

Kesho Ram Vs. the State and anr.

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Court : Delhi

Decided On : Dec-11-1979

Reported in : 1980CriLJ489

Judge : D.R. Khanna, J.

Appellant : Kesho Ram

Respondent : The State and anr.

Judgement :

ORDER

D.R. Khanna, J.

1. This criminal revision is directed against the Judgment dated 19-8-1977 of the Additional Sessions Judge, Delhi, whereby the conviction of Kesho Ram petitioner, under Section 7/16 of the Prevention of Food Adulteration Act, by the Metropolitan Magistrate on 31-1-1976, was maintained. The sentence of 9 months rigorous imprisonment and a fine of Rs. 1,000/-, or in default to further rigorous imprisonment for six months as awarded by the trial court, was, however, reduced to rigorous imprisonment for four months and a fine of Rs. 1,000/-, or in default to further rigorous imprisonment for three months.

2. Kesho Ram petitioner is a milk vendor and is operating his business from shop No. 26, Srinivaspuri, New Delhi. On 29-5-1974, at about 7.30 A. M. Food

Inspector P. N. Ralhan visited the shop and found the petitioner selling milk. After disclosing his identity and giving notice to the petitioner, the Food Inspector purchased 660 ml. of cow's milk for analysis out of the milk lying there in a tub. The same was divided in three equal parts and put into three bottles after addition of 18 drops of formalin in each. The bottles were sealed. One of them was left with the petitioner.

3. Of the two other bottles retained by the Food Inspector, one was sent to the Public Analyst on 2-7-1974. The analysis of the sample revealed that the milk was adulterated due to 2.2 deficiency in milk solids not fat per cent which was equivalent to 26.5 percentage deficiency in milk solids not fat added water). The report of the Public Analyst was dated 5-7-1974. On 18-7-1974, a copy of this report was served upon the petitioner.

4. Since the sample of the milk taken from the petitioner was found adulterated, prosecution was launched against him under Section 7/16 of the Prevention of Food Adulteration Act (hereinafter referred to as 'the Act'), and the necessary complaint was filed in the trial court on 30-8-1974. The court issued bailable warrant for production of the petitioner for 18-9-1974. On that date, it was found that the warrant had not been received back. Fresh warrant was directed to be issued for 5-11-1974, but again the same remained unexecuted as it was noticed that it had been issued very late. Another warrant required to be issued for 5-12-1974, again did not bear result as the Ahlmad of the court had not issued the warrant at all. The warrant was then ordered to be issued for 9-1-1975 and a notice was also issued to the Food Inspector to take steps for the service of the petitioner.

5. On 9-1-1975, again the warrant was not received back. Another warrant was ordered to be issued and it was directed that in case of non-service, the process-server be called. The Food Inspector was also directed to take warrant 'Basti' and get the service effected for 1-2-1975. On this latter date again the warrant was received back unserved. Fresh warrant was required to be issued for 22-2-1975.

6. In the meanwhile, on 3-2-1975, the petitioner himself appeared in the court. His statement about the signatures on various documents was recorded. He was

allowed bail on that date.

7. The case was adjourned to 20th and 21st March, 1975 for recording of evidence. However, on both these dates, no prosecution witness was present. On the latter date, the petitioner moved an application for measuring the contents of the sample bottle. Notice of the same was directed to be given to the concerned Food Inspector. The case was then fixed for 27-5-1975 for recording of evidence.

8. It was then on 22-5-1975 that the petitioner moved an application under Section 13 (2) of the Act for sending the sealed sample bottle lying with the Food Inspector for being analysed by the Director of Central Food Laboratory.

9. In the meanwhile the case came up for hearing on 27-5-1975, Again no prosecution witness was present. The Food Inspector was also not there and, therefore, the bottle could not be sent to the Director. This position continued on 31-5-1975 also. It was on 9-6-1975 that the sealed bottle in possession of the Inspector was sent to the Director of Central Food Laboratory. A report, dated 20-6-1975 was however, received from the Director to the effect that the sample was decomposed and was unfit for analysis.

10. The trial court after recording the evidence, convicted the petitioner under Section 7/16 of the Act. This conviction was upheld in appeal by the learned Additional Sessions Judge, Delhi. He, however, allowed reduction of sentence as already stated above. In the present revision the case of the petitioner has been that he was wrongly convicted as his right under Section 1.3 (2) of the Act had been defeated by lapse on the part of the prosecution. This right, it is pointed out, could have been availed by the prosecution only after the institution of the prosecution- Before that even if he had been supplied with a copy of the report of the Public Analyst, he could not have required the court to send one of the sealed bottles to the Director of Central Food Laboratory under Section 13 (2) of the Act,

11. The filing of the complaint on 30-8-1974 in the present case, it is pointed out, was unduly delayed as the sample was lifted on 29-6-1974 and the Public Analyst's report had also been obtained in early July, 1974. Thereafter the petitioner was not apprised of the institution of the prosecution as the bailable

warrants issued against him were not served for almost five months. It was ultimately on 3-2-1975 that he himself made appearance in the court.

12. So far as the merits of the other evidence on record, the same has not been challenged during the hearing of this petition. The singular plea raised is that he has been prejudiced as his valuable right under Section 13 (2) of the Act has been deprived because of laches on the part of the prosecution or the officials of the court, the conviction is, therefore, sought to be quashed.

13. Reference in this regard has been made to the provisions contained in Section 13 (2) of the Act in order to show that it is only after the institution of the prosecution that the right of the accused to avail the benefit of Section 13 (2) of getting one of the samples analysed from the Director of Central Food Laboratory arises. Prior to that he cannot approach the court for being given the benefit of the exercise of this right even if a copy of the report of the Public Analyst is supplied to him earlier. That apart, it is pleaded, the pre-requisite 'after institution of a prosecution' as envisaged by Section 13 (2) of the Act does not have the implication that the institution simplicities should take place. Such institution has little significance where the accused is not apprised of the same or does not come to know of it. It is only after his having learnt this that he can be, in the real sense, rendered entitled to seek the benefit of availing the report of the Director. Such institution and his acquisition of knowledge thereof must coincide to justify him to avail this right.

14. In the present case it is next pointed out that although the sample was got analysed from the Public Analyst within about a week of its taking and a copy thereof was also supplied to him in about three weeks, the prosecution was instituted on 30-8-1974. This, though not much belated, had little significance for the petitioner inasmuch as several warrants issued against him could not be served either because they were issued belatedly or were not issued at all,. It was only on 3-2-1975 that he having come to know of the prosecution, himself appeared in the court. In the circumstances, it has been asserted that his knowledge of the institution of the prosecution should be taken from 3-2-1975, and the prosecution should be deemed to have been instituted qua him in order to

enable him to exercise his right under Section 13 (2) of the Act of getting the sample analysed from the Director of Central Food Laboratory from that date.

15. The petitioner has next made reference to a number of judicial pronouncements to the effect that normally milk or any of its products, get decomposed even if preservative is added to them, after a period of four months. In the circumstances, it has been vigorously urged, that when those four months had already long stood expired when he learnt of prosecution and appeared in the court on 3-2-1975, it could reasonably be taken that the sealed bottles of the sample of milk had already decomposed, and in the circumstances by the situation as it was, it was meaningless to send the sample to the Director of Central Food Laboratory, and, therefore, his right under Section 13 (2) of the Act should be considered to have been defeated for reasons for which he was not, in any manner, to blame. For the laches on the part of the prosecution or the defaults committed by the court officials in not getting the service effected on him in time, it is asserted, he cannot be penalised nor made to suffer for the defeat of his right to get the sample analysed from the Director under Section 13 (2) of the Act.

16. In these circumstances, it is contended that the mere fact that the petitioner applied belatedly on 22-5-1975 for the exercise of his right under Section 13 (2) of the Act, the same should not be given any undue adverse significance against him. The Inspector, it is pointed out, delayed to some extent the production of the sample bottle for some days and had earlier also not abided by the orders of the court to get the service effected on the petitioner of the warrants issued.

17. From the side of the prosecution on the other hand it has been asserted that there was no laches on its part inasmuch as the sealed sample was got- analysed within a short time and a copy of the report of the Public Analyst was also supplied to the petitioner within three weeks. Thereafter again there was no marked delay in the launching of the prosecution as such papers had to move administratively. The warrants issued against the petitioner, it is next pointed out, were at the correct addresses but somehow they could not be served. For this it is pleaded, the prosecution cannot be blamed in any manner. To hold it otherwise, it is contended, would provide a handle to accused-persons to somehow avoid service

of warrants and thus allow considerable period to lapse and then belatedly come forth that because of delay, their rights under Section 13 (2) of the Act have been frustrated. All that, it is pleaded, should be seen in such cases is whether there was in fact any negligence or deliberate lapse on the part of the prosecution.

18. In any case, it is pointed out that had the petitioner been genuine in availing the benefit available under Section 13 (2) of the Act, he would have forthwith moved an application in that direction after making appearance in the court. Instead he slept over for about four months and allowed the sealed sample to get altogether decomposed as to prevent proper analysis by the Director of Central Food Laboratory. This, it is contended, appeared to be a designed move and, therefore,, the petitioner should not be allowed to take advantage of his own laches.

19. Reference has also been made to certain decisions in order to show that milk after addition of appropriate preservative can remain fit for analysis up to about ten months.

20. I have heard the parties and given my due consideration to all the circumstances. Section 13 (2) of the Act confers a valuable right on the vendor to have the sample procured by the Food Inspector, analysed by the Director of Central Food Laboratory. This right should not be allowed to be frustrated and it is to be expected that the prosecution will proceed in such a manner that the right will not be denied to him. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, e. g., delay in prosecution as a result of which the sample is highly decomposed and cannot be analysed, the vendor, in his trial is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst even though that report continues to be the evidence in the case of the facts contained therein.

21. This principle, however, must be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise his rights. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible. It is also well settled that where the vendor does not apply to obtain analysis from the Director of Central Food

Laboratory the report given by the Public Analyst does not cease to be evidence nor becomes ineffective merely because it could have been superseded by the certificate issued by the Director. (See in this respect the decision of the Supreme Court, in the case of *Municipal Corporation of Delhi v. Ghisa Ram* : 1967 CriLJ939).

22. Although in the Prevention of Food Adulteration Act, as in existence now, certain time is prescribed within which a vendor should apply for analysis under Section 13 (2) of the Act, even earlier, to was expected to act with diligence. If his conduct of its own showed that he applied so late that there was little possibility of the sample remaining under composed, he could not be heard to make a grievance of the same.

23. In the present case there is no dispute that requisite formalin was added to the samples of the milk preserved. There is, however, no evidence that the samples were kept under refrigeration. It has in such circumstances, been recognised in a number of decisions that such sample of milk can remain fit for analysis for about four months. Suffice it to mention here the decision of the Supreme Court in the case of *Municipal Corporation of Delhi v. Ghisa Ram* (supra). It has, however, also been recognised that sample of cow's milk, to which necessary quantity of formalin has been added according to rules and which has been kept in normal circumstances, retains its character and is capable, of being usefully analysed for a period of about 10 months. (See *Babboo v. State* : AIR1970 All122 .

24. So far as the prosecution in the present case was concerned, no blame could be laid upon it for any negligence or laches. The complaint in the court had been filed well in time to enable the petitioner to avail his right under Section 13 (2) of the Act. There was, of course, some delay on the part of the court officials and the process-server in getting the warrant executed on the petitioner. No averment has been made in this regard that any element of collusion with the petitioner was involved. The petitioner, however, appeared in court after seven months of the taking of the sample. In case it was recognised that by then the sample had already got decomposed because of lapse of period of four months, it could be said that by then the right under Section 13 (2) was already rendered infructuous.

However, this could not have been given any significance in case the petitioner had not at all applied for recourse to Section 13 (2) of the Act. He could not have been heard then to plead that it would have been an exercise in futility if he had applied for its benefit as the sample had then, in any case, become decomposed. The Public Analyst's report would still have prevailed. This position was recognised in the case of Ghisa Ram by the Supreme Court (*supra*).

25. What the petitioner did in the present case was that even after appearing in the court on 3-2-1975, he still remained dormant for four months and allowed the matters to drift. He did not move any application for exercise of right under Section 13 (2) of the Act then. This conduct on his part in a way reflected how far genuine he was to resort to those provisions. Perhaps it could be said as per aforesaid decision of the Allahabad High Court that had he soon after his appearance applied under Section 13 (2) there could be a possibility of the sample being still analysed by the Director of the Central Food Laboratory. He allowed the sample to get altogether decomposed and it was on 22-5-1975, i. e. after about a year of the taking of the sample, that he asserted his right under Section 13 (2) of the Act. If, thereforee, at that time the sample had become decomposed, he could not entirely escape from the blame. I am, thereforee, of the opinion that the courts below have been right in holding that the petitioner was no less to blame for the frustration of his right to get the sample analysed from the Director of Central Food Laboratory under Section 13 (2) of the Act. In any case, the prosecution could not be held responsible in any manner.

26. In this view of the matter, I have nothing to differ with the sustenance by the learned Additional Sessions Judge of the conviction of the petitioner under Section 7/16 of the Prevention of Food Adulteration Act. Considering the adulteration involved the sentence awarded also was appropriate. The revision is rejected. Let the petitioner surrender before the Chief Metropolitan Magistrate for serving his sentence. The Chief Metropolitan Magistrate should also ensure that the petitioner is taken into custody for serving the sentence.