
(1984) 08 DEL CK 0022

In the Delhi High Court

Case No : Criminal Revn. 178 of 1978 (Against judgment of J.D. Jain, Addl. Sessions Judge, Delhi, D/- 26-5-1978)

Krishan Lal

APPELLANT

Vs

M.C.D. and another

RESPONDENT

Date of Decision : 14-08-1984

Acts Referred:

Citation : (1984) 08 DEL CK 0022

Hon'ble Judges : Jagdish Chandra, J

Bench : Single Bench

Judgement

1. This criminal revision has been filed by petitioner Krishan Lal assailing and challenging the correctness of the judgment dt 26-5-1978 of the learned Addl. Session Judge, Delhi whereby the conviction and sentence passed by the learned Metropolitan Magistrate on 6-8-1977 were confirmed and the appeal was dismissed. The petitioner was convicted under S. 7/16, Prevention of Food Adulteration Act (hereinafter to be referred to as the Act) and was sentenced to undergo the minimum sentence of six months R.I. and a fine to the tune of Rs. 1,000/- in default of payment of which he was to undergo further R.I. for three months. The petitioner was also found guilty of contravention of Rs. 50/-, Prevention of Food Adulteration Rules, (hereinafter to be referred to as the Rules) and was sentenced to pay a fine in the sum of Rs. 500/- on that count and in default he was to undergo R.I. for one month.

2. The complaint against the petitioner was that on 20-9-1975 at about 12.00 noon co-accused Roop Chand was keeping maida for preparation of Puris and Samosas for sale at stall No. 9 I.S.B.T. Kashmere Gate Delhi, of which the petitioner was the proprietor and at that time this stall was visited by the Food Inspector. T. R. Tuli of Delhi Municipal Corporation and found co-accused Roop Chand working there on behalf of the petitioner. This Food Inspector disclosed his identity and purchased 600 gms. of Maida on payment of Rs. 1.26 P. This quantity of maida was divided equally and put into three dry clean bottles which

were sealed according to rules. The Food Inspector conformed with all the formalities required by the law and the Rules pertaining to prevention of food adulteration. The sample was analysed by the Public Analyst, Prem Prakash Bhatnagar on 22-9-75 when nine white living insects were found present therein and the Public Analyst recorded his opinion that the sample was adulterated due to the presence of insect infestation.

3. In his testimony PW 5 Dr. S. V. Pingley Technical Adviser, Food Corporation of India, Khadya Bhavan, Delhi, on seeing the report of the Public Analyst opined that this sample of maida was unfit for human consumption due to the presence of nine white living insects.

4. The learned counsel for the petitioner raised some defenses during the course of arguments in support of his contention for acquittal by reversing the judgments of the two courts below.

5. The first contention raised by the learned counsel for the petitioner is that maida was not kept for sale as such and so S. 10(2) of the Act did not empower the Food Inspector to take its sample vide Supreme Court authority reported as Municipal Corporation of Delhi Vs. Laxmi Narain Tandon and Others, and it is only now that by the amending Act, 34 of 1976 enforced with effect from 1-4-1976 that the amendment has been made in S. 10(2) of the Act whereby a Food Inspector is empowered to take sample of an article which is stored for the manufacture of any other article of food for sale. In this case the sample of maida was lifted on 20-9-1975 before the amending Act, 34 of 1976, came into force and the maida was kept on the stall of the petitioner not for the purpose of sale as such but only for the preparation of other eatables like patties and Samosas for which reason relying upon S. 10(2) of the Act before its aforesaid amendment the learned counsel for the petitioner submitted that the maida as such not kept for sale at the stall of the petitioner but meant only for preparing other eatables like puris and Samosas, the Food Inspector was not competent to lift its sample. It would be desirable to set out sub-section (2) of S. 10 of the Act both before the amendment and after the amendment. It reads as follows before the amendment :-

S. 10(2)(old)

"Any Food Inspector may enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of such articles of food for analysis."

Section 10(2) after the amendment reads as follows :-

S. 10(2)(New)

"Any Food Inspector may enter and inspect any place where any article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food for sale, or exposed or exhibited for sale or where any adulterant is manufactured or kept, and take samples of such article of food or adulterant

for analysis."

6. It was contended for the petitioner that the first appellate court was bound to follow the Supreme Court judgment in *Municipal Corporation of Delhi Vs. Laxmi Narain Tandon and Others*, and not the earlier judgment of the Supreme Court in *The Food Inspector, Calicut Corporation Vs. Cherukattil Gopalan and Another*, . In *Gopalan's case (supra)* sample of sugar was lifted by the Food Inspector the same having been kept for mixing with tea which was sold to the customers and it was held that "the article of food, which had been purchased by the Food Inspector, need not have been taken out from a larger quantity intended for sale and the person from whom the article of food had been purchased by the Food Inspector need not be a dealer as such in that article." It was further held that "the purchase by the Food Inspector from the accused of sugar for purposes of analysis is a sale under S. 2(1) of the Act." It was also pointed out by the learned counsel for the petitioner that *Municipal Corporation of Delhi Vs. Laxmi Narain Tandon and Others*, was rightly interpreted by the High Court of Bombay in *The State of Maharashtra Vs. Udayram Rupram Oza*, and *Hanmantrao Takaramji Jadhav v. Ramniklal* (1977) 2 FAC 253 as also by the Assam High Court in *Manindra Narayan Sen Gupta and Another Vs. The State of Assam*, . Which supported the proposition that the Food Inspector was not competent under the old law continued in S. 10(2) of the Act to take sample of an article of food not intended for sale as such but which was meant for being used only as an ingredients in the preparation of other articles of food such as tea or coffee. So, on the basis of the dictum in *Lakshmi Narain Tandon's case* as interpreted by the Bombay and Assam High Courts it was contended that under the old law contained in S. 10(2) of the Act prior to the amendment of 1976 the Food Inspector was not competent to lift the sample of maida which was not meant for sale as such but was meant only to be an ingredient in the preparation of other articles of food such as Puris and Samosas.

7. In a Full Bench decision of Delhi High Court reported as *Madan Lal v. State* 1972 FAC 481 the view taken was to the same effect as was taken in the Supreme Court authority in *The Food Inspector, Calicut Corporation Vs. Cherukattil Gopalan and Another*, and even a Division Bench authority of Delhi High Court reported as *Municipal Corporation of Delhi v. Ashok Kumar* (1978) 1 FAC 1 also took the same view. However, no reference was made in this Division Bench authority of Delhi High Court to the Supreme Court judgment in *Municipal Corporation of Delhi Vs. Laxmi Narain Tandon and Others*, .

8. There is now the latest Full Bench authority of our own High Court reported as *New Delhi Municipal Corporation Vs. Hardev Singh and Others*, wherein the question was whether the decision of the Supreme Court in *Lakshmi Narain Tandon's case (supra)* expressly or impliedly overruled the earlier decision of the Supreme Court in *Gopalan's case (supra)* and in the light whether the decision of the Delhi High Court in *Madan Lal's case (supra)* needed reconsideration. This Full Bench authority of Delhi High Court decided both the abovementioned

questions in the negative by holding that the decision of the Supreme Court in Gopalan's case (supra) and accordingly the Delhi High Court's earlier Full Bench judgment in Madan Lal's case (supra) laid down the correct law and did not need any reconsideration.

9. Thus the meaning given to the judgment in Municipal Corporation of Delhi Vs. Laxmi Narain Tandon and Others, by the Bombay and Assam High Courts referred to above stands rejected by the Delhi High Court meaning thereby that under the old S. 10 of the Act also prior to the amendment by Act 34 of 1976 the correct position was that a sample of an article of food could be lifted by the Food Inspector even though that article of food was not primarily meant for sale as such and was to be used only as one of the ingredients in the preparation of another article of food meant for sale. Consequently, the Food Inspector could lift the sample of maida in question in the case in hand even though it was not meant for sale as such but was meant for being one of the ingredients for the preparation of other articles of food such as Puris and Samosas which were meant for sale on the stall of the petitioner, and thus the contention of the learned counsel for the petitioner on this point is rejected.

10. The next defense raised on behalf of the petitioner was that the right of the petitioner under S. 13(2) of the Act to have the sample tested by the Director of Central Food Laboratory was denied to him on account of the inordinate delay in launching the prosecution. Sample in this case was lifted on 20-9-75 and the complaint against the petitioner was filed before the learned trial court on 26-3-1976. It was also contended that insects and uric acid developed by passage of time. In this case the sample was lifted on 20-9-1975 and analysed on 22-9-1975 and the complaint was filed in court on 26-3-1976, i.e. about 6 months after the analysis. Under S. 13(2) of the Act the petitioner could avail of his right to have the counterpart of the sample sent to the Director of the Central Food Laboratory for his opinion but this he could do only on making an application for this purpose and not otherwise. Admittedly, the petitioner made no such application. It was held by the Supreme Court in Ajit Prasad Ramkishan Singh Vs. The State of Maharashtra, as follows :-

"It is clear from the sub-section (reference is made to S. 13(2) of the Act) that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, the Magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps, have contended that he was deprived of his right to have the sample analysed by the Director on account of the laches of the complainant and that he should be acquitted. But, since the appellant never applied under S. 13(2) of the Act, he cannot complain that he has been deprived of any right. In Babu Lal

Hargovindas Vs. The State of Gujarat, Jaganmohan Reddy, J., speaking for the court, said that unless an application to send the sample to the Director is made, the vender cannot complain that he was deprived of his right to have the sample analysed by the Director."

11. The aforesaid Supreme Court authority also took note of the Supreme Court judgment of Sikri, J. as his Lordship then was, given in Sukamal Gupta v. Corporation of Calcutta, Criminal Appeal No. 161 of 1966 decided on 3-5-1968 (Reported in 1974 FAC 207) wherein the following observations were made :-

".... it was held by this court in Municipal Corporation of Delhi Vs. Ghisa Ram, that S. 13(2) of the Act confers a valuable right to have the sample given to him analysed by the Director of the Central Food Laboratory but "the reason why the conviction cannot be sustained is that the accused is prejudiced in his defense and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution." In this case no prejudice of the defense has been shown. It has not been established on the record that the sample of tea which was available with the appellant had deteriorated by the time the summons was received. He never utilised the right under S. 13(2) of the Act of sending the sample to the Director of Central Food Laboratory."

12. The basic authority on the subject is the Supreme Court authority reported as Municipal Corporation of Delhi Vs. Ghisa Ram, in which Bhargava J. observed as follows (Para 7) :-

"It appears to us that when a valuable right is conferred by S. 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defense, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by the court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein."

13. This authority was considered by a Full Bench of Delhi High Court in Municipal Corporation of Delhi v. Bishan Sarup 1972 FAC 273 wherein the following observations appears :-

"If prejudice is caused to the accused on account of the delay in the institution of the prosecution, as when the sample is rendered unfit for analysis in the meanwhile or deterioration of the sample is proved to have occurred in the meanwhile, then the accused is entitled to the benefit of doubt, as the

prosecution itself, in such a case, prevents the accused from getting the final verdict to which he is entitled under S. 13 of the Act. In such a case, as held by the Supreme Court in *Municipal Corporation of Delhi Vs. Ghisa Ram*, the conviction cannot be upheld on the basis of the reports of the Public Analyst. But in case no prejudice is caused to the accused he cannot be allowed to escape the consequence under the law for such an anti-social act which the Legislature has ordained to be dealt with severely."

14. The matter was again considered by a Division Bench of Delhi High Court in *Municipal Corporation of Delhi v. Nand Lal* (1980) 1 FAC 69 wherein after considering the authorities in *Ghisa Ram's* case (supra) and *Bishan Sarup's* case 1972 FAC 273 (supra) the following observations were made :-

"In our opinion, it would not be a correct reading of S. 13 of the Act or the observations in *Ghisa Ram's* case (supra) or *Bishan Sarup's* case (supra) that making of the application for seeking analysis by the Director of Central Food Laboratory and thereby procuring finding by the Director that the sample was no longer in a fit state is a sine qua non for holding that the prejudice had been caused to the accused in his defense and, as a result thereof he was entitled to the benefit of doubt. Only two considerations are important the first being that prejudice has been caused, and the other being, that the accused was not responsible for the same. In case it is patent that by the time opportunity for the exercise of the right became available to the accused, the sample, on account delay, had become unfit it would be clear negation of justice to tell the accused that he had not gone through the formality of making the application for seeking analysis by the Director and, Therefore, he could not be heard. The situation is very much akin to the one which arises when the accused has not actually pleaded the right of exercise of self-defense but argument is sought to be raised that from the material on the records it is possible to spell out that it was, in fact, a case of exercise of the right of self-defense. In our view it would be a useless exercise to seek report from the Director, Central Food Laboratory that the sample was unfit even in a case where it is possible to show by satisfactory evidence that by the time occasion for the exercise of the right under S. 13 arose, the sample had deteriorated."

15. From the aforesaid authorities what emerges out to be the legal position on this matter is that the defense can prove the deterioration or decomposition of the sample either by making an application for sending the same to the Director of Central Food Laboratory who can report about the same or by proving otherwise by some satisfactory material that the sample had deteriorated or could otherwise deteriorate in normal course before he could exercise his right of sending the same to the Director of Central Food Laboratory for analysis in which case it would be unnecessary to send the sample to the Director. In this view of the matter, it is not always necessary in all the cases that the accused must make an application for seeking analysis by the Director of Central Food Laboratory and obtain the finding from him that the sample was beyond the state

of analysis having suffered deterioration to that extent or having become decomposed and thereby to show prejudice to him in his defense. Without making such an application and obtaining such an opinion in his favor he can prove the decomposition or deterioration in the sample having taken place even prior thereto.

16. There is hardly any material on the records of the case or otherwise which could go to show that the sample of maida had become decomposed or had deteriorated to such an extent so as to defy any further analysis by the Director of Central Food Laboratory by the time the prosecution was launched against the petitioner. In these circumstances, the delay whatever in the launching of the prosecution, even though highly undesirable, has not been proved as a factor causing any prejudice to the petitioner in his defense in the matter of his obtaining any favorable report in his favor from the Director of Central Food Laboratory, and in this case the non-making of an application by the petitioner to the Director, Central Food Laboratory is fatal to the petitioner in respect of his defense on this particular point of delay in launching the prosecution, as he himself is to blame in this regard by not making the application as aforesaid. Short order dt. 24-5-1977 showing the sample in question as highly decomposed does not favor the petitioner in any manner in his defense on this point inasmuch as the prosecution against him was launched much earlier on 26-3-1976 and the petitioner could exercise his right of having the sample sent to the Director much earlier during this period of 26-3-1976 to 24-5-1977.

17. It was lastly contended by the learned counsel for the petitioner that the expert's opinion of P.W. 5 Dr. S. V. Pingley, Technical Adviser, Food Corporation of India, was disbelieved by the first appellate court by relying upon certain passage from a book without having afforded an opportunity to Dr. Pingley to explain away the same. The perusal of the statement of Dr. Pingley shows that he is an expert in this field being Ph.D. in Agriculture and having an experience of 30 years in insect and insect infestation field. On seeing Public Analyst's report Ext. PE relating to the sample of maida in question he opined that it was unfit for human consumption due to presence of 9 white living insects. He was aware that the sample in question was lifted on 20-9-1975 and was analysed by the Public Analyst two days later on 22-9-1975. In his cross-examination Dr. Pingley also opined as follows :-

"It is possible that if eggs were present on 20-9-75 they could develop into white living insects in two days time."

What he obviously meant was that even though insects were there on 22-9-1975 the date of analysis of the sample, it was possible that those insects were not there present in the sample on 20-9-1975 the when the sample was lifted by the Food Inspector from the stall of petitioner and that instead eggs were there present in the sample on the date of its lifting. The aforesaid opinion of Dr. Pingley regarding possibility of the presence of eggs only in the sample in question on the date of its lifting and the eggs developing into white living

insects within two days thereafter i.e. on 22-9-1975 the date of analysis, was discarded by the learned first appellate court by disbelieving Dr. Pingley on the basis of certain passages quoted from the book styled "Pets of stored Grain and Grain Products by Richard T. Cotton," and had observed that Dr. Pingley had, during his cross-examination, fumbled and bungled by giving the aforesaid opinion regarding the possibility of insects found in the sample on the date of analysis having developed from the eggs present on the date of the lifting of the sample. Following is the most important sentence appearing in the passages from the aforesaid book relied upon by the first appellate court :-

"The eggs hatch in a few days. The period from egg to adult in summer is said to be about a month."

18. Relying upon the aforesaid sentences from the said book the learned first appellate court observed that there was hardly any possibility of the eggs hatching and growing into larvae within a short span of two days especially towards the end of the month of September when summer season is over. September is a month of rainy season.

19. The learned counsel for the petitioner has relied upon two Supreme Court authorities, viz., Sunderlal Vs. The State of Madhya Pradesh, and Bhagwandas Vs. The State of Rajasthan, . Both these authorities pertain to the opinions of medical practitioner in criminal case under S. 302 I.P.C. The following are the relevant observations in Sunderlal's case (supra) (Para 4) :-

"..... The conviction of the accused by the High Court was mainly based on passages from the text book of Modi on Medical Jurisprudence and Toxicology and these passages had not been put to Dr. Dube when he was in the witness box with the result that the High Court was not right in coming to the conclusion adverse to the accused by merely relying upon these passages."

This authority was followed in the aforesaid other Supreme Court authority Bhagwandas Vs. The State of Rajasthan, wherein the following observations appear at page 858 (of SCR) (at P. 891 of Cri LJ) :-

".... but the learned Judge of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on Medical Jurisprudence by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of disposing of the evidence of an expert unless the passages which are sought to discredit his opinion are put to him."

20. In the face of the aforesaid two Supreme Court authorities the learned first appellate court cannot be said to have resorted to a correct course without putting the passages from the authoritative book to the expert Dr. Pingley who was thus not afforded an opportunity to explain away the same.

21. The learned counsel for the petitioner cited and relied upon a Division Bench authority of Delhi High Court reported as *Mohinder Pershad v. State* 1972 FAC 416 for the proposition that mere presence of eggs of insects in an article of food before insects have emerged from the eggs cannot, Therefore, make the article of food "insect-infested" and in this authority the following relevant observations appear at page 418 :-

"Evidently the egg of an insect is not the same thing as the insect itself though such an egg may in due course of time cause an insect to come into existence. Mere presence of eggs of insects in an article of food before insects have emerged from the eggs cannot, Therefore, make the article of food "insect-infested.""

22. The conviction and sentence of the revision petitioner in that case was set aside and he was acquitted. Even in the case in hand the opinion of the expert Dr. Pingley was that maida in question was unfit for human consumption due to presence of nine white living insects which cannot be upheld due to his further opinion in his cross-examination regarding the possibility of only eggs being present on 20-9-1975 the date of lifting the sample and those eggs developing into white living insects in two days, and consequently for this reason the conviction and sentence of the petitioner under S. 7/16 of the Act has to be set aside.

23. The reliance by the learned appellate court below on the Supreme Court authority *Vijay Kumar Vs. State of Punjab*, wherein their Lordships of the Supreme Court did not agree that during the short period of 12 days the sample of Bari Elachi could not get insect infested to the extent of 9.7%, for disbelieving the aforesaid opinion of Dr. Pingley, is obviously unwarranted for the reason of an altogether different commodity, i.e. Bari Elachi in the aforesaid Supreme Court authority from the commodity of maida in the case in hand.

24. The petitioner had also been convicted for having been found guilty of contravention of R. 50 of the Rules for selling Puris and Samosas without license and had been sentenced to pay fine in the sum of Rs. 500/- on that count and in default he was to undergo R.I. for one month. It was deposed to by both the Food Inspectors, viz., P.W. 2 T. R. Tuli and P.W. 4 Bhim Singh who had both gone to the stall of the petitioner for lifting the sample of maida that the petitioner had no license for the preparation of Puris and Samosas. The petitioner, in cross-examination of these two, Food Inspectors, had challenged his arrival at the spot when the sample was lifted. In his statement recorded under S. 313, Cr.P.C., no question was put to the petitioner about the preparation of Puri and Samosas at his stall without license.

25. The omission to put this question is very vital in the sense that this was the only question pertaining to the charge against the petitioners on this point inasmuch as the license for preparation of Puris and Samosas etc. at his stall was the very essence of the charge under R. 50 of the Rules and if the petitioner, who

had taken up the plea of his not being present at the stall when the Food Inspector came there and lifted the sample, the omission of the question on the point of license could vitally prejudice the petitioner in his defense who then could have produced the requisite license to successfully rebut the charge. It is held in *S. Harnam Singh Vs. The State (Delhi Admn.)*, and *State of Himachal Pradesh Vs. Wazir Chand and Others*, that S. 342 (now S. 313), Cr.P.C., casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, and it follows as a necessary corollary there from that each material circumstance appearing in evidence against the accused is required to be put to him specially, distinctly and separately, and failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused, and if the irregularity does not, in fact, occasion a failure of justice, it is curable under S. 537 of the Code. In *Harijan Magha Jesha Vs. State of Gujarat*, wherein on the personal search of the appellant, a chadi was found which was blood-stained and according to the report of Serologist it contained human blood but unfortunately, however, as this one circumstance was not put to the accused in his statement under S. 342 (now S. 313) the prosecution, it was held, could not be permitted to rely on this statement in order to convict the appellant particularly after he had been acquitted by the trial court.

26. In view of these authorities and the reasons aforesaid pointing towards the prejudice having been caused to the petitioner, his conviction for contravention of R. 50 of the Rules cannot be upheld and has to be set aside. The petitioner had been sentenced to pay fine of Rs. 500/- on this count and in default was undergo one month's R.I. and this sentence has also to be set aside.

27. In view of the above discussion, the revision petition succeeds and so setting aside the conviction and sentences imposed upon him by the learned trial court, and maintained by the learned first appellate court, the petitioner is acquitted. The amounts of fine, if already paid, be refunded to the petitioner.

28. Revision allowed.