

In Re: J.S. Mathews

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Court : Chennai

Decided On : Oct-10-1946

Reported in : AIR1947Mad311; (1946)2MLJ489

Appellant : In Re: J.S. Mathews

Judgement :

Yahya Ali, J.

1. The appellant who is manager of the show rooms of Messrs. Spencer and Company, Limited, Madras, has been convicted by the Chief Presidency Magistrate under Rule 81(4) of the Defence of India Rules read with Clause 11 of the Drugs Control Order, 1943, and has been sentenced to a fine of Rs. 5,000, and in default to two months' rigorous imprisonment.

2. The case against the appellant in brief is this: On the 10 th October, 1945, a tin of Glaxo was needed for a sick girl named Rajam aged one year. P.W. 2 who was a neighbour was approached by the girl's father. P.W. 2 made enquiries in the market, but as he was not able to get it and on learning that there were stocks at Messrs. Spencer and Co., he approached a medical practitioner, Dr. A. Narasinga Rao (P.W. 1) and obtained from him a medical certificate, Ex. P-1. Ex. P-1 merely states without mentioning the name of the parent of the child or even the fact that it was required for a child, that Glaxo and Glucose-D were essential as diet for P.W. 1's patient. It was not mentioned in that certificate that the patient was a child

one year old. P.W. 2 who is a clerk in the office of the Special Assistant Commercial Tax Officer went with P.W. 3, the Special Assistant Commercial Tax Officer himself, to Messrs. Spencer and Co., at about 3 p.m. P.W. 3 remained outside while P.W. 2 went in and met the accused. The accused is admittedly a European who is employed in Messrs. Spencer and Co., and is not a salesman at the counter but is occupying a higher position as manager of the show rooms. Presumably he is not conversant with Tamil except knowing a few simple words. P.W. 2 says that he showed the medical certificate, Ex. P-1 to the accused and asked him for a tin of Glaxo. According to P.W. 2, the accused asked him merely whether the certificate was addressed to Messrs. Spencer and Co., and on his reply in the negative the accused told him in Tamil, 'No. Go.' P.W. 2 admittedly spoke to the accused in Tamil although he knew English fairly well, being a cleric in a public office. Immediately after obtaining the negative reply from the accused, P.W. 2 went to P.W. 3 who was stationed just outside, and both of them returned to the accused, and P.W. 3 questioned the accused why he had refused to sell a tin of Glaxo to P.W. 2. P.W. 3 disclosed to him his official capacity, and thereupon the accused informed him forthwith that he had refused to sell for two reasons, namely, that the age of the patient was not given in Ex. P-1, and the certificate was not addressed to Spencer and Co. The third reason which the accused gives that he did not understand the Tamil words which were spoken by P.W. 2 was not according to P.W. 3 given out to him then. Immediately after this statement, P.W. 3 checked the stock of Glaxo in the shop and found that there was substantial stock available. He also examined P.W. 2 and the accused and recorded their statements, Exs. P-2 and P-3. In his statement, Ex. P-3, the accused gave out that after seeing the doctor's certificate produced by P.W. 2 he refused to supply because the age of the patient was not given therein and the certificate was not addressed to Messrs. Spencer and Co. Upon these facts the accused was prosecuted under Clause 11 of the Drugs Control Order read with Rule 81(4) of the Defence of India Rules.

3. Learned Counsel for the appellant has raised a preliminary objection of a technical nature. He contends that the charge is defective and that in consequence of the error in the charge he has been substantially prejudiced. The charge does not state that the offence was committed by Messrs. Spencer and

Co., and that the accused being the manager of the company was being charged as such under the Drugs Control Order.

4. Clause 4 of the Drugs Control Order provides that no person shall carry on the business of a retailer at any place in British India except under and in accordance with the conditions of a valid licence. Under Clause 7 the licensing authority may specify in the licence the conditions subject to which it is issued and the licensee is bound to comply with those conditions. Clause 11 provides that no retailer shall refuse to sell any drug without reasonable cause. In Clause 11, there are four categories of persons mentioned, namely, manufacturer, importer, wholesaler and retailer and Messrs. Spencer and Co., are, for the purposes of this case, retailers. The accused in his individual capacity does not fall under any of these categories. He could, therefore, be only prosecuted as the manager of the retailer company by invoking the aid of Rule 122 of the Defence of India Rules. Under that rule if the person contravening any of the provisions of the rule is a company or other body corporate, its manager shall be deemed to be guilty of such contravention unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Rule 122 has not been expressly referred to in the charge. Although express reference is not necessary, the charge should at least have indicated that the person who contravened the provisions of the rules, was the company or the body corporate and that the accused was being held liable in respect of that act in his capacity as manager of the company. In the preamble, in describing the accused, the designation of manager of Spencer and Co. is no doubt used. But in the body of the charge, there are no words to indicate that it was the company that was being charged through its manager, the accused, with reference to the principle of liability enacted in Rule 122 of the Defence of India Rules. It is urged for the defence that this defect in the charge has caused material prejudice to the appellant. I am not satisfied, however, that on that account there has been any serious prejudice caused, since as far as I am able to see, the prosecution proceeded in all its stages as if it was directed against the company itself and the accused was not in any manner handicapped in his defence, by reason of the defective charge. The error might be held to have been cured by Section 537, Criminal Procedure Code.

5. Coming to the merits of the case, the principal fact to be noticed is that nobody interested in the child has appeared in the picture. The chief, if not the only, persons who have played any part in this affair are persons connected with the Commercial Tax Department. The conduct of P.W. 2 was remarkable. He is a clerk and from the ability to speak English that he demonstrated subsequently, it is clear that when he first went to the accused and asked him in Tamil for a tin of Glaxo he was doing it with a set purpose. He produced a doctor's certificate and according to him the accused did not even look at it. He has repeated this statement more than once, first in his examination-in-chief and later in his further cross-examination. On the contrary, P.W. 3 who went into the shop immediately with P.W. 2 stated that when P.W. 2 came back after getting a refusal from the accused he told him that the accused had seen the medical certificate and had still refused to sell. The conduct of P.W. 2 in talking to the accused in Tamil and in slipping out immediately after the accused used the words, 'No. Go.' to bring P.W. 3 in order to make search of the stock and the incorrect statement that he has made as regards the inspection by the accused of the certificate--these circumstances very clearly indicate that P.W. 2's evidence is not worthy of credit. P.W. 3 played a relatively minor part. He was told by P.W. 2 that there was a refusal by the accused and he went in. As soon as he went in, the accused told him that since the age of the patient was not given in the certificate and since the certificate was not addressed to Messrs. Spencer & Co. he had refused to sell. This is the consistent position which the appellant had adopted throughout and having regard to the provisions of the licence which the company was bound scrupulously to follow, it cannot be said that the attitude of refusal on the part of the appellant was unjustified. As pointed out, under Clause 7 of the Drugs Control Order, the licensee is bound to comply with the conditions of the licence issued to him. The licence itself is Ex. D-1. In paragraph 2 of the licence, it is specifically mentioned with reference to Glaxo that its retail sale should be regulated by registering the applications and distributing only to registered applicants. The direction is that only 10 per cent of the total supply should be reserved for emergency demands to be issued to those who produce medical certificates. Lastly, it is provided in the licence that Glaxo should be sold only to those who have children below 18 months of age and who use it. It was imperative, therefore,

for the company and its officers to satisfy themselves before issuing even a single tin that the person who was to use it was a child below 18 months of age. In the present case, there was absolutely nothing before the appellant, at the time when he is said to have refused to sell, to show that it was required for a child below 18 months of age. The natural conduct on the part of a person who was in sore need of a tin of Glaxo for a sick child would have been to question the person who had refused to sell why he did so and if he was told that there was no mention in the certificate about the age of the child he would have immediately furnished to the company satisfactory evidence about the age of the child. But apparently the object of P.W. 2 was not to secure a tin of Glaxo but to lay a trap and it is for that purpose that he had P.W. 3 at his elbow and the promptitude with which P.W. 2 ran out as soon as the accused used the words 'No. Go.' and P.W. 3 came in and the search was made shows that the entire transaction was mala fide and pre-arranged.

6. It must be noted before concluding that the most important aspect of the matter, namely, whether the age of the child was disclosed to the appellant before the tin of Glaxo was asked for, was not considered by the learned Chief Presidency Magistrate although the point was definitely raised before him and it has so happened that this appeal has turned wholly upon that question. In the view I have taken on this matter, it is not necessary to examine the other reasons that have been given by the accused for refusing to supply the tin. From any point of view, I am unable to agree with the conclusion of the Chief Presidency Magistrate that the refusal in this case by the appellant to sell to P.W. 2 a tin of Glaxo on 10th October, 1945, was without reasonable cause.

7. The appeal is allowed and the conviction and sentence are set aside; the fine if paid shall be refunded.