KERALA HIGH COURT

Food Inspector

Vs.

Parameswaran Chettiar

Criminal Appeal No. 113 of 1960, in Criminal Appeal No. 61 of 1959

(P.T. Raman Nayar, J.)

21.02.1961

JUDGMENT

P. T. Raman Nayar, J.

1. The accused in this case was convicted by the Additional First Class Magistrate, Kozhikode of an offence punishable under Section 16(1)(a)(ii) read with Section 7 of the Prevention of Food Adulteration Act, 1954, (referred to hereafter as the Act) and sentenced to suffer rigorous imprisonment for one year. On appeal he was acquitted by the sessions court and the complainant, a food inspector, has brought this appeal against acquittal by special leave under Section 417(3) of the Criminal Procedure Code.

2. On 8.10.1959 P. W. 1, a Food Inspector, stopped the accused when he was entering a coffee hotel with a vessel containing about four bottles of milk. He obtained one bottle of this milk from the accused following the procedure prescribed by Sections 10 and 11 of the Act. On analysis this milk was found to contain 14 per cent of added water.

3. The prosecution case is that the milk was being taken by the accused to the coffee hotel for sale while the defense was that the accused, a milkman by caste and calling, was only delivering the milk he had got by milking the buffalo belonging to the proprietor of the coffee hotel at the latter's house, the proprietor having engaged him for the purpose On a monthly wage of Rs. 10/-.

4. The evidence of P. W. 1 that the accused is a milk vendor stands uncontradicted, and it would have been reasonable enough to infer that the accused was, on the day in question, taking the milk to the coffee hotel for the purpose of sale in which case his very possession of the milk would be a sale within the definition in Section 2(xiii) of the Act and he would be undoubtedly guilty of the offence with which he was charged. But then there is the evidence of the hotel proprietor as D. W. 1 in support of the defense and, although this evidence was rejected by the learned magistrate, it was accepted by the learned Sessions Judge. Whatever might have been the view that I myself might have taken had I been trying the case, I see no reason, sitting in appeal against the acquittal, to differ from the appreciation made by the learned Sessions Judge, especially since one reason that weighed with the learned Magistrate in rejecting the defence,

namely that in another case the accused had put forward a fanciful plea, was altogether irrelevant. and I might observe that both the magistrate and the sessions judge appear to have misread the evidence when they say that, when P. W. 1 questioned the accused after stopping him, the accused told him that he was taking the milk to the hotel for sale. This is not what P. W. 1 said in his evidence. He merely made the assertion that he saw the accused going to sell milk at the coffee hotel. What the accused told him on being questioned was only that the milk he was carrying was buffalo's milk and belonged to him. There is nothing in the evidence of P. W. 1 or of his maistry, P. W. 2, who was with him at the time (and is the only other witness for the prosecution) to show that the accused told P. W. 1 that he was taking the milk for sale. and since P. W. 1 admitted that he had no information of what the milk was intended for, apart from what the accused told him, it follows that his statement that the accused was taking the milk for sale was only an inference.

5. Both the magistrate and the sessions judge have proceeded on the footing that the gravamen of the charge was that the accused was in possession of milk for the purpose of sale, an act which amounts to a sale by reason, of the definition in Section 2(xiii) of the Act. If that were so there would be nothing more to be said in the case, but I find that the charge which the accused was actually called upon to answer was that he had sold one bottle of buffalo's milk which was adulterated with water. It is clear that the charge relates to the transaction by which P. W. 1 obtained one bottle of milk from the accused, that it regards this transaction as a sale, and that it was this case, namely, that he had sold one bottle of adulterated milk to P. W. 1 that the accused was called upon to meet. It therefore becomes necessary to consider whether the transaction is a sale within the meaning of the Act.

6. Now it is clear from the evidence of P. W. 1, and from the documents Exts. P2 and P3 prepared by him at the time, that what he did was to take a sample in exercise of the power given to him by Section 10 of the Act, paying the cost of the sample at the rate at which the article is usually sold to the public as required by sub-section (3) of this section and following the procedure prescribed by Section 11. It is true that P.W. 1 began by saying that he purchased one bottle of milk from the accused for 10 annas and that the voucher, Ext. P1, he took from the accused for the payment of this sum shows that it was the price of one bottle of buffalo's milk sold. It is not the case of P. W. 1 that he asked for the milk without revealing his identity. In fact his evidence discloses that he and the accused knew each other very well. p. W. 1 was accompanied by his maistry, P. W. 2. He stopped the accused, questioned him as to what he was carrying, and then asked for a bottle of the milk. In these circumstances it is abundantly clear that the accused knew who P. W. 1 was, that he must have known that P. W. 1 wanted the milk for the purpose of being analysed so that the accused could be prosecuted if it was adulterated, and that the accused would not have given the milk to P. W. 1 if he could have helped it. It could only have been because of the power given to P. W. 1 by Section 10 of the Act, and the sanction provided by Section 16. (1)(b) that the accused handed over the milk, and I have little doubt that this was a case of a seizure or a compulsory acquisition of the milk in exercise of the power conferred on P. W. 1 by Section 10 of the Act.

7. As sale is a voluntary transaction and 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 food 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 of food is nonetheless a sale, by reason of the fact that it was not for consumption or use, but only for analysis. It is noteworthy that Sections 10 and 11 take particular care to see that the taking of a sample under Section 10 is not described as a sale or a purchase, and that the parties to the transaction are not described as seller or purchaser. For this purpose Section 11, for example, uses long phrases such as, "takes a sample of food for analysis" and, "the person from whom the sample has been taken," resisting the temptation to use the single words, "buys" and "seller" respectively. Some of the State Acts which were replaced by the Act we are now considering, the Bombay and the Madras Acts for example, did use the words 'seller,' 'purchaser' 'buy' and 'sell' with reference to the taking of a sample under provisions similar to Section 10 of the Act. But in 1935 the Madras Act was amended eschewing these words and adopting phraseology similar to that used by the Act for describing the transaction of taking a sample under Section 10 of the Act. 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 course, 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.

8. This was the view taken by Lakshmana Rao, J., in *Public Prosecutor v. Srinivasa Rao*[1], and Horwill, J., in *In re Bellemkonda Kanakayya*[2], and with great respect, I think it is wrong to say as has been said in *Public prosecutor v. Annamalai*[3], that these decisions were dissented from in *Public Prosecutor v. Narayana Sing*[4], *Public Prosecutor v. Ramachandrayya*[5], and *Public Prosecutor v. Dada Haji Ebrahim*[6], They were only distinguished and were by implication affirmed, it being held on the facts that the transactions in question were sales and purchases to the true sense of the words and not seizures in exercise of the powers under Section 14 of the Madras Act. These later decisions only lay down that it is possible for a Sanitary Inspector empowered under Section 14 of the Madras Act to make a purchase, something which was recognized by Horwill, J., himself in AIR 1942 Madras 609 when he said,

> "if the Sanitary Inspector had not exercised his powers under Section 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into."

[1] AIR 1938 Mad 541 [3] AIR 1953 Mad 862 at p. 863 [5] AIR 1948 Mad 329
[2] AIR 1942 Mad 609 [4] AIR 1944 Mad 236 [6] AIR 1953 Mad 241

His Lordship went on to observe:

> "In this case the petitioner would presumably not have parted with the goods voluntarily

when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee."

With these observations I am in respectful agreement and would say that the accused in the present case did not sell the milk to P. W. 1.

9. In the result I dismiss this appeal.

Appeal dismissed.