NAGPUR HIGH COURT

Dattappa Mahadappa

Vs

Municipal committee Buldana

Criminal Revn. No. 28 of 1950

(Mudholkar, J.)

23.05.1950

JUDGMENT

Mudholkar, J.

1. This order will also govern the decision of criminal Revn. No 29 of 1950 The applicant in each case was convicted at a summary trial of an offence under Section 5 (2), C. P. and Berar Prevention of Adulteration Act and sentenced to pay a fine of Rs. 51. Each of them was ordered to pay in addition compensation of Rs. 1-12-0 to the non-applicant.

2. The non-applicant is the Municipal Committee at Buldana. Its case is that on 18.1.1949 each of the applicants offered for sale milk which was not of the standard fixed by the Provincial Government by the Notification No. 3775 160 XV of 1941, dated 30.6.1943, under Section 5 (1) of the Act. It is admitted before me that each of the applicants offered milk for sale and that a sample was taken therefrom and sent by the Municipal Committee for analysis to the Public Analyst, C. P. and Berar.

3. Each of the applicants, however, denied that the milk was adulterated.

4. The milk in question was buffalo milk, and the standard prescribed therefor by the notification to which I have already referred is 5% fat and 9% solids excluding fat. According to the report of the public Analyst the sample of milk sent to him in each case contained 3% fat and 6.74% solids other than fat.

5. The point raised is that the report of the Public Analyst is of no value in the absence it his own evidence and in the absence of evidence to show how the sample in each case was sent to him. While the learned counsel for the applicant admits that under sub-sections (2) of Section 11 of the Act, the certificate given by the public Analyst may be used in evidence of the facts therein

stated in any inquiry, trial or other proceedings under the Act, he contends that the value to be attached to the certificate would depend upon the facts and circumstances of every case. He points out that where the article sent for examination is capable of disintegration or of undergoing radical change in composition, it must be shown that the composition of the sample sent had not undergone any change since its transmission. He has relied extensively on a book called 'Milk : Production and Control' by Harvey and Hill in order to show that milk undergoes rapid and considerable chemical change unless it is kept under refrigeration.

6. At p. 11 of the book the subject 'Bacteria found in Milk' is dealt with. Among other things the learned authors have observed :

> "Despite their minute size, bacteria can accomplish a great deal in various directions. It has been proved that latic-acid organisms which are present in milk in varying numbers even when produced under clean conditions, can consume their own weight of food each hour. They absorb food over their entire surface and emit waste products generally acids, into the milk."

Then at p. 13 it is stated :

> The acid producing organisms cause an alteration in the character of the milk which ends in putrefaction. The factors which decide the rate of this change are (a) the quantity originally present in the milk, (b) the temperature at which the milk is kept. If milk with a high bacterial content is kept above a temperature of 60 F., conditions are favorable for early and raid souring."

Then at p. 16 it is stated :

> "In some milks acid develops to a considerable extent, while in others fermentations take place. Seventy degrees F., sees the rapid development of the lactic-acid organisms, principally the Streptococcus lactis."

Then at pp. 177-178 they state :

> "The keeping properties of milk depend upon the number of bacteria contained. Bacteria multiply more rapidly at high temperatures than at low, and the higher the temperature the more rapidly do they increase, this being especially the case with those organisms which cause rapid souring and objectionable flavors in milk.....The bacteria most commonly found in milk grow more rapidly at temperatures above 60 F. At temperatures above 70 F., milk speedly sours. If the liquid contains as few as 10,000 bacteria and is held at 60 F., it will become sour in fifty three hours. If the same milk is held at 50 F., it will not sour for eighty-six hours. Every effort should therefore, me made to ensure that the milk is

cooled to a temperature as low as is possible under the prevailing circumstances."

Where milk is kept in its natural condition for a long time, I take it, therefore, that its fat and non-fat content would be reduced. Since milk is so readily liable to change in composition the learned authors enjoin upon various precautions in the matter of collection of samples and their transmission to a laboratory. Thus, at p. 359 they say :

> "It is essential to the proper standardization of sampling that all samples should be collected in accordance with principles laid down for Designated Milks in Memo. 139/Foode (January 1937) issued by the Minister of Health.....This sample should be delivered intact to the bacteriologist,.....When the milk has been obtained, it should be packed in ice in a suitable carrying case, and should be kept under these conditions until it arrives at the laboratory. This pre-caution is particularly essential if the samples have to travel some distance.... In any case, if milk cannot be delivered to the laboratory within fifteen minutes of sampling, ice should always be used except in the case of pasteurised or other heat-treated milks."

The authors enjoin that the milk should be collected in sterile glass bottles, which should befitted with accurately fitting metal or glass stoppers. They also emphasize that the bottles after being fitted with liquid from the dipper should be securely stoppered and packed in ice in a suitable box and also say that it is important that each bottle should be filled as full as possible in order to exclude the maximum amount of air.

8. The learned authors also attach great importance to the fact that milk is tested as soon after the sample is taken as possible. In this connexion their suggestions to the local authorities are :

> "Whichever method is used, it is advisable that the laboratory should be situated adjacent to the district concerned, in order to prevent any delay in transmitting samples ... it would appear highly desirable that every Council should provide its own laboratory and not rely on testing being carried out by outside bodies as so often is the case."

9. As regards the fat content of milk, the learned authors observed as fallows at p. 394

> "It is important to remember that the Sale of Milk Regulations, 1939 provides that a sample of milk containing less than 3 per cent. of fat or less that 3.5 per cent. of other solids is to be presumed, for the purposes of the Food and Drugs Act, 1938, not to be genuine until the contrary is proved. This limit for fat is exceedingly low when modern scientific principles of farming are considered as the average fat cement of milk from a mixed herd rarely falls below 3.5 per cent. Milk of individual animals, however, frequently fails to reach the standard fixed, this discrepancy being very noticeable amongst pedigree animals from which it might be expected that milk would be of the

highest obtainable standard. Because of these variations and to prevent injustice, provision has been mane for 'appeal to the cow' samples to be taken when necessary. Should such samples fall below the specified standard, an appeal may be allowed."

Thus, the mere fact that fat and non fat solids in any given sample of milk are below those prescribed does not lead to the inevitable inference of adulteration. In this case there is evidence to show that there was 'an appeal to the she-buffalo' (if I may so put it) and that the sample of milk taken at the instance of the owner of the buffalo gave an analysis which showed fat and not-fat solids to be well below the prescribed percentages. In England, therefore, 'the appeal' would have been allowed. Here too that should be done and for identical reasons.

10. Then at p. 405 the learned authors observe as follows :

'Added water may be suspected under the following circumstances : (a) Fat percentage below 3 per cent. (b) Percentage of non-fatty solids below 3.5 per cent. (c) Percentage of total solids below 11.5 per cent. (d) Percentage flash below 0.65 per cent. (e) Freezing point nearer to zero than 0.550 0 (f) Specific gravity less than 1.027. (g) Retractive index less than 37.

It must be reiterated that the above facts only point to suspicion of added water it being impossible to differentiate between watered milk and milk which is naturally poor in fatty or non-fatty solids by the practical use of the above data.

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Although genuine milk usually contains some 87.5 per cent. of water, other sample, though genuine, may contain more or less."

These observations indicate how difficult it is to prove adulteration in a given case.

11. The learned authors then state :

"Because of changes which occur in lactose, even before souring takes place, the percentage of this substance can only be determined when milk is fresh. For this reason it is desirable that milk should reach the analyst at the earliest possible moment after sampling, maintained, if necessary, in a sweet condition by means of ice."

This increases the importance of refrigeration of samples and of avoidance of delay in analysing them.

12. In the present case, the samples were taken on 18.1.1949 and despatched to Nagpur the same day. They were received by the Public Analyst on 20-11949 and analysed by him apparently on 24.1.1919. There is no evidence to show whether the bottles which were used were sterlized and were securely stoppered and whether milk was sent under refrigeration. Further, there is nothing whatever to show about the condition in which the samples were received by the Public Analyst.

Bearing in mind that the milk was analysed by the Analyst almost a week after the samples were taken, the absence of proof of the manner in which the samples were sent and the condition in which the milk was when the samples were received by him detracts, in my judgment, from the value of his certificates.

13. No doubt, sub-sections (1) of Section 5 creates a presumption of adulteration in respect of an article of food examined by the Public Analyst; but whether such a presumption must be drawn must necessarily depend upon the facts established in each case. For, it is clear from the opinion of Harvey and Hill, that the composition of milk undergoes a rapid change unless the milk is either pasteurised or unless it is sent under refrigeration. Therefore, it had to be established that the sampler in question were sent under refrigeration. They have led no evidence to that effect. In the circumstances, I am of the opinion that no presumption under Section 5 (1) can properly be raised in this case.

14. That apart, in this case the applicant had made an application to the Court below for examining the Public Analyst as a witness, either in Court or on commission. This request was, however, disallowed by the trial Magistrate without assigning any reason for it. It seems to me that it was highly improper to turn down the request and that too in a summary way, particularly because the whole case depended upon the opinion of the Analyst.

15. I may here refer to a decision of the Allahabad High Court in *Happu v. Emperor*[1], where dealing with a case in which a person had died of arsenic poisoning the learned Judges held that where a case depended solely upon the opinion of the Chemical Examiner, he should be examined as a witness in the case. This case was later followed *Ujagir Singh v. Emperor*[2], I would say with respect that these cases lay down a salutary rule, and that in a case like the present one it would not be in consonance with the well-established principles of administration of justice to deny the right to an accused person to test the opinion of an expert on the basis of which he is sought to be condemned. When such opportunity was not afforded to the accused person, the opinion of the Public Analyst can carry little weight, and so cannot be regarded as an adequate basis for conviction of the accused person.

16. In the view I take it would follow that little value can be attached to the report of the Public Analyst on which reliance is placed on behalf of the non-applicant in both these cases. I, therefore, allow the applications for revision made by each of the applicants and set aside the conviction and the sentence passed on each of them. The fine and the compensation, if paid, are ordered to be refunded.

Convictions set aside.

[1]56 All 228 : (AIR 1983 All 837 : 35 Cr LJ 280)

[2] AIR 1939 Lah 149 : (40 Cr LJ 576)