
(1955) 07 CAL CK 0045
In the Calcutta High Court

Case No : Criminal Revision Cases No's. 30-33 and 53-56 of 1955

Corporation of Calcutta

APPELLANT

Vs

Sreeram Chandanmull

RESPONDENT

Date of Decision : 25-07-1955

Acts Referred:

Bengal Food Adulteration Act, 1919 — Section 6, 6(4)
Calcutta Municipal Act, 1923 — Section 412
Calcutta Municipal Act, 1951 — Section 462, 462(1), 462(4), 473, 473(1)
Criminal Procedure Code, 1898 (CrPC) — Section 441
English Partnership Act, 1890 — Section 26(1), 32

Citation : (1957) 2 ILR (Cal) 45

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : Monmohon Mukherjee, in Nos. 30 to 33 of 1955 and Sunil Kumar Basu, in Nos. 53 to 56 of 1955, for the Appellant; Santosh Kumar Basu and Indu Prokas Chatterjee, for the Respondent

Judgement

Debabrata Mookerjee, J.—A common question of law arises in these two groups of cases which may conveniently be dealt with and disposed of together. The question that falls to be determined is the true effect of Sub-section (2) of Section 473 occurring in Chapter XXVIII of the Calcutta Municipal Act, 1951. That Sub-section lays the burden of proving that any food or drug is not intended for human consumption or for sale on the party charged in a prosecution instituted under that Chapter. The consequence which such provision entails on the general question of onus of proving commission of an offence under the Chapter and the effect of it on the specific statutory presumption raised by Sub-section (4) of Section 462 of the Act requires consideration.

2. The Corporation of Calcutta is the Petitioner in each of these cases comprised in the two groups and the opposite parties in each are a firm known under the name of Sree Ram Chundan Mull and its proprietors Sriram Agarwalla, Chandan Mall Agarwalla and Moman Chand Agarwalla.

The firm deals in tea and its godown which is at 17 Manick Bose Ghat Street, Calcutta, was visited by two Food Inspectors of the Corporation of Calcutta on June 8, 1954, at two different hours of the same evening. Samples of tea were taken by each of the two Inspectors from different lots of tea stored in the godown. Each sample was divided into three parts as required under the law and they were sent to a public analyst for examination and report. The reports revealed that the samples had in most cases been found to be adulterated. Thereafter the firm of Sree Ram Chundan Mull and its proprietors, who are all opposite parties in these Rules, were prosecuted for contravention of Section 462 of the Calcutta Municipal Act, 1951, which prohibits storing for sale of certain articles including tea which are not of the prescribed standard of purity.

3. The visit of each of the two Food Inspectors to the godown premises led to several samples of tea being taken from different lots kept in the godown. For each of such sample as had been found to be adulterated, a prosecution was started; and the samples taken by each of the two Inspectors having been taken in the course of the same transaction, the cases instituted at the instance of each Inspector were tried together by the learned Municipal Magistrate. The result is that there have been two groups of four cases comprised in each group. On request, it appears, the learned Magistrate dealt with the cases together in two groups which have thus given rise to these eight Revision petitions.

4. For the limited purpose of these Rules it is not necessary to set out separately the facts of each of these petitions. As a matter of fact they are the same, the only difference being the visit of one Food Inspector yielded a batch of four effective samples and the visit of the other, a short while thereafter, yielded another such batch of four samples with distinctive variations in the extent and character of adulteration but all equally were not of the prescribed standard of purity. The material part of Section 462(1) of the Calcutta Municipal Act, 1951, which prohibits storing for sale of certain articles unless they reach a certain prescribed standard of purity reads thus:

No person shall directly or indirectly, himself or by any other person on his behalf, sell, expose or hawk about for sale, or manufacture or store for sale, any of the following articles, namely:

(g) tea, unless the following conditions are fulfilled, namely:

(ix) in the case of tea

it shall be the leaves, leaf-buds and stalks of Thea sinensis prepared by recognised trade processes like fermenting, drying and roasting; it shall not contain any foreign matter or any tea which has been in any measure deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means; any stalks contained in it shall be tender stalks: provided that stalks other than tender stalks, may be present but shall not be more than twenty per cent, by weight, the weight of leaves and stalks being obtained after drying at one hundred degrees centigrade and determined under identical conditions....

(3) In any prosecution under this section it shall be no defence to allege that the vendor, manufacturer or storer was ignorant of the nature, substance or quality of the article sold, exposed or hawked about for sale, or manufactured or stored for sale, by him.

(4) In any prosecution under this section the Court shall unless and until the contrary is proved, presume that any of the articles specified in Clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k) of Sub-section (1) or any article notified by the State Government under Clause (e) of that Sub-section, found in the possession of a person who is in the habit of manufacturing or storing like articles, has been manufactured or stored for sale by such person.

5. The prosecution case is that on receipt of information that adulterated tea was stored for sale by opposite parties the Food Inspectors visited the godown and asked to be allowed inspection of the stock. Samples were then taken according to law from the different lots and prices were paid therefore. The entire stock was seized. The samples thus taken were sent to the analyst who reported that they were adulterated in varying degrees. Thereafter, the opposite parties were complained against and placed on trial before the Magistrate.

6. The opposite parties pleaded innocence and the defence was that the entire stock had been kept at the place for sieving and grading the tea which was not intended in that state to be sold for human consumption. There was however no challenge to the reports of the public analyst produced and proved in the case.

7. In each of these cases the learned Magistrate held that the evidence adduced by the Corporation of Calcutta failed to establish that the tea kept in the godown was intended for sale or for human consumption. Reliance was placed on the circumstance that no independent credible evidence had been produced to show that the place was used for selling or storing tea intended for human consumption. The Magistrate was obviously not prepared to act on the lone testimony of the Food Inspectors. Further, the Corporation's contention that the presumption raised by Sub-section (4) of Section 462 of the Act was available against the opposite parties was negatived on the ground that there were no satisfactory materials to prove that the opposite parties were in the habit of manufacturing or storing like articles. Upon these findings the learned Magistrate directed the acquittal of the opposite parties. Consequently, the Corporation's application for destruction of the seized tea was refused by the Magistrate who directed the sieving and grading of the stuff to be carried out in such manner as to conform to the statutory standard of purity. Thereafter, the Corporation of Calcutta applied to this Court and obtained these Rules which are directed against the orders of acquittal thus made by the learned Magistrate.

8. The ground on which these acquittals are challenged is that the learned Magistrate completely ignored the provisions of Sub-section (2) of Section 473 of the Calcutta Municipal Act, which lays the burden on the person charged in a prosecution under Chap. XXVIII of the Act to prove that the food in question was

not intended for sale or for human consumption.

9. To these Rules the learned Magistrate has submitted a four-fold answer. First, the prosecution did not rely at the trial on the provisions of Sub-section (2) of Section 473 of the Calcutta Municipal Act, but they merely depended on the presumption raised by Sub-section (4) of Section 462. Secondly, Sub-section (2) of Section 473 was not attracted when the statute provided a specific presumption to be raised. Thirdly, even if Sub-section (2) of Section 473 applied, the burden has been discharged by cross-examination of the Food Inspectors against the background of probabilities of the case,. Fourthly, the presumption raised by Section 462(4) cannot be called in aid in the absence of evidence to prove the habit of manufacturing or storing like articles.

10. The fourth answer need not be investigated and the findings of the Magistrate must prevail that the evidence was insufficient to prove habit of storing or manufacturing like articles. It is indeed clear that the presumption could be of no assistance in the absence of proof of habit on proof of which alone the presumption comes into play. The first answer I consider to be wholly inept. I conceived it to be the duty of the court to administer the law as it finds it and the failure of a party before it cannot possibly relieve it of the performance of that duty. The second and the third answers are, therefore, the really material ones which have to be examined.

11. I have referred to the explanation of the Magistrate in particular on the ground that the question raised in these petitions has been directly pronounced upon by it and secondly, treating as a matter of practice, Municipal Magistrates as Presidency Magistrates, this Court is required u/s 441 of the Code of Criminal Procedure to consider the statement of such Magistrate before overruling his decision.

The Corporation's power to inspect food, drugs, etc., is given by Section 473, which provides as follows:

Section 473. (1) The Corporation shall make provision for the constant and vigilant inspection of all animals, food and drugs intended for human consumption which are in course of transit or are exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale or of preparation for sale; and shall also make similar provision for the inspection, during the process of manufacture of any such food or drug.

(2) If, as a result of such inspection as is provided for in Sub-section (1), a prosecution is instituted under this Chapter, then the burden of proving that any such animal, food or drug was not exposed or hawked about or deposited or brought for sale or for preparation for sale, or was not intended for human consumption, shall rest with the party charged.

As a matter of language the words of Section 473 are very wide indeed. Sub-section (1) appears to provide for all contingencies in which food, drug, etc.

might be inspected, while Sub-section (2) makes it clear that in respect of such food, drug, etc., the onus of proving that the food or drug was not for sale or for human consumption lies on the party charged in a prosecution instituted under this Chapter.

12. The contention raised on behalf of the Petitioner, the Corporation of Calcutta is that the conclusion is inescapable that in a prosecution instituted u/s 462, which is included in Chapter XXVIII of the Act the burden of proving that the tea in question was not for sale or for human consumption rests on the opposite parties.

13. Mr. Basu appearing for the opposite parties has argued in the first place that there are certain prerequisites to be complied with before the presumption raised by Sub-section (4) of Section 462 can possibly arise. It is said that the prosecutor is called upon to prove possession of the goods, that such possession must be actual physical possession and the habit of storing or manufacturing for sale has to be clearly established before the presumption can be availed of. It has further been contended that Sub-section (1) of Section 473 does not mention storing or manufacturing and according to Mr. Basu the legislature has advisedly dropped the words in view of the fact that storing or manufacturing when punishable has already been provided for in a preceding section and consequently Sub-section (2) does not apply to a prosecution under Article 462 of the Act.

14. Reliance has been placed upon a decision of this Court in the case of *Ram Charita Ram Bhakat v. District Board of Rajshahi* (1937) 41 C.W.N. 1213, in which Biswas, J. held while construing the word "possession" occurring in Section 6 of the Bengal Food Adulteration Act, that possession meant actual physical possession and not constructive possession, so that possession by a servant of a consignment of goods during transit to the master is not possession of the master and from such possession the presumption provided for in Section 6(4) cannot be drawn against the latter. In another decision of this Court in the case of *Sachi Nandan Piri v. The Chairman, Midnapore District Board* (1939) 44 C.W.N. 173, Edgley, J. concurred in this view and held that an accused cannot be presumed to be in possession under the provisions of Sub-section (4) of Section 6 of the Bengal Food Adulteration Act which according to the learned Judge meant actual physical possession and could not possibly include cases of constructive possession. The reference to these decisions was made on the footing that they are instances in *pari materia* since Section 462(4) of the Calcutta Municipal Act also provides that in order that a presumption may arise under that Sub-section the person charged must be found to be in possession of the article of food in question. Mr. Basu has argued that there is really nothing in the evidence which establishes the actual physical possession by his clients of the tea in the godown and therefore, the presumption cannot possibly arise. I express no opinion on the merits of that evidence, if any, on this head.

15. Secondly, Mr. Basu has contended that the evidence such as it is does not

establish habit of storing or manufacturing tea or like articles. I have not the slightest hesitation in accepting this last argument. I agree with the abstract proposition of law that the presumption cannot possibly arise unless and until the person charged u/s 462 of the Act has been proved to be in actual physical possession of the food or drug in question and secondly, circumstances are clearly proved from which a reasonable conclusion follows that the person charged is in the habit of storing or manufacturing like articles. The learned Magistrate has on reference to the evidence in the case found that one of the essential prerequisites namely proof of habit of manufacturing or storing like articles has not been established in this case. This finding must prevail and I, sitting in revision cannot possibly question the propriety of this part of the Magistrate's order.

16. The other contention raised by Mr. Basu to which I have already referred is that in any event Section 473 contains no reference whatever to storing or manufacturing. It is said that although the words used in Sub-section (1) of that section are very wide, nevertheless the legislature purposely left out cases of storing or manufacturing on the ground that such storing or manufacturing whenever punishable has already been provided for. I am afraid I cannot accept this contention. Reading Section 473 as it is, there can not possibly be any doubt that the words used are intended to cover all sorts of possession of food, drug, etc. If any doubt was ever left, that seems to be resolved by the Sub-section that follows in which food or drug is referred to in all conceivable states or stages including even the stage of preparation. Furthermore, the words used are "deposited or brought for sale or "for preparation for sale". This, in my view, admits of no equivocation and I cannot agree that the word "deposited" should be understood as being limited to keeping by everybody except the owner as has been contended for by Mr. Basu. It has been argued that storing is keeping in a permanent or semi-permanent manner. That would indeed be importing into the word "storing" a concept which it does not bear in its ordinary acceptance; if storing was to be distinguished as keeping not temporarily but on a permanent basis it would be reading something into the section which is not there. Therefore the contention raised that Section 473 not having contained an express reference to "storing or "manufacturing" meant to leave out cases of manufacture or storage cannot possibly be accepted. The words used are sufficiently wide and those words must receive their full effect. There is another objection which appears to me to be fatal to Mr. Basu's contention in this regard. The language is explicit that Sub-section (2) applies to all prosecutions instituted under the chapter. It says so in so many words. If the legislature intended that Sub-section (2) of Section 473 should be taken in a qualified way as suggested by Mr. Basu, I wonder what may have been meant by extending the application of that Sub-section to all prosecutions instituted under the chapter which obviously includes case of storing or manufacture of food and drug in violation of the Act. I must take the words as meaning what they say and I refuse to read into them a sense which will make these words esoteric and result in robbing the

Sub-section of its content.

17. The next question raised is that Section 473(2) is a general provision and consequently it cannot apply where there is a specific provision made in the statute itself. The point urged seems to be that Section 462(4) raises the question of presumption in cases where a person is being charged for selling, etc. food which does not reach the prescribed standard of purity. Therefore Sub-section (4) of that section is a particular provision intended to apply to and govern cases contemplated u/s 462. In those circumstances it is argued the provisions of a general nature to be found in Sub-section (2) of Section 473 cannot be called in aid and they must be held to be inapplicable to a prosecution u/s 462. In support of this contention Mr. Basu has called attention to Maxwell's Interpretation of States, 9th Edition, p. 965, where the learned author says Where there are two sections dealing with the same subject-matter, one being unqualified and the other containing a qualification, effect must be given to the section containing the qualification.

18. The position has been attempted to be reinforced by reference to the decision in the case of Moss v. Elphick (1910) 1 K.B. 465, where an agreement of partnership was entered into between two persons by which it was provided that the partnership should be terminated "by mutual arrangement only". One person gave notice of his intention to determine the partnership. Reference was made to the Partnership Act 1890, which by Section 26(1) provided that where "no fixed term" has been agreed upon for the duration of the partnership, any partner may determine it at any time by notice. But Section 32, "subject to an agreement" between the partners, a partnership "for an undefined time" may be dissolved by notice. It was held that although the duration of the partnership was for "no fixed term" within the meaning of Section 26(1), it was also for an "undefined time" within the meaning of Section 32, and that, as by the qualification contained in that section it could only be determined by notice "subject to any agreement "between the parties", effect must be given to that qualification as governing Section 26(1), and, therefore, the partnership could only be determined by mutual arrangement as provided by the partnership agreement.

19. Reliance has been placed upon the excerpt from Maxwell and on the decision set out above for the purpose of inducing the court to hold that where a specific provision has been made the general provision also contained in the same statute stands modified. This argument presupposes that the two provisions—one general and the other specific relate to one and the same subject-matter. Mr. Basu's contention is that for all practical purposes the presumption raised in Sub-section (4) of Section 462 and the onus or the burden of proof referred to in Sub-section (2) of Section 473 relate in effect to the same subject-matter—the two being the obverse and reverse of one and the same thing. I cannot agree that presumption and onus are identical things. They are, to my mind, entirely different categories which cannot in any circumstance overlap. Onus casts a duty to prove the existence of certain facts; presumption is a rule of law under which

courts are authorised to draw a particular inference from facts already proved; and unless and until the truth of such inference is disproved by other evidence the presumption prevails. Thus presumption and onus belong entirely to distinct legal categories -one relates to a rule of inference, the other to a rule of proof. They cannot overlap, each governs in its own sphere the facts which in one case will raise an inference and in the other will discharge a burden.

20. In this view the excerpt from the learned author Maxwell or the citation from English authority appears to me to be of no assistance to Mr. Basu. The subject-matter dealt with in Section 473(2) and Section 462(4) are entirely different. There is no question of one and the same provision being expressed in a particular form and repeated in a general way, the particular prevailing in preference to the general. The two as I have said are entirely different.

21. There is another branch of Mr. Basu's argument to which reference has to be made in this context. He has strenuously argued that for the purpose of raising a presumption u/s 462(4) no reliance can possibly be placed upon Section 473(2). In other words, the failure of a person charged to prove that the food in question is not intended for sale or for human consumption cannot be called in aid or pressed into service to give rise to the presumption in Sub-section (4) of Section 462. I entirely agree. In the case of Section 462(4) the prosecution has to prove affirmatively that the person is in actual possession of the food in question, and that he is in the habit of storing like articles. These facts have to be positively proved by the prosecution in order that it might reasonably ask the court to raise the presumption against the person charged. If the prosecution does not succeed in proving either of these elements the presumption cannot be called in aid. But upon that failure the prosecution does not necessarily get foundered. The prosecution can succeed despite the facts that the presumption is not raised and independent evidence, if available and brought on the record, can properly sustain the guilt of the person charged with an offence u/s 462 of the Calcutta Municipal Act. But by Sub-section (2) of Section 473 it is the failure of the accused which is to be taken into account under the specific provision made by the legislature which casts a burden upon the person charged. The legislature has thought fit to impose that burden on the accused presumably in the interests of public health. If, therefore, the failure of the prosecution was attempted to be remedied and the deficiency made up by resort to Sub-section (2) of Section 473 of the Calcutta Municipal Act, I should have thought that the prosecution could not possibly succeed that way in raising the presumption. In the present case, the Magistrate having found on evidence that the habit of storing like materials has not been proved, the opposite parties are certainly entitled to the benefit of that finding, but that does not neutralise the effect of Section 473(2).

22. A cognate contention has been raised, that the prosecution cannot prove their case by depending on the failure of the person charged to prove that the food in question was not meant for sale or intended for human consumption. To my mind in a prosecution under this chapter although the legislature has

expressly thrown the burden of proving matters which are really matters of defence and which lie peculiarly within the knowledge of the person accused. I agree that the major burden of proving the case does not shift at all. The prosecution have to prove therefore that the articles seized is food within the meaning of the Calcutta Municipal Act; they have to prove that the food in question is adulterated or is not of the prescribed standard of purity; and then, when the foundations are thus firmly laid and the major burden discharged, the person charged is thereafter required to discharge what I conceive to be a minor burden of proving that the food was not intended for sale or not for human consumption. The essential facts therefore must be proved by the prosecution and these are that the article in respect of which the prosecution is launched is food within the meaning of the Act and that it is adulterated. Thereafter, the burden on the accused falls and he is to discharge it. If he omits to do so, he does it at his peril. I am fortified in the view I take of this matter by a decision of this Court in the case of *Gangadhar Nathmull v. The Corporation of Calcutta* (1937) 41 C.W.N. 1344, where Biswas, J.

23. expressed the same view while dealing with Section 412 of the Calcutta Municipal Act, 1923, which is repeated in Sub-section (2) of Section 473 of the Act of 1951: The learned Judge held:

What this section prohibits is the sale of an article of human "food", and obviously, in a prosecution for an offence under this section, the burden of proving that what was being sold is "food" intended for human consumption must rest on the prosecuting authority. Once it is shown that the article is an article of human food, it is then, if the party charged says it was not intended for human consumption, that the onus of proving this will be on him.

24. I, therefore, hold that the presumption will fail if, for instance, the habit of storing or manufacturing is not proved as it has been held not proved in these cases. The failure of the presumption has merely the effect of putting an additional burden on the prosecution who can independently of that presumption prove the elements of the offence u/s 462 of the Act. But once the prosecution has discharged its main burden of proving that the article is "food" within the Calcutta Municipal Act and that it is adulterated or is not of the prescribed standard of purity, Sub-section (2) of Section 473 comes into full play and the onus must be held to lie on the person charged to show that the food was not intended for sale or for human consumption. It is to be observed that the words used in Sub-section (2) of Section 473 are without qualification, and it is impossible to disregard the clear language of the statute which provides that this Sub-section will apply to all prosecutions under Chapter XXVIII of the Calcutta Municipal Act. If, on the other hand, Mr. Basu's contention prevails that where Sub-section (4) of Section 462 would apply, Sub-section (2) of Section 473 is repelled that in my view, renders the provisions of the latter Sub-section utterly otiose. To my mind the contents of the two Sub-sections are in no way co-extensive. In one sense Sub-section (2) of Section 473 is wider than Sub-section

(4) of Section 462. The person charged has to prove that the article is not for sale, or is not intended for human consumption. Whereas in Sub-section (4) of Section 462 the presumption is limited to sale only. I cannot agree that Section 473(2) is merely an idle provision.

25. It is somewhat curious that the learned Magistrate should have thought that although Section 473(2) was not mooted, nevertheless the opposite parties may be said to have discharged the burden by cross-examination of the Food Inspectors and by proof of circumstances affecting the general probabilities of the case. I have not been able to discover anything in the evidence of the Food Inspectors which might reasonably be said to establish the position that the tea was not intended for human consumption or for sale. The positive evidence is that the tea was stored in the godown for sale and one of the Food Inspectors stated that he did not see any apparatus for saving in the premises. The mere fact that at that hour of the night no one was found buying tea on the premises or no cash memos were found would not establish that the tea was not intended for sale or for human consumption. It is indeed difficult to appreciate the learned Magistrate's reference to proof of general probabilities of the case amounting to discharge of the burden laid on the opposite parties.

26. It must, therefore, be held that the learned Magistrate completely misdirected himself in thinking that the failure of the prosecution to prove circumstances giving rise to the presumption raised by Sub-section (4) of Section 462 relieved him of his duty to see if the burden imposed on the opposite parties u/s 473(2) to prove that the tea was not for sale or for human consumption had been duly discharged.

27. I feel bound to hold that once the prosecution discharges its major burden of proving that the article in question, is "food" within the meaning of the Calcutta Municipal Act and it was not of the prescribed standard of purity, the onus lay on the party charged to prove that it was not for sale or for human consumption. The failure of the prosecution to prove facts in order to be entitled to the benefit of the presumption u/s 462(4) does not disentitle them to the advantage of Section 473(2), or more appropriately, such failure does not automatically relieve the person prosecuted under the Chapter, of the burden of proving that the food or drug was not for sale or for human consumption.

28. If it was a mere question of appraisal of evidence, this Court would not have substituted its own estimate for the Magistrate's for the purpose of interfering with these orders of acquittal. There can be no doubt that the opposite parties have been acquitted upon a complete misapprehension of the law. There has not been, in my view, proper trial of these cases. In these circumstances, despite my hesitation to interfere with acquittals, I am constrained to hold that there has been not merely error of law, but a grave miscarriage of justice which requires to be remedied. These are applications on behalf of public body seeking to discharge their statutory duty of protecting public health and are certainly distinguishable from similar applications by private parties seeking to satisfy

private vengeance.

29. The result, therefore, is that these Rules are made absolute and the orders of acquittal are set aside. The opposite parties are, therefore, directed to be retried by the senior Municipal Magistrate in accordance with law. At the retrial the allegations will be confined to three cases in each group.