

(2001) 02 GUJ CK 0010
In the Gujarat High Court

Case No : Criminal Revision Application No. 350 of 2000

Abbasali Taheralii Vora

APPELLANT

Vs

Trilokkumar Babubhai Bhaskar Food Inspector

RESPONDENT

Date of Decision : 20-02-2001

Acts Referred:

Citation : (2001) CriLJ 2459 : (2001) 21 GLH 698 : (2001) 4 GLR 3356

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : B.M. Gupta, for the Appellant; A.J. Desai, APP, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Mehta, J. 1. Abbasali Taherali Vora, applicant (original accused), has filed this revision application u/s 397 of Cr.P.C. challenging the judgement and order dated 25.5.2000 passed by Judicial Magistrate First Class, Kalol, in Criminal Case No. 204 of 1989 below Exh. 101. The learned Magistrate thereby directed that the public analyst be orally examined as per Section 311 of the Criminal Procedure Code.

2. The facts of this case are as under:

2.1 In this case from the record it appears that on 20.7.1988 sample of black pepper was purchased from Abbasali Taherali Vora, the present applicant. The said sample was sent to laboratory somewhere in August, 1988 and after examination public analyst Baroda sent his report on 22.8.1988 which is produced at Exh. 72.

2.2 From the record it appears that somewhere in March, 1989 sanction was granted to prosecute the accused and case was filed bearing Criminal Case No. 204 of 1989.

2.3 In March 1989 one private complaint was filed by Trilokkumar Babubhai Bhaskar, Food Inspector, having the office at Food and Drug Control

Administration, Godhra, against the present applicant accused for the alleged offences u/s 2(i-a), (a), (m) read with Section 7(1)(5) and punishable u/s 16(1) (a)(1)(2) of Prevention of Food Adulteration Act, 1954. In the said complaint it was alleged that the present applicant is mixing of black pepper (Kalamari).

2.4 Thereafter, on 21.7.1995 charge was framed.

2.5 Examination of original complainant P.W. No. 1 was started on 2.4.1998 which is produced at Exh. 59 and his cross-examination was completed on 11.2.1999. Prosecution witness No. 2 Mansingh Panch was examined at Exh. 92 on 10.9.1999. The Exh.. 72 was proved and exhibited in the deposition of P.W. No. 1 somewhere in April, 1998.

2.6 Thereafter the prosecution examined the following witnesses and produced documents as under:

1. Ex. 59 deposition of original complainant 2. Ex. 60 the copy of the Gazette where, the complainant's name is published. 3. Ex. 61 form showing the purchase of 450 grams of black pepper on 20.7.1988 4. Ex. 62, the bill showing the sale of goods to the Food Inspector. 5. Ex. 63 showing the receipt of the amount by the accused. 6. Ex. 64, alleged to be three bottles wherein the sample was taken. The seal and the label was applied for and this procedure was recorded and the copy was produced and the same is at Ex. 64. 7. Ex. 65, is showing the collection and the seal number of the seal, slip, cotton thread, cross and whatever is done in presence of the witness. 8. Ex. 66, that one specimen was sent along with the memorandum copy in the sealed cover to the Baroda Laboratory, Public Analyst and the said being received by the Public Analyst, Baroda. 9. Ex. 67, the copy of the memorandum 10. Ex. 68, the receipt of the Public Analyst, Baroda. 11. Ex. 69 and 70 are the other two specimen kept in tact. 12. Ex. 72 is the copy showing the result of the Analyst. 13. Ex. 74, shows the round seal of the Public Analyst, Baroda. 14. Ex. 75, is the sanction for the prosecution from the Nadiad Office. 15. Ex. 76, is the copy given to the accused. 16. Ex. 77, is the postal receipt of the same. 17. Ex. 92 Examine of witness Manish Raising

2.7 After completion of prosecution evidence further statement of the applicant-accused u/s 313 was recorded by the learned Magistrate and thereafter the matter was posted for arguments as per Section 314 of the Cr.P.C. The applicant had filed written arguments vide Exh. 100 on 29.4.2000 and thereafter the matter was posted on 25.5.2000.

2.8 It has been stated that on 25.5.2000 the learned Magistrate suo motu passed an order to examine the public analyst. In the said order the learned Magistrate stated that in this case the prosecution for establishing their case have examined the Food Inspector Trilokkumar Babubhai Bhaskar and panch witness Mansinh Raising. However, the learned Magistrate was of the view that it will be necessary to orally examine the public analyst u/s 311 of the Cr.P.C. Therefore, he has directed that the public analyst may be examined orally on

25.5.2000.

3. Being aggrieved and dissatisfied with the said order the applicant-original accused has filed this revision application before this court in this behalf.

4. The learned advocate for the applicant accused has tried to assail the order of the learned Magistrate on various grounds. According to him there were no reasons to take oral evidence at this stage. He submitted that three reasons given by the learned Magistrate for examining the public analyst did not exist and the same is contrary and inconsistent with the Criminal Procedure Code, particularly Section 311 of the Code.

5. Before I examine the contention of the learned counsel for the petitioner-applicant (accused), let me examine relevant provisions of Prevention of Food Adulteration Act, 1954. The learned counsel for the applicant has relied on definition 'adulterated' given in Section 2(ia). He submitted that as per the said definition 'adulterated' means an article of food shall be deemed to be adulterated -

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is also to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;

(b) if the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;

6. He has also relied on definition of Section 2(v) "food" which means any article used as food or drink for human consumption other than drugs and water and includes (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food

(b) any flavouring matter or condiments, and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

6.1 He has also relied on definition of Section 2(xii-a) 'primary food' which means any article of food, being a produce of agriculture or horticulture in its natural form. He has further relied on Section 13 of the Prevention of Food Adulteration Act which provides for the report of the public analyst particularly clause (1), (2) and 5 of the said section. He has also relied on Rule 7(1) of the Prevention of Food Adulteration Rules, 1955 which provides for duties of public analyst. He has also relied on Section 5 of the Cr. P.C. and contended that in view of the said section, the provisions of the said Code will not be applied inasmuch as Prevention of Food Adulteration Act is a special Act. He has also relied on Section 311 of the Cr.P.C. and submitted that the order of the learned Magistrate is not in consonance with Section 311 of the Code because the evidence of public analyst need not be essential to the decision of the case.

6.2 The learned counsel for the applicant has stated that the order of the learned Magistrate is contrary to the judgement of this court in the case of STATE VS. SHANTABEN reported in 5 G.L.R. 578 in which at para 5 the court has observed as under:

"What is made evidence u/s 13 of the Prevention of Food Adulteration Act and Sec. 510 of the Cri. Pro. Code, is a document purporting to be a report upon any matter or thing duly submitted for examination or analysis. The report contains the result of the examination or analysis and does not contain any opinion. Opinion is not made evidence under Sec. 510 Cr.P.C. or under Sec. 13 of the Prevention of Food Adulteration Act. The result of the examination or analysis is factual and does not consist of any opinion. It has its value because the Chemical Analyser and the Public Analyst are qualified to make the examination or analysis of the articles submitted to them for examination or analysis. If the chemical analyser examines an article submitted to him and makes a report that that article contains one per cent of arsenic, there is no reason to reject that evidence, even if no reasons are given. Similarly, if a public analyst under the Prevention of Food Adulteration Act reports that an article of food submitted to him for analysis contains 6.2% of solids other than fat, he need not give any reasons in the report, and even if the Chemical Analyser or the Public Analyst is not cross-examined, there is no reason to reject that evidence. Of course, there is a provision for calling the Chemical Analyser for cross-examination u/s 510(2) of the Cri. Pro. Code. Even sub-sec. (2) of the said section provides that the Court may, if it thinks fit, summon and examine any such person as to the subject matter of his report. This sub-section does not make it obligatory on the Court to examine such persons as to the subject matter of their report. I am, therefore, of the opinion that the report of the public analyst under sec. 13 of the Prevention of Food Adulteration Act should ordinarily be accepted as conclusive, unless it has been superseded under sub-section (3) of Section 13 of the said Act by a certificate issued by the Director of the Central Food Laboratory."

6.3 He has also relied on the judgement of the Hon"ble Supreme Court in the case of Mir Mohd. Omar and Others Vs. State of West Bengal, . In paragraphs 14 and 15 the Hon"ble Supreme Court has observed as under:

"para 14 - the object of S. 278 is two fold: firstly to ensure that the evidence of the witness as recorded is accurate and secondly to give the witness concerned an opportunity to point out mistakes, if any. If the correction suggested by the witness is one which the Judge considers necessary he will make it at once as required by sub-sec. (1) but if the correction is such that the Judge does not consider necessary, sub-sec. (2) requires that a memorandum of the objection be made and the Judge add his remarks, if any, thereto. In the present case, the learned trial Judge corrected all the typographical errors which he considered necessary but refused to carry out the substantive part of his deposition. The section is not intended to permit a witness to resile from his statement in the name of correction. The learned trial judge was justified in refusing to effect the

change which he thought was intended to change the earlier version. He did not make a memorandum as the correction slip was unsigned and was not properly filed. Now, since the correction slip as well as the remarks of the learned trial Judge have become a part of the record, nothing more need be done as the provisions of S. 278 are substantially complied with.

Para 15 - We equally see no justification for the High Court for giving liberty to the prosecution to file an application for re-examination of PW 34. In fact, it will be seen from the operative portion of the impugned order the High Court proceeds on the assumption that PW 34 would be recalled for further examination. Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under S. 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for."

6.4 He has also relied on the judgement of the Rajasthan High Court in the case of BALWANT SINGH VS. STATE OF RAJASTHAN reported in 1986 Cri. L. J. 1374 which provides for power of the Court and scope of witness recalled after stage of final arguments to explain whether weapon was used from edge side or blunt side. It was held that the learned judge has used improper use of discretion. He has also stated that the order of the learned Magistrate is not an interlocutory order and therefore the present revision application is maintainable.

6.5 The learned advocate for the applicant has stated that the aforesaid order of the learned Magistrate is illegal and not tenable in law because the said report Ex. 72 is admissible in evidence and defence has also not disputed to exhibit the same and to read the said report in evidence and so also the order passed by the learned Magistrate u/s 311 of the Cr.P.C. on Exh. 101 is illegal and deserves to be quashed and set aside. He has relied on the decision of the Hon'ble Apex court in the case of MIR MOHD. OMAR VS. STATE OF WEST BENGAL (supra)) . He has also relied on the decision of the Rajasthan High Court in the case of BALWANT SINGH VS. STATE OF RAJASTHAN (supra). Reliance is also placed on Rule 7(i) of Prevention of Food Adulteration Rules, 1955.

6.6 The learned A.P.P. submitted that the contention of Mr. Gupta that in view of Section 5 of the Cr. P.C. and in view of special provisions of the Prevention of Food Adulteration Act, provisions of the Code will not apply. He submitted that Prevention of Food Adulteration Act, 1954 provides for any specific section which overrides the provisions of the Cr.P.C. Only certain sections which are special sections particularly Section 13 provides for report of the public analyst, Section 16-A provides power of court to try cases summarily, Section 16 provides for penalties, Section 20 provides for cognizance and trial of offences. However, that will not lead to the conclusion that the provisions of the Code will be overridden or they will not have any effect in prosecution as alleged as per the provisions of the Prevention of Food Adulteration Act. He has relied on the judgement of this court in the case of STATE OF GUJARAT VS. KAMLESH BAROT reported in

2000(2) GLR 1772 in which at para 3 on page 1774 it is observed as under:-

"Bona fide missed question are also, in the interest of justice, as stipulated in Sec. 311 of Cr. P. Code, can be permitted to be asked to such witnesses. Careful reading of Sec. 311 of Cr. P. Code reveals that while recalling the witness, the Court should evaluate the entire set of facts vis-a-vis the 'interest of justice' and Court should see that such permission may not cause prejudice to the other side. At the same time, rejection of such an application, whether would cause prejudice to the prosecution is also a question which needs consideration."

6.7 The learned A.P.P. has stated that this revision application is not maintainable because the same has been filed against interlocutory order. Even on merits of the case, he has relied on a decision of the Hon"ble Supreme Court in the case of Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, and stated that the court, if it is satisfied, can examine any person at any stage. He has also relied on the judgement of the Hon"ble Supreme Court in the case of MOHANLAL SHAMJI SONI VS. UNION OF INDIA reported in 32(2) G.L.R. 974. In para 18 the Hon"ble Supreme Court has held as under:

"The next important question is whether Sec. 540 gives the Court carte blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said section is unguided, uncontrolled and uncannalised. Though Sec. 540 (Sec. 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Sec. 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the said of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the Court while exercising the power under this Section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

Again at para 27 on page 983 the court has observed thus: "The principle of law that emerges from the views expressed by this Court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person

which would depend on the facts and circumstances of each case."

6.8 He has further submitted that in any view of the matter the present order passed by the learned Magistrate is clearly an interlocutory order. It does not prejudice the case of the accused. He submitted that the present order did not affect or adjudicate the right of the accused for a particular aspect of trial in this behalf. He submitted that the accused will have a right to cross-examine and further to proceed in accordance with the procedure laid down in Cr. P.C.

6.9 I have gone through the record of the case. I have also gone through the reasoning given by the learned Magistrate. I have also considered the submissions of the learned counsel for the applicant-accused and submissions made by the learned A.P.P. Mr. Desai. In my view the learned Magistrate has given a very cogent and convincing reason for examining the public analyst at this stage. He has stated that in this case the public analyst has already given report at Exh. 73 and the court will have to consider sample taken whether it is adulterated or not, whether it is injurious to health of the human-being and for that case examination of public analyst is necessary and for that matter he has directed that public analyst be examined u/s 311 of the Code. In my view the learned Magistrate has perfectly acted as per the provisions of Section 311 of the Code which provides for recall or re-examine any person already examined and the court shall summon and examine or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The scope of this section is very wide. It enables any Court at any stage of any inquiry, trial or other proceeding under the Code to do one of three things, (1) to summon any person as a witness; (2) to examine any person who is in attendance though not summoned; or (3) to recall and re-examine any person already examined. So far the section to that extent is permissive. The section confers a power in absolute terms. The court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial.

6.10 In my view the learned Magistrate has exercised his jurisdiction legally and properly as he was of the view that proper evidence was not adduced at the relevant time and therefore he has permitted such mistake to be rectified at this stage by examining the public analyst. Afterall the function of the criminal court is administration of justice and in view of the same the order of the learned Magistrate is perfectly legal and justified.

6.11 In my view the learned counsel for the petitioner-accused has not been able to point out as to what prejudice is caused if the present order has been passed by the learned Magistrate. In my view no prejudice will be caused to the accused in this behalf. The only submission made by the learned counsel for the petitioner-accused is that there will be delay in trial of the case. I have already narrated in my earlier paragraph various dates and in this case the sample was taken in 1988, complaint was filed in 1989 and thereafter the witnesses were examined somewhere in 1998-1999 and ultimately, the present order has been

passed by the learned Magistrate on 25.5.2000. So there was a delay in the trial in this case. Moreover, learned A.P.P. Mr. Desai has also drawn my attention to the fact that the present revision application is filed somewhere in August 2000 and the matter reached hearing on 6.12.2000 whereby this court has overruled the objection raised by the Registry of this court as to name of the parties does not tally with certified copy. Even after 6.12.2000 this matter is placed for hearing before me on 14.2.2001. Therefore, there is already sufficient delay on the part of the accused in moving this court after the order of the learned Magistrate in May 2000. Therefore, it does not lie in the mouth of the learned counsel for the petitioner that there will be delay and his case will be prejudiced.

6.12 I am completely in agreement with the submissions of the learned A.P.P. Mr. Desai in this behalf. In my view there will not be any prejudice to the accused on account of delay. In view of the same, the revision application is dismissed. The order of the learned Magistrate dated 25.5.2000 directing examination of the public analyst is upheld in this behalf.

6.13 However, before parting with the case, I hope and trust that in this case the initiation of proceedings started in 1988 and complaint has been filed in 1989. In my view only one witness is to be examined and all other evidences are ready and there will not be much delay in concluding the trial. The learned Magistrate will try to expedite the hearing of the case at an early date.

7. In view of the same, the revision application is rejected. No order as to costs.