

(2007) 02 GUJ CK 0021

In the Gujarat High Court

Case No : Criminal Appeal No's. 871 and 904 of 1992

Patel Chunibhai Ranchhodbhai

APPELLANT

Vs

Joitaram Rambhai Patel and Another

RESPONDENT

Date of Decision : 15-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 326, 326(3)
Essential Commodities Act, 1955 — Section 3, 7

Citation : (2007) 02 GUJ CK 0021

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : Munshi, for A.J. Patel, No. 1, for the Appellant; Shakeel A. Qureshi, for Opponent No. 1 and A.J. Desai, Assistant Public Prosecutor for Opponent No. 2, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—Both these appeals are arising out of the judgment and order of conviction and sentence dated 9th September, 1992, rendered by the Special Judge, Mehsana in Summary Case No. 2 of 1988 for the offence punishable under Clause 4 of the Fertilizer (Control) Order, 1957 and for the offence punishable u/s 3 of the Essential Commodities Act. The appellants-accused were sentenced to undergo simple imprisonment for three months and ordered to pay a fine of Rs. 500/-, in default thereof, to undergo seven days simple imprisonment.

2. Both these appeals were listed for final hearing on 15th February, 2007 and after detailed submissions made before the Court by the learned Counsel appearing for the appellant, as well as, learned A.P.P., Mr. A.J. Desai, the Court had passed final order on that day and the reasons are kept reserved for the discussion made herein under and reasons assigned the acquittal has been recorded.

3. It is the case of the prosecution that complaint was filed by one Shri J.R.

Patel, Agriculture Inspector, Mehsana for the offence punishable u/s 3 read with Section 7 of the Essential Commodities Act, 1955 and on account of violation of Clause 4, 5 and 21 of the Fertilizer (Control) Order, 1957. It is alleged that complainant, as well as, in-charge Quality Control Inspector, Mehsana had inspected the premises of Ijapura (Jethaji) known as Service Cooperative Society Ltd., of Village Ijapura, Tal.Mehsana on 9th September, 1986. The reason for visiting the premises of the appellant was because of receipt of one application from one of the members of the Co-operative Society, Rasiklal Chimanlal Patel. Upon inspection, the complainant found that as per the record mainly the stock register, last sale of Chemical Fertilizes Urea manufactured by KRIBHCO was not shown since 17th August, 1986. No sale was reflected in the stock register. Upon verification the Officer found that on the day of inspection 10 bags were there in the stock. As per stock register on 20th August, 1986 the closing stock was of 20 bags of Chemical Fertilizes Urea manufactured by KRIBHCO. On 9th September, 1986 during physical verification, the complainant found the stock of 10 bags. It is alleged that when closing stock was shown of 20 bags on 20th August, 1986 then how only 10 bags could be there with accused No. 1-society was the question. It is alleged that 10 bags of Chemical Fertilizes Urea was disposed of or sold without issuing bills in the proper format prescribed under the Fertilizer Control Order. Statement of one farmer member was also recorded by this Officer and it is alleged that accused Nos.2 and 3 had accepted the irregularities found by the Inspecting Officer. No misappropriation, malpractice, overpricing or other irregularities were noticed.

3.1 In the complaint, as well as, in the impugned judgment and order passed by the learned trial Judge, the Fertiliser (Control) Order, 1957 has been referred. But, the inspection was carried out on 9th September, 1986 and on that day the Fertiliser (Control) Order, 1985 was applicable, as the same was published in the Gazette of India Extra Ordinary Part-II and the order was made effective from that very day in exercise of powers conferred by Section 3 of the Essential Commodities Act, 1955. This is a Central Government Order and Clause 5 of the Order is practically similar to Clause 4 of Fertilizer (Control) Order, 1957. So, for the sake of brevity and convenience, I would like to reproduce the Clause 4 and 5 of the Fertiliser (Control) Order, 1957.

4. Display of stock position and price list of fertilisers.- Every dealer, who makes or offers to make a retail sale of any fertilisers, shall prominently display in his place of business-

(a) the quantities of opening stock of different fertilisers held by him on each day.

Explanation.- The actual stocks at any point of time during the day may be different from that of the displayed opening stocks to the extent of sale and receipt of such fertilisers up to the time of inspection during the that day;

(b) a list of prices or rates of such fertilisers fixed under Cl.3 and for the time being in force.

5. Issue of cash / credit memorandum.- Every dealer shall issue a cash or credit memorandum to a purchaser of a fertiliser in [Form M]. Comment Clause 4 of the Fertiliser Control Order of 1957 is not contravened if cash or credit memos are issued to a person non-existent because no form was prescribed by the controller- A dealer is required to give a cash or credit memorandum to a purchaser of fertiliser in such form as Controller of Fertiliser has not given any such direction. Question arises as to whether a dealer is liable to issue any cash memo even though no form was prescribed by the Controller and for non-issuance of cash memo or any defect in the cash memo a person can be said to have contravened Clause-4 of the 1957 Order so as to make him liable Section 7 of the Act. Form Cl.4 aforementioned it would be plain that if the controller has not given any direction prescribing the form of cash or credit memorandum, in that event the requirement of issuing cash memo in Cl.4 of the 1957 Order cannot operate. Prescription of form by the controller is sine qua non for casting an obligation upon a dealer to issue cash or credit memorandum under Cl.4 of the 1957 Order. In view of the foregoing discussions, it was held clearly of the view that the petitioner cannot be said to have contravened Cl.4 of 1957 Order.

4. Mr. Munshi, learned Counsel appearing for Mr. A.J. Patel, for the appellants and Mr. R.C. Jani, appearing for accused Nos.2 and 3 have pointed out various infirmities and the error committed by the learned trial Judge in evaluating the evidence, material contradictions in the oral evidence led by the prosecution witness. However, both of them mainly concentrated their argument on one legal aspect keeping all points open urged on merit. According to them, the judgment and order of conviction and sentence should be quashed and set aside because the procedural infirmity that has resulted into serious prejudice to the accused and this illegality be treated as fatal illegality because the judgment and order of conviction is delivered and passed by one Judge, who himself has not conducted the trial and had no scope to even notice the demeanour of all the witnesses normally in summary cases wherein gist of the evidence is being recorded. The Presiding Judge is supposed to try a summary case as if the Court tries summons case in view of the scheme contemplated under the Code of Criminal Procedure qua summary trials. In the present case, the prosecution was instituted on the strength of the complaint way-back in the month of August, 1987. The case against the accused was instituted otherwise than on the police report; but as the complaint was sent for investigation to Santhal Police Station in exercise of powers u/s 156(3) of the Code of Criminal Procedure, the Court conducted the case as a case instituted after submission of the final report by Police. On 21st November, 1987, the Police had submitted C-Summary, but the Court by passing speaking order decided to issue process against the accused as per provisions of Section 156(3) of the Code of Criminal Procedure. The case instituted for the offence under the Essential Commodities Act can be tried and the same has been tried, summarily. But the trial is concluded on 27th August, 1992. Depositions of witnesses have been recorded by more than one Presiding Judge. The process was issued on 18th January, 1988 by one another Presiding Judge and the plea

of the accused was recorded by the other Presiding Judge on 18th February, 1988. The evidence is recorded by third Presiding Judge. Issuance of process and recording of plea in a case which requires to be tried as summons case can be said to be a commencement of trial.

5. So, in the present case the trial was also commenced by one Presiding Judge but the same was concluded by the other. Original Records and proceeding are before the Court. Having considered the scheme of Section 326 of the Code of Criminal Procedure, vis-a-vis the other relevant provision, it is amply clear that in summary case also, the accused cannot claim successfully that has been prejudiced, unless it is established that the evidence of the trial has not been recorded by same.

6. Learned Advocate, Mr. Munshi, has relied upon several decisions of the Apex Court. One of the decisions is in case of Raj Kumar Agrawal and Anr. v. State of Bihar reported in 2001 (4) Crimes 264. The Patna High Court while dealing with the Criminal Appeal against the order of conviction and sentence for the offence punishable under the Essential Commodities Act has observed that Section 326 of the Code of Criminal Procedure empowers a Magistrate to record the order of conviction on evidence partly recorded by the predecessor. But, Sub-section 3 of Section 326 of Criminal Procedure Code clearly mentions that the aforesaid provision under the main Section would not be applicable to the trial held in summary manner. It is rightly observed by the Patna High Court that because the structure of Sub-section 3 of Section 326 of Criminal Procedure Code is based on a non-obstante clause, it shall have its full operation. So, in the event of transfer of a Presiding Judge or transfer of a case from one Judge to another Judge or in case of a transfer of a case from one Court to another Court, the Presiding Judge is bound to hold a de novo trial. Section 326 of Criminal Procedure Code provides about conviction or commitment on the evidence partly recorded by one Magistrate and partly by other. Recording of plea or taking of a cognizance can be said to be a commencement of trial. Undisputedly it is not commencement of recording of evidence in trial. For the sake of brevity and convenience, it is necessary to reproduce Section 326 of the Code of Criminal Procedure, including relevant Sub-section 3 of Section 326.

326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

(1) Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate. who has and who exercises such jurisdiction; the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witness whose evidence has already been recorded is

necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of Sub-Section (1).

(3) Nothing in this Section applies to summary trials or to cases in which proceedings have been stayed u/s 322 or in which proceedings have been submitted to a superior Magistrate u/s 326.

6.1 Mr. Munshi, has concentrated his arguments on this aspect. Obviously the Court shall have to say whether in the present case it is possible for the Court to observe that conviction recorded by the Judge other than a Judge who had recorded the plea can be said to be bad in law and therefore requires to be set aside or not.

7. The Andhra Pradesh High Court in case of Ramnivas Bung v. State of Andhra Pradesh reported in 1996 (1) Crimes 426 (H.C.) has observed as under: "The Sessions Judge has rightly found that the trial by the learned Metropolitan magistrate was vitiated since the evidence has been recorded by another Magistrate who without passing the judgment, has been transferred. His successor has passed the judgment, which is illegal as violative of Section 326, Sub-clause (3) of Criminal Procedure Code. It has also to be mentioned that the alleged offence has been committed in 1991 and the offence alleged is adulteration of ground nut oil and the petitioner is only a small kirana merchant. It is not in the interests of justice to order retrial, on the facts of this case."

8. The Andhra Pradesh High Court in case of Chandana Surya Rao v. State of Andhra Pradesh reported in 1989 Cri.L.J. 2077 has observed as under: SThus, from the above decisions, it is clear that the Judge or the Magistrate, who tries the S.T.C. must give his judgment and if he is transferred without pronouncing judgment, the succeeding Sessions Judge or the Magistrate has to start the trial afresh and pronounce the judgment. In the present case, admittedly, the Sessions Judge who examined P.Ws. 1 and 2, was transferred and the succeeding Sessions Judge pronounced the judgment. Therefore, the same is vitiated as per Section 461(1) of the Code of Criminal Procedure. As per Section 12AA(f), the offences under the Essential Commodities Act must be tried by the Special Court. Therefore, they are being tried by the Sessions Judge.

9. The Patna High Court in case of Prafulla Pradhan v. State of Bihar reported in 1998 (1) Crimes 295 has held that using evidence of witnesses recorded by Predecessor in summary trial offence which Magistrate was not competent in view of Section 326(3) of Criminal Procedure Code renders order of conviction and sentence bad in law.

9.1 In the same way, the Karnataka High Court in case of Ramadas Kelu Naik Vs. V.M. Muddayya and Another, has held that in a summary trial evidence recorded by a Magistrate cannot be considered by its successor and proceed from that stage onwards. This irregularity is material irregularity and the same is not curable. Even the consent by the counsel on both sides cannot confer such jurisdiction on the succeeding Magistrate.

10. The Rajasthan High Court in case of State of Rajasthan v. Rajesh Agrawal and Ors. reported in 4 1994 CCR 2971; wherein the prosecution instituted for the offence punishable under the Essential Commodities Act, one pointed question was raised before the Court and Rajasthan High Court has answered that, "The law, as it stands today, gives no power to the Succeeding Judge to proceed with the trial from the stage at which his Predecessor had left it, as in view of Sub-section (3) of Section 326 of Code of Criminal Procedure. The provision of Section 326 of Code of Criminal Procedure are not applicable to the summary trial and there is no option except to order for de novo trial." The correctness of the order asking the parties to enter into de novo trial was assailed before the Rajasthan High Court and Rajasthan High Court observed that the learned Special Judge of Essential Commodities Cases Court, Jodhpur has therefore, committed no illegality in ordering for de novo trial.

11. So, it is true that if the evidence relied upon by the Judge recording conviction has not been recorded by that very Presiding Judge and has placed reliance on the evidence recorded by any other Presiding Judge of the Court dealing with a criminal case adopting the procedure of summary trial, then such order of conviction would not sustain and it would not be advisable in such cases to remand the matter for de novo trial because again it is likely to cause the same prejudice. In some cases, the matter can be remanded back for de novo trial but such exercise after lapse of several years normally should not be adopted, as it would not be prudent.

12. In the present case, as mentioned earlier, the evidence in the case against both appellants has been recorded by one Presiding Judge and in couple of months he has concluded the trial, so the ratio propounded by the above cited decisions and finding recorded of course is in favour of Mr. Munshi, in principle would not help the accused. In every case tried summarily, the Presiding Judge is supposed to record the substance of the evidence and the judgment should contain number of statement and the reasonings of the finding. In the present case, the Judge who has recorded the substance of the evidence is the very Judge who has recorded the evidence. So, the above cited decisions would not help the appellants, in present case.

13. The Court is of the view that more substance is there in the submissions made by Mr. Munshi, on the other grounds of merits.

14. The basic allegation is that on purchase of one bag of the chemical fertilizer, the father of Prosecution Witness No. 1, Kanubhai Khodidas had not given the

bill. Statement of Khodidas Maganbhai Patel was recorded by the Inspecting Officer but this very witness has not been examined. In absence of evidence of Khodidas Maganbhai Patel, the version of Kanubhai Khodidas Patel cannot be considered and shall not be considered as hearsay evidence. Statement of Kanubhai Khodidas Patel was also recorded. The evidence of Kanubhai Khodidas at Exh.24 simply says that he had purchased chemical fertilizer of Urea from the Society. In the year 1986 he had purchased the fertilizer of one bag but neither he had demanded bill nor the Society had issued any bill to him. One of the documents seized was produced by the accused that too from the record of Co-operative Society, reveals that Bill No. 642 of the amount stated by Prosecution Witness No. 1 in his statement recorded by the Inspecting Officer, was issued and the same is the bill issued from the Sale Register. During the course of trial, the said documents were produced with the list Exh.40. The genuineness of the record was not assailed even by the prosecutor who conducted the trial. There is no reason for the trial Court to ignore these documents when they are part of the record of the accused No. 1-Co-operative Society. The Inspecting Officer ought to have seized this record if they were suspecting any interpolation or overwriting. The name of father of Prosecution Witness No. 1 is in the middle of the list of the members who were given the chemical fertilizer Urea. The Courts are always viewing first and last entry in the Register with more doubt especially when the same is relied upon either by prosecution or defence side. But, here that is not the case. No evidence of other members were available before the trial Court. So, it was not safe for the Court to link the accused with the crime on the evidence of this Kanubhai Khodidas Patel.

15. Even, otherwise the status of the accused No. 1-Co-operative Society was not of a dealer or distributor within the meaning of Fertilizer Control Order, 1985. Here, the Court would like to consider the observations made by the Apex Court in case of State of Punjab and Others Vs. Guno Majra Cooperative Agriculture Service Society Ltd., The Apex Court has observed that, "A perusal of Clause (2) (f) and Clause (7) of the Order shows that any person carrying on the business of selling of fertilizers has to obtain a certificate of registration which is to be granted under Clause (9) of the Order. The respondent is the Agricultural Service Co-operative Society and since the respondents-society is not carrying on any business in fertilizers, therefore, the society is not required to obtain a certificate of registration." Of course, the Apex Court was dealing with altogether a different set of facts and here in the present case, none of the accused has been prosecuted for selling chemical of fertilizers without certificate of registration. But the Court cannot ignore the entire scheme of Fertilizer Control Order. The Fertilizer Control Order governs various areas relating to its manufacture, store, sell, quality standards. So, every such aspects can be regulated well by the implementing agency. So, as per the example the authorized Officer can draw a sample of the fertilizer to test the quality standard even from purchaser and responsible person can be prosecuted if the sample of fertilizer is not able to stand to test. Here, the allegation against the Co-operative Society is that while

distributing the chemical fertilizer, it has not issued bill or even debit memo. On plain reading of the above referred Clause viz. No. 4 and 5, it is inferable that it applies to the category of the person, who fallen in the category of dealer. The dealer is defined in Clause 2 (f) and as per definition dealer means a person carrying on the business of selling fertilizers. Undisputedly, the co-operative Society cannot be equated with pool handling agency because it cannot define in Clause 2 (f) or any agency which can be said to be carrying on business of selling fertilizers. Therefore, the ratio of the above cited decision of the Apex Court would help the appellant.

16. The other point which requires to be considered is that as discussed earlier there is no charge or otherwise even allegation of overpricing or black marketing or mishandling of stock of fertilizers. When the distribution of bags of chemical fertilizers was regulated by entering names in the Register price wise and quantity wise and as emerged from the explanation given by the accused-persons and mainly the documents submitted with list Exh.40, it is not possible to link any of the accused with the crime in light of the ratio of the deceased in case of *Nathulal Vs. State of Madhya Pradesh*, . In this case, the Apex Court was dealing with a criminal case instituted for the offence punishable u/s 7 of the Essential Commodities Act and question was whether mens rea is essential ingredients in the offence punishable u/s 7 of the Essential Commodities Act. It would be beneficial to reproduce the relevant part of paragraph No. 4 of the judgment.

(4) The law on the subject is fairly well settled. It has come under judicial scrutiny of this Court on many occasion. It does not call for a detailed discussion. It is enough to restate principles. Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof;

17. The Court is conscious about one established principle of criminal jurisprudence that intention mens rea even can be inferred from the circumstance and the totality of the evidence led by prosecution to prove the charge. The crucial question in such a fact situation is how to disprove the mens rea. In *Halsbury's Laws of England*. 3rd Edition, Col.10, at p.283 says thus. "When the existence of a particular intent or state of mind is a necessary

ingredient of the offence, and prima facie proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally, or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed, would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief.

18. Ultimately, the object is to control the distribution of the chemical fertilizers in general public and the interest of the persons who are in real need of such chemical fertilizers. Merely, because the Co-operative Society was not meticulous in giving a debit memo or credit memo or typed document or distribution voucher to its member or member himself has failed in obtaining such document meticulously from the Office of Society where he himself is a member at the time of taking his share or portion of chemical fertilizer after paying the price fixed, then mens rea cannot be inferred. In case of Nathulal (Supra) the Apex Court had examined after posing a question in paragraph No. 5 of the judgment, the facts which are narrated in paragraph No. 6 of the judgment, and observed that "(he) i.e. appellant could not, therefore, be said to have intentionally contravened the provisions of Section 7 of the Act or those of order made u/s 3 of the Act." Of course, the judgment in case of Nathulal (Supra) is a majority decision while delivering the decanting judgment Mr. Justice J.C. Shah on facts has observed that, "I am, therefore, of the view that no serious view of contravention of provision of Madhya Pradesh Food Ground Dealers Licence Order, 1958 may be taken."

19. Here, in the present case, the accused No. 1 is a Co-operative Society and accused Nos. 2 and 3 in the capacity of persons managing the aforesaid co-operative society, as it does not fall in the category of dealer, they cannot be linked with the offence punishable u/s 3 read with Section 7 of the Essential Commodities Act. There is no reference to violation of either Clause 4 or 5 or 21 of the Fertilizer (Control) Order, 1957. On the contrary, the Clause 21 of the Fertilizer Control Order would not even be attracted on the facts that were placed before the trial Court. For these reasons the Court passed the following order on 15th February, 2007.

Both the Criminal Appeals are allowed. The judgment and order of conviction and sentence dated 9th September, 1992 rendered by the learned Special Judge, Mehsana in Summary Case No. 2 of 1988 is hereby quashed and set aside. The appellants are acquitted of all the charges levelled against them. Fine, if paid by the appellants, is ordered to be refunded to them.

Bail Bonds executed by the appellants-accused shall stand discharged. Order and Direction accordingly.