

(1971) 11 AHC CK 0043
In the Allahabad High Court

District Medical Officer of Health and Another	APPELLANT
Vs	
Binda Prasad	RESPONDENT

Date of Decision : 10-11-1971

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 16, 2, 6, 7

Citation : (1972) CriLJ 1067

Hon'ble Judges : K.C. Puri, J;K.B. Srivastava, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.C. Puri, J.—This revision petition has been preferred by the District Medical Officer of Health, Lucknow, and D.C. Srivastava Food Inspector, Goshainganj Lucknow, against the judgment and order dated 8th of December 1969, passed by the Pargana Magistrate. Mohanlalgani, Lucknow, convicting the respondent Binda Prasad of offence u/s 7/16 of the Prevention of Food Adulteration Act, and sentencing him to payment of Rs. 20/- as fine for the same or in default of payment of fine to suffer one week's imprisonment.

2. The petitioners claim that the trial court illegally erred in awarding the sentence of fine of Rs. 20/- to the respondent as the minimum punishment which ought to have been awarded to the respondent for the commission of the said offence was imprisonment of six months and payment of Rs. 1.000/-fine.

3. The respondent did not file any appeal or revision against his conviction, but presently he does challenge his conviction. When revision petition has been filed by the District Medical Officer of Health and another against the judgment and order referred to above, then it is open to the respondent to challenge his conviction before us.

4. It is unfortunate that the counsel for the petitioners was not present at the time of the hearing of this petition and therefore, we did not have the advantage of hearing his arguments, but we heard the arguments of the learned Counsel for

the respondent and went through the record.

5. According to the prosecution, the respondent was found in possession of adulterated milk which he was keeping for sale on the 16th of December, 1967. at about 11.30 a.m., near Amethi ki Puliya on the Lucknow-Sultanpur Road, Sri D. C. Srivastava. Food Inspector, had found the respondent keeping the said milk for the purpose mentioned above and purchased from him milk against payment to utilise the same for purpose of ascertaining as to whether the same was adulterated. The said inspector had found the respondent vending milk and the respondent had disclosed at that time that the said milk contained 80 per cent of buffalo's milk and 20 per cent of cow's milk. The respondent gave receipt Ext. Ka.-2 to the said inspector in token of his having received 80 p. as the price of one seer of milk sold by him to the said inspector and therein he indicated the proportion in which the said milk contained buffalo's and cow's milk. The Public Analyst, to whom the sample of milk was sent, found that fat therein was 5.8 per cent and the non-fatty solid were 5.8 per cent. He was of the opinion that the sample was deficient in fat contents by about 4 per cent and was also deficient in non-fatty solid content by about 35 per cent. In the report Ext. Ka-3 he indicated, inter alia, the sample had been adjudged by him on the basis of the standard derived from the statutory standards for cow's milk and buffalo's milk mixed in the proportion specified above.

6. The respondent pleaded not guilty to the said charge and refuted the claim of the inspector concerning his having taken any milk from him.

7. On behalf of the prosecution Sri D. C, Srivastava, Food Inspector, and Sri Rajendra Kumar Saxena another Food Inspector, deposed to the above version of the prosecution. The trial Court, relying on the evidence of the said witnesses, held the respondent guilty of the said offence and sentenced him as above.

8. It is urged by the learned Counsel for the respondent that no independent witness of the locality was availed of by the Food Inspector concerned in effecting raid on the respondent and in recovering from him the milk in question. In this connection it is further urged that the only other person, besides the two witnesses named heretofore, who was said to be present at the time of effecting the said recovery was Sri Y. P. Rastogi who was an Ex-Food Inspector and, therefore, he could not be deemed to be an independent witness. Merely because Sri Rastogi happened to be an ex-employee of the Food Department would not make him an interested person and we are not prepared to believe that he would be prepared to perjure himself to oblige the Food Inspector who took the said sample of milk from the respondent. It has not been elicited out by the respondent that at the place, where the respondent was found in possession of the said milk which he was keeping with him for sale, there were many houses or shops in the vicinity wherefrom persons could have been collected by the Food Inspector to witness the said incident. Under these circumstances, the said contention falls through.

9. It is next urged by the learned Counsel for the respondent that the receipt Ext. Ka-2 was not put to the respondent while examining him u/s 342, Criminal P.C. to ascertain from him as to whether the same was executed by him. It is true that the trial Court failed to question the respondent concerning the said receipt, but the witnesses of the prosecution deposed to the execution of the same and while cross-examining them, the execution of the said receipt by the respondent was not challenged. Therefore, the trial Court was justified in concluding that the respondent has executed the said receipt.

10. From the statements of the said two witnesses it is established beyond reasonable doubt that the respondent was having in his possession for the purpose of sale milk sample whereof had been taken on price by the Food Inspector named heretofore and that at that time the respondent had himself represented that 80 per cent of the said milk was that of buffalo and 20 % was of cow. This fact is further borne out from the contents of the receipt Ext. Ka-2.

11. It is further contended by the learned Counsel for the respondent that the prosecution has not established that Rules 17 and 18 of the Prevention of Food Adulteration Rules had been complied with. Rule 17 lays down the procedure for sending containers of the samples to the Public Analyst. It is embodied therein that the container of sample for analysis shall be sent to the public analyst by registered post or railway parcel or air freight, or by hand in a sealed packet enclosed together with a memorandum in Form VII in an outer cover addressed to the public analyst. The grievance of the learned Counsel for the respondent is that the prosecution has not established that Form VII was enclosed along with the container of the sample. It is true that the prosecution did not specifically ask the Food Inspector concerned as to whether any form had or had not been enclosed along with the container of the sample when the same was despatched to the public analyst, but the defence also never questioned the Food Inspector as to whether he had failed to enclose the memorandum in Form VII along with the said container. When an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential for a case. Where there was evidence to the effect that the sample of adulterated milk was sent by the Food Inspector to the Public Analyst, in such a case it is permissible to raise a presumption that, the act of despatch was done regularly and properly. It was so held in *Kamal Singh v. State* (1957 All LJ 89). It was also urged by the learned Counsel for the respondent that the prosecution failed to comply with the provision contained in Rule 18 of the said Rules wherein it is laid down that a specimen impression of the seal used to seal the packet in question shall also be sent to the Public Analyst by registered post. Here again, no question was put to the Food Inspector as to whether he had or had not sent the same. The aforementioned comments relating to the compliance or otherwise of Rule 17 equally apply to this contention as well. Relying upon the decision in *Belgaum Borough Municipality v. Shridhar Shanker Kundri* reported in AIR 1968 Mys 196 the learned Counsel for the respondent urged that Rules 17 and 18 are

mandatory and non-compliance with the Rules affects evidentiary value of certificate of Public Analyst and in the absence of extraneous evidence conviction based on such report is vitiated. In the first place, as observed earlier, we are not in a position to conclude that the said rules were not complied with by the said Inspector. In the second place, we find that the view of this court, as reported in 1957 ALJ 89, referred to earlier, is that "Rules 7, 16, 17 and 18 of the Prevention of Food Adulteration Rules are directory, and not mandatory. It, therefore, follows that, even if a particular rule was not followed, that would not be sufficient for interfering with a person's conviction under the Prevention of Food Adulteration Act." We concur with the aforementioned decision of Oak, J., as he then was.

12. It is next contended by the learned Counsel for the respondent that there is no standard laid down for a mixed milk and, as such, it cannot be said that the respondent was selling adulterated milk. Standards have been prescribed separately for cow's milk and buffalo's milk. It is not disputed by the learned Counsel for the respondent that if the said standards were taken into account separately for the proportion of cow's and buffalo's milk contained in the said sample, then the milk in question would be below the requisite standard. It has been held above that the respondent himself indicated that 80 % of the said milk was that of buffalo and 20 % thereof was that of cow. After it had been specifically indicated by him as above, the public analyst had to judge the said milk on the basis of the standard derived from the statutory standards for cow's milk and buffalo's milk mixed in the said proportion. Again, even if the entire milk were to be taken as that of cow's milk without any buffalo's milk being there, yet the milk in question was below the standard laid down for cow's milk. It is not disputed by the learned Counsel for the respondent that the contents of the said milk would fall short of the statutory standard fixed for the cow's milk. It has been laid down in State Vs. Zalim Lonia, that:

In a prosecution for an offence punishable u/s 16(1)(a) read with Section 7(1), Prevention of Food Adulteration Act for selling adulterated milk, it is for the accused to indicate whether he was selling milk of buffalo, cow, goat or sheep. Paragraph A 11.01.03 of Appendix B of the Rules clearly lays down that if no such indication is given the standards prescribed for buffalo milk shall apply. Where the accused did not give any indication and simply stated that he was selling milk and the Food Inspector labeled the sample sent for analysis as milk, it must be held that the Food Inspector had clearly indicated the nature of the article that he had submitted for analysis and there was no contravention of Rule 15 (e) of the Prevention of Food Adulteration Rules. In the absence of any indication on the part of the accused the sample would be treated as buffalo milk and would be judged on the basis of the statutory standards for buffalo milk.

13. Thus, in the first place, if the respondent had not given indication of the nature of the said milk, then the milk would be judged on the statutory standards for buffalo's milk, but as found above, the respondent had specified

the proportions in which the constituents of the said milk respectively. It has also been observed earlier that even if the said milk were treated to be of cow's milk only then too it was deficient from the prescribed standard fixed for cow's milk. Thus, looking from either angle, the milk in question was adulterated one and the respondent was correctly convicted of the said offence.

14. The only question now left for determination is as to whether, the punishment awarded by the trial Court was legally wrong and as to whether the same merits enhancement. Section 16 of the Prevention of Food Adulteration Act lays down that if any person stores or sells food which is adulterated, then he shall be, in addition to the penalty to which he may be liable under the provisions of Section 6, punishable with imprisonment for a term which shall not be less than six months but which may extend to six years, and with fine which shall not be less than one thousand rupees. There is a proviso in the said section which lays down that:

if the offence is under Sub-clause (1) of Clause (a) and is with respect to an article of food which is adulterated under Sub-clause (1) of Clause (i) of Section 2 or misbranded under Sub-clause (k) of Clause (ix) of that section; or

(ii) if the offence is under Sub-clause (ii) of Clause (a), the Court may for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or of fine of less than one thousand rupees or of both imprisonment for a term of less than six months and fine of less than one thousand rupees.

15. The said proviso clearly indicates that even if for adequate and special reasons indulgence is to be accorded to the accused concerned, then the imprisonment and fine both are to be imposed upon the accused concerned though reduction may be effected therein from the normal punishment provided in Section 16 as indicated above. It is not open to the Court while convicting the accused of offences mentioned in the said proviso to award sentence of payment of fine only. No, the trial Court was absolutely wrong in awarding sentence of fine only to the respondent.

16. We further find that the said Court did not indicate any adequate and special reasons for according the said indulgence. On the record the accused has not brought anything which may justify according any indulgence to him. The word "adequate and special reasons" contained in the said proviso are significant. The Court has to be satisfied before deciding to impose punishment less than the normal to an accused that has made out adequate and special reasons for meriting indulgence. Since the accused has not been able to indicate any adequate and special reasons for meriting reduction in the sentence, we are bound to award normal punishment to him.

17. We, therefore, allow the revision petition and modify the order of the Court below and direct that the respondent shall suffer six months simple imprisonment and shall pay Rs. 1000/- as fine and in default of payment of fine

shall suffer further imprisonment of one and a half months.

18. The respondent is reported to be on bail. The A. D. M. (J), concerned shall issue non-bailable warrant of arrest against the respondent and after he is arrested, shall remand him to jail custody to suffer the sentences directed above.