

(2010) 02 GUJ CK 0141

In the Gujarat High Court

Case No : Criminal Rev. Application No. 351 of 2000

Navinchandra Himmatlal

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 16-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Prevention of Food Adulteration Act, 1954 — Section 16, 7
Prevention of Food Adulteration Rules, 1955 — Rule 14

Citation : (2011) 3 Crimes 445

Hon'ble Judges : J.C. Upadhyaya, J

Bench : Single Bench

Advocate : K.V. Shelat, Mr. D.K. Modi and Mr. M.D. Modi, for the Appellant; H.L. Jani, APP. for the Respondent No. 1, Mr. Satyam Y. Chhaya, Advocate for the Respondent No. 2, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The petitioner-Navinchandra Himmatlal preferred this Criminal Revision Application u/s 397 read with Section 401 of the Code of Criminal Procedure (Cr.P.C.) challenging the legality and validity of the judgment and order rendered by the Ld. Addl. Sessions Judge, Ahmedabad City on 18.8.2000 in Criminal Appeal No. 9/1995, whereby the Ld. Addl. Sessions Judge confirmed the judgment and order rendered by the Ld. Metropolitan Magistrate, Court No. 8, Ahmedabad, on 13.12.1994 in Criminal Case No. 138/1989 whereby the petitioner was convicted for the offence punishable u/s 16 read with Section 7 of the Prevention of Food Adulteration Act (for short "the Act") and sentenced to undergo rigorous imprisonment (for short "RI") for six months and to pay fine of Rs. 1,000, in default of payment of fine, to undergo further RI of one month.

2. The prosecution case, in nutshell, is that the respondent No. 2 Mr. H.H. Dave, Food Inspector, Ahmedabad Municipal Corporation on 18.11.1988 at 7.20 a.m., visited the shop of petitioner. Navinchandra Himmatlal and collected sample of

cow-milk from the shop. When the sample was analyzed by the Public Analyst, it was opined to be not in conformity with the standards laid down under the Prevention of Food Adulteration Rules (for short "the Rules") and was found to be adulterated.

2.1. After obtaining necessary sanction for the purpose of launching criminal prosecution, the respondent No. 2 Food Inspector, filed criminal complaint in the Court of the Ld. Metropolitan Magistrate, which was registered as Criminal Case No. 138/1989. Since the petitioner accused did not plead guilty and claimed to be tried, the respondent No. 2 Food Inspector adduced his oral and documentary evidence. He was examined by the trial Court as PW 1 at Ex. 25. One witness Nirav Kapoor was examined as PW 2 at Ex. 27 and the Peon of the Food Inspector, namely Babaji Thakore PW 3 was examined at Ex. 26. The defence examined Public Analyst Mr. Bharatbhai Desai at Ex. 29. After considering the oral and documentary evidence on record, the Ld. Metropolitan Magistrate, by virtue of the impugned judgment and order rendered on 13.12.1994, came to the conclusion that the Food Inspector proved the case beyond any reasonable doubt. There was no violation of any of the mandatory requirements laid down under the Act and the Rules. Ultimately he recorded conviction of the petitioner-accused for the offence punishable u/s 16 read with Section 7 of the Act and awarded the sentence as referred above.

3. Being aggrieved and dissatisfied with the order of conviction recorded by the trial Court, the petitioner-accused preferred Criminal Appeal No. 9/1995 before the Sessions Court, Ahmedabad City. After considering evidence on record and the submissions made on behalf of both the sides, Ld. Addl. Sessions Judge, by impugned judgment and order dated 18.8.2000, dismissed the appeal preferred by the petitioner-accused and confirmed the order of conviction and sentence rendered by the Ld. Metropolitan Magistrate, Ahmedabad. This has given rise to the present revision application u/s 397 read with Section 401 of the Cr.P.C.

4. I have heard the arguments of learned advocate Mr. KV Shelat for the petitioner, Ld. APP Mr. HL Jani for the respondent No. 1 State and Ld. Advocate Mr. SY Chhaya for the respondent No. 2 Food Inspector.

5. Ld. Advocate Mr. Shelat for the petitioner submitted that the mandatory requirements laid down under Rule 14 of the Rules have not been duly and fully complied with. Considering the entire evidence on record including deposition of Food Inspector, there is nothing that at the time of collecting sample of cow-milk in the sample bottles, he had cleaned those sample bottles or that the same were cleaned in his presence. It is further submitted that before collecting the sample of milk from a milk can, admittedly the milk in the can was not stirred by the Food Inspector. According to the Food Inspector, the milk which was collected for the purpose of sample, was initially collected in a tumbler and he only stirred the milk collected in a tumbler by a spoon. It is submitted that the Food Inspector in his cross-examination categorically admitted that he had not made the sample homogeneous one.

5.1. Ld. Advocate Mr. Shelat for the petitioner, drawing my attention to the P.A. Report, submitted that so far as milk fat is concerned, the PFA limit is minimum 3.5 %, whereas in the instant case, the analysis reveals the milk fat to be 4.6 %; and so far as milk S.N.F is concerned, the PFA limit suggests minimum 8.5 %; whereas the analysis reveals the percentage to be 7.59% say 7.6 %. It is submitted that the difference is very marginal and considering the decision rendered in the case of Administrator of the City of Nagpur v. Laxman, 1995 Supp (1) SCC 247 almost in identical situation. Hon''ble the Apex Court observed that the difference was very marginal and the accused was entitled to the benefit of doubt.

5.2. Ld. Advocate Mr. Shelat for the petitioner-accused relied upon an order passed in the case of KG. Patel v. Madhubhai Jamorbhai Rabari by this Court on 1.4.2009 in Criminal Appeal No. 2506 of 2008, wherein relying upon a judgment delivered by Hon''ble the Apex Court in the case of P.S. Sharma v. Madanlal Kasturichandji 2002 (2) FAC 224 this Court held that in such marginal difference in percentage, the benefit of doubt may be given to the accused.

5.3. Regarding non-compliance of Rule 14 of the Rules, reliance was placed upon decisions rendered by this Court in the case of CD. Patel v. Papatla! Jivaji Thakor 2005 (1) FAC 46 and in the case of State of Gujarat v. Shyamai Tolaram Kourani decided by this Court on 13.5.2009 in Criminal Misc. Application No. 16203 of 2008 in Criminal Appeal No. 3036 of 2008.

5.4. Ultimately, Ld. Advocate Mr. Shelat for the petitioner/accused submitted that the revision may be allowed and the conviction of the petitioner/accused recorded by the trial Court and confirmed by the first appellate Court be set aside and the petitioner/accused may be acquitted of all the charges leveled against him.

6. Ld. Advocate Mr.. Chhaya and Ld. APP Mr. Jani for the respondents vehemently opposed this revision application and submitted that the scope and purview of such revision application arising u/s 397 read with Section 401 of the Cr. P.C is very limited. There are concurrent findings of two Courts to the effect that the bottles were duly cleaned and dried and that the milk was duly stirred before taking the sample. It is further submitted that so far as the compliance or otherwise of the mandatory requirements laid down under Rule 14 of the Rules is concerned, the trial Court as well as the first appellate Court have categorically stated that the provision was duly complied with. That petitioner/accused never raised such contention before the trial Court.

6.1. About the marginal difference in percentage, decision rendered in the case of State of Haryana Vs. Daya Nand, was relied upon, wherein Hon''ble the Apex Court, considering the facts and circumstances of said case and especially considering the marginal difference in percentage of fat and non-solid fat in the sample of cow milk, came to the conclusion that mere marginal difference may not be sufficient to raise an inference that the milk was not stirred properly

before collecting the sample.

6.2. Ultimately, it is submitted that the revision application may be dismissed.

7. I have examined the record and proceedings in the context of the submissions made by the rival side.

8. So far as the first contention raised on behalf of the petitioner- accused that the mandatory requirements laid down in Rule 14 of the Rules have not been duly complied with, suffice it to say that considering the evidence of Food Inspector. Mr. Dave PW 1, he stated in his examination-in-chief that the sample of milk was initially collected in clean and dried tumbler and thereafter, in clean and dried glass bottles. It is true that in his cross-examination, on behalf of the accused, no specific question was asked as to whether the tumbler and bottles were cleaned by the Food Inspector or were cleaned by somebody in his presence. But it is pertinent to note that a suggestion was put in his cross-examination that he did not collect the sample properly, to which though the Food Inspector denied, but it can safely be said that on behalf of defence, the manner and method of collection of sample by the Food Inspector was effectively challenged. Under such circumstances, considering the evidence on record and the judgments rendered by this Court in CD. Patel's case and Shyamal Tolaram's case (supra), it can safely be said that the mandatory requirements laid down in Rule 14 of the Rules cannot be said to have been duly and fully complied with.

9. So far as stirring aspect is concerned, I have perused the evidence of the Food Inspector PW 1 Mr. Harshadrai Dave. It clearly transpires that the sample of cow milk was collected from a can, wherein there was 5 liters to 6 liters of cow milk. According to him, initially the milk for the purpose of sample was collected in a tumbler. He stated that he stirred the milk, with a spoon, which was collected in a tumbler. In his cross-examination he admitted that before collecting the sample he did not make the milk homogeneous one. The defence has examined Scientific Officer of the Public Analyst office, namely Mr. B.R. Desai at Ex. 29 and he admitted that the sample in question was at a narrow margin. He further admitted that if the milk is not properly stirred before collecting the sample, then there may be marginal difference in analysis of the milk. About manner and method of stirring, he stated that the milk in a can should be stirred by a rod long enough to go at least to the bottom of the can.

10. In the above background, if the P.A. Report is considered, about milk fat, the PFA limit is stated to be minimum 3.5%; whereas in the sample of cow milk analyzed by the Public Analyst, the result was 4.6%. So far as milk solid non-fat is concerned, the minimum limit is prescribed at 8.5%; whereas the sample revealed it to be about 7.6%. In Laxman's case (supra) almost identical was the situation wherein in a sample of cow milk, the fat percentage was higher than the minimum; whereas the percentage of solid non-fat was less than the minimum. Hon'ble the Apex Court held that "under these circumstances, we can not say that the Courts below erred in acquitting them by giving the benefit of

doubt to the respondents." In KG. Patel's case (supra) almost identical was the situation so far as the percentage of fat and percentage of solid non-fat in milk was concerned and the accused was given benefit of doubt.

11. In Daya Nand's case (supra) relied upon on behalf of the respondents, there is no dispute that the difference in percentage of fat and solid non-fat in cow milk was marginal. Punjab and Haryana High Court, considering the marginal percentage of difference, while recording acquittal of the accused, held that the marginal difference is result of non-stirring of the milk. Hon'ble the Apex Court held that the trial Court as well as the first appellate Court have considered this question and on the material available on record, both the Courts below have come to the conclusion that the sample material in question was properly stirred as required by law and the sample was made representative and homogeneous. It was further observed by Hon'ble the Apex Court that the High Court cannot substitute the factual foundation available on record, by an assumption, to give benefit of doubt to the accused. Reverting back to the facts of our case, needless to say that in the instant case, the Food Inspector himself admits that before collecting the sample, the milk was not made homogeneous, what he stirred was not the milk which was in the can, but which was in the tumbler he had collected from the can for the purpose of sample. Moreover, the evidence of Scientific (sic) reveals that in the instant case, the marginal difference in percentage can be the result of lack of effective stirring of milk. Under such circumstances, in the instant case, from the evidence of Food Inspector, there is a positive evidence of non-stirring. Under such circumstances, the facts and circumstances of our case are totally different than the facts and circumstances and evidence on record in Daya Nand's case.

12. In the result, I am of the opinion that the revision application deserves to be allowed. Following order is, therefore passed:

13. For the aforesaid reasons, the revision application is allowed, the impugned judgment and order rendered by the Ld. Addl. Sessions Judge, Ahmedabad City on 18/8/2000 in Criminal Appeal No. 9/1995, whereby the impugned judgment and order rendered by the Ld. Metropolitan Magistrate, Court No. 8, Ahmedabad, on 13.12.1994 in Criminal Case No. 138/1989 recording the conviction of the petitioner Navinchandra Himmatlal for the offence punishable u/s 16 read with Section 7 of the Prevention of Food Adulteration Act and the sentence awarded there under by the Ld. Metropolitan Magistrate, came to be upheld by the Ld. Addl. Sessions Judge, Ahmedabad City, are set aside. The petitioner- original accused Navinchandra Himmatlal is acquitted of all the charges leveled against him. Fine, if paid, be refunded to him. His bail bonds shall stand cancelled.