

KERALA HIGH COURT

State of Kerala

Vs

Parameswaran Pillai Vasudevan Nair

Criminal Appeal No. 89 of 1973

(P. Narayana Pillai, K. Bhaskaran and S.K. Kader, JJ.)

18.07.1974

JUDGMENT

Narayana Pillai, J.

1. This appeal by the State is from the acquittal of the respondent by the Sub-Divisional Magistrate, Attingal, of an offence punishable under the Prevention of Food Adulteration Act, hereinafter referred to as "the Act".

2. On June 12, 1972, the respondent sold to the Food Inspector of the Elakamon Panchayat, P.W. 1, 660 m.l. of cow milk. After complying with the formalities prescribed by law and adding the necessary preservative the sample was sent to the Public Analyst for examination. He received it on June 15, and after analysis issued the report, Ext. P/5, on June 19, 1972, declaring the result as follows :-

"Milk fat... 4.8%

Milk Solids-non-fat... 7.7%

Starch and Sugar and Freezing point...Absent.

(Hortvet's method) and expressing his opinion thus :...0.48° C."

"The said sample does not conform to the standards prescribed for cow's milk under the Prevention of Food Adulteration Rules, 1955 and is therefore adulterated.

..... ..

The sample contains not less than nine per cent (9.0%) of added water, as calculated from the freezing point (Hortvet's method). The percentage of added water has been calculated on the basis of the fact that the freezing point of genuine cow's milk is 0.53°C."

After receipt of the report P.W. 1 filed the complaint on September 5, 1972. Besides P.W. 1, an attester in the memorandum prepared by him at the time of purchase, P.W. 3, also gave evidence about the sale of milk by the respondent. The Magistrate found that the sale of milk as alleged

was proved but acquitted the respondent holding that the percentage of added water in the sample was negligible.

3. It is sufficiently proved in this case by the evidence of the prosecution witnesses, which is reliable, that the respondent sold 660 m.l. of milk to P.W. 1 as alleged by the prosecution and by the report of the Analyst that that milk was adulterated as it did not conform to the standard. Therefore unless it is found that the variation of the standard was negligible and so could be ignored, conviction has to follow.

4. The Magistrate followed the decision of a learned Single Judge of this Court in *Gopinathan Nair v. Palani*¹, to hold that if the adulteration was negligible it could be ignored. The correctness of that decision is challenged here.

5. As here it was sale of milk that was involved in 1971 Ker LT 248 also. There the variation in the milk solid-non-fat was 0.3 per cent. The decision there was that it was a borderline variation and that the accused was entitled to the benefit of doubt arising from it. In that case the learned Judge followed the decision of the Supreme Court in the *Malwa Cooperative Milk Union Ltd. v. Bihari Lal*², (unreported).* and the decision of the Delhi High Court in *Municipal Corporation of Delhi v. Om Prakash*³, the Delhi High Court also followed the decision of the Supreme Court in Criminal Appeals Nos. 235 and 236 of 1964* and held that where the difference was only marginal benefit of doubt could be given to the accused.

* Since reported in 1968 Jab LJ 213 (SC)

6. The facts in Criminal Appeals Nos. 235 and 236 of 1964 (SC)* were peculiar. Two samples of buffalo milk purchased from a Co-operative Milk Union were found on examination by Analyst to contain less than the required minimum solids in one sample by 1% and in the other by 0.4%. As the Milk Union was likely to become one of the major milk distributors in the City of Indore the Corporation of the City of Indore considered that it was not in the public interest to continue the prosecution against the Milk Union especially when none of the accused had personally benefited by the sale and the Public Prosecutor applied for permission to withdraw the two cases. The trial Magistrate allowed it and acquitted the accused. Applications filed before the Sessions Judge for revision of the Magistrate's orders were dismissed. Thereafter a Single Judge of the High Court in revision set aside the acquittal and ordered retrial. In the appeals therefrom the Supreme Court set aside the High Court's orders and restored the orders of the Magistrate.

* Since reported in 1968 Jab LJ 213 (SC)

7. While prosecution under the Act was for public interest, withdrawal of the prosecution in that case was also for public interest. The two samples of milk purchased in that case were from the same Milk Union and they both were examined by the same authority, the Public Analyst. In spite of that the reports of the Analyst differed slightly regarding certain particulars. As regards milk-fat he said in one case that it was 6% and in the other 5.9% and as regards solid-non-fat he said in one case it was 7.9% and in the other 7.7%. If the reports were accurate such differences could not have happened in the case of milk purchased from the same person and examined

¹1971 Ker LT 248

³1970 Cri LJ 1047 (Delhi). In 1970 Cri LJ 1047

² Criminal Appeals Nos. 235 and 236 of 1964

by the same authority. It was in those peculiar circumstances and on those peculiar facts that the

Supreme Court happened to observe that the variation was on borderline, that it was not clear whether the Analyst was able to isolate the fat content so successfully as not to have left room for the slight variation which was found in his reports and that it was possible that a slight error in calculation or in isolation of fat may have been made by him.

8. The following sentence in the judgment of the Supreme Court after making those observations :

"But without speculating upon this aspect of the case, it is quite clear to us that this was hardly the kind of case in which the High Court should have exercised its powers to set aside in revision an acquittal which proceeded not after trial and determination of this and several other facts in issue, but on the withdrawal of the case by the Public Prosecutor at the instance of the Corporation and possibly of Government."

shows, with great respect, that the observations made that the Analyst may not have successfully isolated the fat content and may have committed slight error in calculation or isolation, were all only speculations and that the Supreme Court interfered with the orders of the High Court only because it was satisfied that that was hardly the kind of case where the High Court should have interfered with acquittal especially when the policy of the Corporation and Government indicated that acquittal was desirable if the supply of milk to the City of Indore was to be regulated. It is true that the Court added that the variations in the solid contents of the milk were not so great as to merit attention but guardedly said, only "prima facie" and underlined it. This was what the court said :

"The variations of the solid contents of the milk prima facie were not so great as to merit attention even in the first instance and we think that the High Court might well have left the acquittal endorsed by the Sessions Judge to stand."

9. If in respect of the same article there is the report of the Public Analyst and the certificate of the Director of Central Food Laboratory the latter should, to the extent it goes, supersede the former. If, in respect of it, there are more than one report of the Analyst and they conflict with each other regarding material particulars, error in calculation or in isolation may be possible and the accused can be given the benefit of doubt. That can be done if there are more than one certificate by the Director of Central Food Laboratory and they conflict with each other in material particulars also. But where there is only one report or one certificate there is no warrant for the assumption about inaccuracy in any detail mentioned in it or regarding error in calculation or isolation at the stage of analysis. There is nothing in the decision in Criminal Appeals Nos. 235 and 236 of 1964 (SC)* to show that it was a different view that was taken by the Supreme Court there.

* Reported in 1968 Jab LJ 213 (SC)

10. There was some discussion at the Bar about the scope of Article 141 of the Constitution which says that the law laid down by the Supreme Court shall be binding on all the courts in the country. Judicial propriety, dignity and decorum demand that being the highest judicial tribunal

in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in *Gurcharan Singh v. State of Punjab*⁴, and *Prakash Chandra Pathak v. State of Uttar Pradesh*⁵, that as on facts no two cases could be similar to its own decisions which were essentially on questions of fact and could not be relied upon as precedents for decision of other cases. In the *State of Orissa v. Sudhansu Sekhar Misra*⁶, and *Madhav Rao Jivaji Rao Scindia v. Union of India*⁷, the Supreme Court held that it was not a profitable task to extract a sentence here and there divorced from the context from its judgement as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment and build upon it. In *Rajeswar Prasad Misra v. State of West Bengal*⁸, the arguments advanced before the Supreme Court disclosed a tendency to read the observations made in the judgments of that court as statutory enactments. Dealing with it the court said that although the Indian Courts are bound by the law declared by the Supreme Court it should not be forgotten that that court does not enact. In *Raval and Co. v. K.G. Ramachandran*⁹, the Supreme Court held that general observations contained in any judgment of that court should be confined to the facts of that case and cautioned that they should not be applied in interpreting the provisions of an Act unless it had applied its mind and analyzed the provisions of that particular Act.

11. No case on facts can be on all fours with the facts of another. Criminal Appeals Nos. 235 and 236 of 1964 (SC)* was a plain case on facts. The statement there that the variation was only slight and on the border line as not to merit attention was made, with respect, only to strengthen the conclusion the court arrived at that the acquittal did not deserve interference. It was not an opinion expressed on a question of law. It was also not an opinion expressed after analysing the provisions of the Act. On the other hand the relevant provisions in the Act were analysed by the Supreme Court in its later decision in *Jagdish Prasad v. The State of West Bengal*¹⁰, and thereafter it held that as the standards had been fixed with great care as per statutory provisions any person who dealt in articles of food not conforming to the standards was liable to be punished. It was contended there on the strength of certain decisions of the Calcutta and Madras High Courts that standards prescribed in Appendix I to the Rules framed under the Act were not conclusive. The Supreme Court observed there that decisions of courts could not alter or vary the standards fixed in exercise of the powers conferred by the Act in Appendix I to the Rules. The Court said :

* Reported in 1968 Jab LJ 213 (SC)

⁴1956 Cri LJ 827 : AIR 1956 SC 460

⁶(1968) 2 SCJ 236 : AIR 1968 SC 647

⁵ AIR 1960 SC 195 : (1960 Cri LJ 283)

⁷ AIR 1971 SC 530

⁸(1966) 1 SCR 178 : (1965-2 Cri LJ 817)

¹⁰ AIR 1972 SC 2044 : (1972 Cri LJ 1309)

⁹ AIR 1974 SC 818

"Section 3 of the Act authorises the Central Government to constitute a Committee called the Central Committee for Food Standards to advise the Central Government and the State Governments on matters arising out of the administration of the Act and to carry out the other functions assigned to it under the Act. Under Section 23(1)(b) of the Act the Central Government may, after consultation with the Committee and subject to the

condition of previous publication make rules "defining the standards of quality for, and fixing the limits of variability permissible in respect of any article of food". It is in exercise of this power that Rule 5 was made authorising standards of quality of the various articles of food specified in Appendix B (Appendix I) to the Rules. In view of this provision any article of food which does not conform to the standards specified in Appendix B (Appendix I) to the Rules which under Section 2(1) of the Act is said to be adulterated because "the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability...It appears to us therefore that standards having been fixed as aforesaid any person who deals in articles of food which do not conform to them contravenes the provisions of the Act and is liable to punishment thereunder."

In another decision, *M.V. Joshi v. M.U. Shimpi*¹¹, the Supreme Court after saying that it was a fundamental principle of interpretation that the primary test was the language employed in the Act and when the words were clear and plain Courts were bound to accept the expressed intention of the legislature held :

"If the standard is not maintained, the butter, by a fiction, becomes an adulterated food. A dealer in such butter cannot adduce evidence to prove that notwithstanding the deficiency in the standard, it is not adulterated."

12. Although concern about abuses in the market-place is as old as the recorded history of man, the tempo of change in the character of the marketplace and the types of goods offered in it have been greater now than ever before. From a predominantly agrarian society we are moving into an urbanised society. The products of the agrarian society were limited and for the most part uncomplicated and uncontaminated. Modern technology has placed at the disposal of the consumer a bewildering variety of highly complex products, consumable and non-consumable. As a result of scientific discoveries foodstuffs can now be made even out of sewage. Unlike AIR pollution, problem connected with prevention of food pollution, resulting from food adulteration, can successfully be solved even at the national level and the provisions in the Act are in that direction.

13. The Act is a piece of consumer legislation. It regulates to some extent the consumer-supplier relations. Consumerists demand enforcement of discipline among the producers or manufacturers of food to ensure safety in the realm of food. The consumer's legitimate, ignorance and his almost total dependence on the fairness and competence of those who supply his daily needs have made him a ready target for exploitation. The Act is intended to protect him against outright frauds.

¹¹ AIR 1961 SC 1494 : (1961-2 Cri LJ 696)

14. The Act does not make a distinction between cases coming under it on the basis of the degree of adulteration. It does not provide for aggravation of offence based on the extent of contamination. The offence and punishment are the same whether the adulteration is great or small. Food pollution, even if it be only to the slightest extent, if continued in practice, would adversely affect the health of every man, woman and child in the country. Hence even marginal

or border line variations of the prescribed standards under the Act are matters of serious concern for all and as public interests are involved in them, the maxim, De Minimis Non Curat Lex. law does not concern itself about trifles, does not apply to them.

15. The standard fixed under the Act is one that is certain. If it is varied to any extent the certainty of a general standard would be replaced by the vagaries of a fluctuating standard. The disadvantages of the resulting unpredictability, uncertainty and impossibility of arriving at fair and consistent decisions, are great.

16. The Act does not provide for exemption of marginal or border line variations of the standard from the operation of the Act. In such circumstances to condone such variations on the ground that they are negligible is virtually to alter the standard itself fixed under the Act.

17. The standards of qualities of the articles have been fixed by the Government under the provisions of the Act after due deliberation and after consulting a committee of competent men. It is for them to give due allowance for probable errors before fixing a standard. They may have done it also. There is no reason to assume otherwise. Therefore the conclusion is that for an article of food when a standard has been fixed under the Act it has to be observed in every detail.

18. With great respect we are unable to agree with the decision of the Delhi High Court in 1970 Cri LJ 1047 (Delhi) and the decision of the learned single Judge of this Court in 1971 Ker LT 248 that border line or marginal variations of standards have to be ignored and that in such a case the accused is entitled to benefit of doubt and he has to be acquitted.

19. In the result the acquittal of the respondent is set aside, this appeal is allowed and the respondent is convicted under Section 16(1)(a)(i) of the Act and sentenced to undergo simple imprisonment for six months and to pay a fine of Rs. 1,000 and in default of payment of fine to undergo simple imprisonment for a further period of one month.

Bhaskaran, J.

20. I agree with the conclusions reached and the sentence awarded by my learned brother Narayana Pillai, J.

21. An article of food sold by a vendor shall be deemed to be adulterated within the meaning of Section 2(i)(a) of the Act if it is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be. Cow milk containing added water, or not conforming to the standard prescribed under Appendix I, Rule A-11.01.11 of the Rules is adulterated and whoever sells such milk for human consumption is to be held guilty of the offence under Section 7, and is punishable under Section 16(1)(a)(i) of the Act. An item of food is either adulterated or not; the statute does not appear to admit of a via media position on this question. The Government framed the rules defining the standards of quality for, and fixing the limits of variability permissible in respect of, any article of food in consultation with or in accordance with the advice of, the Committee for food standards, and it is not for the Courts to adopt a standard different from what has been prescribed in Appendix I to the Rules. The offence of adulteration is committed in all cases where the quality or purity of the article thereof falls short of the

prescribed standard, or its constituents are present in quantities which are in excess of the prescribed limits of variability, however, negligible such variations may be.

22. What was engaging the consideration of the Supreme Court in Crl. Appeals Nos. 235 and 236 of 1964* was the propriety on the part of the High Court in setting aside an order permitting the withdrawal of a prosecution passed by the Magistrate, and confirmed by the Sessions Judge, on the facts and in the peculiar circumstances of that case. The observation contained in that judgement has to be read and understood with reference to the particular facts and circumstances of that case and without giving any meaning which the Supreme Court does not, on a proper reading of the judgement, appear to have intended. The later decision of the Supreme Court in AIR 1972 Supreme Court 2044 : (1972 Cri LJ 1309) should set at rest the doubt, if any, entertained on this point.

* Reported in 1968 Jab LJ 213 (SC)

Kader, J.

23. My learned brother, Narayana Pillai J., with respect, has elaborately dealt with the points involved in the case. I also agree with the conclusions arrived at and the sentence passed against the accused by my learned brother. The article of food involved in the instant case is cow milk. The standard for different classes and designation of milk are prescribed under A-11.01.11 of Appendix 1 of the Prevention of Food Adulteration Rules, 1955. The standard of minimum per cent of milk fat and milk solid-non-fat for cow milk in various parts of the country has been prescribed. As per this, the minimum per cent of milk fat and milk solid-non-fat for cow milk in Kerala are 3.5 and 8.5 respectively. Under Rule 44 of the Prevention of Food Adulteration Rules, notwithstanding the provisions of Rule 43, no person shall either by himself or by any servant or agent sell milk which contains any added water. Cow milk, the quality of which does not come within the statutory standard prescribed must be deemed to be adulterated and the sale of such an article of food contravenes Section 7 of the Act and is an offence. Any person who sells milk which is not of the nature, substance or quality contravenes the provisions of the Act and thereby commits an offence. If the milk fat is less than the prescribed minimum or the milk solid-non-fat is less than the prescribed minimum, the sample of milk would be deemed to be adulterated within the meaning of Section 2(i)(1) of the Act, irrespective of the presence of quantity of added water. As already referred to, sale of milk containing added water is prohibited under Rule 44 and that by itself is an offence punishable under Section 16 of the Act. Milk added or diluted with water would come within the definition of the word "adulterated" under the Act. When a standard of quality or purity has been prescribed under a statute for an article of food, it is not within the scope and province of the courts of law to question the reasonableness or correctness of the standard so prescribed. Under Section 2(i)(1) of the Act, an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability. The purpose of Rule 44 is to ensure that the article of food sold must be without any of the things or substances not permitted by law. The foreign matter added or adulterated substance need not be poisonous or injurious to health. The fat contents of milk may vary in various States depending upon several factors and that is why the standards prescribed for fat contents of milk vary from State to State. The relevant rule under this Act has not prescribed a cast iron

percentage. But, it has only prescribed a standard insisting only on a minimum percentage of certain ingredients or contents. In other words, it is laid down that to be within the standard prescribed the ingredients should not fall below a particular percentage. The constituents of an article of food should not be present in quantities which are in excess of the prescribed limits of variability. This is clear from the definition under Section 2 of the Act, and it is evident that the possibility of the contents of milk varying because of various factors, has certainly been taken into consideration in prescribing the standard for cow milk under the Act insisting the compliance of certain minimum requirements. It may not therefore be proper for a court of law to go beyond the standard prescribed and assume that in certain circumstances the contents in the milk may go lower or higher than that prescribed in the statute. When a standard has been prescribed by law for an article of food and on analysis if it is found that it does not conform to the standard so prescribed, the sale of such an article of food contravenes the provisions of the Act and is an offence punishable thereunder.

24. An argument was also addressed on behalf of the respondent that if any water is added with milk, the milk fat content present in such milk would normally be less than the prescribed limit, that the milk fat content in the sample in question is 4.8 per cent which is in excess of the limits prescribed and that this shows that no water was added to the milk in question. Addition of water to milk is likely to reduce both fat contents and milk solid-non-fat. The decrease in milk solid-non-fat can only result from the addition of foreign matter and not due to any natural process. The water contents of genuine milk would not introduce any variation in the quantity of non-fatty solids.

25. In 1971 Ker LT 248 the sample of cow milk was found, on analysis, to contain 18% of added water, 3.5% of milk fat and 6.9% of milk solid-non-fat. The Director of Central Food Laboratory to whom the sample was sent for further analysis, found that the milk sample contained 5% of milk fat and 8.2% of milk solid-non-fat. Both the experts were unanimous that the sample of milk in question was adulterated. It was on the basis of the deficiency of solid-non-fat contents noticed that the Public Analyst came to the conclusion that the sample contained not less than 18% of added water. The learned Single Judge stated therein that it was without adopting a scientific analysis that the Public Analyst came to the conclusion that water was added, that there was therefore scope for doubt as to water was added at all and held that the benefit of this doubt must go to the accused. But, in the instant case, the Public Analyst has applied the Hortvet's method to ascertain whether there was added water in the sample of milk. The Public Analyst has stated that the percentage of added water has been calculated on the basis of the fact that the freezing point of genuine cow milk is 0.53°C . Hortvet's method has been accepted as a more dependable and safe method for determining whether there is added water or not in a given sample of milk. Apart from the fact that the sample of cow milk in the case under consideration does not conform to the standard prescribed for cow milk, it also contained not less than 9 per cent of added water. Even if it is assumed for the sake of argument that there is only a negligible variation in the contents of milk fat and milk solid-non-fat in the sample, the data given in the report of the Public Analyst clearly shows that the sample of milk contained added water and the sale of such milk is prohibited under Rule 44, the contravention of which is an offence punishable under the Act. The learned Single Judge who decided the case in 1971 Ker LT 248 has, with great respect, rightly stated that under the Indian law when once an article of food is found below the standard prescribed it has to be presumed that the article of food is adulterated and the accused has no right to prove before court that notwithstanding any deficiency in the

standard the stuff is, in fact, not adulterated; but appears to have failed to apply this principle to the facts of that case. The case on hand is one where the sample of milk sold to the Food Inspector by the accused is found to be not in accordance with the standard prescribed by law.

26. The accused has no case that the report of the Public Analyst has not furnished sufficient or adequate data. Under Section 13 of the Act the report of the Public Analyst in the prescribed form containing the result of analysis is admissible in evidence unless it is superseded by the certificate issued by the Director of Central Food Laboratory. By virtue of this section the report of the Public Analyst is per se evidence. The accused has been given a right under Section 13(2) to challenge the correctness of the report; and if the accused does not exercise this right the report of the Public Analyst constitutes a good piece of evidence in the case. The respondent, the accused, in the present case has not challenged the correctness of the analysis or the genuineness and validity of the report of the Public Analyst. To my mind it appears that the decision of the Supreme Court in Criminal Appeals Nos. 235 and 236 of 1964* has no application to the particular facts of the instant case. The statements and observations made in that judgment have to be understood bearing in mind the facts in that particular case.

* Reported in 1968 Jab LJ 213 (SC)

Order accordingly.