

The State Vs. Isakki Muthu, (Accused)

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SooperKanoon Citation : sooperkanoon.com/787608

Court : Chennai

Decided On : Nov-12-1991

Reported in : 1992CriLJ2884

Judge : Padmini Jesuddurai, J.

Appeal No. : Criminal Appeal No. 316 of 1987

Appellant : The State

Respondent : isakki Muthu, (Accused)

Advocate for Def. : P. Peppin Fernando, Adv.

Advocate for Pet/Ap. : P. Govindarajan, Govt. Advocate (Crl. side) for Public Prosecutor

Judgement :

1. This appeal has been filed by the State, challenging the acquittal of the respondent by the Judicial First Class Magistrate, Tirunelveli in C.C. 99/85 for offences under Ss. 7(1), 16(1)(a)(i) read with S. 2(ia)(a)(j) of the Prevention of Food Adulteration Act and Rule 28 of the Rules framed thereunder, tried on the allegation that the sample of sweets taken from his shop, was found to contain Rhodamine-B which is not in the list of permitted coal-tar food colours to be used in food.

2. PW 1, the Food Inspector visited the sweet-stall of the respondent styled 'Shanmughavilas Sweets' and found sweets in closed polythene bags kept for sale. He purchased 3 such polythene packets of sweets as samples, packed them and sent them for analysis. Ex. P. 5 report of the Public Analyst showed that the sample contained 0.25 mg. Rhodamine-B per 100 gram of the sample, that Rule 28 of the Prevention of Food Adulteration Rules 1955 (hereinafter referred to as the Rules) prohibits the addition to food of any coal tar colours, other than those permitted therein, and that Rhodamine-B is not in the list of permitted coal tar food colours to be used in food. Hence the prosecution.

3. The learned Magistrate, acquitted the respondent on the ground that the sample had not been put into clean, dry, empty container and thereafter packed but that the polythene bag with the sample inside was wrapped with paper and cardboard paper and this was a violation of Rules 14 and 16 and that polythene bags is not a 'container' within the meaning of Rule 14. Challenging the correctness of ground for acquittal, this appeal has been preferred by the State.

4. The learned Public Prosecutor, by referring to Rules 14 and 16 urged that when the sample was found packed in air tight closed polythene bags and thereafter wrapped with paper and cardboard paper covering, securely tied, sealed and placed in a wooden box and sent to the public analyst, there was no violation of Rule 14 or 16 and the acquittal was therefore, wrong. The learned Public Prosecutor relied upon a judgment of a Division Bench of the Kerala High Court in *Harisankar v. Food Inspector*, 1988 MLJ 369.

5. Per contra, Thiru P. Peppin Fernando, learned Counsel for the respondent referred to the decisions of High Court of Punjab and Haryana, relied on by the learned Magistrate for acquitting the respondent and also on a decision of the High Court of Andhra Pradesh to contend that a polythene bag could never be construed as a container and as such the acquittal had to be sustained.

6. The question that arises for consideration is whether on the facts of the case, a polythene bag could be said to be a suitable container within the meaning of Rule 14.

7. Rule 14 is as follows :-

'Samples of food for the purpose of analysis shall be taken in clear dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed.'

8. The Act as well as the Rules lay down certain precautionary measures, which a Food Inspector has to take when sending the sample for analysis by the public analyst. These precautions relate to the manner of packing, sealing and sending the sample, addition of preservatives, stipulating the period within which each act has to be performed and so on. The object of these precautions is to see that the sample taken, is preserved in the same state for analysis. The object of Rule 14 in requiring the sample to be taken in bottles, jars or in other suitable containers, is to see that leakage and evaporation are prevented and in the case of dry substance, that moisture does not enter so that changes or deterioration of the sample might not take place. The container, therefore has to be clean, dry and has to be closed sufficiently tight as to prevent leakage, evaporation and entrance of moisture. This is the object of requiring the sample to be kept in containers. Bottles and jars are mentioned as illustration of what could be containers. The use of the terms 'or in other suitable containers' would show, that the list is by no means exhaustive. In other words, Rule 14 specifies that the container should be clean, dry and should be capable of being closed sufficiently tight to prevent leakage, evaporation or entrance of moisture. The words 'suitable' is also relatable to the nature of the sample. With the advance of science, one could never exhaust the list of what could be suitable containers. New packing materials and new devices for airtight closing, either by simple machines or even manually, are ever entering the market. The real test would therefore be whether it could be clean, dry and could be closed sufficiently tight so as to prevent leakage, evaporation and entrance of moisture.

9. Polythene bags have a plastic base. They are waterproof and if properly closed, could prevent leakage, evaporation and entry of moisture. Not only are dry substance packed in polythene bags, even liquid and semi-liquid substances are packed in polythene bags. They continue to remain air tight, so long as they

remain closed. It cannot therefore be laid down as a rule of law, that a polythene bag can never be a 'suitable container' within the language of Rule 14. As to whether in a particular case, it was closed sufficiently tight to prevent leakage, evaporation and entry of moisture, is a question of fact to be decided in each case, just as would be done in the case of a bottle or jar. Polythene bag could be a suitable container, just as a bottle or a jar could be.

10. Thiru P. Peppin Fernando, learned counsel for the respondent referred to the decision of a learned Judge of the Punjab and Haryana High Court in Chand Ram v. State of Punjab, (1986) 2 FAC 1, wherein Mirch Powder was taken by the Food Inspector in paper packets and the learned Judge held that, taking of sample of the original paper packing violated rule 14. Another learned Judge of the same court in Sham Lal v. State of Punjab, (1986) 2 FAC 245 held sending sample of chilly powder in their original paper packing to be violative of Rule 14 on the ground that the packet was likely to be tampered with.

11. A learned Judge of the Andhra Pradesh High Court in Public Prosecutor v. Kothakonda Shanker, (1990) 2 FAC 247 had held that when sample of redgram dall was put in dry, clean, empty polythene bags and sent to the public analyst, there was violation of Rule 14, which requires the sample to be kept in suitable bottles.

12. On the contrary, a Division Bench of the Kerala High Court in Harisankar v. Food Inspector, 1988 MLJ 369 after discussing the decisions referred to in paragraphs 10 and 11 above, observed that the above decisions lack data to find out their rationale and could not therefore provide any guidelines on the question. The Division Bench held that polythene bag is a suitable container for a sample of peas dhal, which was found to contain 82% kesari dhal and observed that there was nothing to indicate that any prejudice had been caused to the accused. I am in agreement with the view expressed by the Division Bench.

13. Coming to the facts of the case, P.W. 1 has stated that the sweets were kept for sale in closed polythene bags. He purchased three such bags, wrapped each with a paper wrapper, pasted the sample number, then wrapped each packet with a thick cardboard like brown paper, folding the edges suitably, tied each packet

lengthwise and breadthwise, affixed the seal in the necessary places, enclosed a Form No. 7 and again tied each packet, finally placed one pack in a wooden box and packed it in such a way that the pack would not break or give way and thus sent the sample to the public Analyst. The cross-examination of P.W. 1 was to suggest that no sample was taken from the shop of respondent. Ex. P. 5 the report of the Public Analyst shows that the sample was received by the Public Analyst properly sealed and fastened and the seal was found intact and unbroken. The seal fixed on the container and the outer cover of the sample, tallied with the specimen impression of the seal, separately sent by the Food Inspector and the sample was in a condition fit for analysis. This clearly shows that the polythene bag in which the sample was originally packed, was a suitable container for the sample and it had been closed sufficiently tight, so as to prevent leakage, evaporation and entrance of moisture.

14. The respondent himself is the manufacturer of the sample and along with two permitted colouring namely sunset yellow and caramoisine, the prohibited colouring Rhodamine B had also been added. The learned Magistrate, therefore, was in error in relying upon the decisions High Court of Punjab and Haryana to give a kind of summary disposal to the case. The acquittal cannot be sustained. The respondent is convicted for the offence under S. 7(1) read with S. 16(1)(a)(i) read with S. 2(ia)(a) and (j) of the Act. Post on 11-11-91 for questioning.

15. This appeal having been posted this day for further orders in the presence of the said advocates, the court delivered the following judgment :

On 11-11-1991, the respondent was present in court and was questioned about the sentence. Mr. Peppin Fernando, learned counsel for the respondent submitted that the Supreme Court in Babu Ram v. State of Haryana (1988) 2 FAC 157 had awarded a sentence of imprisonment of less than the minimum of six months provided under the Act and sentenced the accused to undergo imprisonment for a period of three months only and the same principle could be followed to give a lesser sentence to the respondent. No doubt, in the above decision, the Supreme Court has awarded a sentence less than the minimum provided under the Act, even though the Act has no provision enabling the court to award a lesser

sentence for any reasons to be recorded. On the facts of that particular case, the Supreme Court had felt that a lesser sentence would meet the ends of justice. The facts of the present case are totally different. The minimum sentence has to be imposed on the respondent.

16. In the result, the respondent is sentenced to undergo imprisonment for a period of six months and to pay a fine of Rs. 1,000/- in default to undergo rigorous imprisonment for a period of two months. Time for payment of fine till 3-1-1991.

17. It has been brought to my notice that the Government of Tamil Nadu has passed G.O.Ms. No. 180, Home (Prisons IV) Department, dated 28-1-89 and G.O.Ms.No. 781, Home (PR & C) Department, dated 11-4-1990. Both the G.Os. are under section 432, Cr.P.C. and each G.O. gives a remission of imprisonment for a period of six months to convicted persons. It is true that on the dates when the above G.Os. came into force, the respondent was not a convicted person since the trial Court had acquitted him on 30-10-86.

18. A Constitutional Bench of the Supreme Court, while dealing with the newly introduced S. 433-A, Cr.P.C. held in Maru Ram v. Union of India, : 1980 CriLJ1440 that S. 433-A, Cr.P.C. is only prospective in its application; but an accused who has been acquitted by the trial Court before S. 433A had been introduced and convicted by the appellate Court after S. 433-A was introduced, would be entitled to the benefits that were available to him on the date of judgment of trial Court, even though on the conviction by the appellate court, such benefits had been taken away. Dealing with the principle, the court observed (Para 56) :

'When a person is convicted in appeal, it follows that the appellate court has exercised its power in the place of the original court and the guilt, conviction and sentence must be substituted for and shall have retrospective effect from the date of Judgment of the trial Court. The appellate conviction must relate back to the date the trial court's verdict, and substitute it.'

The Supreme Court followed its earlier decision in Boucher Pierre Andre v. Supdt., Central Jail, Tihar, : 1975 CriLJ182 to hold that an appeal is a continuation of trial and an appellate judgment, a replacing of the original judgment.

19. Applying the above principle, an accused acquitted by the trial Court, but convicted by the appellate court, would be entitled to the benefits of the above two Government Orders, if they were available to him on the date of the judgment of the trial Court. In the instant case, the judgment of the trial court dated 30-10-86 gets substituted by the judgment of this court and hence, the respondent would be entitled to the benefits of the above two remission Government Orders. Since the sentence of imprisonment is only six months and the entire sentence stands remitted under any one of the Government Orders, it is needless for the respondent to surrender to custody in the event of the fine being paid by him. If the respondent does not pay the fine, he will have to undergo the imprisonment for a period of two months without reference to the above two G.Os., which do not apply to imprisonment in default of payment of fine.

20. In the result, the appeal is allowed.

21. Appeal allowed.