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State Vs. Mahavir

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Court : Delhi

Decided On : Mar-20-2009

Reported in : 2009CriLJ3313

Judge : Mool Chand Garg, J.

Acts : Prevention of Food Adulteration Act - Sections 7, 10, 13(2), 16(1)(1A); Prevention of Food Adulteration Rules; Code of Criminal Procedure (CrPC) - Sections 378(4) and 482

Appeal No. : Crl. App. 26/1998

Appellant : State

Respondent : Mahavir

Advocate for Pet/Ap. : Arvind Kumar Gupta, AP

Disposition : Appeal dismissed

Judgement :

Mool Chand Garg, J.

1. This appeal which has been filed under Section 378(4) Cr.P.C. by the appellant assailing the order passed by the Addl. Sessions Judge dated 27.01.1997 whereby the Addl. Sessions Judge has reversed the order of conviction and

sentence awarded to the respondents for having committed an offence under Section 16(1)(1A) and Section 7 of Prevention of Food Adulteration Act (hereinafter referred to as PFA Act).

2. Briefly stating the facts of this case are as follows:

i) On 20.04.1989 F.I. Arun Kumar purchased a sample of Lal Mirchi powder from Shri Mahavir respondent at his Masala Rehri at Jawahar Chowk, Najafgarh, Delhi which had been stored for sale by the respondents. The sample was taken from an open tray bearing no label declaration but it is the case of the prosecution that the sample was taken after properly homogenizing the same with the help of a clean and dry jhaba lying there.

ii) That the sample so taken was divided into 3 equal parts and each part of the sample was packed, fastened and sealed separately in clean and dry bottles according to PFA Act and Rules.

iii) Notice was given to the respondents and price of the sample purchased was also given to him. Panchnama was prepared at the spot and the documents were thumb marked/ signed by the respondents.

iv) One counter part of the sample was sent for analysis by the Public Analyst which as per report given by the Analyst dated 28.04.1989 was found to be adulterated after completion of the investigation and obtaining sanction of the competent authority.

v) A complaint was filed in the Court of Metropolitan Magistrate concerned. The Magistrate issued a notice to the respondents.

vi) The respondents exercised his right under Section 13(2) of PFA Act. The second sample was sent to CFSL where also the report of the public analyst was confirmed and it was observed, that the sample was adulterated.

vii) After recording the evidence of the prosecution the petitioner was held guilty for both the offences and was sentenced to undergo R.I. for one year and to pay a fine of Rs. 2000/- only. I.D. of payment of fine accused shall further under go S.I.

for 3 months. Bail bond of accused cancelled. Surety is discharged. File be consigned to Record Room.

3. An appeal against the order of the Metropolitan Magistrate was decided by the Addl. Sessions Judge of Delhi who vide her order dated 07.02.1997 set aside the order of conviction and sentence and acquitted the appellant.

4. The reasons which have prevailed in the mind of the Addl. Sessions Judge were that the sample in question was not a representative sample as the same was not homogenized in accordance with PFA Rules. She also observed that the Jhaba which was used for mixing was lying in the Rehri and, therefore, it could not be said that it was a clean Jhaba.

5. Relevant observations made by ASJ in the order impugned in this appeal are reproduced hereunder:

5. In my view, the prosecution has failed to establish that the sample which was drawn was in fact a representative sample. Under Section 10 of the PFA Act, the Food Inspector has the power to take sample of any article of food of any person selling such an article in the course of deliver or from the consignee. The case of the prosecution is that this article of food is allegedly being sold by the appellant from his Rehri. PW3 has admitted that there was no sign board of sale on the Rehri. PW2 has also admitted in his cross-examination that the fact about the mixing of Lal Mirch and having rotated it in a clockwise and anti-clockwise direction has also not been mentioned in the sample documents. Although under the PFA Act and PFA Rules, it is not specifically contained that sample in order to be representative must be taken after homogeneously mixing the article of food, yet, it is established by judicial authorities that a representative sample means a sample which is drawn after homogeneously mixing the same especially in the case of Lal Mirch as is so in the present case. This commission on the part of the prosecution to mention it in the sample documents is a glaring lacuna. It appears that all the witnesses of the prosecution have parrotwise recited their testimonies. PW3 has also admitted that Jhaba which was used for mixing was already lying on the Rehri. DW1 has stated on oath that he was also running a masala rehri in the neighbourhood and the sample taken by the Food Inspector was a rejected stuff

and it was not meant for sale. In my view, in view of the aforestated evidence which has come on record, it is clear that the prosecution has failed to establish that the samples which have been drawn were in fact meant for sale which it has categorically been asserted by the appellant that it was rejected and the same was to be returned. This is also clear from the fact that there was no sign board of sale on his rehri. The prosecution in my view has also failed to establish that the sample was in fact a representative sample and the Jhaba used for the mixing was clear and dry as per the Rules. PW2 has admitted that the fact that the homogeneous mixing of Lal Mirch powder has not been so stated in the sample documents. Benefit of doubt must go to the accused.

6. The appeal was admitted on 27.01.1998. Notice was sent to the respondents. Even though respondent appeared once and was released on bail he failed to appear since 02.02.2007. Bailable warrants as well as non-bailable warrants have been issued against him which could not be executed. Finally, it was informed that he has been declared proclaimed offender and process under Section 482 Cr.P.C. has been issued against him. Arguments have been heard from the side of the appellant & record perused.

7. It is submitted that the Appellate Court erred in holding that the sample was not representative sample and that the Jhaba was not clean and dry inasmuch as no such evidence is borne out from the record & that the appeal was decided without notice.

8. It is also submitted that the Appellate Court failed to appreciate that at no point of time, during the trial of the case, the respondent argued that the sample was not representative sample or that the red chilli powder from where the sample was taken was not meant for sale. He in fact sold the sample, accepted price for the same.

9. I have given my thoughtful consideration to the submissions made by the appellant, and I find that it cannot be said that the Appellate Court has not issued a notice to the respondents. The proceeding goes to show that the copy of the appeal was accepted by the counsel for the respondents on 27.01.1998 but thereafter the respondents did not cause appearance and, therefore, the Appellate

Court decided the appeal on the basis of record.

10. It is also not disputed that the sample was lifted from a masala rehri where the jhaba which was lying in the rehri was used. It is not the case of the prosecution that the sample was taken from three sides and thereafter, it was mixed. Thus, it is an admitted fact that the sample was not a homogenous sample and therefore the approach adopted by the First Appellate Court which is in favour of the accused and is a well-reasoned one cannot be faulted with.

11. It would be appropriate to take note of the cross examination of Food Inspector Arun Kumar, which reads as under:

It is correct that I have not mentioned the fact of mixing of mirch powder with the help of clean and dry jhaba by rotating clock-wise, anti-clockwise in my sample documents. It is incorrect to suggest that sample was not representative.

12. At this stage it would further be appropriate to take note of the judgment delivered by this Court in the case of State (Delhi Admn.) v. Khem Raj 2007 (4) AD (Del) 146 wherein it has been held:

4. In the present case, sample of milk was taken but there was no conclusive evidence that before taking sample the milk had been thoroughly stirred clockwise and anti-clockwise, up and down with a plunger to bring the entire milk in homogenized state so that the representative sample of the milk could be taken. The learned Trial Court, on the basis of evidence doubted that the plunger was carried and used for stirring the milk and the sample was taken after making the milk thoroughly homogenized. The learned Sessions Judge, therefore, gave benefit of doubt to the respondent.

5. I find no infirmity in the order of the Addl. Sessions Judge. The appeal is hereby dismissed.

13. Even otherwise, the law with regard to deciding appeals against acquittal is well settled. We may take note of a judgment delivered by this Court in State v. Dwarka Dass Crl.App. No. 135/1989 decided on 02.04.2007 where it was observed:

5. In Sachchey Lal Tiwari v. State of Uttar Pradesh : 2004 CriLJ4660 also laid down certain principal in this regard in the following words:

(i) Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal.

(ii) If two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

(iii) A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

(iv) Where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not.

(v) Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so.

14. In view of the aforesaid, I do not find any reason to reverse the order of the First Appellate Court and the appeal is consequently, dismissed.

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