

(1960) 09 BOM CK 0017
In the Bombay High Court
Case No : Criminal Appeal No. 416 of 1960

Shantilal Uttamram Mehta

APPELLANT

Vs

Dhanji Kanji Shah and Another

RESPONDENT

Date of Decision : 12-09-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 342, 417(3)
Merchandise Marks Act, 1887 — Section 2(2)
Penal Code, 1860 (IPC) — Section 486

Citation : AIR 1961 Bom 203 : (1961) 63 BOMLR 69 : (1961) CriLJ 66 : (1961) ILR (Bom) 248

Hon'ble Judges : V.S. Desai, J;V.A. Naik, J

Bench : Division Bench

Advocate : K.S. Shavaksha, K.M. Desai, L.B. Desai and P.T. Gundaria, for the Appellant; Ashok H. Desai and C.C. Vaidya, Asst. Govt. Pleader, for the Respondent

Judgement

Naik, J.—This is an appeal by the complainant with the leave of the Court from an order of acquittal passed by the Additional Chief Presidency Magistrate, III Court, Esplanade, Bombay, in Case No. 327/S of 1959.

2. The complainant Shantilal Uttamram Mehta is the General Manager of Messrs. Parte Products Manufacturing Company Limited. The company manufactures biscuits and confectionery, which are sold in the market on a large scale. In February 1958 the complainant Shantilal Uttamram Mehta received reports that biscuits were being manufactured and wrapped in wrappers which, were counterfeit of the wrappers used by Messrs. Parle Products and were being sold in the market. The complainant lodged a complaint On 26th March. 1958 and on 15th May 1958 he- obtained an. order for raiding the shop of Dhanji and Company. That shop is owned by accused No. 1 and was being managed by accused No. 2. Sub-Inspector Vaidya of the C.I.D. raided the shop. Accused No. 2 was present in the shop. In the course of raid 22 packets of "Bengal Glucose" biscuits, 17 packets of "Royal Glucose" biscuits and 14 packets of "M. H. Milk

Glucose" biscuits were seized at the instance of the complainant. At the time of the trial only five packets of "Bengal Glucose," biscuits, 3 packets of "M. H. Milk Glucose" biscuits and 4 packets of "Royal Glucose" biscuits could be Produced and it was stated that the rest of the packets were eaten away by rats and were not, therefore, available for production, it was the case for the complainant that the design On the wrappers in which the three varieties of biscuits were packetted, were counterfeit of the design of the Parle Glucose Biscuits and, therefore, both the accused were liable u/s 486 of the Indian Penal Code.

3. Both the accused pleaded not guilty to the charge. Accused No. 1 contended that he was carrying on the manufacture of confectionery and was devoting his attention to that business. He further stated that so far as the shop Dhanji and Co., is concerned, the management was entrusted to accused No. 2. He stated that he visits the shop off. and on and was not aware as to which goods were purchased by accused No. 2 and kept in the shop for the purpose of sale. He also contended that he had given specific instructions to accused No. 2 not to deal in objectionable biscuits. In answer to questions u/s 342 of the Criminal Procedure Code, accused No. 1 denied that the wrappers were imitations or counterfeits of the wrappers of the Glucose Biscuits trade mark. Accused No. 2 admitted that he purchased the objectionable biscuit packets. He, however, suggested that he purchased them from hawkers, who sell these goods on the footpath. In substance his defence was that he was not careful enough to see that the wrappers of the packets, which he purchased, were colourable imitations of the packets used by Parle Manufacturing Company. He admitted that his master, that is, accused No. 1, had given strict instructions not to deal in objectionable goods. He also denied that the wrappers were colourable imitations of Parle Glucose Biscuit Packets.

4. The trying Magistrate held that the wrappers on the packets, that were seized from the shop of accused No. 1, were counterfeits of the wrappers used by Parle Co. under a registered Trade Mark. At the same time he held that accused No. 1 was not guilty because he was not carrying on the business of the shop and that he did not know what kind of goods were purchased and kept stored for sale by accused No. 2 in the shop. According to the learned trial Magistrate, accused No. 1 was absolved from the liability because he had given specific instructions to accused No. 2, his servant, not to deal in any kind of objectionable goods. The learned Magistrate also found that accused No. 2 could not be convicted because he acted innocently; in that he purchased the goods from hawkers and was not aware that the wrappers on the packets purchased by him were counterfeits of the wrappers of the Parle Glucose biscuits. Consequently he acquitted both the accused. It is against that order that the complainant has come up in appeal after obtaining the leave of the Court u/s 417 (3) of the Criminal Procedure Code.

5. Mr. Shavaksha, the learned advocate for the complainant, contended that the trial Court has completely misunderstood the nature and scope of the exceptions (a), (b) and (c) laid down in Section 486 of the Indian Penal Code. He contended

that as soon as the Court comes to the conclusion that the wrappers of the impugned packets are counterfeits then the offence u/s 486 is complete and the burden shifts on to the accused to establish that his case falls either within the ambit of exceptions (a) and (b) read together or exception (c). He contended that the case of accused No. 1 cannot possibly fall under the exception in Clause (a) because he does not say that he has taken any precaution in respect of the genuineness of the marks on the wrappers of the impugned packets. He also pointed that it is not the defence of either of accused Nos. 1 and 2 that they acted inadvertently or under a mistake or misapprehension of fact. According to him, the trial Court was wrong in acquitting the accused on the ground that their defences fell within the purview of any of the exceptions.

6-7. (Mr. Desai on behalf of the accused challenged the finding recorded by the trial Magistrate about the counterfeit character of the wrappers of the impugned packets. Before proceeding to discuss the question as to whether the defences put forward on behalf of the accused were covered by any of the three Clauses (a), (b) and (c) in section 486, his Lordship discussed the correctness or otherwise of the finding recorded by the Magistrate about the counterfeit character of the wrappers found with the accused, and held that the marks used were counterfeit).

8. That takes us to the main question, namely, as to whether the defences raised by either of the accused or both of them fall within the purview of either Clauses (a) and (b) read together or of Clause (c) of Section 486 of the Indian Penal Code. Before discussing the legal position we may make a few observations about the factual position on which there is no longer any dispute in the present appeal. It is common ground that accused No. 1 was not present at the time of the raid it is also clear from the evidence that accused No. 1 does not take active part in the conduct of the shop. Admittedly accused No. 1 visits the shop off and on. The complainant himself stated that he had seen accused No. 1 sitting in the shop once or twice and this was about 8 or 10 months back. Asgarali, who was examined for the defence and who is an agent of the Parle products for certain territories, stated that accused No. 2 is the Manager of the shop and that accused No. 1 does not sit in the shop regularly. He added that he saw accused No. 1 two or three times sitting in the same shop. To the same effect is the evidence of another witness examined for the defence, namely, Narsidas Kesavji. Another point on which there is no dispute is that along with the impugned packets, some packets having the genuine wrappers of Parle Company were also found in the shop. One of the points which weight with the learned Magistrate in accepting the defence put forward on behalf of the accused was that the accused were keeping the genuine Parle products also in their shop for sale. It may also be mentioned THAT it is common ground between accused Nos. 1 and 2 that accused No. 1 had given specific instructions to accused No. 2 not to expose for sale counterfeit or objectionable goods. In this connection we may refer to another circumstance and it is that in 1956 the complainant had launched a prosecution against accused No. 1 in Criminal Case No. 298/A S in the

Presidency Magistrate's Court, 19th Court, in respect of similar counterfeit wrappers and the case was compounded on accused No. 1 giving an undertaking that he would not sell biscuits in wrappers similar to Parle wrappers. The complainant has not produced a copy of the complaint given by him nor a copy of the undertaking furnished by accused No. 1 but he has given evidence on oath and his statement does not appear to have been seriously challenged in cross-examination. The only relevant question that was asked in that respect was as to whether the complainant knew whether the objected brands were sold in the market at the time when accused No. 1 was prosecuted in 1956. It is in this factual background that we have to examine the Question of law arising in this case.

9. Section 486 of the Indian Penal Code runs thus:

"Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves--

(a) that, having taken all reasonable precautions against committing an offence against this section he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

It would appear from the main section that the offence of counterfeiting will be complete as soon as the various acts mentioned in the section as forming ingredients of the offence have been established. The section makes no reference to mens rea or a guilty state of mind. After the proof of the essential ingredients, which go to make up the offence, the burden shifts on to the accused to prove the existence, of circumstances, which will take the case either within the ambit of Clauses (a) and (b) or Clause (c). There are only two exceptions and so far as the first exception is concerned both the clauses (a) and (b) will have to be satisfied before it can be said to have, been established as a ground of defence. In Clause (c) the word "otherwise" has been used and ordinarily the use of the word "otherwise" indicates that there is a division by dichotomy between the clause which precedes and the clause in question. That means that clause (c) will apply only when first two clauses do not come into operation.

10. Mr. Desai contended that the case of accused No. 1 falls under the first exception covered by Clauses (a) and (b) as also under the second exception covered by clause (c). In that connection he pointed out that accused No. 1 had

given specific instructions to accused No. 2 not to keep any objectionable brands in the shop. According to him this instruction was sufficient to attract the exception laid down in clauses (a) and (b). He laid emphasis upon the words "having taken all reasonable precautions against committing an offence" and contended that the accused must be deemed to have taken necessary precautions as soon as he gave instructions to accused No. 2 not to deal in objectionable goods. We are unable to accept this line of reasoning, The words "having taken all reasonable precautions" must be read in conjunction with the concluding words of that clause, namely, "had no reason to suspect the genuineness of the mark." That means that the precautions, which the accused is expected to take, have relation to the examination of mark and his coming to the conclusion that after having taken all reasonable precautions, he had no reason to suspect that the mark was a false or it counterfeit mark. The very fact, that accused; No. 1 thought it fit to give specific instructions to Accused No. 2 not to deal in objectionable goods, indicates that Accused No. 1 had a suspicion in that respect. We may even go further and say that he had a guilty conscience in that matter. The reason for this inference is that he was already prosecuted in 1956 and had given an undertaking that he would not deal in objectionable goods. If he had given any such instructions, which Accused No. 2 says that Accused No. 1 baa given, then it is reasonable to infer that accused No. 1 would follow up those instructions and would take care to examine the goods kept or stored in the shop with a view to find out as to whether any of the objectionable goods were kept in his shop. Accused No. 1 admittedly was visiting the shop off and on and he is, therefore, expected to examine the contents of the shop. Not only, therefore. Accused No. 1 has failed to take reasonable precautions but actually he has not taken any precautions whatsoever and has behaved in a reckless manner. If clause (a) does not come to the help of Accused No. 1, we need not go to Clause (b) at all because, as stated above, the two clauses must be read together and the two together constitute one defence.

11. Mr. Desai vehemently argued that in any case the cases of both accused Nos. 1 and 2 fall within the exception of clause (c). He contended that Accused No. 1 acted innocently_ in this matter because he gave the necessary instructions and it was up to accused No. 2 to act up to those instructions. So far as Accused No. 2 is concerned, he pointed out that he was making purchases from the hawkers on the streets and he was not, therefore interested in examining the various brands. In this connection he relied upon the circumstance that accused No. 2 had also purchased the genuine Parle products. Even the learned Magistrate has come to the conclusion that accused No. 2 behaved in a careless manner so far as the purchase of the goods and storing them in the shop is concerned. In our view the circumstance that the genuine Parle biscuits were also kept in the shop raises an inference adverse to the defence set up on behalf of the accused. That shows that the accused knew what were the essential features of the genuine Parle brand. Prima facie, therefore, neither of the accused can be said to have acted innocently in this matter.

12. Mr. Desai contended that it is necessary for the prosecution to establish mens rea or guilty mind so far as, at any rate, accused No. 1 is concerned because admittedly accused No. 1 was not present at the time when the goods were taken possession of in the course of the raid. In this connection he relied on the decisions of the Bombay High Court in *Emperor v. Isak Soloran Mac-mull* 50 Bom LR 190 : AIR 1948 Bom 364 and *State Vs. Caulfield Holland Ltd.*, their Lordships were dealing with a case of sale of motor spirit in contravention of the Motor Spirit Rationing Order, 1941. To all intents and purposes the prohibition against sale of the article otherwise than in accordance with the methods laid down in the Order was absolute. Their Lordships considered the question as to whether in every case of absolute prohibition the question of mens rea is irrelevant. They held --

"It is not in every case of an absolute prohibition that no question of mens rea arises. Only a limited and exceptional class of offences can be committed without a guilty mind. The Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, an accused should not be found guilty of an offence under the criminal law unless he has a guilty mind."

That means that in each case, the very first question that the Court has to consider is whether the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime. Their Lordships thereafter proceeded to lay down that if mens rea cannot be excluded either on the express language of the section or by necessary implication, then the Court has to consider the nature of the offence and the quantum of punishment awardable in respect thereof. They relied on a passage in Halsbury's Laws of England, Vol. IX at page 10 to the following effect:--

"In a limited class of offences, mens rea is not an essential element. This class consists, for the most part, of statutory offences of a minor and only quasi-criminal character and, in order to determine whether mens rea is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it." Then they referred to the judgment of Justice Wright in *Sherras v. De Rutzen* (1895) 1 QB 918 and pointed out that the principal classes of exceptions may be reduced to three. The first is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. The second class is, all public nuisances, and the third, cases in which, although the proceeding is criminal in form, it is really a summary mode of enforcing a civil right. The principles laid down in this case were followed in *State Vs. Caulfield Holland Ltd.*, . Mr. Justice Gajendragadkar, who delivered the judgment of the Division Bench, observed--

"In the absence of clear and unambiguous language indicating: such an intention on the part of the Legislature it may be permissible to ascertain the intention of the Legislature by examining the object of the statute in question and its general scheme. The nature and extent of the punishment awardable under the statute

may also have to be considered. As often happens it is not very difficult to enunciate these broad principles; the difficulty arises in applying them to the facts in a particular case."

Mr. Desai contended that the offence u/s 486 cannot be considered to be an offence of a quasi-criminal character not an offence, which can fall within the category of public nuisance. He pointed out that the punishment awardable u/s 486 of the Indian Penal Code is imprisonment for one year of either description, He, therefore, contended that this is a serious type of offence so that mens rea should be regarded as an essential ingredient which must be established by the prosecution for bringing the charge home under that section. It is, however, to be noted that the first point which has to be considered is whether On the words used in the section Or by necessary implication it can be inferred that the Legislature wanted to rule out mens rea as a necessary ingredient for the commission of the offence. It is only when no such indication is available that we have to consider the other tests laid down in the rulings cited above. In our view, the language of Section 486 by necessary implication leads to the inference that mens rea in its ordinary sense, that is to say, in the sense of a dishonest intention or an intention of deceiving or cheating does not form an essential ingredient for an offence u/s 486. In this connection we may refer to the leading case *Miami v. Selfridge and Co.* (1925) 1 KB 129. The case was decided by Lord Howard, C. J., the then Chief Justice of England. The offence in question was u/s 2(2) of the Merchandise Marks Act, 1887. The wording of Sub-section (2) of Section 2 is similar to the wording of Section 486 of the Indian Penal Code. The exceptions (a), (b) and (c) are in identical terms and even the main part of Section 486 closely follows the wording of Sub-section (2) of Section 2. It is also noteworthy that the punishment provided under that section on a conviction on indictment Can extend to two years. In discussing the question of of mens rea for the offence u/s 2(2) Lord Hewart .C. J., observed at page 136 as Allows:--

"Secondly, the Magistrate has clearly taken the view that mens rea for this purpose means intent to cheat or intent to defraud. That I think is an erroneous view.""

In effect the view taken in that case was that it is enough if there is intention to do a thing, which is forbidden by the statute. In the earlier part of the judgment His Lordship observed;

"the scheme of the Act, which is undoubtedly rigorous and intended to deal with offences of a notorious and at one time at any rate of frequent occurrence, is that when certain acts are proved, the proof of the offence is complete unless the defendant is able to discharge the burden which the statute puts upon him."

In the present case also what the Magistrate has found is that the prosecution has failed to prove that there was any intention on the part of the accused to defraud or cheat. That finding is not inconsistent with the existence of mens rea in the sense of an intention to do a thing forbidden by law. Every man is

presumed to intend the consequences of his act. The very fact, that the accused has kept in the shop goods containing counterfeit trade mark, shows by necessary implication that he has an intention to do an act, which is forbidden by the statute.

13. Lord Hewart has also pointed out that the defences available to the accused in Clauses (a) and (b) on the one hand and Clause (c) on the other, are distinct and separate and they cannot be jumbled together. He has emphasized that the word "otherwise" denotes a division by dichotomy. In this connection he observes--

"In other words, the section in effect says that it is no excuse for the defendant to say that he had no reason to suspect the genuineness of the trade description unless he shows that he has taken all reasonable precautions. Here there was a failure to take all reasonable precautions, and therefore the defence based upon the absence of reason to suspect the genuineness of the trade description, was impracticable. What then was the defence raised? It was that in some way, other than that referred to in para (a), the respondents had acted innocently. They sought to show that although reasonable precautions had not been taken, there was nevertheless no reason-to suspect the genuineness of the trade description. The argument involves reading the words of para (a) not as they appear in the statute but as if they were, "Having taken or not taken, as the case may be, all reasonable precautions against committing an offence he had at that time no reason to suspect the genuineness of the trade description"".

14. With reference to the defence falling under clause (c) His Lordship pointed out that the innocence contemplated by the Act is the innocence of any intention to infringe the Act of Parliament. Such innocence can only exist where the infraction is committed by inadvertence or mistake of fact.

15. The principles laid down in (1925) 1 KB 329 were followed in *Slatecher v. George Mence Smith* (1951) 2 KB 631 so far as the meaning and. implication, of Clause (c) is concerned. There also it was held that innocence within the meaning of that clause can only exist where the act was committed by inadvertence or mistake of fact. In that case the prosecution was launched against the proprietors of the shop, which sold paraffin under false description. It was contended that the servant was the seller and for the act of sale of the servant, the proprietor, who was absent at the time of the actual sale, cannot be held liable. This argument was negatived by their Lordships and they held that the defendants were the real sellers. Their Lordships cited the following passage from the Judgment of Lord Russel, in *Coppen v. Moore* 1898-2 QB 306 with approval.

"In our judgment it was clearly the intention of the legislature to make the master criminally liable for such acts, unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act". These principles have been followed by the Bombay High Court in *Pranjivandas*

Sunderji Vs. State of Bombay, Justice Bavdekar, who delivered the judgment of the Division Bench in that case, held:

"The word 'innocently' in Section 486(c) of the Indian Penal Code, did not mean 'without any intention to defraud' but meant 'without any intention to do the act which was forbidden by the statute'".

16. The Court further accepted the interpretation put on the words "acted innocently" in the above English cases and held that those words have application where the accused acted under misapprehension or mistake of fact or inadvertently. Applying that test, it is clear that the defence raised by neither of the accused can fulfil the requirements of law. It may also be pointed out that in (1951) 2 KB 631 the defendants had set up a plea that they had taken all necessary precautions to prevent the manager from committing the offence and these precautions consisted in supplying the manager with suitable measures and funnels. The defendants' representatives also used to visit the premises once a week or once every fortnight for the purposes of inspection and the manager was specifically instructed to use proper measures. It was held that these facts did not constitute a defence within the meaning of any of the defences in Clauses (a), (b) and (c). In our view, therefore, the Magistrate was wrong in acquitting the two accused relying on Clauses (a), (b) and (c) of Section 486 of the Indian Penal Code.

17. We, therefore, hold that both the accused are guilty for the offence u/s 486 of the Indian Penal Code and accordingly convict them under that section.

18-20. His Lordship then dealt with the question of sentence. This portion of the judgment is not reported, being not material for the purposes of this report).

21. Order accordingly.