

(1980) 09 MAD CK 0006

In the Madras High Court

Case No : Criminal Ap. No. 14 of 1077

State by Public Prosecutor

APPELLANT

Vs

Rajamani, Proprietor-cum-Vaidyar, M/s. Shanmuga Pharmacy,
Erullappapuram, Nagercoil-2

RESPONDENT

Date of Decision : 18-09-1980

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 18(a)(ii), 18(c)

Citation : (1981) LW(Cri) 98

Hon'ble Judges : Suryamurthy, J

Bench : Single Bench

Advocate : Mr. M. Karpagavinayagam, Govt. Advocate No, III Criminal Side for State, for the Appellant; Mr. C.R. Pattabhiraman for Mr. M. Kilyanasundoram for the Respondent/Accused, for the Respondent

Judgement

Suryamurthy, J.—This is an appeal against the judgment of the learned Chief Judicial Magistrate, Kanyakumari at Nagercoil, acquitting the

respondent against whom a complaint was filed by the appellant for offences under SS. 18 (c), 18 (a) (ii) and 18-A of the Drugs and Cosmetics

Act, (hereinafter referred to as the Act), and the Rules framed thereunder punishable under SS. 27 (a) (ii), 27 (b) and 28 of the Act.

2. The complainant, who is the Drugs Inspector, Kanyakumari at Nagercoil, visited on 20th February, 1975, the Shanmugha Pharmacy,

Erulappapuram, Nagercoil, belonging to accused/respondent and took three bottles of Sandhanasavam manufactured by the said Shanmugha

Pharmacy for analysis. The three bottles were sealed with the official seal of the complainant in the presence of the accused to whom a copy of the

intimation in Form No. 17 was given together with the sealed bottle. The cost of the three bottles was paid. One sealed bottle with an intimation

under Form No. 18 was sent to the Government Analyst, Drugs, King Institute, Guindy, for analysis. The Government Analyst reported that the sample was misbranded as it contained 1.6 mgm. of morphine per 100 ml. of the sample. According to the complainant, an Ayurvedic preparation cannot contain morphine. Ayurvedic preparation should be manufactured exclusively in accordance with the formula described in the authoritative books of Ayurveda specified in Schedule I to the Act. As the preparation contained morphine it was contended by the complainant that it was not an Ayurvedic preparation within the meaning of S. 3 (a) of the Act, but a preparation within the meaning of the word "drug" as defined in S. 3 (b) of the Act.

3. This case of the prosecution was spoken to by P.W.I, the Drugs Inspector, who took the sample, and P.W.2 who was the Government Analyst at the King Institute in Guindy, and who analysed the sample in question and issued the certificate, Ex. P4, stating that it contained 1.6 mg. of morphine in 100 ml. of the sample.

4. The accused filed C.M.P. No. 392 of 1975 for sending the sample bottle given to him for analysis by the Central Drugs Laboratory, Calcutta.

In the said petition, he did not ask the Director of the Central Drugs Laboratory, Calcutta, to analyse the contents of the sample bottle sent to him

and report regarding the ingredients thereof, but very cleverly wanted the opinion of the Director as to whether the Sandhanasavam is an

Ayurvedic preparation or not, and, therefore, the Director of the Central Drugs Laboratory, Calcutta, reported that as no analytical standards in

respect of the Ayurvedic Drugs had been prescribed, yet under the Drugs Act and the Rules framed there-under, the Central Drugs Laboratory is

not in a position to analyse the sample and give any opinion as to whether it is an Ayurvedic preparation or not. He, therefore, referred the matter

to the Adviser, Indigenous System of Medicine, Ministry of Health, Government of India, Nirman Bhavan, New Delhi, for his opinion. The counsel

for the accused thereafter filed another petition requesting that the sample may be sent to the Adviser, Indigenous System of Medicine, Ministry of

Health, Government of India, Nirman Bhavan, New Delhi, for his opinion as to whether the samples are Ayurvedic preparation or not. The sample

sent to the Adviser, Indigenous System of Medicine, would appear to have been

sent to Capt. Srinivasamurthi Research Institute, Adyar, Madras, for analysis, where it was analysed by D.W.I, who submitted the reports, Exs. D2 and D3. According to Exs. D2 and D3, there was no morphine, but only chloral hydrate. Though the learned Magistrate was aware that Capt. Srinivasamurthi Research Institute at Adyar is not a statutorily recognised institution, nevertheless he relied on the evidence of D.W.I and his reports to come to the conclusion that there was no morphine in the sample, and, therefore, found the accused not guilty.

5. It is contended by the learned counsel for the respondent now that Chapter IV of the Act had not been extended to the territory of Tamil Nadu and has not come into force in this State prior to 1st June, 1977, that the standards for Ayurvedic, Unani and Siddha have not been prescribed for this State, that a Government Analyst in relation to Ayurvedic, including Siddha and Unani Drugs within the meaning of S. 3 (c) (i) of the Act has not been appointed by the Central Government or by the State Government under S. 33-F of the Act and that therefore, there is and was nobody competent to pronounce an opinion regarding the quality and standard of the sample, namely Sandhanasavam prepared by the accused.

6. Taking up the latter argument first, I may straightway say that the question is not whether the Sandhanasavam prepared and marketed by the accused, samples of which were taken by F.W. 1, conform to the" Ayurvedic standards or not. If that question is to be determined, no doubt, only an Analyst appointed by the Central Government or a State Government under S. 33-F of the Act as contemplated by S. 3 (c) (i) of the Act can give an opinion after analysis. The question in the instant case is whether what was sold by the accused as Sandhanasavam was mis-branded in the sense that it contained morphine,

7. S. 3 (a) of the Act defines ""Ayurvedic or Unani Drugs"" as including: all medicine intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease in human beings, mentioned in and processed and manufactured exclusively in accordance with the formulae prescribed in the authoritative books of Ayurvedic system of medicine, specified In the First Schedule.

By reason of S. 3 (b), ""drug"" includes-

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or for the diagnosis, treatment;

mitigation or prevention of disease So human beings or animals, and

(ii) such substances (other than food) intended to effect the structure or any function of the human body or intended to be used for the destruction

of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by

notification in the Official Gazette.

It would be seen from this that the definition of "drug" is a comprehensive definition excluding only medicines and substances which are exclusively

used or prepared for use exclusively in the Ayurvedic or Unani system. It has been held by the Supreme Court in *Ishwar Singh Bindra v. State of*

U.P. (1949) 1 S.C.R. 219:

The scheme of Cl. (1) of S. 3 (b) is to take in all medicines or substances with the exception of such medicines or substances which are exclusively

used or prepared for use in accordance with the Ayurvedic or Unani system of medicine. The exception made in the case of latter class of

medicines or substances was essentially meant to cover only such medicines or substances which were used in the Ayurvedic or Unani system or

were prepared for use in accordance with these systems.

Morphine is an official preparation in the Indian Pharmacopoeia, and is not therefore a drug exclusively used in accordance with the formulae

described in any authoritative Ayurvedic text.

8. The allegation of the prosecution is that the accused has no license to manufacture a drug containing morphine. The accused has not produced

the manufacturing license issued to him to show that he has a right to use morphine in any Ayurvedic preparation. In fact, I granted time to produce

the license, but the license has not been produced. Therefore, I find that by using morphine, which is not a drug exclusively used in Ayurvedic or

Unani preparation, and that too without a valid license, the accused has contravened the provisions of S. 18 (c), and S. 18 (a) (ii) of the Act, read

with Rr. 17(e) and 96 of the Rules framed under Act.

9. It is, however, contended by the learned counsel for the accused/respondent that the accused has been deprived of his valuable right of getting

an opinion from a greater expert by sending the sample of the drug under S. 25(4) of the Act to the Central Drugs Laboratory* 1 his argument is

without any substance. In fact, an application has been filed by the counsel for the accused in the lower Court under S. 25(4) of the Act for

sending the sample kept in the Court to the Central Drugs Laboratory for analysis and report, and, therefore, the sample was sent to the said

Laboratory. But, in the memo. dt. 2nd September, 1975 filed in the Court of the Chief Judicial Magistrate, the counsel for the accused has stated

that,

the samples of Sandhanasavam which are to be sent to the Central Drug Laboratory are Ayurvedic preparation and so the opinion required is, as

to whether the samples of Sandhanasavam are Ayurvedic preparations or not.

He has further submitted that,

Opinion is to be called for, as to whether the samples of Sandhanasavam are Ayurvedic preparations or not.

Thus, the Counsel for the accused has deliberately drawn a red-herring across the line, and the learned Chief Judicial Magistrate was misled and

allowed himself to be misled into thinking that the drug had to be analysed at the Central Drugs Laboratory In Calcutta by the expert to ascertain

whether it is an Ayurvedic preparation. Thereafter, the Central Drugs Laboratory had replied by letter, dt. 17th September, 1975 as follows:-

As no analytic standards in respect of Ayurvedic drugs has yet been prescribed under the Drugs Act and Rules thereunder we regret we are not in

a position to analyse these samples and give any opinion whether it is an Ayurvedic preparation or not. The case may perhaps be referred to the

adviser, Indigenous System of Medicine, Ministry of Health, Government of India. Nirman Bhavan, New Delhi-11 for his opinion.

However, if there is any suspicion by the Drug Control authorities as to the presence of any allopathic ingredient (which must be specified by

name), this Laboratory could perhaps try to detect the presence of such Ingredient in such samples under reference.

At least, after receiving this letter. the Chief Judicial Magistrate should have applied his mind to the facts of the case and should have asked the

Director, Central Drugs Laboratory, Calcutta, to state whether the samples sent contained morphine. However the Chief Judicial Magistrate failed

in his duty to ask for an opinion relevant to the case and has allowed himself to be misled as aforesaid by the accused.

10. Again, the accused has filed a petition before the Chief Judicial Magistrate, on 25th September, 1975, for sending the samples to the Adviser,

Indigenous System of Medicine, Ministry of Health, Government of India, Nirman Bhavan, New Delhi, for his opinion as to whether these samples

are Ayurvedic preparations or not. He has stated in this petition:-

In the Interests of justice it is absolutely necessary that the sample should be analysed by the Adviser, Indigenous System of Medicine to find out

whether it is an Ayurvedic preparation or not.

Earlier, in this petition, he has stated that,

The point for consideration is whether it is an Ayurvedic preparation or not.

This again, was a misleading petition, and the learned Chief Judicial Magistrate erred in thinking that the sample had to be analysed to ascertain

whether it was an Ayurvedic preparation or not. What had to be ascertained was whether it contained morphine, a drug of India Pharmacopoeia.

The Advisee replied by letter, dated 6th December, 1975, that;

The Central Government has not so far established any Drug Testing Laboratory for Ayurveda, Siddha or Unani Drugs.

11. Subsequently, the Deputy Adviser, Ministry of Health and Family Planning, Government of India, New Delhi, sent the sample of the drug to

Captain Srinivasamurthy Research Institute, Adyar, Madras, "for necessary analysis". The said Institute has sent Exs. D2 and D3 to the Chief

Judicial Magistrate, Kanyakumari District expressing the opinion that

The sample does not conform to the preliminary standards for Chandanasavam (prepared according to the formula given in Bhaisajya Ratnaval,

Sukramohadbikara, Sloka 34-38, which corresponds to the formula given in Sahasrayoga) in that the total solid and alcohol contents are in

excess of the limits.

12. By letter, dt. 25th March, 1976 (marked as Ex.DI) the Adviser in Indigenous Systems of Medicines has informed the learned Chief Judicial

Magistrate that

The fact that the samples do not conform to the preliminary standards for Chandanasavam (Prepared according to the formula given in Bhaisajya

Ratnavalli Sukramehaadhikara Sloka 34-31 which corresponds to the formula given in Sahasrayogam) received with your letter No. 6163/75-HC,

dt. 21st December. 1975, in respect of total solid and alcohol content, which are In excess of the limit, will not make this medicine non-ayurvedic,

since the "standards have not been notified by the Government of India. However, the presence of Chloral hydrate. In even negligible quantity,

which is not mentioned In the formula will make this medicine Non-Ayurvedic.

In the face of Ex.DI, it is preposterous to contend, as the learned counsel for the accused does, that the Sandanasavam manufactured by the

accused, a sample of which was taken by the Drugs Inspector, is act Ayurvedic preparation. In any event, after asking the Director, Central Drugs

Laboratory, Calcutta to state whether the samples of Sandhanasavam sent are Ayurvedic preparation or not, instead of asking him to analyse the

sample and find out whether it contains morphine, it is not open to the accused to turn round and wail now that he has been denied an opportunity

to have the drug analysed by the Director of Central Drugs Laboratory, Calcutta, to find out whether it contains morphine. I may add that there

was no purpose in sending the sample to the Director of Captain Srinivasamurthy Research Institute, Adyar Madras, for analysis, because the said

Director has not been appointed by notification in the Official Gazette to be a Government Analyst as laid down in S. 33-F of the Act.

13. Incidentally, I may add that when the concerned Chief Judicial Magistrate was called upon to explain under what circumstances he sought for

the opinion of the Director, Central Drugs Laboratory, Calcutta, as to whether the preparation is an Ayurvedic preparation or not, instead of

asking his opinion whether it contained morphine or not, he has sent an irrelevant reply without understanding the reason for which the explanation

was sought, and has contended that

If for any reason the High Court construes that the action of mine (as Chief Judicial Magistrate, Kanyakumari at Nagercoil) is not In compliance

with the said provision of law, the question would amount to one of error of judgment In construing the abovesaid provision of law and In all

principles governing administrative tribunals and departments, no error of judgment can be the subject-matter of any kind of action whatsoever.

The explanation was sought, because the learned counsel for the accused

endeavored to throw the blame on the learned Chief Judicial Magistrate

for asking the opinion whether the sample seized was Ayurvedic drug or not, instead of seeking an opinion as to whether it contained morphine or

not, and not for taking any action against the learned Magistrate. This Court does not need to be told by the learned Magistrate, when action can

be taken and when it cannot be taken.

14. As the preparation called Sandhanasavam the sample of which was taken by the Drugs Inspector in the instant case, is proved to have

contained morphine, it is not an Ayurvedic preparation. It is, therefore, a misbranded drug.

15. The learned Chief Judicial Magistrate, has however, observed that

...when it is the case and the contention and the evidence is also such that in an Ayurvedic preparation. Morphine has been added, it would be a

case of adulterine Ayurvedic medicine and hence it is highly doubtful as to whether the provisions of S. 15 (c) and S.18 (a)(ii) of the Drugs and

Cosmetics Act would apply.

The learned Magistrate has not understood the prosecution case.

Subsequently, he observes that

In this case a peculiar situation has arisen in which the presence of morphine itself has become a matter of doubt.

The learned Magistrate seems to be assailed by such a doubt, because the "accused sent the sample given to him to the Central Drug Laboratory,

Calcutta, for analysing it as to whether it is an Ayurvedic preparation or not.

The learned Magistrate was obviously unable to understand the difference between asking for an opinion as to whether the drug contained

morphine and an opinion as to whether it is an Ayurvedic drug. The judgment of the learned Magistrate is lacking in rectitude in induction and

consistency in deduction.

16. The learned Magistrate has relied on the evidence of D. W. 1, the expert who analysed the samples sent to Captain Srinivasamurthy Research

Institute, Adyar, Madras, and Exs. D2 and D3 to come to the conclusion that "the presence of morphine as per Ex. P 4 and the evidence of P. W.

2 would become doubtful". In view of the provisions of S. 33-F of the Act, the learned Magistrate, ought not to have relied on the opinion of D.

W. 1. The learned Magistrate, however, observes that-

D. W. 2 would say that he also tested to find out whether there was morphine or not; but found no Morphine and found out only Chloral Hydrate.

Therefore, the presence of Morphine having been not found by D. W. 2 although he specially tested the same purpose it has become a highly

doubtful matter as to whether Morphine was really present or not.

Only one witness has been examined by the accused and he is D. W, 1 (Dr. Bhima Rao) attached to Captain Sriivasamurthy Research Institute,

Adyar, Madras, whose opinion, as already stated cannot be relied on as he is not a Government Analyst appointed by notification in the Official

Gazette by the Central Government or the State Government as laid down in S. 33-F of the Act. It appears from the judgment of the learned

Magistrate that the learned Assistant Public Prosecutor brought to the notice of the learned Magistrate the provisions of S. 33-F of the Act, and

contended that

Captain Sriivasamurthy Research Institute, Adyar, maintained by the Government of India under the Ministry of Health and Family Planning and

Intended for Indian Medicine like : Ayurveda. Unani and Siddha and Homeopathy is not a recognised Institute under the Drugs and Cosmetics Act

and therefore, any certificate issued by that Institute has no legal basis and has to be excluded

The learned Magistrate has got over this argument by observing that

Although Captain Sriivasamurthy Research Institute at Adyar is not a recognised one under the Drugs and Cosmetics Act and therefore it has no

statutory recognition, inasmuch as the Institute and D W.2 are Experts in Indigenous Medicine and are competent to analyse Ayurvedic

preparations/ certainly it has evidentiary value. No statutory character can be attached. But evidentiary value cannot be lost sight of.

Here again, the learned Magistrate has fallen into an error by equating the analysis to ascertain whether a formulation contains morphine with

competency to analyse and state whether the preparation is Ayurvedic or not. The learned Magistrate has lost sight of the difference between the

two purposes. It is impossible to find out what the learned Magistrate means by saying that "no statutory character can be attached". The

observation of the learned Magistrate that the evidentiary value cannot be lost

sight of, has no meaning, because in the face of S. 33-F of the Act and the further fact that the expert in Ayurvedic Medicine attached to Captain Srlnivasamurthy Research Institute was asked to state whether the sample seized is an Ayurvedic preparation or not, and has stated that it is not an Ayurvedic preparation, there is no evidence of any value, the sight of which the learned Magistrate refuses to lose.

17. The learned Magistrate considers D. W. 1 to be "an Expert of outstanding qualification" because he is "an M- A. in Chemistry and M. Sc, in

Organic Chemistry and Ph.D. in Organic Chemistry besides a Ph. D. Degree holder of Madras University." Later on, he observes that D. W, 1

being an Expert in the Field and he having found no Morphine, certainly a serious doubt has arisen with regard to the evidence of P.W.2 and Ex.

P.4 and the benefit of the same has to be given to the accused who has been contending throughout that he never added morphine. I have already

pointed out that even in Ex. P8 he has to contended. When he has been putting forward the straight contention from the beginning and the

Expert/D.W.I has found no morphine, certainly a serious doubt has arisen and the benefit of the same has to be given, and If so done the very

basis of the prosecution is lost.

The qualifications of D.W.I do not detract from the effect of S. 33-F of the Act and his opinion cannot be relied on.

18. The learned Magistrate appears to have been impressed by what he calls the "straight contention" of the accused "from the beginning" that the

formulation contains no morphine. The opinion of P.W.2 expressed in Ex. P4 that the sample of Sandhanasavam contains morphine has become

final after the attempt of the accused to side track the issue by asking the opinion of the expert In the Central Drugs Laboratory, Calcutta, to state

whether or not it Is an Ayurvedic preparation. No accused can be expected to admit his guilt, and the mere fact that the accused disputes the case

of the prosecution "throughout" does not take away the effect of the evidence adduced by the prosecution. Accepting the evidence of P.Ws.1 and

2 and the opinion of P.W.2 in Ex. P4 that the sample of Sandhanasavam contains morphine, I find that the accused is guilty of the offences

punishable under S. 18 (c) read with S. 27 (a) of the Act and S. 18 (a) (ii) read with S. 17 (e) and 27(b) of the Act. At the request of the learned

Counsel for the accused, this case is adjourned to 4th August, 1980 for hearing the accused on the question of sentence.

19. I have heard the accused and the learned Counsel for the accused on the question of sentence. The accused feels highly repentant and says

that he was not aware that morphine should not be added to the preparation called ""Sandhanasavam"". The Ayurvedic medicine" called

Sandhanasavam"" prepared by the accused was not for internal consumption, but only for external application, and only a very small percentage of

morphine was found. As the preparation was not Intended for internal consumption, I am of the opinion that a severe sentence of imprisonment Is

not called for. The accused appears to be weak in health and also old. I am satisfied with his assurance that hereafter he will take care to see that

no drug of the Indian Pharmacopoeia is added to any of his preparations. In these circumstances, on the first count of charge framed under S.

18(c) read with S. 27(a) of the Act, the accused is convicted and sentenced to imprisonment till the rising of the Court, and to a fine of Rs. 500/-

and in default to suffer simple imprisonment for three months. On the second count of charge framed under S. 18 (a) (ii) read with S. 17(e) and

27(b) of the Act, the accused is convicted and sentenced to imprisonment till the rising of the Court and to a fine of Rs. 500/- and in default to

suffer simple imprisonment for three months. Time for payment of fine-one month from the date of receipt of this order in the lower Court.