

(1997) 01 KAR CK 0060
In the Karnataka High Court
Case No : Criminal Appeal No. 235 of 1991

H.K. Shivanna

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 31-01-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 464, 465
Essential Commodities Act, 1955 — Section 3, 7
Penal Code, 1860 (IPC) — Section 302, 34, 392

Citation : (1997) 2 ALT(Cri) 181 : (1997) ILR (Kar) 1888

Hon'ble Judges : Chidananda Ullal, J

Bench : Single Bench

Advocate : Smt. M. Gayathri for C.H. Hanumantharaya, for the Appellant; B.H. Satish, HCGP, for the Respondent

Judgement

1. The instant appeal is filed by the accused to challenge the judgment and order of sentence dt. 25-3-91 passed by the Special Judge. Bangalore Rural District, Bangalore for the offence under Secs. 3 and 7 of the Essential Commodities Act, read with Sec. 19 of the "Karnataka Edible Oils Act".

2. I heard the learned Counsel for the appellant Smt. M. Gayathri appearing for the learned Counsel Sri C. H. Hanumantharaya and Sri B. H. Satish appearing for the respondent-State. I have also perused the records.

3. The facts in brief of the case are as follows :

That on 2-6-87, the appellant being the owner of the Government Fair Price Depot situated in Hagalahally, sold 100 kgs. of palmolein oil which was supplied to him for the purpose of distribution to the ration card holders of Hagalahally Fair Price Depot to P.W. 1 - P. R. Veerachandrappa alias Vijaya Kumar without distributing the same to the ration card holders and the same was done by the appellant for the purpose of making profit and it was found out by P.W. 15 - Ravi Kumar, the Assistant Commissioner of Ramanagaram sub-division. Therefore, the charge sheet was filed against the appellant before the Court of the Special

Judge, Bangalore Rural District, Bangalore (hereinafter referred to and called as the "Special Judge".)

4. After hearing the appellant, the learned Special Judge was pleased to frame the charge under Secs. 3 and 7 of the Essential Commodities Act (hereinafter in brief referred to as E.C. Act) read with Sec. 19 of "Karnataka Edible Oils Act" against the appellant. The appellant pleaded not guilty before the learned Special Judge, whereupon the learned Special Judge had held trial for the said offences. The prosecution in all examined 19 witnesses and also marked 23 documents as Exs.P. 1 to P. 23. The appellant also chose to mark Exs.D. 1 and D. 2 in his defence. After hearing the parties and on appreciation of the evidence on record, the learned Civil Judge was pleased to record conviction and sentence as against the appellant as above and the appellant therefore is now before this Court to challenge the same in the instant appeal.

5. After going through the records. I am convinced that the instant appeal could as well be disposed of on the point of law alone and there is no necessity for me to advert to the voluminous evidence both oral and documentary adduced by the prosecution in support of its case. Hence, I do not find it necessary to advert to the merit of the case and the number of authorities relied upon thereon.

6. As a matter of fact, one of the main grounds in the appeal is that the impugned judgment and the sentence recorded by the learned Special Judge is opposed to law for the reason that the charge was framed for an offence under a non-existing Act called the "Karnataka Edible Oils Act". Reiterating the said legal ground, the learned Counsel appearing for the appellant argued that the conviction of the appellant under Secs. 3 and 7 of E.C. Act for the contravention of Sec. 19 of the Karnataka Edible Oils Act cannot sustain at all. She submitted that the prosecution had filed the charge sheet as against the appellant alleging that the appellant was punishable under Secs. 3 and 7 of the E.C. Act on the ground that he had contravened what they called the "Karnataka Edible Oils Act". I have to observe here that the learned Government Pleader appearing for the respondent - State in fact had not disputed that such an Act did not exist at all. Continuing her argument, Smt. Gayathri argued that when there was no act called "Karnataka Edible Oils Act", question of contravention thereof punishable under Secs. 3 and 7 of the E.C. Act did not arise at all. Therefore, according to her, the very filing of the charge sheet and subsequently the very framing of the charge by the learned Civil Judge is totally bad and therefore obviously, the impugned judgment convicting and sentencing the appellant in passing the impugned judgment by the learned Special Judge cannot stand the scrutiny of law. In support of her argument, Smt. Gayathri relied upon the decision in 1983 Cri LJ 25 on the point that when mistake is on the part of the Judge in framing the charge, the same is not curable under Sec. 464 of Cr.P.C. In the said decision, our High Court while setting aside the conviction under Sec. 392 read with Sec. 34 of IPC held as follows :

"No doubt, S. 464 provides a safety valve for the prevention of miscarriage of

justice which might otherwise result out of defects which are technical in nature in the matter of framing charge. It should not however, be overlooked that the paramount consideration is the dispensation of justice and nothing which would result in prejudice to the accused would or could be condoned by resort to S. 464 Cr.P.C. This is an enabling provision to be invoked sparingly and in exceptional circumstances, not as a matter of course. It would be wrong to assume that S. 464 Cr.P.C. is meant to cover up every carelessness, omission or mistake on the part of the Judge in framing the charge."

7. The next case Smt. Gayathri relied upon is (1946) Cri LJ 1946 wherein Allahabad High Court held that, failure to mention facts constituting the contravention of the Rule (the reference would have been to Rule 130(1) of Defence of India Rules, 1939) is not a proper report to set in motion the machinery of law. The ultimate result of the appeal in the said case was that the conviction handed down by the learned Sessions Judge, Meerut was set aside for the said reason. I find sufficient force in the argument of Smt. Gayathri on the point of law.

8. The last case she had placed reliance is Ishar Das Vs. The State of Punjab, on the point that the Probation of Offenders Act is equally applicable to the case in hand, probably she was not certain as to the result of the case in favour of the appellant, in view of the fact that the evidence on record well established by the prosecution the guilt of the appellant beyond all reasonable doubt before the learned Special Judge that the appellant did sell 100 kgs. of palmolein oil received by him on 2-6-87 for distribution to the ration card holders pertaining to his Fair Price Depot to P.W. 1.

9. The sum and substance of the argument of Smt. Gayathri on the point of law is that, in the facts and circumstances of the case that when there is no law called the "Karnataka Edible Oils Act", the conviction as well as the sentence under Ss. 3 of the E.C. Act that is punishable under S. 7 of the E.C. Act could not sustain in law. Therefore, she prayed that the impugned judgment and the sentence be set aside in allowing the appeal filed by the appellant.

10. As against the above argument, Sri B. H. Satish, the learned High Court Government Pleader argued that the E.C. Act is a major Act and it is under Ss. 3 of the E.C. Act that is punishable under S. 7 of the said Act, charge was framed by the learned Special Judge, nevertheless, as stated above, he had fairly conceded that there is no Act called "Karnataka Edible Oils Act" and according to him it was a bona fide mistake on the part of the prosecution to say that the appellant had contravened S. 19 of that Act instead of mentioning therein that the appellant had contravened clause/Rule 19 of the "Karnataka Edible Oils Licensing Order, 1977". He further submitted that though there was some omission in mentioning the contravention of the above Licensing Order, all the more, the charge against the appellant is sustainable, for according to him, mere wrong mentioning of the provision of law would not absolve the appellant if he was otherwise found guilty of the offence charged against him. He further argued

that the appellant was heard by the learned Special Judge before the charge was framed and the appellant at no point of time either earlier to framing of charge or thereafter or for that matter till the pronouncement of the impugned judgment and sentence, had ever brought to the notice of the learned Special Judge that there was defect in the charge framed against him. According to him, the charge was very well understood by the appellant that he was charged under Ss. 3 of the E.C. Act that is punishable under S. 7 of the E.C. Act for contravention of the "Karnataka Edible Oils Licensing Order, 1977". Therefore, he submitted that it is too late in the day to argue now before this Court to say that there was defect in the charge and therefore, the very conviction and sentence cannot sustain.

11. The further submission of the learned Government Pleader is that under S. 465 of Code of Criminal Procedure, such a omission is curable, for according to him, the charge was very well understood by the appellant. It is only thereafter, evidence was let in by the prosecution on standing trial by him.

12. In support of the argument, the Government Pleader had cited before me the following decisions :

AIR 1956 SC 171 : (1956 Cri LJ 338) wherein the Hon"ble Supreme Court held that having regard to the nature of the charge framed, the omission to frame a separate charge under S. 302 of IPC was only a curable irregularity which in the absence of prejudice could not affect the legality of conviction under S. 302 of IPC; ILR 1979 Kar 2556, wherein the Division Bench of this Court held that when on facts, no prejudice had been caused and the accused had understood the prosecution case, it could not be said that the charge was defective and 1987 Cri LJ 1658 wherein the Division Bench of this Court held that when the accused persons were separately charged of committing murder in furtherance of common intention and in the charge framed against one accused, name of the other was not mentioned, the Court held that the defect in the charge as framed by the Court does not amount to irregularity.

13. The learned Government Pleader Sri Satish also cited the following decisions :

Lala and Others Vs. The State, , wherein it was held as follows :

"In a charge under R. 81, Defence of India Rules, for attempting to transport grain outside the Bikaner State the notifications prohibiting such transport need not be mentioned."

1967 (2) Mys LJ 145, wherein the single Judge of this Court held as follows :

"The bare fact of omission to frame charge unaccompanied by a probable suggestion of any failure of justice having been occasioned, is not enough to warrant the quashing of the conviction."

14. Therefore, Sri Satish submitted that non-mentioning of the correct provision of law which was contravened by the appellant to say that he was punishable under Ss. 3 of the E.C. Act that is punishable under S. 7 of E.C. Act at best be an

irregularity in the framing of charge and therefore cannot vitiate the proceedings. Hence, he prayed that the appeal be dismissed and the conviction and the sentence recorded by the learned Special Judge in passing the impugned judgment be confirmed by this Court.

15. Now the point before me is whether such a frame of charge can sustain in law or not. To appreciate that, we have to read S. 211 of Cr.P.C. which speaks as to what should be the contents of charge. To quote S. 211 of Cr.P.C., the same reads as follows :

"211. Contents of charge.- (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall be written in the language of the Court.

(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed."

For our purpose, S. 211(4) is relevant. That provision as above makes it crystal clear that the law and the section of law against which the offence is said to have been committed shall be mentioned in the charge (emphasis supplied by me). If we look into the said provision and analyse the same, we are left with any doubt that by use of the words "shall be mentioned in the charge", it is a direction under the said provision of law that law under which the offence is said to have been committed shall invariably be mentioned in the charge framed against the accused. In the instant case, the charge was framed by the learned Special Judge as follows :

"That you on 2-6-1987 in Ramanagaram Town being the owner of the Government Fair Price Dept. sold 100 kgs. of palm oil which was supplied to you for distribution to card-holders of Hagalahally Fair Price Depot, to C.W. 6 P. R.

Veerabadra alias Vijayakumar, for earning profit when your shop was checked by C.W. 1 P. Ravi kumar and you thereby contravened provisions of S. 19 of the Karnataka Edible Oil Act and thereby you have committed an offence punishable under Ss. 3 of the E.C. Act that is punishable under S. 7 of the Essential Commodities Act 1955 and within my cognizance."

16. It should be pointed out here that the above charge was framed by the learned Special Judge based on the charge sheet filed by the prosecution. In Column No. 7 of the charge sheet under the head :

it has been written as follows :

17. From the above, it is clear that right from the inception of filing the charge sheet as against the appellant, the case of the prosecution is that, the appellant had contravened S. 19 of Karnataka Edible Oils Act and therefore, punishable under Ss. 3 of the E.C. Act that is punishable under S. 7 of E.C. Act. If it is so, it cannot be argued now by the learned Government Pleader before this Court that the learned Special Judge might have committed mistake in framing the charge, to say that the appellant had contravened the provisions of S. 19 of Karnataka Edible Oils Act and thereby he committed the offence punishable under Ss. 3 of the E.C. Act that is punishable under S. 7 of the E.C. Act, 1955. As a matter of fact, the learned Special Judge had borrowed the alleged contravention of law from the very charge sheet filed by the prosecution; of course the learned Special Judge would have been little more cautious to verify the said provision of law before framing of charge by him. Unfortunately, for the prosecution that had not come on in the hands of the learned Special Judge.

18. As pointed out by the learned Government Pleader, and as I understand, what had been contravened is the clause or R. 19 of Karnataka Edible Oils Licensing Order, 1977, issued under S. 3 of E.C. Act. As a matter of fact, it is the contravention of that order issued under S. 3 of the E.C. Act that is punishable under S. 7 of the said Act, for S. 7 of the E.C. Act is only a penal section. Therefore, it appears to me that the alleged contravention of non-existing law, what was called the "Karnataka Edible Oils Act" cannot be read into S. 3 of the Essential Commodities Act to base the conviction under S. 7 of the E.C. Act, for the Karnataka Edible Oils Act is not at all a notification issued under S. 3 of the E.C. Act.

18A. Hence, it is clear that the charge as set out in Col. 7 of the charge sheet as well as the charge as framed by the learned Special Judge appears to be totally erroneous and therefore the same goes to the very root of the matter. In my considered view, it cannot be cured under S. 465 of Cr.P.C. for it is not a mistake that occurred on record in the hands of the learned Special Judge while framing the charge, but that mistake that had occurred in the very filing of the charge sheet in the hands of the prosecution itself.

18B. That being the position, in my further considered view, the same is fatal to the case of the prosecution and cannot be cured, for the appellant was not at all

made to know what was the law that was contravened by him. The learned Government Pleader by placing before me many authorities also argued that the conviction and sentence be set aside and the matter be remanded to the learned Special Judge for retrial. It is difficult for me to accept the said argument of the learned Government Pleader, because it will not improve matters for the simple reason that the mistake was not in the frame of the charge by the learned Special Judge, but as pointed out as above, the mistake was in the filing of the charge sheet itself by the prosecution and that being the position, it appears to me that no purpose is going to be served by such a recourse.

19. In the circumstances, I am but to observe that the prosecution was totally negligent, if not callous in the matter of filing the charge sheet as against the appellant. Therefore, I do not find any good reason why the appellant who is now aged above 65 years should undergo the misery of the trial all over again before the learned Special Judge, for the fatal mistake the prosecution had committed to its peril.

20. Therefore, to my mind, it appears that the conviction and sentence recorded by the learned Special Judge for contravention of the so-called "Karnataka Edible Oils Act"; a non-existing legislation cannot be read into S. 3 of the E.C. Act to punish the appellant herein under the penal S. 7 of the said Act. Furthermore, at the cost of repetition, I have to point out in conclusion that what was contemplated to be contravened under S. 3 of E.C. Act is the notification, one issued under S. 3 of the E.C. Act, made punishable under S. 7 of the said Act. To sustain the above view, the case law on the point is 1984 (1) Crimes 402, wherein the Punjab and Haryana High Court in the case of Bara Singh v. The State of Punjab held as follows :

"No person can be convicted under S. 7 of the Essential Commodities Act unless it is proved that the person has contravened an order under S. 3 of the Essential Commodities Act."

The above case was decided by the above High Court by following the Division Bench ruling of Calcutta High Court reported in Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Prohlad Agarwalla, , in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Prahlad Agarwalla wherein their Lordships held as follows :-

"A person can be convicted under S. 7 of the Essential Commodities Act, 1955, only when it is proved that he has contravened any "order" made under S. 3 of the Act. When there was a contravention of a direction given under the notification made by the Controller in exercise of the powers given to him under paragraph 14(2) of the Iron and Steel (Control) Order, 1956 which was made under S. 3 of the Act and the direction was not a direction contained in the notification, the contravention of the direction could not be said to be the contravention of a provision of the order."

In that view of the matter, I hold that the impugned judgment and sentence

passed by the learned Special Judge, as against the appellant cannot sustain in law.

21. In the result, the conviction and sentence recorded by the learned Special Judge is hereby set aside.

22. The appeal therefore succeeds and allowed accordingly.

23. Appeal allowed.