

(2014) 11 KL CK 0036
In the High Court Of Kerala
Case No : Crl. Rev. Pet. No. 1692 of 2002

Rajeev

APPELLANT

Vs

Food Inspector

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 11(1), 13, 13(2), 13(2B), 13(3)

Citation : (2014) 11 KL CK 0036

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : Santhosh Subramanian, Sheji P. Abraham, E.A. Thankappan, Sherry J. Thomas and S. Sreekumar, Advocate for the Appellant; K.K. Rajeev, Public Prosecutor, Advocate for the Respondent

Judgement

A. Hariprasad, J.—In this criminal revision, conviction of the revision petitioners/accused under the provisions of the Prevention of Food Adulteration Act, 1954 (in short, "the Act") is under challenge. The trial court tried them for offences punishable under Sections 2(ia)(b)(j), 7(i)(iii) and 16(1)(a)(i) of the Act read with Rules 23 and 50 and A.16.16 of Appendix B of the Prevention of Food Adulteration Rules, 1955 (in short, "the Rules") and convicted them for all the said offences. Aggrieved by the conviction and sentence, the revision petitioners approached the Sessions Court in a criminal appeal. In the appeal, learned Additional Sessions Judge partly modified the conviction and sentence. The conviction under Section 7(i) read with Section 16(1)(a)(i) of the Act was confirmed. Against that conviction, the accused persons have come up in revision.

2. The allegations in the complaint, filed by the Food Inspector, in brief, are as follows: 1st accused is the manager of Parisudham Restaurant attached to Panchami Tourist Home and Bar Hotel at Vazhakkulam. 2nd accused is the owner and licensee of the said hotel. On 01.06.1995 at 2.30 p.m., the complainant visited the hotel and after disclosing his identity, he gave notice to the 1st accused. The complainant purchased 600 grams of lime pickle kept in a steel

vessel in the restaurant of the accused. It is alleged that the food item was kept for sale. Sampling was done in accordance with law. One sample was sent for analysis to the Public Analyst with the prescribed memorandum. The other two samples were forwarded to the Local Health Authority along with two copies of Form VII memorandum. The Public Analyst, reported that the sample purchased from the accused was adulterated. Therefore, the prosecution was initiated against the accused persons for violating the law. On receipt of intimation under Section 13(2) of the Act, the 1st accused applied for sending the second sample to the Central Food Laboratory ("CFL", in short). Accordingly the second sample was sent to CFL and report of CFL was obtained. It also revealed that the sample was adulterated. Thereafter, the learned Magistrate completed the formalities and the accused were tried. In the trial, three witnesses were examined on the side of the prosecution and one on the side of the defence. Exts. P1 to P20 were marked by the prosecution.

3. Heard Shri Santhosh Subrahmanian, the learned counsel for the revision petitioners and Shri K.K. Rajeev, the learned Public Prosecutor.

4. Learned counsel for the revision petitioners argued that the conviction and sentence is against law and evidence in the case. It is the grievance of the revision petitioners that the courts below did not consider the fact that the allegations in the complaint raised by the Food Inspector have no legal basis. It is further contended that during trial, the report of the Public Analyst was not marked. The accused thereby lost an opportunity to challenge the correctness of the report of CFL as it is in complete variance with the report of the Public Analyst. Further, the courts below did not consider the worth of testimony of D.W. 1, a Professor in Chemistry, Department of Nutrition, Kerala Agricultural University.

5. The alleged detection of food adulteration was on 01.06.1995. Learned counsel for the revision petitioners, therefore, contended that there are certain vital errors committed by the courts below regarding the law applicable to the facts and thereby the substratum of the prosecution has become shaky.

6. Learned counsel for the revision petitioners further submitted that the courts below should have marked the report of the Public Analyst. Although the statute, under Section 13(3) of the Act, says that the report of the Director of CFL will supersede the report of Public Analyst, for effective defence of the case, the report of the Public Analyst should have been marked, contended Sri Santhosh Subrahmanian. According to the revision petitioners, that omission caused extreme prejudice to them. P.W. 1 has deposed about the report. I am of the view that the report of the Public Analyst can be marked in this proceedings for the reason that it is part of the records. Besides, it is the basis for initiation of prosecution. I find no reason to remand the case for that purpose alone. It is true that it cannot be the basis for conviction of the accused by virtue of Section 13(3) of the Act. Nonetheless, for the completeness of discussion, I find that marking the same may be convenient. Therefore, the report of the Public Analyst

is marked as Ext. P21.

7. Learned counsel for the revision petitioners contended that the Rules in its original form did not prescribe any standard for pickles. Rule 28 is relating to use of coal tar food colours. Rule 28 clearly shows the list of permitted coal tar food colours or mixture thereof. The provision reads as follows:

"Coal tar food-colours which may be used.- No coal tar food colour or a mixture thereof except the following shall be used in food:

In this context, Rule 29 is also relevant. It speaks about the food items in which coal tar food colours are permitted to be used. The provision reads as follows:

"Use of permitted coal tar food-colours prohibited.-Use of permitted coal tar food-colours in or upon any food other than those enumerated below is prohibited:--

- (a) Ice-cream including mixed ice-cream,
- (b) Dairy products except milk, dahi, butter, ghee, cheese, chhanna, condensed milk, cream, skimmed milk, butter milk, toned milk, double toned milk, recombined milk, skimmed milk, chhanna, standardised milk chhanna, khoa, dry whole milk, dry skimmed milk and baby foods,
- (c) xxxx (omitted)
- (d) xxxx (omitted)
- (e) Biscuit, pastry, confectionery, savouries like dalmoth, Mongia, Phul Gulab, Papar, sago or plain Dal Biji, wafer and similar products and sweets,
- (f) Fruit products except as otherwise provided in Appendix B,
- (g) Non-alcoholic beverages except tea, cocoa, malted foods and coffee,
- (gg) Alcoholic beverages(for the period up to and inclusive of the 21st May, 1977),
- (h) Custard powder,
- (i) Jelly crystals,
- (j) Soup powder,
- (k) xxxx (omitted)
- (l) Processed or preserved vegetables,
- (m) Flavouring agents,
- (n) Ice-candy,
- (o) Sweetened ice, thread candies and similar products."

Rule 28 of the Rules was substituted by notification No. GSR 133 dated 23.01.1973. Rule 29 also underwent a change as per notification No. SRO 2755

dated 20.11.1956. It is, therefore, contended that coal tar food colours mentioned in Rule 28 are permitted to be used. Since Rule 29, as it stood at the inception, did not permit the use of coal tar food colour in any food item other than those mentioned in the said Rule, it can be definitely said that use of coal tar colour of the description in Rule 28 would amount to adulteration, if used in any food other than the items mentioned in Rule 29. But, it is to be seen that no standard was prescribed for pickles at the time when the Rules were framed.

8. Learned counsel for the revision petitioners contended that for the first time, standard was prescribed for pickles with effect from 23.02.1991. Appendix B, A.16.16, introduced by notification No. GSR 729 (E) dated 23.08.1990 (w.e.f. 23.02.1991), reads as follows:

"A.16.16.- PICKLE means the preparation made from sound, clean, raw or sufficiently mature fruits or vegetables or a combination of both free from insect damage or fungus attack preserved in salt, acid, sugar or any combination of the three. The pickle may contain onion, garlic, ginger, sugar, jaggery, edible oils, spices, spice extract or oil of turmeric, pepper, chillies, fenugreek, mustard seed or powder, vegetable ingredients, asafoetida, bengal gram, lime juice, lemon juice, green chillies, vinegar or acetic acid, citric acid, dry fruit including raisins and fruit nuts.

Combination of pickles may be:

(i) Pickles in citrus juice or brine.-The percentage of salt in covering liquid shall not be less than 10 per cent when salt is used as major preserving agent. When packed in citrus juice, acidity of the covering liquid shall not be less than 1.2 per cent calculated as citric acid. Soluble calcium salt and permitted preservatives may be used in such type of pickles. Pickles shall be free from added salts of copper, alum and mineral acids.

(ii) Pickles in oil.- The fruit or vegetable percentage in the final product shall not be less than 60 per cent. The pickle shall be covered with oil so as to form a layer of not less than 0.5 cm above the contents or the percentage of oil in pickle shall not be less than 10 per cent.

The pickle shall be free from added copper, alum and mineral acid. It may contain rapeseed (rai), ajwain, saunf, black pepper and like spices, etc. Permitted preservatives may be used in pickles.

(iii) Pickles in vinegar.- Pickles in vinegar mean the preparation from sound, clean, raw or sufficiently matured fruits or vegetables free from insect damage or fungus attack, which have been cured in brine or dry salt or salted and dried stock with or without natural fermentation. It shall contain vinegar or acetic acid and the percentage of acid in the fluid portion shall not be less than 2 per cent w/w calculated as acetic acid. It may contain sugar, whole or ground or semi-ground, spices, dried fruits, green and red chillies, ginger, etc., dry fruit. Citric acid may also be added in such type of pickles. Spice extract or essences may

also be used. The drained weight of the product shall not be less than 60 per cent. The pickles shall be free from added copper, mine acid, alum or added coal tar colours and shall show no sign of fermentation. The product shall be reasonably free from sediments. Permitted preservatives may be used in pickles."

The provisions in the Appendix would reveal that earlier there were three types of pickles visualised, viz., pickles in citrus juice or brine; pickles in oil and pickles in vinegar. Different specifications are made for these three types of pickles. It is also specified therein that the pickles shall be free from added salts of copper, alum and mineral acid. That apart, pickles in vinegar shall not contain added coal tar food colours. According to the learned counsel for the revision petitioners, on the date of complaint, this provision existed in the Rules and analysis of the food item should have been done in accordance with the stipulations in the Appendix as it then existed. It is also contended that subsequently w.e.f. 11.04.2000, Appendix B, A.16.16 underwent a change by notification No. GSR 695(E) dated 11.10.1999. It came into effect on 11.04.2000. There, it has been added that pickles shall be free from added synthetic colours. But, it is very important to note that this change in the provision will have no effect in this case as the detection was in 1995 and the amendment was not intended to be retroactive. Therefore, the prosecution will have to go by the standard prescribed w.e.f. 23.02.1991. It can be seen that at present the standards prescribed for pickles in Appendix B, A.16.16 is completely different. But, the prohibitions that it shall be free from copper, mineral acid, alum or synthetic colours and that there shall be no sign of fermentation are retained. However, these things are extraneous for our consideration and will only have an academic value.

9. Shri Santhosh Subrahmanian vehemently contended that if we consider Ext. P21 report by the Public Analyst and Ext. P14 report of the Director of CFL, we will find a clear mismatch between them. According to the learned counsel, the incongruity can either be on account of faulty analysis or the difference in the identity of samples. It is also contended that the glaring incongruity in the said reports will go to the root of the prosecution case. In answer to this argument, learned Prosecutor contended that as per Section 13(3) of the Act, the certificate issued by the Director of CFL under Sub-section (2-B) shall supersede the report given by the Public Analyst under Sub-section (1) of Section 13. Section 13(2-B) of the Act says that on receipt of the part or parts of the sample from the Local (Health) Authority under Sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in Clause (b) of Section 11 (1) are intact and the signature or thumb impression is not tampered with and despatch the part or one of the parts of the sample under its own seal to the Director of CFL. He, in turn, shall sent a certificate to the court in the prescribed form within one month from the date of receipt of the part of sample specifying the result of the analysis. Bidyadhar Jena Vs. State of Orissa, to support his contention that the report of the Director, CFL will supersede the report of the Public Analyst. It is true that the report of the Director of CFL may be used as evidence of the facts stated therein in any proceeding under the Act, if it supersedes the report of the

Public Analyst as per Sub-section (5) of Section 13 of the Act. At the most, it can be contended that no adjudication can be made in respect of guilt of the accused on the basis of the report of the Public Analyst, if it is superseded by the report of the Director, CFL. Here, the question raised is regarding the acceptability of the report of the Director, CFL. On a look at Ext. P21, it can be seen that in the analysis of the Public Analyst, synthetic colour (coal tar dyes) was identified. The identified coal tar colours were sunset yellow FCF (colour index 15985) and carmoisine (colour index 14720). It is the contention of the defence that if the two colours were identified by the Public Analyst on a proper analysis, there is no chance for any one of them missing when a homogeneous sample was analysed by the Director, CFL. Now, if we look at Ext. P14, the CFL report, it can be seen that synthetic colour - sunset yellow FCF alone was detected in the sample sent from the court to the CFL. How the other colour, viz., carmoisine, detected by the Public Analyst disappeared has not been established by the prosecution. In this context, learned counsel for the revision petitioners relied on the testimony of D.W. 1. He was working as Professor of Chemistry, Department of Nutrition affiliated to the Kerala Agricultural University, Mannuthy. He was examined to speak about the method of analysis possible to detect food adulteration. To a specific question whether from a well-mixed sample of lime pickle, if on analysis coal tar colours like sunset yellow, carmoisine, etc. were detected, was it possible, when another part of the same sample was analysed after a few months, that anyone of the colours would disappear. D.W. 1's answer to this question was that there is no possibility provided the material was fit for analysis. Learned defence counsel relying on Anil Sharma and Others Vs. State of Jharkhand, contended that it is well settled that equal treatment should be given to the evidence of the prosecution and the defence witnesses. This proposition is beyond any pale of dispute. It is, therefore, contended that the prosecution has to establish the reason for the divergence of expert opinions as seen on Exts. P14 and P21. Decision rendered by a Division Bench of this Court in Food Inspector v. Karingarappully Co-op. M.S. Society Ltd. (1986 KLT 174) is also pressed into service to contend that the burden of proof resting on the accused in a prosecution under the Act is not as onerous as that resting on the prosecution. The observations in paragraphs 21 and 22 are also relevant for our purpose. They are:

"21. What is the effect of Public Analyst's report? Sub-section (5) of S. 13 of the Act states, inter alia, that the report of the Public Analyst may be used as evidence of the facts stated therein in any proceeding under the Act. The report is legal evidence even without the examination of the Public Analyst. If it is not challenged by the accused, certainly the court would be justified in acting upon it. It is open to the accused to challenge the report either by citing the Public Analyst and examining him or by adducing independent evidence or by relying on any material intrinsic in the report or by causing one of the remaining samples to be sent to the Director of Central Food Laboratory for analysis or in any other legally permissible manner. If the accused does not choose to challenge the

report in any manner known to law, the court would certainly be justified in acting on the report. If the report is challenged as aforesaid, the court has to consider the challenge and the materials presented and arrive at a conclusion. If the court feels any doubt about the contents of the report, it is open to it to summon the Public Analyst and examine him as a court witness. As observed in Rajan's case (1976 KLT. 74) in the absence of definite materials, it is not open to the accused to say that it is erroneous and should not be acted upon. 22. Of course, mistakes could be committed in the process of analysis; there could be mistakes committed in recording the result of analysis; there could be mistakes in calculation of the result of the analysis. Such mistakes could be brought to light by examining the Public Analyst and in some other appropriate way. Without doing so, it would not be possible to reject the report of the Public Analyst by a mere process of reasoning without the support of any data, scientific or otherwise. In Savanna's case (1985 KLT. 483), Karunan's case (1985 KLT. 523) and certain decisions of other High Courts referred to earlier, it has been concluded that there must have been an error in analysis or calculation from the mere circumstance that the milk fat content exceeded the minimum and the milk-solid-not-fat content was deficient."

It is submitted by the defence counsel that neither the Public Analyst nor the Director, CFL was examined to explain away the differences in the conclusions in Exts. P14 and P21. It is, therefore, contended that the prosecution has failed in its duty to establish the allegation of adulteration against the accused.

10. Another important argument raised by the defence counsel is regarding the findings in Exts. P14 and P21 that synthetic colours (coal tar dyes) were identified in the lime pickle taken from the hotel of the accused. According to the learned counsel for the revision petitioners, the statute or the rules thereunder did not authorise an analysis for synthetic colours at the material time. From the discussions made above, it is evident that originally in the Rules, there was no standard prescribed for pickles and later, by changes in Appendix B, pickles were added to the list of articles and initially it was directed that it shall be free from coal tar colours. Appendix B, A.16.16 w.e.f. 11.04.2000, says that pickles shall be free from added synthetic colours. The detection of the offence was prior to this addition. Therefore, there was no reason for analysing for synthetic colour, contended the learned counsel for revision petitioners. None of the Officers of the Laboratories were examined to explain away the method of analysis and how they detected synthetic colours.

11. Learned counsel for the revision petitioners relying on Ramjee Prasad and Another Vs. State of Bihar, contended that the Supreme Court had taken note of the difference between the report of the Public Analyst and that of the CFL. Ultimately on analysis, the Supreme Court acquitted the accused finding that the accused suffered prejudice. The defence counsel, therefore, contended that the same principle has to be applied in this case as well. In Charanji Lal Vs. State of Punjab, , the Supreme Court in paragraph 11 of the judgment considered the

inconsistencies in the report of the Public Analyst and the Director, CFL and found that the differences were not properly considered while convicting the appellant. Learned defence counsel, therefore, contended that this is a matter causing prejudice to the accused and it was recognized by the Supreme Court also. Relying on *Dinesh K (Vendor) v. State of Kerala* (2009 (2) FAC 154), it is contended by the learned counsel for the revision petitioners that the report of the Director, CFL can be challenged at the time of trial. It is, therefore, contended that Ext. P14 is not a final word on the correctness of analysis. It cannot be accepted in the light of the unexplained differences of opinion seen on Exts. P14 and P21.

12. From the above discussion, it can be seen that the prosecution has not established by reliable evidence as to why one of the coal tar food colours disappeared when it was sent for analysis by the Director, CFL. That apart, as per the provisions of the Rules mentioned above, why was a test for synthetic colours made and what test was performed are not explained. Therefore, the contention of the defence that the prosecution failed to discharge its burden of establishing guilt is more probable. That apart, the case of the defence is that lime pickle was not intended for sale as such. It was only kept in the hotel to be served as a dish along with meals served to the customers. This argument, however, may not hold good if actually it was proved to be adulterated. But in the absence of any reliable evidence, I find that the conviction of revision petitioners is not sustainable in law.

In the result, the revision petition is allowed. Conviction of the revision petitioners under Section 7(i) read with Section 16(1)(a)(i) of the Act in CrI. Appeal No. 339 of 2000 on the file of the Additional Sessions Court (Adhoc-II), Ernakulam is hereby set aside. They shall be set free forthwith, if not wanted in any other case. Their bail bonds are cancelled.

All pending interlocutory applications will stand dismissed.