

**Khaju Vs. the State**

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**Court :** Rajasthan

**Decided On :** Feb-14-1971

**Reported in :** 1971WLN37

**Judge :** L.S. Mehta, J.

**Appeal No. :** S.B. Criminal Revision No. 317 of 1970

**Appellant :** Khaju

**Respondent :** The State

**Disposition :** Application dismissed

**Judgement :**

**L.S. Mehta, J.**

1. On February 28, 1968, P.W. 1 Balraj Singh, Food Inspector, Ajmer, after issuing requisite notice (Ex. P. 1), purchased at Ajmer 12 'Chhatanks' of cow-milk from Khaju Gujar, resident of Kalyanipura in lieu of 60. P. for the purpose of an analysis. The milk was divided into 3 equal parts, each of which was kept in a bottle, which was duly sealed. One of the samples was given to the accused Khaju and a receipt thereof there of Ex P. 2 was obtained from him. The other sample was kept by the Food Inspector and the third one was sent with a memorandum Ex. P. 4 to the Public Analyst, Ajmer, for ascertainment of chemical elements. The

sample reached the hands of the Public Analyst on February 28, 1968. He at first compared the seal on the container of the sample with the specimen impression received by him separately and found the seal on the bottle identical and in tact. Thereafter he analysed the sample and certified the result as under:

1. Fat content 5.2%

2. Solids non-fat content 7.56%

In the opinion of Public Analyst the sample did not conform to standard of purity prescribed by Prevention of Food Adulteration Rules, 1955 due to low percentage of solids not fat contents. The Analyst found that the sample contained 11% of added water. After obtaining necessary sanction from the Local Body a complaint was made in the court of the Municipal Magistrate, Ajmer. The accused was charged by the trying Magistrate under Section 16, read with Section 7 of the Prevention of Food Adulteration Act (here in after referred to as the Act), to which he pleaded guilty and did not claim trial. The Sub-Divisional Magistrate did not rest content with the admission of the guilt and proceeded with the trial of the accused Khaju. He examined P.W. 1 Balraj Sinsh. In his statement, recorded under Section 342, Cr.P.C, the accused denied to have committed the offence. In his defence he produced Girdharilal, D.W. J, who stated that he did not see him selling milk. The trial court, relying upon the testimony of P.W. 1, convicted the accused Khaju under Section 16, read with Section 7 of the Act and sentenced him to six months' rigorous imprisonment and to pay a fine of Rs. 1000/-, in default to further undergo rigorous imprisonment for 3 months. The accused took an appeal against the above verdict in the court Sessions Judge, Ajmer who maintained the appellant's conviction, but reduced the sentence to 3 months' rigorous imprisonment and to pay a fine of Rs. 500/-, in default to suffer two months' further rigorous imprisonment.

2. Dissatisfied with the above judgment, Khaju has preferred this, revision-application. Learned Counsel for the accused raised, in the course of his arguments, the following three points:

1. that the trial court went wrong in holding that Khaju was a milk-vendor;

2. that the prosecution did not examine the 'Motbirs' in whose presence sample of milk was obtained from the accused and that it was improper on the part of the learned Magistrate to base conviction solely on the statement of the Food Inspector Balraj Singh, P.W, 1;

3. that if the conviction of the accused is some how maintained the sentence imposed on him deserves reduction as the milk contained 5.35 fat content, which is more than the prescribed limit.

3. As for the first point raised on behalf of the petitioner, it may be 'X stated that the evidence of Balraj Singh, P.W. 1, shows that the sample of milk was obtained from the accused Khaju in lieu of CO P. after giving him a notice in the prescribed form (Ex. P. 1). The definition of 'sale' as given in Section 2(xiii) of the Act, runs as follows-

'Sale' with its grammatical variations and cognates expressions, mean the sale of any article of food, whether for Cash or on credit or byway of exchange and whether by wholesale or retail, for human consumption or use, or for analysis and includes an agreement. for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes, also an attempt to sell any such article:

The Act gives a special definition of the word 'sale' in Section 3(xiii), which includes within its ambit a 'sale' for analysis. A 'sale' for analysis must, therefore, be considered as 'sale' even if the transaction contains an element of compulsion. A contract is brought about by acceptance of a proposal made by one person to another by that other person. The latter is not bound to accept the accept the proposal. It does not, however, necessarily follow that where that other person has no choice but to accept the proposal, the transaction would not amount to a contract vide *Mangaldas v. Maharashtra State* : 1966 CriLJ106 . Where, therefore, a milk-vandor sells to a Food Inspector milk for analysis, that transaction will be covered by the ambit of the Act. In the instant case the Food Inspector Balraj Singh bought for analysis sample of milk from the petitioner and, therefore, the sale became complete within the meaning of the Act. The definition of 'sale' is also satisfied even if the matter is looked at from another angle. In this case the

accused was carrying milk from his village Kalyanipura to Ajmer for sale. That would obviously imply that he was having the stuff in his possession for sale. Manifestly this aspect could also bring the transaction within the definition of 'sale'. Thus, the first point canvassed on behalf of the petitioner is devoid of substance.

4. I now take up the second point pressed on behalf of the petitioner regarding the non-examination of 'Motbirs'. Learned Counsel for the petitioner submits that under Sub-section (7) of Section 10 of the Act, when Food Inspector takes a sample, he has to call one or more persons to be present when such action is taken and to take his or their signatures on requisite memorandum. Here the Food Inspector while taking the sample called Kishore and Tarachand to be associated with the proceedings and their signatures were obtained on Ex. P.3. But these attesting witnesses have not been examined in the trial court. Failure to examine them learned Counsel adds, raises a presumption against the prosecution under illustration (g) to Section 114, Evidence Act.

5. Sub-Section (7) of Section 10 of the Act reads as under:

Where the Food Inspector takes any action under Clause (a) of Sub-section (1), Sub-section (2), Sub-section (4) or Sub-section (6) he shall call one or more persons to be present at the time when such action is taken and his or their signatures.

It is not provided in Sub-section (7) that a person who is present at the time when action under Sub-section (1)(a) is taken, he shall be required to attend the court as a witness. It is no doubt true that ordinarily the prosecutor should produce the attesting witnesses. For this purpose the prosecution should specifically mention the names of such witnesses in charge-sheet, so that the court may summon them if it so desires. However, his failure to do will not necessarily affect the merits of the case. It passes beyond comprehension that the trial court would be inclined to distrust the evidence of the Food Inspector for no valid reason. He is an officer of the Municipal Board and is charged with the duty of maintaining public health. In the case in hand in the course of cross-examination of the Food Inspector there is no material to show that he bears any ill-will or enmity against the accused. That apart, there is nothing inherently improbable in the Food Inspectors' statement

which would persuade the court to reject his testimony. His statement is not in the nature of an accomplice-evidence so that the court could insist on some kind of corroboration. It is not the law that a fact cannot be proved by the evidence of a single witness. If there is nothing intrinsically unbelievable in the evidence of a particular witness, the court can base its conclusion upon his statement and find the facts deposed to by him as proved. I have gone through the statement of the Focd Inspector with meticulous care. I have not been able to find out in his statement anything, which would entitle me to distrust his testimony. In this connection a reference is made to the analogous provisions of Sub-section (1) and (b) of Section 103, Cr.P.C. Both the sub-sections run as follows:

(1) Before making a search under this Chapter the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by the witness; but no person witnessing a search under this section shall be required to attend the Court, as a witness of the search unless specially summoned by it.

Section 103, Cr.P.C., received consideration of their Lordships of the Privy Council in *Malkan Khan v. Emperor* AIR 1946 PC 16 and it was observed:

Their Lordships do not stay to consider whether in truth the two witnesses to the search are properly described as witnesses for the Crown since the argument breaks down on a wider ground. It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution & though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the

persuasiveness of the testimony given in the light of such criticism as may be leveled at the absence of possible witnesses.

Keeping in view the facts and the circumstances of this case, I am firmly of the opinion that the trial court was not wrong in relying upon the sole testimony of the Food Inspector Balraj Singh, P.W. 1. There is nothing inherently improbable in his evidence. His testimony is corroborated not only by the various exhibits but by the categorical admission made by the accused on March 19, 1969. The conviction of the accused, therefore, cannot be vitiated on this ground.

6. Lastly, learned Counsel argued that the sentence awarded to the accused is much too severe and, therefore, it should be reduced. A Division Bench of this Court in D.B. Criminal Reference No. 23 of 1969, State v. Biharilal, decided on February 11, 1971, has observed:

Cheating the purchaser and depriving the consumer of the nutrition for which he has paid for are writ large in the process of adulteration of milk.

In that case the accused Beharilal was convicted under Section 16, read with Section 7 of the Act by the Sub-Divisional Magistrate, Aklera, and was sentenced to pay a fine of Rs. 20/-, only. This Court, on a reference having been made by the Additional Sessions Judge, Jhalawar, enhanced the sentence of the accused to six months, rigorous imprisonment and to pay a fine of Rs. 250/-, in default to undergo an additional sentence of one month's rigorous imprisonment. That judgment is binding on me. No extenuating circumstance, or special and adequate reasons have been brought to light in the instant case for the reduction of the sentence. There is adulteration of 11% of added water in the milk brought by the accused for sale in Ajmer. This in my opinion, is no small scale adulteration. In this view of the matter, I do not feel inclined to reduce the sentence.

7. In the result, this revision-application fails and is hereby dismissed. The accused is on bail. The District Magistrate, Ajmer, is directed to take necessary steps for the arrest of the accused Khaju and send him to jail to undergo the sentence awarded to him by the learned Sessions Judge, Ajmer.

