally into three separate phials which were duly closed, labelled and sealed. One of the phials was given to the accused and out of the other two one was sent to the Public Analyst for analysis. The report of the Public Analyst disclosed adulteration of the sample as mentioned above. The Food Inspector deposed that the said sample was taken in the presence of Sri Krishna P.W. 3 who was called to the retail shop of the accused. Sri Krishna P.W. 3 is a manufacturer and retail seller of oil who has his shop in the nearby locality. He has in his statement corroborated the case set up by the Food Inspector. He has deposed to the taking of the sample

by the Food Inspector. He has stated that the said sample was taken in his presence and that was divided into three phials which were duly sealed and labelled. He has also corroborated the Food Inspector to the effect that one of the phials was given to the accused. He has stated in very clear words that the sample taken by the Food Inspector was that of Kali Lahi ka tail. The evidence of these two witnesses leaves no room for doubting that the Food Inspector did as a matter of fact take the sample of mustard oil (Kali Lahi ka tail) from the shop of the accused on payment of its price and that he divided the same in equal portions and sent one of the phials for analysis, the report of which forms the basis of the prosecution.

6. As I have mentioned above the defence case originally taken was that if linseed oil is extracted first and from the same expeller without being cleaned mustard oil is subsequently extracted there is likelihood of mixture of both these oils. Some questions were put with regard to this defence to the witnesses mentioned above. The accused, however, having given up this defence on retrial, we do not think it would be proper for us to take this defence into consideration. The fresh defence which has been pleaded by the accused in the present case on retrial is that the oil from which a sample was taken by the Food Inspector belonged to a customer. The Food Inspector Sri Basant Singh P.W. 1 as well as Sri Krishna P.W. 3 were cross-examined on this aspect of the matter. Both of them had categorically denied the suggestion and stated that the accused did not inform the Food Inspector that the Lahi oil from which the sample in question was taken belonged to a customer. The accused has not produced any evidence to support this defence. Such a plea could have been easily established by the production of the owner of the oil if any. We are, therefore, not at all Inclined to accept the defence case, which to our minds, is clearly an afterthought.

7. We have carefully perused the Judgment of the Sessions Judge. He has given a number of grounds for recording an acquittal of the accused. One of these grounds on which great emphasis is placed by him is that the delay in the initiation of the prosecution against the accused has caused great prejudice to him. The sample in question was taken by the Food Inspector on July 30, 1964. It was received by the Public Analyst on August 3, 1964 and it was analysed on

September 16, 1964. Sanction for prosecution was obtained on 22.1.1965. and the present complaint was filed on February 1, 1965. In the opinion of the court below there was an unexplained delay of about 4 months in the initiation of the prosecution of the appellants. As a result of this delay the court below was of opinion that the accused could not exercise his right under Section 13(2) of the Prevention of Food Adulteration Act to send his sample for analysis to the Central Food Laboratory. The court below has relied upon certain cases which are all concerned with adulteration of milk in which the delay in the initiation of the proceedings resulted in the deterioration of the constituents of the sample. These cases to our minds are not applicable to the facts of the present case and the Sessions Judge has erred in law in relying upon them. Under the Food Adulteration Act rules have been framed for mixing preservatives in samples which are liable to deterioration. For instance formaline is mixed when a sample of milk is taken. This prevents the sample from deteriorating. For other articles also different preservatives have been prescribed under the Food Adulteration Act. which are mixed therewith for the purpose of preserving the constituents of the sample. It is significant that mustard oil does not find place any where in these rules, or Schedule, as a substance in which a preservative must be mixed at the time of taking the sample. The reason for this is obvious. Mustard oil does not deteriorate with lapse of time. On the contrary it is common experience that the quality of the mustard oil improves with the lapse of time. As a matter of fact, mustard oil itself is sometimes used as a preservative for pickles and the like. It is thus obvious that the court below has clearly committed an error in holding that the delay in the initiation of proceedings against the accused has caused prejudice to him with the result that he has been deprived of a right to send his sample for analysis to Central Food Laboratory under Section 13(2) of the aforesaid Act. It was open to the accused to have got his sample phial examined at any time after the initiation of the proceedings.

8. Another consideration which had weighed with the Sessions Judge is that linseed oil may have been extracted from the expeller of the accused and subsequently without cleaning the machine, mustard oil may have been extracted. As such it resulted in mixture of linseed oil with mustard oil. The court below has totally lost sight of the fact that this defence has been given up by the accused on

retrial. The new defence which he has taken up was that the oil in question belonged to another customer. We have already dealt with the defence case in detail and have rejected the same. In our opinion the Sessions Judge has committed clear illegality in allowing his mind to be influenced by the defence case which has been given up by the accused.

9. For the reasons given above, we are of opinion that the order of acquittal passed by the Sessions Judge is erroneous and illegal and must be set aside.

10. The question, however which remains to be considered is as to what is the appropriate sentence which should be awarded to the accused. For this purpose we shall compare the standard prescribed for mustard oil under the rules with the analysis report of the Public Analyst

11. According to the rules the standard prescribed is as follows:

(a) Butyro-refractometer reading at 40C 58.0 to 60.5 (b) Saponification value 168 to 176 (c) Iodine value 96 to 108 (d) Unsaponifiable matter Not more than 1.2 per cent. (e) Free fatty acid as Oleic Acid Not more than 3.0 per cent (f) Bellier test (Turbidity temperature Acetic acid method) Not more than 26.5C

The test for argemone oil should be negative.

12. According to the report of the Public Analyst the result of the analysis is as follows:

1. Butyro-refractometer reading at 40C: 60.72. Saponification value: 76-73. Iodine value: 116.44. Free fatty acids as Oleic Acid: 1.14% 5. Unsaponifiable matter: within limit 6. Test for Argemone oil: Negative. 7. Bellier's test 25.8C 8. Linseed Oil 9.72%

Comparing both the above results we find that:

(a) With respect to Butyro-refractometer reading at 40C the maximum limit is exceeded by 2

(b) Saponification value exceeds the maximum limit by 70.

(c) Iodine value exceeds the maximum limit by 6.4. and

(d) the sample contains 9.72 per cent of linseed oil.

13. To our minds even according to the report of the Public Analyst the difference in the standard prescribed and the result of the analysis is very minor. The mixture of linseed oil is also a small amount of 9.72 per cent. The offence, therefore made out against the accused is minor and technical, and is covered by proviso (i) of Section 16 of the Prevention of Food Adulteration Act. In our opinion, therefore, there are adequate reasons for extending the benefit of the proviso to the applicant.

14. The question, therefore is as to what is the appropriate sentence which should be imposed upon the accused. A perusal of Section 16 of the aforesaid Act discloses that the minimum punishment to be imposed for an offence under this Act 'is imprisonment for a term which shall not be less than six months but which may extend to six years and with fine which shall not be less than Rs. 1000/-.' The proviso to Section 16 authorises the court for any adequate and special reasons to be mentioned in the judgment..to impose a sentence of imprisonment for a term of less than six months or of fine of less than one thousand rupees or of both imprisonment for a term of less than six months and fine of less than one thousand rupees.

It is evident that while the substantive section makes it incumbent upon the Court to award a sentence of imprisonment and of fine for an offence under this Act, the proviso mentioned above affords three alternatives namely:

(a) to impose a sentence of imprisonment for a term of less than six months

or

(b) to impose a fine of less than one thousand rupees

or

(c) both imprisonment for a term of less than six months and fine of less than one thousand rupees.

The circumstances of the case may justify Imposition of sentence of imprisonment of fine or of both below the limit prescribed by Section 16 itself. This depends entirely upon the discretion of the Court which has to record adequate and special reasons. It is submitted by the counsel for the State that even if a case is covered by a proviso of Section 16 mentioned above. It is incumbent upon the Court to impose e sentence of imprisonment as well as of fine. We do not find any justification for this submission. Under the principal Section 16 the conjunction used is 'and' i.e. Imprisonment and fine has to be imposed; but in the proviso the conjunction used is 'or' i.e., imprisonment or fine or both may be imposed. We have therefore no doubt in our minds that the proviso entitles a court to impose a sentence of imprisonment alone or of fine alone or if the circumstances of the case so justify of imprisonment plus fine.

16. Counsel for the applicant has placed before us a decision of the Supreme Court reported in : [1966]1SCR367 Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai and has brought the following passage to our notice.

The proper function of a proviso is to except or qualify something enacted in the substantive clause which but for the proviso would be within that clause. It may ordinarily be presumed in construing a proviso that it was intended that the enacting part of the section would have included the subject matter of the proviso. But the question is one of interpretation of the proviso and there is no rule that the proviso must always be restricted to the ambit of the main enactment.

We have also been referred to another case reported in : 1972 CriLJ1309 Jagdish Prasad v. State of West Bengal. This was a case under the Prevention of Food Adulteration Act to which the proviso was made applicable by their Lordships. While dealing with the exception their Lordships observed as follows:

An exception was however made in oases falling under Sub-clause (i) of Clause (a) of Section 16(1) and in respect of an article of food which was considered to be adulterated under Section 2 Clause (i)(1) or misbranded under Section 2 Clause (ix) or for an offence under Sub-clause (ii) of Clause (a) of Section 16(1) in which case the Court is given the discretion for any adequate and special reasons to be mentioned to award a lesser sentence than six months or impose a fine lesser

than one thousand rupees or of both lesser than the minimum prescribed.

It is clear from the above observations of the Supreme Court that the court is empowered under the proviso of Section 16 to impose a sentence of imprisonment or of fine or of both. It is not necessary that a sentence of imprisonment as well as of fine should be imposed upon the accused when the Court extends the benefit of the proviso to the accused.

17. In view of the opinion expressed by us above and having regard to all the facts and circumstances of the case we are of the view that a sentence of Rs. 50/- fine would be sufficient to meet the ends of justice.

18. This appeal by the State is, therefore, allowed. The accused is convicted for an offence under Sections 7(1)/16(1)(a)(i) of the Prevention of Food Adulteration Act and is sentenced to pay a fine of Rs. 50/- within two months of this order. In default of payment of fine, the respondent shall undergo one month's R.I.

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