

K.N. Sarkar Vs. the State

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Court : Orissa

Decided On : Jul-13-1967

Reported in : 33(1967)CLT1158; 1968CriLJ121

Judge : G.K. Misra, J.

Appellant : K.N. Sarkar

Respondent : The State

Judgement :

G.K. Misra, J.

1. The petitioner is a shop-keeper at the daily market, Unit No. 1, New Capital, Bhubaneswar. At 9-50 a.m. on 30.11.1965, Sri B. Biswal, Food and Sanitary Inspector in the company of one D.S. Misra, Vigilance Sub-Inspector and R.K. Pal, A.S.I. of Police arrived at the shop of the petitioner. No independent witnesses were present. Sri V.S. Rao, Magistrate, 1st Class, Bhubaneswar went on mobile duty, followed the raiding party and remained at a distance. In presence of the Vigilance S.I. and the A.S.I., the Food and Sanitary Inspector seized 60 kg. of Motor (peas) and 10 Kgs of mustard oil. He submitted a prosecution report to the Magistrate Sri V.S. Rao giving the description of the offence thus:

The accused is selling the food article such as Motor, Mustard Oil which is insect infested and the mustard Oil is adulterated by mixing foreign matters. Hence is

noxious and unfit for human consumption. So the accused is liable for prosecution under Section 273, Penal Code-Motor-60 kg. Mustard oil-10 kg.

2. The accused was produced before the Magistrate by the Food and Sanitary Inspector. The learned Magistrate stated the particulars of the offence under Section 273, Penal Code thus:

Q. That on 30.11.65 you were selling the Motor and mustard oil?

A. Yes. I am guilty.

3. Thereafter, the Magistrate convicted the petitioner on his own plea and sentenced him to pay a fine of RS. 100/. in default to undergo S.I. for one month. The seized articles were directed to be destroyed after the appeal period was over.

4. There was a summary trial and hence a revision has been filed in the High Court. Mr. Bath for the petitioner advanced the following contentions:

(i) The accused asked to be defended by a lawyer. The learned Magistrate refused the prayer in violation of Article 22 of the Constitution and as such the entire proceeding is illegal.

(ii) The Magistrate did not comply with the provisions of Section 242, Criminal P.C. as the particulars of the offence were not stated. On that ground alone the trial was vitiated. At any rate it has occasioned failure of justice and the accused is entitled to benefit of doubt.

(iii) Even on the particulars stated to the accused, no offence is made out.

5. The first contention is that the said of the shop, seizure of the article, production of the petitioner before the Magistrate and the examination by him were done within a short period. The Magistrate refused the assistance of an advocate and as such Article 22 of the Constitution is infringed.

Article 22 confers a right on the accused to be defended by a legal practitioner if he demands it. The petitioner asserted that he wanted time for engagement of a

counsel. In his explanation, the Magistrate refuted it. The order-sheet does not show that the petitioner made such a prayer. Prima facie the order-sheet would be taken as representing the correct state of affairs. On the facts of this case. I hold that the petitioner did not make a prayer for engaging a counsel and the Magistrate did not refuse such a prayer.

Unless the accused insists on the exercise of his right to get the assistance of a legal practitioner, Article 22 is not violated. See : AIR1967 Ori37 , Hadu Sahu v. State and : 1965 CriLJ236 , Ram Sarup v. Union of India. The first contention has no merit and must be rejected.

6. The other two contentions may be noticed. Section 273, Penal Code reads thus:

Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

It is not disputed that the petitioner had exposed the article seized for sale. The petitioner was not given a copy of the prosecution report and thus did not know its contents. His knowledge of the offence is derived from his examination under Section 242, Criminal P. C. by the Magistrate Sri V.S. Rao. That statement as quoted above merely is that the petitioner was selling Motor and mustard Oil. Selling Motor and mustard oil is not an offence. The vital particulars constituting the offence were omitted from the statement. Even if all the particulars put to the accused are accepted, no offence is made out and the accused cannot be convicted under Section 273, Penal Code even if he pleaded guilty.

7. The essentials of Section 273 are:

(i) Selling or offering or exposing for sale as food or drink, the seized article;

(ii) The article must have become noxious or must be in a state unfit for food. The word 'noxious' means injury to health;

(iii) The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious a3 food or drink or is unfit for food and drink.

The last two essentials were not put to the accused in the statement under Section 242, Criminal P.C.

8. There is some controversy as to whether the omission to state the particulars of the offence to the accused amounts to an illegality or to a mere irregularity curable under Section 537, Criminal P.C. Majority of the High Courts have taken the view that it is a mere irregularity curable under Section 537, Criminal P.C. and the trial is not vitiated unless it has occasioned a failure of justice. This Court has taken the same view. See : AIR1959 Ori121 Bidyadhar v. Daitari. On such a view the conviction cannot be sustained. In this case, as already indicated, the two vital essentials of the section have not been put to the accused while stating the particulars not established. The accused was not represented by a counsel. On the very face of it, the omission has occasioned failure of justice. The trial is vitiated and the conviction must be set aside.

9. A word of caution is necessary for the mobile Magistrates. They generally move in the company of the prosecution party. They are not expected to be present at the time of search and seizure in which case they would themselves be witnesses. Trial in such cases is done outside the normal court precincts and at distant places where the accused cannot expect assistance of counsel, Public might lose confidence in the administration of justice unless the Magistrate conducts himself impartially and sees that the accused does not make confessions or admissions under fear. It would be a sound exercise of Judicial discretion for the mobile magistrate to preserve the seized articles for examination by higher courts.

10. It is to be noted that in this case, the prosecution report is very vague. The seized articles were described as insect infested and mixed with foreign matters. This vague generalisation does not give a clear picture and any objective tests to the court as to the nature and quantum of adulteration. The section enjoins that the articles of food and drink for sale must be noxious or unfit for food and drink. Mere adulteration is not enough. It must be such that the food or drink becomes noxious or unfit. To give an illustration, during rainy season a few insects may fall

into mustard oil exposed for sale. This does not mean that the accused adulterated the food or drink. If, however, as a result of such insects getting into the food materials, the food or drink becomes obnoxious or unfit for consumption, the accused would be liable for the offence. It is the court and court alone which would be ultimate judge. The conviction cannot be based on the opinion of the Food and Sanitary Inspector alone that the article was obnoxious or unfit for food and drink.

11. Mr. Rath levelled a number of criticisms against Sri V.S. Rao and the manner in which he examined the accused and conducted the case. Excepting for the fact that the case was perfunctorily tried, I find no substance in the other criticisms.

12. In the result, the order of conviction and sentence passed by the learned Magistrate is set aside and the petitioner is acquitted. Fines, if paid, be refunded. The criminal revision is allowed.

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