

(2016) 02 GUJ CK 0005
In the Gujarat High Court

Case No : Criminal Revision Application Nos. 364 and 365 of 2007

Babulal Dharamshibhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 16(1)(a), Section 7(1)

Citation : (2016) 02 GUJ CK 0005

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : D.K. Modi and M.D. Modi, Advocates, for the Appellant; N.J. Shah, APP, for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. As both the applications arise out of a common judgment and order, they are disposed off by this common judgment.

2. Criminal Revision Application No. 364 of 2007 is filed by the applicant-accused against the order dated 26.6.2007 passed by the Sessions Court in Criminal Appeal No. 2 of 1995. The applicant has also prayed that order dated 24.2.1995 passed by learned J.M.F.C. (Municipal Corporation), Rajkot in Criminal Case No. 665 of 1995 be quashed and set aside whereas Criminal Revision Application No. 365 of 2007 is filed against the order dated 26.6.2007 passed below Exh. 37 by the learned Sessions Court, Rajkot in Criminal Revision Application No. 24 of 1997.

3. Heard learned advocate Mr. D.K. Modi appearing for the applicant in both the applications, learned APP Mr. Shah for respondent No. 1-State of Gujarat and learned advocate Mr. Buch, learned advocate for respondent No. 2-original complainant.

4. The facts in nutshell are as under:

"4.1 The Food Inspector of Rajkot Municipal Corporation visited the shop of the petitioner on 3.7.1986 and collected the sample of curd for the purpose of analysis. After following the procedure laid down in the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the Act" for the sake of brevity) and Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as "the Rules" for the sake of brevity), the Food Inspector sent the sample for necessary testing to the concerned Laboratory. When the report of the public analyst was received, it was revealed that the sample was having milk fat of 2.65% instead of minimum 6% as per PFA limit. The Food Inspector, therefore, after obtaining necessary sanction, filed the complaint against the applicant-accused. During the course of the trial, the deposition of Food Inspector Ashwin Acharya was recorded vide Exh. 52, deposition of Panch Bhupatbhai Maganlal Mehta was recorded at Exh. 101 whereas deposition of Akbar Osman Rathod was recorded vide Exh. 105. The report of the public analyst is produced vide Exh. 64. After considering the documentary as well as oral evidence on record, the trial Court convicted the applicant-accused for the offence punishable under Section 7(1) read with Section 16(1)(a) of the Act and sentenced him to suffer three months rigorous imprisonment and fine of Rs. 1,000/- was imposed, in default, he was ordered to suffer two months simple imprisonment. The said order was passed by the learned trial Court on 24.2.1995. Against the said order, the applicant preferred Criminal Appeal No. 2 of 1995 whereas the present respondent No. 2-original complainant preferred Criminal Revision Application No. 24 of 1997. The complainant preferred the revision application for enhancement of the sentence on the ground that the trial Court has imposed the sentence less than the minimum provided under the Act. The appellate Court, by common judgment and order dated 26.6.2007, dismissed the Criminal Appeal No. 2 of 1995 preferred by the present applicant whereas the Criminal Revision Application No. 24 of 1997 preferred by the respondent No. 2-original complainant was allowed and thereby sentence imposed by the learned trial Court has been enhanced from three months to six months rigorous imprisonment. Thus, as observed hereinabove, the applicant has challenged the said common judgment against the dismissal of his appeal and the against the order of enhancement of the sentence imposed by the Sessions Court."

5. Learned advocate Mr. Modi appearing for the applicant-accused has mainly contended that the prosecution has failed to establish that alleged sample was collected after stirring the whole bulk of the curd which was lying in a big utensil and, therefore, the complainant has not complied with the mandatory requirement of the law laid down by this Court and the procedure prescribed under the Rules. In support of the aforesaid contention, learned advocate Mr. Modi has placed reliance upon the order dated 30.6.2006 passed by this Court in Criminal Appeal No. 377 of 2004. In the said case, this Court confirmed the order of acquittal passed by the trial Court wherein it has been observed and recorded that the food article like curd is required to be taken after giving a vertical cut to the entire quantity. In the said case, the food article i.e. the curd was not

collected after giving a vertical cut from the entire quantity and, therefore, the deficiency in the fat content was noticed as it did not represent the entire quantity for sale. It was, therefore, observed by this Court that if the food sample was taken after giving a vertical cut, then the result would have been otherwise. This Court, further observed that the process of churning, though not mandatory, yet, on certain food articles, was required to be observed so as to make the entire quantity homogeneous for reflecting its true quality. The same was absent.

6. Thus, relying upon the said observation, learned advocate Mr. Modi contended that in the present case, the Food Inspector has failed to observe the aforesaid procedure while collecting the sample and, therefore, the trial Court ought to have acquitted the applicant-accused and, therefore, the order passed by the appellate Court is also required to be quashed and set aside.

7. Learned advocate Mr. Modi, thereafter, contended that public analyst was not examined by the prosecution and the case of the prosecution is based on the report given by the public analyst. The said report is produced vide Exh. 64. He further contended that even the said report did not mention about the method or the test applied by the public analyst while analyzing the sample in question and, therefore, in absence of details about the method adopted or the test applied during the course of the analysis, the trial Court ought to have discarded the said report and, therefore, the impugned orders passed by both the Courts below be quashed and set aside. In support of the said contention, learned advocate for the applicant has placed reliance upon the decision rendered by this Court in the case of *State of Gujarat v. Shantaben w/o Bhoi Dhulabhai Devabhai* reported in 1964 GLR 578, order dated 8.1.2015 passed by the this Court in Criminal Revision Application No. 599 of 2005, decision rendered by the Division Bench of this Court in the case of *Mohd. Hanif Shaikh Ibrahim v. State of Gujarat* reported in , 1994(2) PFA 446 and the order dated 20.1.2016 passed by this Court in Criminal Revision Application No. 192 of 2005.

8. Learned advocate for the applicant thereafter contended that even if the contention of law and undisputed facts with regard to non-compliance of mandatory provision of the rules are not raised before the trial Court or the appellate Court, such contention can be taken in revision application before this Court if the same is going to the root of the matter. In support of the said contention, learned advocate has placed reliance upon the decision rendered by the Division Bench of this Court in the case of *State of Gujarat v. Keshavlal Kalidas Patel* reported in , 1981 Cr.L.J. 551 and the order dated 20.1.2016 passed by this Court in Criminal Revision Application No. 192 of 2005.

9. Learned advocate for the applicant, therefore, urged that both these revision applications be allowed and the impugned orders be quashed and set aside.

10. On the other hand, learned advocate Mr. Buch appearing for the original complainant has mainly submitted that the trial Court has passed the order of

conviction after considering the oral as well as documentary evidence produced on record. However, the trial Court has imposed the sentence below the minimum prescribed under the Act and, therefore, the complainant filed revision application for enhancement of the sentence. The appellate Court has also, after considering the material produced on record, rightly dismissed the appeal preferred by the applicant-accused and allowed the revision application filed by the complainant and thereby enhanced the sentence from three months to six months and thereby the appellate Court has not committed any illegality. He further contended that the Food Inspector had violated the procedure prescribed under the Rules and when the report of the public analyst disclosed the fact that the sample collected from the shop of the applicant-accused was not in accordance with the prescribed limit and, therefore, when there are two concurrent finding of facts, this Court may not entertain this revision application. Scope of interference in revision application is limited and, therefore, both these applications are dismissed.

11. Learned APP Mr. Shah has also supported the submissions canvassed on behalf of respondent No. 2-original complainant.

12. I have considered the submissions canvassed on behalf of learned advocate appearing for the parties. I have also gone through the record and proceedings called for from the trial Court. I have also gone through the provisions of law relied upon by the learned advocates for the parties as well as the decisions relied by learned advocate for the applicant.

13. From the record, it is revealed that the complainant has relied upon the report submitted by the public analyst. The same is produced vide Exh. 64. However, if the said report is carefully examined, it is clear that the public analyst has not at all mentioned about the method of the test used at the time of analysis of the sample in question. Even public analyst who has given the said report is not examined by the prosecution. Therefore, the method or the test adopted by the public analyst at the time of analyzing the sample in question has not come on record. This Court, in similar type of facts and circumstances of the case, after considering the form No. III (Rule 7(3) of the Rules) held in Criminal Revision Application No. 192 of 2005 that when the methodology adopted by the public analyst while analyzing the sample in question was not at all placed before the trial Court by producing oral as well as documentary evidence, in absence of such details the trial Court has committed an error by convicting the accused for the alleged offence. The relevant observation of this Court in the aforesaid decision are in paragraphs 8,9,13,14 and 16 which read as under:

"8. I have considered the submissions canvassed on behalf of the learned advocates for the parties. I have also gone through the material produced on record as well as the Record and Proceedings. From the record it emerges that while taking the sample from the premises of the applicant - accused, the complainant, Food Inspector, has followed the procedure prescribed under the Act and the Rules. Before filing the complaint, sanction from the competent

authority was also obtained by him. However, the prosecution - complainant has relied upon the report submitted by the Public Analyst which is produced vide Exh. 23. If the said report is carefully perused, it is clear that the report was submitted by the Public Analyst in prescribed form No. III (Rule 7(3) of the Rules) provided under the Rules. As per the said report, 12.92% of total ash was found instead of maximum 9% permissible under the Act and the Rules and simply relying upon the said report, the prosecution was launched against the applicant accused. On careful examination of the said report, it is further revealed that the said report is not as per the prescribed form and detail with regard to name of method of test used is missing in the said report. Form III prescribed under the Rules provides as under:

"[FORM III [See rule 7(3)] [REPORT BY THE PUBLIC ANALYST]

Report No.

Certify that I,.....(name of the Public Analyst)..... duly appointed as Public Analyst under the provision of the Prevention of Food Adulteration Act, 1954, for..... (name of the local area)..... received from**..... a sample of..... bearing Code No. and Serial No. of Local (Health) Authority on..... (Date of receipt of sample)for analysis.

The condition of seals on the container and the outer covering on receipt was as follows:.....

..... I found the sample to be.....category of the food sample).....falling under item No.of *Appendix B of Prevention of Food Adulteration Rules, 1955/*proprietary food. The sample* was in condition fit for analysis and has been analysed on..... (Give Date of starting and completion of analysis).....and the result of its analysis is given below/*was not in a condition fit for analysis for the reason given below:--

Reasons:.....

Analysis Report:--

(i) Sample Description:.....

(ii) Physical Appearance:.....

(iii) Label:.....
.....
.....

Opinion***

Signed this.....day of.....20.....

(Signature) Public Analyst (Seal)

Address.....

*Strike out whichever is not applicable.

**Give details of the senders.

***When opinions and interpretations are included, document the basis upon which the opinions/interpretation have been made."

9. Thus, name of method of test used is not at all stated by the Public Analyst in the report produced vide Exh. 23. Thus, in absence of the details of procedure followed by the Public Analyst while analyzing the sample in question, it is not proper for the Trial Court to convict the applicant - accused for the alleged offence.

13. In view of the aforesaid decisions rendered by this Court, I am of the opinion that the methodology adopted by the Public Analyst while analyzing the sample in question was not at all placed before the Trial Court by producing oral as well as documentary evidence and therefore in absence of such details, Trial Court has committed an error by convicting the applicant - accused for the alleged offence. Similarly, the Appellate Court has also ignored the aforesaid important aspect of the matter while dismissing the appeal filed by the applicant.

14. It is true that such contention was not taken before the Courts below. However, law point can be raised at any point of time and in the present case it is an undisputed fact that in the report Exh. 23 details with regard to methodology adopted by the Public Analyst is not stated which is required as per the prescribed form No. III under the Rules. Thus, when said fact goes to the root of the matter, benefit of doubt is required to be given to the applicant - accused. The Hon'ble Supreme Court in the case of Rabindra Sahu (supra) has observed and held in para 3 as under:

"3. It is not in dispute that Rule 18 of the Prevention of Food Adulteration Rules is mandatory in character. If it is mandatory, the procedure laid down therefor was required to be complied with for sustaining the judgment of conviction. If on the basis of the materials on record, the High Court could come to a finding that the provisions therefor had not been complied with, we are of the opinion that the High Court was not precluded from going into the said contention only because the same had not been raised before the Trial Court or before the

Appellate Court."

16. Thus, keeping in mind the law laid down by the Hon"ble Supreme Court as well as this Court, this Court is conscious about its limitation of exercise of revisional jurisdiction and normally in case of concurrent finding of fact the Revisional Court would be slow in interfering. However, as discussed hereinabove, important detail is missing in the report of the Public Analyst and therefore the benefit of doubt is required to be given to the applicant-accused. Accordingly, this application is allowed. The impugned order dated 29.02.2000 passed by learned Judicial Magistrate First Class, Ahmedabad (Rural) in Criminal Case No. 870 of 1993 as well as the order dated 15.02.2005 passed by learned Additional Sessions Judge, Ahmedabad (Rural) passed in Criminal Appeal No. 8 of 2000, are hereby quashed and set aside. Applicant is ordered to be acquitted of the charges levelled against him. Rule is made absolute. R & P be sent back to the learned Trial Court forthwith."

14. Thus, as discussed hereinabove, in the present case, it is an undisputed fact that public analyst is not examined nor there is any reference in the report Exh. 64 about the method adopted by the public analyst while analyzing the sample in question and, therefore, it is in violation of prescribed Form No. III(Rule 7(3) of the Rules). Thus, there is a violation of the mandatory provisions of the Rules and, therefore, the trial Court has committed an error while relying on such report. The appellate Court has also failed to consider the said important aspect of the matter and, therefore, even if such undisputed questions of fact and law is raised for the first time before this Court in revision application, in view of the aforesaid decision, the same can be taken into consideration by this Court.

15. Thus, keeping in mind the law laid down by the Hon"ble Supreme Court as well as this Court, this Court is conscious about its limitation of exercise of revisional jurisdiction and normally in case of concurrent findings of fact, revisional Court would be slow in interfering. However, in view of the discussion made hereinabove, when the important detail is missing in the report of the public analyst, the benefit of doubt is required to be given to the applicant-accused. Accordingly, both these applications are allowed. The common judgment and order dated 26.6.2007 passed by the Sessions Court in Criminal Appeal No. 2 of 1995 and Criminal Revision Application No. 24 of 1997 is quashed and set aside and the order dated 24.2.1995 passed by learned J.M.F.C. (Municipal Corporation), Rajkot in Criminal Case No. 665 of 1995 is also quashed and set aside. The applicant-accused is ordered to be acquitted of the charges levelled against him. Rule is made absolute. R & P be sent back to the trial Court forthwith.