
(1956) 02 CAL CK 0024
In the Calcutta High Court
Case No : Criminal Appeal No. 224 of 1954

S. Dutta and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 29-02-1956

Acts Referred:

Bengal Drugs Rules, 1946 — Rule 5
Criminal Procedure Code, 1898 (CrPC) — Section 32
Drugs and Cosmetics Act, 1940 — Section 25(3), 27
Penal Code, 1860 (IPC) — Section 120B, 420

Citation : AIR 1959 Cal 427 : (1959) CriLJ 829

Hon'ble Judges : S.K. Sen, J;J.P. Mitter, J

Bench : Division Bench

Advocate : Ajit Kumar Dutt and Anil Kumar Bose, for the Appellant;J.M. Banerjee, for the Respondent

Judgement

J.P. Mitter, J.—The appellants, S. Dutta and Bhupati Naha, were tried by a learned Presidency Magistrate, Calcutta. They were both convicted u/s 420, read with Section 120B of the Indian Penal Code as also u/s 27 of the Drugs Act, 1940. Appellant S. Dutta was also convicted u/s 420 of the Indian Penal Code. In respect of the offence u/s 420 read with Section 120B of the Indian Penal Code, appellant Bhupati Naha was sentenced to undergo rigorous imprisonment for 8 months. He was also sentenced to rigorous imprisonment for 8 months in respect of his conviction u/s 27 of the Drugs Act. The two sentences imposed upon him were, however, ordered to run concurrently. The other appellant Section Dutta was sentenced to rigorous imprisonment for 3 months in respect of each of the three convictions, but the sentences were directed to run concurrently.

2. Appellant Naha was, at all material times, the proprietor of Messrs. Chandemerdaya & Co., while appellant Dutta, who is a nephew of Naha, was the proprietor of Messrs. Bhabani Medical Stores. Dutta was also a salesman of Chandemardaya & Co. The said charges were the outcome of the appellants' dealings in a drug described upon the bottle containing the drug as

"Oil Olive.

blended and bottled by Chandemardaya & Co., with oleum olive of Italy."

The drug when tested and / or analysed was found to contain a percentage of arachis oil. Upon each of the bottles containing the drug appeared "Harries Hart & Co. Ltd., Blackley, Manchester."

3. The charge of conspiracy against both the appellants was to the effect that they were parties to a criminal conspiracy to cheat divers persons by selling to them misbranded drug, to wit, bottles of alleged olive oil representing them to contain olive oil of medicinal quality, which they would not have bought had they known the same to be misbranded drug. The charge of cheating against appellant S. Dutt was to the effect that on or about the 7th day of January, 1953, he cheated D.R. Mehta, P.W. 4. by selling six bottles of the said misbranded drug, falsely representing them to contain genuine olive oil of medicinal quality. The third charge against each appellant was for contravention of Section 18(a) (i), (ii) and (iii) and Section 13(c) read with Section 17, (a), (c) and (e) of the Drugs Act, 1940 and with Rule 62 (2 and 3) of the Bengal Drugs Rules, 1946.

4. The prosecution case against the appellants was as follows: On or about April 27, 1951, Bhupati Naha, as proprietor of Messrs. Chandemardaya & Co., applied for license to sell drugs. This application was rejected. On or about February 5, 1952, appellant S. Dutta, as proprietor of Bhabani Medical Stores, applied for a similar license. No order on the application has yet been passed. On or about December 18, 1952, Bhupati Naha applied for a drug manufacturing license. This application was rejected on or about March 17, 1953. At no material time did either of the appellants possess either a license to sell drugs or a license to manufacture drugs. On or about April, 1, 1953, an Inspector of Drugs named T. Rai Mahasay seized some 7 bottles of the offending drug when appellant S. Dutta was in the act of selling some 12 bottles of the said drug to one Harilal Mehta, proprietor of Bharatiya Medical Stores of 55/73, Canning Street, Calcutta. The samples taken of this drug thus seized were in due course forwarded to the Government Analyst for test which revealed that the drug contained a percentage of arachis oil. It was also found that the alleged olive oil did not conform to B. P. specification. Divers attempts were made to serve each of the appellants with the analyst's report of the said test, but the appellants refused it. After compliance with certain formalities, the Drug Inspector filed a complaint on or about August 14, 1953.

5. The defence of each of the appellants was that he had not conspired with anyone to cheat anybody, that no offence of cheating had been committed or proved and that the drug in question having been blended, it had not been put forward as pure olive oil of the B. P. standard. Each appellant filed a lengthy written statement off his defence. It was in the main argumentative, but the point stressed was that by reason of the label which expressly stated that the drug was blended, the drug in question had not been put in the market as pure

olive oil. In view of the arguments addressed to us on behalf of the appellants, it is not necessary to give the details of the respective written statements filed by the appellants.

6. Mr. Ajit Kumar Dutta appearing on behalf of the appellants argued, firstly, that there was no evidence in support of the charge of conspiracy to cheat, nor any in respect of the charge as to cheating. Mr. Dutta next argued that in view of the provision contained in Sub-section (3) of Section 25 of the Drugs Act (Act XXIII of 1940) whereby any document purporting to be a report signed by a Government Analyst is conclusive evidence of the facts stated therein, it was incumbent upon the prosecution to establish that full protocols of the tests applied in the case had been sent along with the report and that in the absence of such protocols the report mentioned in Section 25(3) could not be held to be conclusive evidence of the drug in question having been mixed with arachis oil.

7. In our view, the first point urged by Mr. Dutta must succeed. Mr. J.M. Banerjee on behalf of the State referred to the label upon each bottle as representing that the contents of the bottle were olive oil blended with olive oil of Italy and that the manufacturers thereof were Messrs. Harries Hart & Co. of Blackley, Manchester. Of the buyers, P. W. 4 D.R. Mehta was one. The charge of cheating levelled against appellant S. Dutta was to the effect that on January 7, 1953, he had cheated D.R. Mehta by falsely representing to him that the Olive Oil in question was genuine olive oil of medicinal quality. Witness D.R. Mehta, however, did not testify to any false representation having been made to him by Dutta or that he had been induced to buy the drug by any representation that might have appeared upon the label. With regard to the evidence of Harilal Mehta, P. W. 19 we find that he had been dealing in drugs, including olive oil, for upwards of thirty years. As a dealer in Olive Oil he knew that the Olive Oil offered to him for sale was not of the B. P. standard, for, according to his own evidence, "all products of B. P. standard must bear the letters" B. P. on the label. It is true that in the course of his evidence-in-chief he deposed to have placed an order for one dozen Olive Oil of B. P. Standard from appellant S. Dutta, but it is clear from the rest of his evidence that he could not have been misled as to the quality of the oil which he was purchasing nor could he have been induced to buy the drug in question upon any misrepresentation. In fact, nowhere in his evidence did he depose to have been induced by any false representation to purchase the offending drugs from S. Dutta. The charge of cheating must accordingly fail. The evidence on record does not appear to us to make out any case of conspiracy either. That being so, the two charges of conspiracy and of cheating must fail. We would, accordingly, set aside the conviction and the sentence of each appellant u/s 420/120B of the Indian Penal Code. We would also set aside the conviction and sentence of appellant S. Dutta u/s 420 of the Indian Penal Code.

8. With regard to the charge against each appellant u/s 27 of the Drugs Act, the prosecution case, in our view, was established beyond all reasonable doubt. In this connection we shall presently deal with Mr. Dutta's second point. There can

be no manner of doubt, upon the evidence adduced at the trial, that appellant Bhupati Naha was at all material times the proprietor of Chandemardaya & Co. There can also be no doubt, on the evidence in the case, that appellant S. Dutta was at all material times the proprietor of Messrs Bhabani Medical Stores. The evidence in the case also established beyond any doubt that at all (material times appellant S. Dutta was also a salesman of Chandemardaya & Co. That the various bottles containing the offending drug were offered for sale by S. Dutta on or about April 1, 1953, was beyond question, because of the evidence not only of P.Ws. 8 and 9 but also of the Inspector of Drugs who was witness No. 1 for the prosecution. On the above facts which, in our view, were established by the evidence in the case, as well as in view of the fact that the offending drug was found to contain a percentage of arachis oil, each of the appellants would be guilty of an offence u/s 27 of the Drugs Act for contravention of the provisions of Sections 18(a) (i) and (ii) and 18(c) of the Drugs Act, 1940. Section 27 of the Act, which is the punitive section, provides that whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale, or distributes any drug in contravention of any of the provisions of Chapter IV or any rule made thereunder shall be punishable in a particular way. Section 17 of the Act sets out what are deemed to be misbranded drugs. Section 18 of the Act, so far as it is material to this case, is as follows;

"18. From such date as may be fixed by the Provincial Government by notification in the official Gazette in this behalf no person shall himself or by any other person on his behalf

(a) manufacture for sale, or sell, or stock or exhibit for sale, or distribute

(i) any drug which is not of standard quality;

(ii) any misbranded drug;

(c) manufacture for sale, or sell, or stock or exhibit for sale, or distribute any drug, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter." In this case, we are not concerned with the provisos to the section.

9. The finding of the learned Magistrate that the offending drug was a misbranded drug within the meaning of Section 17(a) (c) and (e) was not disputed. It was not challenged that the drug in question was not of standard quality. Indeed, the defence was that the olive oil concerned was blended and, therefore, not of standard quality. The evidence in the case established beyond any doubt that neither appellant had a licence to manufacture or sell or stock or exhibit for sale or distribute any drug. Thus, each appellant would be guilty of contravention of the provisions of Section 18(a) (i) and (ii) and of Section 18(c) of the Act. The main criticism put forward by Mr. Dutt was about the alleged omission on the part of the prosecution to give full protocols of the tests applied by the Government Analyst in carrying out the tests and/or analyses of the drug. This omission, Mr. Dutta urged, was fatal to the prosecution case. We must,

therefore, turn to a consideration of this point.

10. Sub-section (3) of Section 25 of the Act is as follows:

"Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the said warrantor has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report."

With this sub-section must be read Rule 5 of the Bengal Drugs Rules, 1946. Rule 5 is as follows:

"5. Procedure on receipt of sample. On receipt of a package from an Inspector containing a sample for test or analysis, the Government Analyst shall compare the seals on the packet with the specimen impression received separately and shall note the condition of the seals on the package. After the test or analysis has been completed, he shall forthwith supply to the Inspector a report in triplicate in Form 1 of the result of the test or analysis, together with full protocols of the tests applied.

Provided that no protocols of tests shall be supplied in the case of patent and proprietary medicines registered at the Central Drugs Laboratory."

In Form 1 which is given in Schedule A to the Rules there appears an item as follows:

"7. Result of test or analysis with protocols of tests applied....."

It is thus clear that a Government Analyst has to submit a report in Form 1 of the result of the test or analysis concerned together with full protocols of the tests applied. Unless full protocols of tests are supplied, the report of a Government Analyst cannot be regarded as conclusive evidence, or indeed as any evidence, of the facts stated therein. This position is not challenged on behalf of the State. What was argued on behalf of the State was that the relative certificate (Ex. 35) contained full protocols of the tests applied by the Government Analyst. Mr. J.M. Banerjee on behalf of the State was, however, not clear as to the meaning of the word "protocols" and there was no evidence as to what was meant by the word. Accordingly, we examined the Government Analyst Mr. P.K. Sanyal, to tell us what he meant by the expression "full protocols of the tests applied." We discovered, to our amazement that the Government Analyst had been approached on behalf of the prosecution and forewarned as to the point which troubled us. There is no doubt that the word "protocol" or "protocols" has been and is now used in different senses. Originally, the word appears to have meant the original note or minute of a transaction, negotiation agreement or the like, drawn up by a recognised public official, notary etc., and duly attested, which formed the legal authority for any subsequent deed,

agreement, or the like based on it. (see Murray's Oxford Dictionary, page 1509). The word "protocol" also meant as it does now, a formal or official statement of a transaction or proceeding. Mr. Dutt urged that the word as used in the Drugs Rules meant the original minute or report of the tests applied in the case, especially in view of the fact that by Sub-section (3) of Section 25 of the Act the report of a Government Analyst was made conclusive evidence of the facts stated in it. In our view, the expression "full protocols of tests applied" means an official statement or account of a proceeding, as a description of an experiment or a clinical report. Indeed this is one of the meanings of the word "protocol" or "protocols" given in Webster's Dictionary, Volume II, 1934 Edition. Mr. P.K. Sanyal, who in this case carried out the required tests, deposed to the effect that the word "protocol" meant an official statement of the experiments carried out by the department to determine the quality of the drug. We find that the various tests employed by the analyst to test the purity of the drug were in fact embodied in the report itself. We find that under item 7 of the report (Ex. 35) full protocols of the tests applied are set out; for instance,

"Test for Purity : 1 c. c. of the oil was boiled with 1.5 N alcoholic potash under reflux condenser for 10 mins. 50 c. c. alcohol (70 per cent) and Order 8. C. C. H. Cl. added. The mixture was stirred with a thermometer in it. Turbidity appeared at above 38°C.

(Genuine olive oil should not show turbidity above 9°C)"

Mr. Sanyal also told us that while the tests were carried out a rough minute was made in a piece of paper which, however, was destroyed after the report in Form No. 1 had been filled up and signed. In our view, the protocols of the tests applied in this case having been embodied in the report itself, the report was conclusive evidence of the results stated. In other words, it was established beyond reasonable doubt that the drug in question was a misbranded drug. That being the position we must hold that the prosecution case u/s 27 of the Drugs Act against each of the appellants was established beyond all reasonable doubt. We must, accordingly, affirm the conviction of each of the appellants u/s 27 of the Drugs Act.

11. There now remains to consider only the question of sentence. An offence under the Drugs Act must be viewed with great concern. In view, however, of the fact that the adulteration concerned does not appear to have been too deleterious and in view of all the circumstances of this case, a sentence of fine to the maximum limit permissible in each case, instead of a sentence of imprisonment, will meet the ends of justice. We would, accordingly, set aside the sentence of imprisonment passed against each of the appellants u/s 27 of the Drugs Act and impose instead a sentence of fine of Rs. 500/- in default, to rigorous imprisonment for 3 months.

12. The appeal is disposed of accordingly.

S.K. Sen, J.

13. I agree.