

(1986) 05 GAU CK 0003

In the Gauhati High Court

Case No : Government Criminal Appeal No. 17/80

State of Assam

APPELLANT

Vs

Radha Oil Industries & Anr.

RESPONDENT

Date of Decision : 06-05-1986

Acts Referred:

Prevention of Food Adulteration Rules, 1955 — Rule 9(e), 9(e)

Citation : (1987) 1 GLR 134

Hon'ble Judges : K.Lahiri, J

Bench : Single Bench

Advocate : S.K.Sen, C.B.De, B.Acharyya, A.R.Paul Mazumdar, A.K.Phukan,
Advocates appearing for Parties

Judgement

1. This is an appeal from the order of acquittal. The accused persons were charged U/Ss. 7/16 and 17 of the Prevention of Food Adulteration Act, 1954. On appreciation of the evidence learned Magistrate reached the conclusion that the prosecution had failed to establish the charge against the accused. Learned Magistrate held that the evidence of "taking of sample" was not unpolluted and antiseptic to bring home the charges against the accused. Learned Magistrate held that while taking the sample the quality and/or the standard might have been affected. Learned Magistrate held, on appreciation of the evidence, that the implements used by the Food Inspector for taking the sample and the bottle in which the samples were kept were not pure and clean and the quality and the standard of the mustard oil might have been impaired or blemished by the use of such, implements and accordingly acquitted the accused.

2. What is the ambit of power of the High Court under section 423 (1) (a) of the Code of Criminal Procedure, 1973 in an appeal against the order of acquittal ?

The power conferred by Section 423 (1) (a) of "the Code" which deals with an appeal from an order of acquittal is as large and wide as the power conferred by Clause (b) thereof, which deals with an order of conviction. It is thus obvious that the High Court's power in dealing with criminal appeals are equally wide

whether the appeal is one against acquittal or conviction. In an appeal against an order of acquittal the High Court has the full power to review at large the evidence upon which the order of acquittal is based and to reach the conclusion on the evidence as to whether the order of acquittal should be reversed or not. "The Code" places no special limitation on the appellate court to appraise the evidence distinct and separate from the manner in which it should be appreciated in an appeal against conviction. Indeed the appellate court dealing with an appeal against the order of acquittal has full power to review the evidence on which the order of acquittal is based and to reach a conclusion either to set aside the order or not but while exercising the function, it has been ruled by the Supreme Court in a catena of cases, the High Court should give appropriate weight and consideration to the following aspects :

(i) the views of the trial court as to the credibility of the witnesses should be properly weighed and considered :

(ii) the presumption of innocence in favour of the accused is never weakened by the fact that he has been acquitted at the trial :

(iii) the right of the acquitted persons to the benefit of reasonable doubt should not be denied on the score that they have been acquitted and are no longer accused :

(iv) the appellate court should be slow in disturbing the findings of fact reached by the trial Judge who had the advantage of personally seeing the witnesses: and.

(v) when the High Court does not agree with the view of the trial court yet reaches the conclusion that the view expressed by the trial court is reasonably possible, the same should not be disturbed.

We cull the principles from the decisions of the Supreme Court in *S. A. A. Biyabani vs. State of Madras*, AIR 1954 SC 645 : 1954 CrL. L. J. 1665; *Aher Raja khima vs. State of Saurashtra*, AIR 1956 SC 216 : 1956 CrL. L. J. 426; *Sanwat Singh vs. State of Rajasthan*, AIR 1961 SC 715 : 1961 CrL. L. J. 766 : *Ramabhopal Reddy vs. State of Andhra Pradesh*, AIR 1971 SC 460 : (1971) CrL. L. J. 422; *The State of U. P. vs. Samman Das* AIR 1972 SC 677: (1972) 3 SCR 58; *Bhim Singh Rup Singh vs. State of Maharashtra*, AIR 1974 SC 286 : 1974 CrL. L. J. 337; *State of Andhra Pradesh vs. P. Anjaneulau*, AIR 1982 SC 1598: 1983 CrL. L. J. 153; *Babu and others vs. State of Uttar Pradesh*, AIR 1983 SC 308: 1983 CrL. L. J. 334; *Ramji Surjya vs. State of Maharashtra*, AIR 1983 SC 810 : 1983 CrL. L. J. 1105 and *Chandra Kanta Debnath vs. State of Tripura*, AIR 1986 SC 606.

3. The Factual Matrix : On 8.8.77, P. W. 1, Shri Tarun Kanta Dutta Choudhury, the Food Inspector took sample of mustard oil from Ramavatar, respondent No. 2, the proprietor of M/s. Dipak Stores. He purchased mustard oil for analysis on payment of price. He sent one of the samples of mustard oil to the Public Analyst

who submitted his report which has been proved as Fact. 4. The report shows that the sample of mustard oil tallied with the standard specified in Item 17.06 of Appendix B to the Prevention of Food Adulteration Rules for short, "the Rules" but the specification value was in excess by 2.7 and such it was opined that it was sample of adulterated mustard oil. The report was in respect of the sample of mustard oil sent by the Food Inspector to the Public Analyst.

4. The case under the Prevention of Food Adulteration Act, dealing with adulteration and admixture of food stuff can not be brought home unless the evidence is clean, pure and unpolluted. If the sample was taken with polluted implements or instruments containing impurity or contamination, the report of the Public Analyst can not be pressed into service to convict an accused of an offence under "the Act" where imprisonment is compulsory. It is the bounden duty of the prosecution to show that the article taken from the accused was taken and put in the container or jar without impairing the standard and quality of the article by the Food Inspector. It is in evidence that the sample of mustard oil was put in the bottles having narrow necks. The evidence disclosed that the Food Inspector had collected oil from a tin. The Food Inspector used a mug to collect oil from the tin with the help of a funnel, channelled the oil into the bottles, in which samples were stored and one of such bottle was sent to Public Analyst for his report. The defence witness stated that the mug and the funnel were brought by the Food Inspector and traces of oil were visible in those utensils. Learned Magistrate on appreciation of the evidence has held that the funnel and the mug might have been used earlier by the Food Inspector for collecting adulterated mustard oil from other shops. This apart, the Food Inspector could not assert positively that the bottle in which the samples were taken were uninfected, unpolluted or antiseptic bottles. He said that he took the bottles from the godown. Of course, the Food Inspector has stated in Court that he had poured the mustard oil direct from the tin into the narrow necked bottles, however, the evidence has been countered by the testimony of D. W. I. Now, I find that the mug which was used had traces of oil. At least it was not neat and clean, unadulterated and uncontaminated. The funnel had also traces of oil and as such it was not unpolluted and untainted. The evidence that the sample was taken in a pure bottle is shaky and doubtful. The food Inspector relied on his memory and recalled the events. He was obligated by Rule 9 (e) of "the Rules" to "maintain records of all inspection made and action taken by him in the performances of his duties including taking of sample and seizure of stock and submission of the report to the health officer."

The Food Inspector candidly admitted that he had failed to perform his statutory duties in maintaining the record or diary in respect of the action taken by him at the time of taking the sample. It is difficult for the court to accept that the public servant conversant with his duties did not perform them in accordance with the provisions of Rule 9(e) of "the Rules". If the food Inspector had failed to perform his statutory duties enjoined by Rule 9(e) of "the Rules" where is the guarantee of the purity of his actions in taking the sample ? An adverse inference must be

drawn against the witness for the nonperformance of his statutory obligations. When he did not comply with the provisions of "the Rules", the trial Court was justified in holding that he did not take necessary care and caution to take the samples of mustard oil in the battles without impairing the standard and quality of the matter as it was in the tin. In fact the presumption ought to be drawn that P. W. I. had maintained the diary and records but did not produce them in Court as it would have gone against the prosecution case. Rule 14 of "the Rules" mandates that the sample of food for the purpose of analysis must be taken in a clean and dry bottle or jar. The provision implies that if any implement is used for putting the sample into bottles or jars, it should also be clean, pure and unpolluted. There is enough room to doubt that the implements and the bottle used for taking the sample were not pure, unadulterated and clean. The sample of mustard oil sent to the Public Analyst was, therefore? not the pure sample taken from the accused. At least there are reasonable grounds to believe that it was blemished and contaminated by the used implements having traces of oil in them. As such, learned Magistrate reached the finding that the prosecution had failed to prove beyond reasonable doubt that the sample examined by the Public Analyst was not unmixed and undiluted sample of mustard oil taken from the accused. The view expressed by learned Magistrate has strong basis. Learned magistrate also Relied on the law laid down by a Division Bench of this Court in Criminal Appeal No. 9/71. Tezpur Municipal Board vs. Mohanlal Tibrewal And Anr, decided on 10.12.76. It has been held therein that in the absence of positive and firm evidence that the sample was taken in a dry and clean bottle following the correct procedure the report of the Public Analyst can not be used for convicting the accused under "the Act". I find that in the instant case there is just a fractional up gradation of specification value. It was quite possible that it happened because the samples were taken by means of tainted implements. In *Ultadanga Oil Mill vs. Corporation of Calcutta*, 1963 (2) CrL L.J. 448 under similar circumstances the Calcutta High Court has held that under "the Act" where penalties are severe the requirements in the matter of taking samples should be carefully and meticulously observed by the Food Inspector. It has been held that the provisions of the Rules regarding taking of sample should be followed in letters and spirit. The phial or the bottle in which the samples were taken was not dry and clean and there was possibility that the bottle or jar might have contained other matters, sediments etc. which might be responsible for variation in the standard and quality of the article. The High Court has held that under such circumstances the result of the Analyst is not dependable evidence. I am bound by the view expressed by the Division Bench of this Court in *Mohanlal Tibrewal* (supra), I respectfully agree with the view expressed by the Calcutta High Court. I hold that the finding reached by the learned Magistrate is just, proper and adequate. There was possibility of containing impure oil matters, sediments or elements in the funnel, mug and the bottle and as such, the report of the Public Analyst based on the sample can not be acted upon.

5. In any view of the matter, learned Magistrate has reached the conclusion

which is just and reasonable and even if there is another view which might be taken on the materials on record, the order of acquittal can not be set aside on the authority of the decisions of the Supreme Court alluded to in the earlier paragraph of the Judgment.

6. In the result the appeal fails.