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Khitai Vs. the State of M.P.

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Court : Madhya Pradesh

Decided On : Aug-19-1994

Reported in : 1995CriLJ3244

Judge : N.P. Singh, J.

Acts : Prevention of Food Adulteration Act, 1954 - Sections 7(1), 14, 14A, 16(1), 16A and 20(1); Code of Criminal Procedure (CrPC) , 1973 - Sections 262 to 265, 448, 465 and 537

Appeal No. : Cri. Rev. No. 16 of 1990

Appellant : Khitai

Respondent : The State of M.P.

Advocate for Def. : N.S. Ruprah, Dy. Govt. Adv.

Advocate for Pet/Ap. : R.D. Gambhir, Adv.

Disposition : Petition allowed

Judgement :
ORDER

N.P. Singh, J.

1. This revision shall also govern disposal of Criminal Revision No. 22 of 1990, as common questions of law are involved in both the criminal revisions.

2. Criminal Revision No. 16 of 1990, is directed against the judgment of conviction and sentence dated 6-1-1990 passed by the Additional Sessions Judge, Sihora in Criminal Appeal No. 16 of 1988, whereby he dismissed the appeal, affirming the conviction and sentence of the applicant as passed by the trial Magistrate.

3. The applicant in this case was prosecuted for an offence under Section 16(1)(a)(i) read with Section 7(1) of the Prevention of Food Adulteration Act, 1954 (here in after referred to as the 'Act') for selling adulterated groundnut oil and he was convicted there under and sentenced to undergo R. I. For six months and to pay a fine of Rs. 1,000/- in default to undergo S. I. for two months.

4. Whereas, the Criminal Revision No. 22 of 1990 is directed against the judgment of conviction and sentence dated 10-1-1990 passed by the IVth Additional Sessions Judge, Bhopal in Criminal Appeal No. 73 of 1988, where by he dismissed the appeal, affirming the conviction and sentence of the applicant as passed by the Chief Judicial Magistrate, Bhopal.

5. The applicant in this case was prosecuted for an offence under Section 16(1)(a)(i) read with Section 7(1) of the Act for selling adulterated mixed milk of cow and buffalow and he was convicted there under and sentenced to undergo R. I., for six months and to pay a fine of Rs. 1,000/- in default to under go R.I. for further six months.

6. In both the cases, the trial Magistrate adopted the procedure of warrant trial instead of summary trial as provided under Section 16-A of the Act. Section 16A read as follows:

16-A. Power of court to try cases summarily.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offence sunder sub-section (1) of Section 16 shall be tried in a summary way by a Judicial Magistrate of the first class specially empowered in this behalf by the State Government or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both

inclusive) of the said Code shall, as far as may be, apply to such trial:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

7. Shri R. D. Gambhir, learned counsel for the applicant, has contended that the procedure of warrant trial adopted by the trial Magistrate instead of following trial in a summary way, has vitiated the trial of the applicants. The contention of Shri Gambhiris not well founded.

8. It is true, that the trial of the offences under the Act in a summary way is mandatory and not directory.

9. It is well settled, that when statute lays down to do a certain thing in a certain way the thing must be done in that way or not at all. The other modes of performance are necessarily forbidden.

10. It is equally settled that irregularity in following proper procedure in the trial, is curable under Section 465 of the Code of Criminal Procedure, if no prejudice has been caused to the accused.

11. Law, on this point, has been set at rest by the apex Court in the case of Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986 : 1961 (2) Cri LJ 39 wherein the Court observed :

'It is true that after the amendment of the Criminal Procedure Code an offence under Section 448 is triable as a summons case and Mr. Goswami adopted the

procedure prescribed for a case triable as a warrant case,' we are, however, of the opinion that this irregularity does not vitiate the proceedings and is curable by the provisions of Section 537, as no prejudice to the accused has been caused in the case.'

12. Punjab and Haryana High Court in the case of Subhash Chand v. State of Haryana, 1991 Cri LJ 2481 (P&H;) relying the case of Gopal Das's, AIR 1961 SC 986: 1961 (2) Cri LJ 39 (supra) has held:

'The omission to follow summary procedure in the instant case instead of following procedure meant for warrant case would amount to a mere irregularity and cannot be deemed to be an illegality as contended by the counsel of the petitioner. Thus their regularity in following the proper procedure, in the present case, referred to above is curable under Section 465 of the Code and the orders of conviction and sentence passed by the Courts below cannot be seta side on this score.'

13. In the instant case, the applicant has not made any grievance that the omission to follow summary procedure by the trial Magistrate has caused prejudice to him. The applicant however cannot make such a grievance, as under the procedure of warrant trial, he had much scope or opportunity either to cross-examine the prosecution witnesses or to lead his evidence. The omission on the part of the trial Magistrate, however would amount to mere irregularity and not illegality which would go to the root of the case. In such an eventuality the irregularity in the procedure followed by the trial Magistrate is curable under Section 465 Cr. P. C.

14. As regards, the contention that the prosecution was launched without sanction, as contemplated under Section 20(1) of the Act. there is nothing on the record to indicate that the written consent of the authority was obtained for launching the prosecution against the applicant. Section 20(1) of the Act lays down as follows:

20. Cognizance and trial of offences.- (1) No prosecution for an offence under this Act, not being an offence under Section 14 or Section 14A shall be instituted except by, or with the written consent of, the Central Government or the State Government or a person authorised in this behalf, by general or special order, by

the Central Government or the State Government.

It is obvious, that written consent of the authority is a sine qua non for launching the prosecution of the offence under this Act.

15. The apex Court in the case of A. K. Roy v. State of Punjab, : 1986 CriLJ2037 has held:

'The provision contained in Section 20(1) of the Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of Section 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution, may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in Section 20(1) 'No prosecution for an offence under this Act... shall be instituted except by or with the written consent of plainly make the requirements of the section imperative.

16. The failure on the part of the prosecution in the instant case, to obtain written consent of the authority for launching the prosecution against the applicant is a fundamental defect which goes to the very root of the case. Therefore, the conviction and sentence of the applicant cannot be sustained on the basis of the prosecution launched by the complainant Food Inspector, who was not authorised to launch the prosecution.

17. For the reasons mentioned aforesaid, the impugned order of conviction cannot be sustained. Accordingly, it is set aside and in the result both there vision applications are allowed. The applicants are exonerated from their bail bonds. The fine, if realised be refunded to the applicants.

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