Mangaldas Raghavji Ruparel & Anr.

Vs

The State of Maharashtra & Anr.

Criminal Appeal No. 113 of 1963

(K. N. Wanchoo, M. Hidayatullah, J. C. Shah, S. M. Siskri, J. R. Madholkar JJ)

08.02.1965

JUDGMENT

MUDHOLKAR, J. -

This appeal and Criminal appeal No. 113/63 arise out of a joint trial of the appellant Mangaldas and the two appellants Daryanomal and Kodumal in Crl. A. 113 of 1963 for the contravention of section 7(v) of The Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) in which they were convicted and sentenced under section 16(1)(a) of the Act. The appellants Mangaldas and Daryanomal were each sentenced under section 16(i)(a)(ii) of the Act to undergo rigorous imprisonment for six months and to pay a fine of Rs. 500 while the other appellant was sentenced under sub-cl (i) to undergo imprisonment until the rising of the Court and to pay a fine of Rs. 200. On appeal they were all acquitted by the Additional Sessions Judge, Nasik. The State preferred an appeal before the High Court of Bombay which allowed it and restored the sentences passed on Mangaldas and Daryanomal by the Judicial Magistrate but imposed only a fine of Rs. 200 on Kodumal. They have come up to this Court by special leave.

The admitted facts are these. Mangaldas is a wholesale dealer, Commission agent, exporter, supplier and manufacturer of various kinds of spices doing business at Bombay. Dayanomal is engaged in grocery business at Nasik while Kodumal is his servant. On November 7, 1960 Daryanomal purchased from Mangaldas a bag of haldi (turmeric powder) weighing 75 kg. which was dispatched by the latter through a public carrier. It was received on behalf of Daryanomal at 11.45 A.M. on November 18, 1960 by Kodumal at the octroi post of Nasik Municipality. After he paid the octroi duty to the Nasik Municipality and took delivery of the bag the Food Inspector Board purchased from his 12 oz. of turmeric powder contained in that bag for the purpose of analysis. The procedure in this regard which is laid down in section 11 of the Act was followed by Burud. A portion of the turmeric powder was sent to the Public Analyst at Poona, whose report Ex. 16, shows that the turmeric powder was adulterated food within the meaning of section 2(i) of the Act. Thereupon Burud, after obtaining the sanction of the Officer of Health of the Municipality, filed a complaint against the appellants in the court of the Judicial Magistrate for offenses under section 16(1)(a) read with section 7(v) of the Act. At the trial Kodumal admitted that he had taken delivery of the bag at the octroi post and sold 12 oz. of turmeric powder to the Food Inspector and that he had also received a notice from him under section 11 of the Act. It was contended at the trial on behalf of Daryanomal that actually no delivery had been taken but that point was not pressed before the High Court. While Mangaldas admitted that he had did and despatched the bag containing turmeric powder he contended that what was sent was not turmeric powder used for human consumption but was "Bhandara" which is used for religious purposes or for applying to the forehead. This contention was rejected by the Judicial Magistrate as well as by the High Court but was not

considered by the Additional Sessions Judge. It was sought to be challenged before us by Mr. Ganatra on his behalf but as the finding of the High Court on the point is upon a question of fact we did not permit him to challenge it.

We will take Mangaldas's case first. Mr. Ganatra had made an application on his behalf for raising a number of new points, including some alleged to raise constitutional questions. At the hearing, however, he did not seek to urge any question involving the interpretation of the Constitution. The new points which he sought to urge were :

(1) that the appellant was not questioned regarding the report of the Public Analyst;

(2) the joint trial of Mangaldas with the other two appellants was illegal; and

(3) that the sanction was not valid.

As regards the first of these points his contention is that he had raised it before the High Court also though it has not referred to in its judgment. The High Court has stated clearly that all the points raised in argument before it were considered by it. In the face of this statement we cannot allow the point to be urged before us.

As regards the second point it is sufficient to say that it was not raised before the Magistrate. Section 537(b) of the Code of Criminal Procedure provides that no judgment, conviction or sentence can be held to be vitiated by reason of misjoinder of parties unless prejudice has resulted to the accused thereby. For determining whether failure of justice has resulted the Court is required by the Explanation to section 537 to have regard to the fact that the objection had not been raised at the trial. Unless it is so raised it would be legitimate to presume that the accused apprehended no prejudice. The point thus fails.

As regards the alleged invalidity of sanction it is sufficient to point out that the contention was not raised in the High Court or earlier. We, therefore, decline to consider it.

Mr. Ganatra urged that the trial court had no jurisdiction to try the appellant as the appellant had not committed any offense within its jurisdiction. With regard to this point the High Court has held that Mangaldas had distributed the commodity within the jurisdiction of the Magistrate and, therefore, the Magistrate had jurisdiction to try him. Apart from that we may point out that under section 182 of the Code of Criminal Procedure where it is uncertain in which of the local areas an offence was committed or where the offence is committed partly in one local area and partly in another or where on offence is a continuing one and continues to be committed in more local areas than one or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. Since Mangaldas actually sent the bag from Bombay to Nasik he could be said to have committed the offence partly in Bombay from where it was despatched and partly in Nasik to which place it had been consigned. Apart from that, the mere fact that proceedings were taken in a wrong place would not vitiate the trial unless it appears that this has occasioned a failure of justice (see section 531, Cr.P.C.). Mr. Ganatra, however, say that there was failure of justice in this case because had Mangaldas been prosecuted at Bombay, one of the samples taken from the bag of turmeric powder would have been sent to the Public Analyst at Bombay and not to the Public Analyst at Poona. We are wholly unable to appreciate how this could make any difference whatsoever. Apart from that since the samples were actually taken at Nasik the one meant for analysis had, according to an administrative order of the Government, to be sent to

the Public Analyst at Poona. Therefore, even if Mangaldas had been tried at Bombay the report of the Public Analyst at Poona could be put in evidence. There is nothing in the Act which prevents that from being done.

In view of the fact that the finding of the Judicial Magistrate and the High Court that the turmeric powder had been adulterated was based solely on the report of the Public Analyst, Mr. Ganatra raised three contentions before us. One is that such evidence is not by itself sufficient for the conviction of an accused person; the second is that the Public Analyst was not called as a witness in the case and the third is that unless notice is given to an accused person under section 11 of the Act after a sample had been taken of the allegedly adulterated commodity the report of the Public Analyst concerning that commodity is not admissible against him.

In support of the contention that the conviction could not be based solely upon the report of the Public Analyst that the turmeric powder was adulterated. Mr. Ganatra relied upon the decisions in State v. Bhausa Hanmatsa Pawar ([1962] Bom. L.R. 303.) and City Corporation Trivandrum v. Antony (I.L.R. [1962] 1 Kerala 430.). The first of these is a case under the Bombay Prohibition Act, 1949 (Bombay XXV of 1949). In that case a large quantity of angurasava, partly contained in two barrels and partly in three boxes containing 109 bottles was recovered from the house of the accused person. Samples taken from the barrels and boxes were sent for analysis to the Chemical Analyser and to the Principal, Podar Medical College, Bombay. The report of the former showed that three out of the four samples contained alcohol in varying degrees. Thereupon the accused was prosecuted for affiances under sections 65, 66(b) and 83(1) of the Bombay Prohibition Act. His defense was that the manufactured a medicinal preparation called angurasava which contained Ayurvedic ingredients which generated alcohol. According to him, therefore, what was seized from him was outside the orbit of the Bombay Prohibition Act. Partly relying upon the certificate issued by the Principal of Podar Medical College, the trying Magistrate acquitted the accused holding that the prosecution failed to discharge the onus of proof that angurasava was prohibited liquor. On appeal by the State of Maharashtra before the High Court reliance was placed upon the certificates issued by the Chemical Analyser as well as by the Principal, Podar Medical College. The certificate of the former showed that three out of the four samples contained "2. 2 and 6 per cent v/v of ethyl alcohol respectively and they contain yeast. No alkoloidal ingredient or metallic poison was detected in them. The certificate of the Principal of the Podar Medical College is as follows :

> "Formula supplied is found to be similar to that given in the Ayurvedic Books. There are no easy methods to find out the herbal drugs dissolved in a liquid. It is not possible for us, to find out the herbal drugs used in the above liquids. The colour and smell of the samples supplied is not identical with the colour and smell of fermented Ayurvedic preparation like, Assav and Arishta. Hence it is very difficult to give any definite opinion in the matter."

On behalf of the accused it was urged that the virtue of sub-section (ii) of section 24(a) of the Prohibition Act, the provisions of sections 12 and 13 thereof do not apply to any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor. Section 12 of the Act prohibits the manufacture and possession of liquor and section 16 prohibits the possession of materials for the manufacture of liquor. It was, however, contended on behalf of the State that once it is established that what was seized from the possession of the accused contains alcohol the burden of proving that what was seized falls under section 24(a) was on the accused person. The High Court, however, held that the burden of establishing that a particular article does not fall under section 24(a) rests on the prosecution. In so far as the certificate of the Chemical Analyser was

concerned the High Court observed as follows :

> "It is beyond controversy that, normally, in order that a certificate could be received in evidence, the person who has issued the certificate must be called and examined as a witness before the Court. A certificate is nothing more than a mere opinion of the person who purports to have issued the certificate, and opinion is not evidence until the person who has given the particular opinion is brought before the Court and is subjected to the test of cross-examination."

It will thus be clear that the High Court did not hold that the certificate was by itself insufficient in law to sustain the conviction and indeed it could not well have said so in view of the provisions of section 510, Cr.P.C. What the High Court seems to have felt was that in circumstances like those present in the case before it, a court may be justified in not acting upon a certificate of the Chemical Analyser unless that person who examined as a witness in the case. Sub-section (1) of section 10 permits the use of the certificate of a Chemical Examiner as evidence in any enquiry or trial or other proceeding under the Code and sub-section (2) thereof empowers the court to summon and examine the Chemical Examiner if it thinks fit and requires it to examine him as a witness upon an application either by the prosecution or the accused in this regard. It would, therefore, not be correct to say that where the provisions of sub-section (2) of section 510 have not been availed of, the report of a Chemical Examiner is rendered inadmissible or is even to be treated as having no weight. Whatever that may be, we are concerned in this case not with the report of a Chemical Examiner but with that of a Public Analyst. In so far as the report of the Public Analyst is concerned we have the provisions of section 13 of the Act. Sub-section (5) of that Section provides as follows :

> "Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code :
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> Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein."

This provision clearly makes the report admissible in evidence. What value is to be attached to such report must necessarily be for the Court of fact which has to consider it. Sub-section (2) of section 13 gives an opportunity to the accused vendor or the complainant on payment of the prescribed fee to make an application to the court for sending a sample of the allegedly adulterated commodity taken under section 11 of the Act to the Director of Central Food Laboratory for a certificate. The certificate issued by the Director would then supersede the report given by the Public Analyst. This certificate is not only made admissible in evidence under sub-section (5) but is given finality of the facts contained therein by the proviso to that sub-section. It is true that the Certificate of the Public Analyst is not made conclusive but this only means that the court of facts is free to act on the certificate or not, as it thinks fit.

Sub-section (5) of section 13 of the Act came for consideration in Antony's case (I.L.R. [1962] 1 Kerala 430.) upon which the State relied. There the question was whether a sample of buffalo's milk taken by the Food Inspector was adulterated or not. The Public Analyst to whom it was sent submitted the following report :

> "I further certify that I have analyzed the aforementioned sample and declare the result of my analysis to be as follows :
>
> #Solids-not-fat .. .. 9.00 per cent.Fat .. .. 5.4 per cent.Pressing point(Hortvet's method) .. .. 0.49 Celsius##
>
> and am of the opinion that the said sample contains not less than seven per cent (7%) of added water as calculated from the freezing point (Hortvet's method) and is therefore adulterated."

The Magistrate who tried the accused persons acquitted them on the ground that it was not established that the milk was adulterated. Before the High Court it was contended that the certificate was sufficient to prove that water had been added to the milk and reliance was placed upon the provisions of section 13(5) of the Act. The learned Judge who heard the appeal observed that this provision only says that the certificate may be used as evidence but does not say anything as to the weight to be attached to report. The learned Judge then proceeded to point out what according to him should be the contents of such report and said :

> "In this case the court is not told what the Hortvet's test is, what is the freezing point of pure milk and how the calculation has been made to find out whether water has been added. I cannot, therefore, say that the Magistrate was bound to be satisfied on a certificate of this kind, which contains only a reference to some test and a finding that water has been added. The prosecution could have examined the Analyst as a witness on their side. The learned Magistrate also could very well have summoned and examined the Public Analyst, but whatever that might be, I am not prepared to say that the finding of the Magistrate that the case has not been satisfactorily proved is one which could not reasonably have been reached by the learned Magistrate and that the acquittal is wrong and calls for interference." (p. 436)

All that we would like to say is that it should not have been difficult for the learned Judge to satisfy himself by reference to standard books as to what Hortvet's method is and what the freezing point of milk is. We fail to see the necessity of stating in the report as to how the calculations have been made by the Public Analyst. Apart from that it is clear that the decision does not support the contention of learned counsel that a court of fact could not legally act solely on the basis of the report of the Public Analyst.

As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail solely on the ground that the Public Analyst had not been called in the case. Mr. Ganatra then contended that the report does not contain adequate data. We have seen the report for ourselves and quite apart from the fact that it was not challenged by any of the appellant as inadequate when it was put into evidence, we are satisfied that it contains the necessary data in support of the conclusion that the sample of turmeric powder examined by him showed adulteration. The report sets out the result of the analysis and of the tests performed in the public health laboratory. Two out of the three tests and the microscopic examination revealed adulteration of the turmeric powder. The microscopic examination showed the presence of pollen stalks. This could well be regarded as adequate to satisfy the mind of a Judge or Magistrate dealing with the facts. Mr. Ganatra then said that the report shows that the analysis was not made by the Public Analyst himself but by someone

else. What the report says is "I further certify that I have caused to be analysed the aforementioned sample and declare the result of the analysis to be as follows." This would show that what was done was done under the supervision of the Public Analyst and that should be regarded as quite sufficient.

Now as to the necessity of notice under section 11 of the Act. Mr. Ganatra said that the report is admissible only against a person to whom notice is given under section 11(1)(a) by the Food Inspector, that the object of taking the sample was to have it analysed. The law requires notice to be given only to the person from whom the sample is taken and to none else. The object of this provision is clearly to apprise the person from whom the sample is taken of the intention of the Food Inspector so that he may know that he will have the right to obtain from the Food Inspector a part of the commodity taken by way of sample by the Food Inspector. This is with a view to prevent a plea from being raised that the sample sent to the analyst was of a commodity different from the one from which the Food Inspector has taken a sample. What bearing this provision has on the admissibility of the evidence of the Public Analyst is difficult to appreciate. Once the report of the Analyst is placed on record at the trial it is admissible against all the accused persons. What it shows in the present case is that the commodity of which Kodumal had taken possession contained turmeric powder which was adulterated. Therefore, since it is admitted and also established that the bag of turmeric powder from which sample was taken had been dispatched by the appellant Mangaldas, the report of the Public Analyst could be properly used against him in regard to the quality or composition of the commodity.

Mr. Ganatra then said that it was necessary to establish that the appellant had the mens rea to commit the affiance. In support of his contention Mr. Ganatra pointed out that section 19(1) of the Act deprives only the vendor of the right to contend that he was ignorant of the nature, substance or quality of the food sold by him and not a person in Mangaldas's position. According to him, the word vendor here means the person from whom the sample was actually taken by the Food Inspector. We cannot accept the contention. The word "Vendor", though not defined in the Act, would obviously mean the person who had sold the article of food which is alleged to be adulterated. Mangaldas having sold the bag to Daryanomal, was the original vendor and, therefore, though the sample was taken from Kodumal he will equally be barred from saying that he was not aware of the nature, substance or quality of the turmeric powder in question. Moreover, it is curious that a person who sought to get out by saying that what he had actually sent was not an article of food but something else should now want to say that he did not know that though it was an article of food it was adulterated.

We may now refer to two decisions upon which learned counsel relied in support of his cotention. The first is Municipal Board, Bareilly v. Ram Gopal (42 Crr. L.J. 243.). There the question was whether a shopkeeper who allowed the owner of adulterated ghee to sell on his premises was entitled to say in defense that he was ignorant of the quality of ghee which its owner was offering for sale. It was held by the Allahabad High Court that he was so entitled. We fail to appreciate how this case is of any assistance in the matter before us. For, here, the turmeric powder admittedly once belonged to Mangaldas and was in fact sold by him to Daryanomal. At one stage, therefore, Mangaldas was the vendor of the turmeric powder and, therefore, falls squarely within the provisions of section 13(1) of the Act. The second case is Ravula Hariprasada Rao v. The State ([1951] S.C.R. 322.). What was held in that case is that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The proposition there stated is well-established. Here section 19(1) of the Act clearly deprives the vendor of the defence of merely alleging that he was ignorant of the nature, substance or quality of the article of

food sold by him and this places upon him the burden of showing that he had no mens rea to commit an offence under section 17(1) of the Act. In a recent case - State of Maharashtra v. Mayer Hans George ([1965] 1 S.C.R. 123.) - this Court had to consider the necessity of proving mens rea in regard to an offense under section 23(1) (a) of the Foreign Exchange Regulation Act (7 of 1947) read with a notification dated November 8, 1962 of the Reserve Bank of India. The majority of Judges constituting the Bench held that on the language of section 8(1) read with section 24(1) of the above Act, the burden was upon the accused of proving that he had the requisite permission of the Reserve Bank of India to bring gold into India and that there was no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition or mens rea is postulated as necessary to constitute an offence referred to in section 23(1-A) of the above Act. We are, therefore, unable to accept the contention of learned counsel.

The only other point which falls for consideration is the on raised by Mr. Anthony in the other appeal. Mr. Ganatra did not address any separate argument on this point but he adopted what was said by Mr. Anthony. That point is whether the transaction in question i.e., taking of a sample by a Food Inspector under section 11 amounts to a "sale" and, therefore, whether the person connected with the transaction could be said to have infringed section 7(v) of the Act. Mr. Anthony's contention is that for a transaction to be a sale it must be consensual sale. Where a person is required by the Food Inspector to sell to him a sample of a commodity there is an element of compulsion and, therefore, it cannot be regarded as sale. In support of the contention he has placed reliance upon the decision in Food Inspector v. Parameswaran ([1962] 1 Crl. L.J. 152.) Raman Nayar J., who decided the case has observed therein :

> "As a sale is voluntary transaction and (sic) a seizure or compulsory acquisition in exercise of statutory power is not a sale within the ordinary sense of that word. Nor does the definition of 'sale' in section 2(xiii) as including a sale of good for analysis make it one, for, the first requisite even under the definition is that there must be a sale. The definition apparently by way of abundant caution, merely states that the word 'sale' means all manner of sales of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis; and all that the definition means in relation to the question we are considering is that a sale food is nonetheless a sale, by reason of the fact that it was not for consumption or use, but only for analysis.
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> In my view when a food inspector obtains a sample under section 10 of the Act there is no sale. Of course, it is possible for a Food Inspector just like any other human being to effect a purchase in the ordinary courses, and the transaction would be a sale notwithstanding that the purchaser is a Food Inspector and that his purpose is to have the article analysed with a view to prosecution. But, if he obtains the article not by a voluntary exchange for a price but in exercise of his statutory power under section 10 of the Act the transaction is not a sale notwithstanding that in obedience to sub-section (3) of section 10 its cost-and I think the sub-section advisedly uses the long phrase, 'its cost calculated at the rate at which the article is usually sold to the public' instead of the word 'price' is paid to the person from whom the sample is taken."

In Sarjoo Prasad v. The State of Uttar Pradesh ([1961] 3 S.C.R. 324.); M. V. Joshi v. M. U. Shimpi ([1961] 3 S.C.R. 986.) and The State of Uttar Pradesh v. Kartar Singh (A.I.R. 1964 S.C. 1135.) this Court has treated a transaction of the kind we have here as a sale. No doubt, no argument was addressed in any of these cases before this Court similar to the one advanced by Mr. Anthony in this

case and as advanced in Parameswaran's case ([1962] 1 Crl. L.J. 152.). A view contrary to the one taken in Parameswaran's case ([1962] 1 Crl. L.J. 152.) A was taken in State v. Amritlal Bhogilal (I.L.R. 1954 Bom. 459.) and Public Prosecutor v. Dada Raji Ebrahim Helari (A.I.R. 1953 Mad. 241.). In both these cases the sale was to a sanitary inspector who had purchased the commodity from the vendor for the purpose of analysis. It was contended in these cases that the transaction was not of a voluntary nature and, therefore, did not amount to a sale. This contention was rejected. In Amritlal Bhogilal's case (I.L.R. 1954 Bom. 459.) the learned Judges held :

> "There is also no reason why in such a case the article should not be held to have been sold to the inspector within the meaning of section 4(1)(a). He has paid for the article purchased by him like any other customer. Moreover, section 11 itself uses the words "purchase' and 'sell' in regard to the inspector's obtaining an article for the purpose of analysis and paying the price for it. It is, therefore, clear that the Legislature wanted such a transaction to be regarded as a sale for the purpose of the Act." (p. 463)
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> The learned Judges in taking this view relied upon several reported decisions of that Court. In Dada Haji Ebrahim Helari's case (A.I.R. 1953 Mad. 241.) which was under the Madras Prevention of Adulteration Act, (3 of 1918) Ramaswami J., dissented from the view taken by Horwill J., in In re Ballamkonda Kankayya (A.I.R. 1942 Mad. 609.) and following the decisions in Public Prosecutor v. Narayan Singh (1944 M.W.N. Crl. 131.) and Public Prosecutor v. Ramchandrayya (1948 M.W.N. Crl. 32.) held the transaction by which a sample of an article of food was obtained by a sanitary inspector from the vendor amounts to a sale even though that man was bound to give the sample on tender of the price thereof. But Mr. Anthony contends that a contract must be consensual and that this implies that both the parties to it must act voluntarily. No doubt a contract comes into existence by the acceptance of a proposal made by one person to another by that other person. That other person is not bound to accept the proposal but it may not necessarily follow that where that other person had no choice but to accept the proposal the transaction would never amount to a contract. Apart from this we need not, however, consider this argument because throughout the case was argued on the footing that the transaction was a 'sale'. That was evidently because here we have a special definition of "sale" in section 2(xiii) of the Act which specifically includes within its ambit a sale for analysis. It is, therefore, difficult to appreciate the reasons which led Raman Nayar J., to hold that a transaction like the present does not amount to a sale. We are, therefore, unable to accept that view. In the result we uphold the conviction and sentence passed on each of the appellants and dismiss these appeals.

Appeals dismissed.

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