
(2020) 01 BOM CK 0132
In the Bombay High Court
Case No : Criminal Appeal No. 541 Of 2002

State Of Maharashtra

APPELLANT

Vs

Abdulazad Abdulkadar Bhatari And Ors

RESPONDENT

Date of Decision : 23-01-2020

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 9, 10(7), 14A, 16, 17
Code Of Criminal Procedure, 1973 — Section 342
Electricity Act, 2003 — Section 49A
Prevention Of Food Adulteration Rules, 1955 — Rule 14

Citation : (2020) 01 BOM CK 0132

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Pallavi Dabholkar, Ritesh Thobde, Ayushi Anandpara

Final Decision : Dismissed

Judgement

1. This is an appeal filed by the State impugning an order and judgment dated 10th October 2001 passed by the Judicial Magistrate First Class, Malkapur, acquitting the 15 accused of charges under Section 16 (Penalties) read with Section 17 (Offences by companies) of Prevention of Food Adulteration Act 1954 (PFA).

2. Before we proceed further, I am informed by the learned APP that accused nos.3, 4, 8 and 9 have expired and therefore, the appeal abates against those respondents/accused.

3. On 6th January 2020 since nobody was present in Court representing respondents, the Court appointed Ms. Ayushi Anandpara, an Advocate, as Amicus Curiae. Subsequently, of course Mr. Thobde appeared for respondents. Before I proceed with the case, I must candidly express my unreserved and uninhibited appreciation for the distinguished assistance rendered by Ms. Ayushi Anandpara, learned Amicus Curiae. I also record my appreciation for the sustained endeavour put forth by Ms. Anandpara, Amicus Curiae, for it has been of

immense value in rendering the judgment.

4. It is the case of the prosecution that complainant - Arun Shankar Kulkarni (PW-1), a Food Inspector, duly appointed under Section 9 of PFA, went to Bhatari Brothers, a shop owned by respondent no.1 as sole proprietor, and purchased 450 ml of soyabean oil, 750 gms. of masur dal and 450 gms of tea. At that time, PW-1 (complainant) was accompanied by one Madhukar Ganpati Pawar and another Food Inspector - Shri A.B. Hogale. Both these persons, i.e., Pawar and Hogale, though were listed as witnesses in the charge sheet, have not been examined. Mr. Pawar was the panch witness. PW-1, after disclosing his identity, collected samples. PW-1 did not find anything wrong with the masur dal or tea samples and therefore, complaint is restricted to soyabean oil, which according to complainant, did not conform to the standards of refined soyabean oil as per PFA Rules 1955. PW-1 collected the samples, put in bottles, seized and sent the samples to Public Analyst, Kolhapur, who issued a report dated 29th February 1996 (Exhibit 78) in which PW-3, the Public Analyst, has opined that the sample of soyabean oil was found to be showing iodine value not in the limit of 120 to 141 and hence, it did not conform to the standards of refined soyabean oil as per PFA Rules 1955.

5. Accused no.5 is the firm from whom the sealed tin of soyabean oil was purchased by accused no.1 for retail sale. Accused nos.2 to 4 were partners of accused no.5. Accused no.5 had purchased this sealed tin of soyabean oil from accused no.11 and accused nos.6 to 10 were partners of accused no.11. Accused no.11 had purchased sealed tin soyabean oil from accused no.15 and accused nos.12 to 14 were partners of accused no.15. Admittedly, when the sample was drawn by complainant (PW-1), the seal on the tin was intact. Relying on the report (Exhibit 78), charges were framed. All the accused pleaded not guilty and claimed to be tried. The defence was of total denial.

6. Prosecution to prove their case, led evidence of three witnesses, i.e., Arun Shankar Kulkarni - complainant as PW-1, Sallauddin Abbas Momin, who was the Assistant Commissioner and Local Health Authority in District - Kolhapur as PW-2 and Arvind Dhondiba Bhujbal, Public Analyst, Kolhapur as PW-3. The Trial Court, after considering the evidence and documents, passed the impugned order of acquittal.

7. At the outset, I have to note that when the complaint was filed by PW-1 against all the accused of offences punishable under Section 16 read with Section 17 of PFA and Rules thereunder as amended, the role of each accused has been different. The Apex Court in Willie (William) Slaney V/s. The State of Madhya Pradesh AIR 1956 SC 116 held that the charge must set out the offence with which the accused is charged and if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. The Court observed that the object of the charge is to enable the accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet.

The essential facts that he has to be meet must be conveyed in a clear and unambiguous manner because a charge founds the foundation of a trial and is a most important step in it. The complaint does not indicate which accused is charged of what offence under Section 16 or Section 17 of PFA. Section 16 of PFA provides for various situations for which a person can be accused of. A general charge that all are accused of offence under Section 16 will not enable the accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. It does not help an accused to deal with the charge. Section 17 of PFA provides for offences by companies. The prosecution has invoked Section 17 of PFA. But in the complaint, there is no averment or material provided to fasten the liability of each of the partners of accused nos.5, 11 or 15. In the charge, it has to be expressly mentioned that each of the partner is in charge of and responsible for the said firm. The complaint is also silent on that. I will also add that there should not only be an averment but charge also has to be proved. I find support for this view from a judgment of a Single Judge of this Court in Ashutosh Bhailal Rao and Ors. V/s. The State of Maharashtra 2018 ALL MR (Cri) 32.

8. Secondly, since the panch witness has not been examined, there is no independent corroboration of what has been stated by PW-1. The Court can consider and rely on the evidence of PW-1 alone, provided the Court can come to a conclusion that PW-1 is absolutely reliable and his evidence is unimpeachable. Unfortunately, I cannot come to that conclusion. First of all, PW-1, in his examination in chief, states that on 19th January 1996 he went to Bhatari Brothers, a retail shop of accused no.1, alongwith Madhukar Ganpati Pawar and Food Inspector Shri Hogale. In the cross examination, PW-1 states on 19th January 1996 he, another Food Inspector Shri Hogale and one Peon had reached Malkapur and he admits that there is no reference in the panchnama about the presence of Peon. Where did the Peon go nobody knows. Even the panch witness, who was called to remain present, PW-1 does not explain how he found the panch witness. PW-1 simply states that he met the panch witness before entering the shop in front of the shop of accused no.1 on Kolhapur-Ratnagiri Highway. PW-1 admits that the panch witness was a businessman and panch witness told him that he has been doing the business of grocery shop. Accused no.1 also runs a business of grocery shop. PW-1 admits in his examination in chief that in the premises of Abdulazad Abdulkadar Bhatari (accused no.1) that time there was a grocery shop. Therefore, it gives an impression that the panch witness was probably a rival businessman of accused no.1.

9. PW-1 also admits that apart from soyabean oil, accused no.1 was also selling other edible oils and other oils in opened boxes. PW-1 also admits that the measurement equipments were in the open tin boxes and that time there were three to four measurement equipments. PW-1 admits that he has used the measurement equipments of the shop and not something that he had carried with him duly sterilized. PW-1 also states that the measurement equipments and utensils were daily used instruments and he had taken sample of soyabean oil in

one stainless steel vessel. PW-1 admits that the said stainless steel vessel was of shop of accused no.1 and he has not mentioned that in the panchnama or in the complaint. PW-1 also admits that he has not mentioned in the panchnama whether the said stainless steel vessel was clean or not. PW-1 also states that he has not mentioned in the panchnama that the seal was put on the mouth of bottle. Moreover, PW-1 states that he did not even check with the accused whether the accused was able to read English because the seal on the bottle, as per Rule 14 of PFA, and the labels were in English. PW-1 admits that even in the panchnama, it is not mentioned that he explained the contents of Form No.6, notice under Section 14-A and contents of seal to accused in Marathi. PW-1 also admits that he has not mentioned in the panchnama that he has affixed seal on the knot made in the bottles. In the cross examination, PW-1 states that he had taken six bottles size of 200 ml and he had personally taken the materials of sampling and given in custody of Peon, who is not mentioned anywhere in the panchnama or complaint. PW-1 states that the bottles were in the store room and the bottles were not sterilized. PW-1 also admits that he did not personally clean the bottles. PW-1 also admits that there is an inward and outward register in his office when the bottles of sample are brought. PW-1 admits that the fact that the sample bottles that were brought in the office is not mentioned in the inward register. We have to note that PW-1 admits that he collected the sample from sealed tin. PW-1 states that the seal put on the bottles contained seal no.207. With this, let us consider the evidence of PW-3 - Public Analyst.

10. The report of Public Analyst, PW-3 - Arvind Dhondiba Bhujbal (Exhibit 78), does not give any seal number. It is a printed format which simply states "that I found the seal intact and unbroken". Nowhere this evidences that the seal, that was put by PW-1, was the same seal that PW-3 found to be intact and unbroken. This is also very relevant because the onus is on the prosecution to show that the sample, which they collected from the sealed tin, was the same sample sent untampered for analysis, Public Analyst tested the same samples and report relates to the same samples that was drawn on 19th January 1996 by PW-1. These details cannot be found in the report (Exhibit 78). Therefore, one cannot rely on Exhibit 78 to prosecute the accused. It has also to be noted that PW-3, in his cross examination, has admitted that there is a possibility, if the measurement equipment already used for another oil and then used for collecting sample of another oil, there will be a change in the iodine value. PW-3 also admits that the iodine value, mentioned in Exhibit 78, is equal to the standard for groundnut oil. On this, PW-1 has admitted that accused no.1 was selling other oils, which were kept in opened tins and that there were three to four measurement equipments kept in those tins and he has also used the steel utensils from the shop. I have to also note that PW-1 does not say anywhere that he used the measurement equipments that he brought from his office and he did not use the measurement equipments which were kept in the shop.

PW-1 also states that he did not stir the oil before collecting the sample. In an unreported judgment of this Court in State of Maharashtra through Shri A.S.

Tayade, Food Inspector, Food and Drug Administration, Yavatmal, District Yavatmal V/s. Shri Lanchand Zaverilal Dungarwal and Ors. Criminal Appeal No.735 of 2003, it is observed that oil was not stirred so as to get homogeneous and representative sample and as there was no reliable evidence to show that it was representative sample, the learned Trial Court has rightly arrived at a conclusion that if the sample is not proved to be representative, the subsequent analysis report cannot be relied upon. The situation here also is the same. On this ground alone Court can arrive at a conclusion that the sample is not proved to be representative and the subsequent analysis report cannot be relied upon.

11. In the case of The State of Maharashtra V/s. Gitaram Kaluram (1993) 2 Prevention of Food Adulteration Cases 238, this Court has observed that sample bottles should be clean and dried before the sample was taken. PW-1 does not say anywhere that he had even seen that the sample bottles were clean and dried before he took the samples.

12. Ms. Anandpara relied upon a judgment of this Court in B.A. Samant V/s. The State of Maharashtra 1968 SCC Online Bom 115 to submit that the failure of PW-1 to state in his evidence that he had taken the samples in clean and dried bottles, which to his knowledge were clean and dried, would certainly affect the credibility of his evidence. Ms. Anandpara submitted that a Food Inspector, who does not care to follow strictly the mandatory provisions of the PFA and the rules with which he is vitally concerned cannot be assumed to have much regard for truth even supposing that he may be truthful and in such a case, the Court must insist on some corroboration to his evidence. Ms. Anandpara submitted that there is no corroboration whatsoever to the evidence of PW-1 because the panch witness has not been examined and also Mr. Hogale, who had accompanied PW-1 on 19th January 1996, has not been examined. Paragraphs 20 to 23 of the said judgment read as under :

20. In my judgment the contentions raised by Mr. Peerbhoy on behalf of the accused must be upheld in the present case, because, in the first place, there is no evidence to show that the Food Inspector complied with the provisions of Section 10(7) by taking independent witnesses for the purpose of entering, inspecting and taking sample from the shop of the accused. It was only after the bottles were filled in and the labels were put that witness Gopinath was made to sign on them. Secondly, the Food Inspector himself has not cared to state in his evidence that he had taken the samples in clean and dry bottles as required by Rule 14 of the Prevention of Food Adulteration Rules. It is true that breaches in the performance of his duties under Section 10(7) and Rule 14 may not necessarily result in vitiating the trial. But they certainly affect his credibility. A Food Inspector, who does not care to follow strictly the mandatory provisions of the Prevention of Food Adulteration Act, 1954 and the rules with which he is vitally concerned cannot be assumed to have much regard for truth even supposing that he may be truthful, I think, the rule of prudence requires the Court to insist on some corroboration to his evidence. In the present case, as

stated above, the Food Inspector did not even care to examine the witness who had accompanied him. It may be argued that it is not necessary for him to examine the witness who accompanied him. Whenever his evidence is challenged or is liable to be challenged, it is desirable that the witness who accompanied the Food Inspector should be examined, so that the evidence of the witness will lend assurance and corroboration to the evidence given by the Food Inspector. It is necessary to guard against baseless allegation which might be made by the accused against him particularly because the Food Inspectors are likely to forget one or the other of the provisions laid down under the Prevention of Food Adulteration Act and the rules made thereunder, with regard to the manner in which the samples have to be taken and forwarded for analysis.

21. In the present case, however, witness Gopinath has been examined by the defence and he has stated emphatically that he did not see the empty bottles at all. The argument of Mr. Rege that no such case was put to the Foods Inspector by the accused is of no avail because the accused in this case was unrepresented and the Food Inspector himself did not state in his evidence that he had used clean and dry bottles as required by Rule 14; and, therefore, it was not necessary to ask him in his cross-examination anything about it. I have already referred to above, as to how the statement of the accused under Section 342 of the Criminal Procedure Code has been recorded in this case. If the accused has not specifically stated that the bottles were not clean and dry when they were filled in with the milk supplied by the accused, it cannot be said to be a ground, which debars him from arguing, on the facts and the circumstances of the case, that unless the compliance with the provisions of Rule 14 is strictly proves, the benefit of doubt which must arise in the present case as a result of the evidence of Gopinath (D.W.1) should be given to him.

22. Further a grave doubt arises with regard to the contents of the two samples which were analysed in this case because of the striking discrepancy between the analysis by the Public Analyst and the one by the Director of Central Food Laboratory, with regard to the water contents of the two bottles. So far as milk fat is concerned, the difference is only of 0.1 per cent, in the report of the Public Analyst and the one given by the Director of Central Food Laboratory. With regard to the milk solids other than milk fat the difference is 0.3 per cent. These differences can be considered to be negligible. But it is difficult to understand how there could be one bottle with 21 per cent of water and the other with 17 per cent. The main question in this case is whether the accused can be convicted merely relying on the evidence of the Food Inspector and the report of the Director of Central Food Laboratory for holding that the accused sold adulterated milk. In view of the fact that the Food Inspector did not lead any evidence with regard to the following of the procedure under Rule 14 and did not try to explain how this difference in the two reports was caused, it will be difficult to convict the accused relying on the evidence of the Food Inspector alone.

23. Further, a doubt is created in accepting his evidence because of the

statement of the defence witness, Gopinath, who stated that he did not see the empty bottles. As I have stated above, the offences under Section 16 of the Prevention of Food Adulteration Act are grave ones and before an accused person can be convicted the Court must be satisfied beyond any reasonable doubt that the accused sold the adulterated article of food. In the present case a grave doubt arises with regard to the way in which the samples were taken by the Food Inspector and if it is not satisfactorily established that the sample that was taken was in a clean and dry bottle, it would be reasonable to doubt whether the sample that was sent to the Director of Central Food Laboratory was the article of food which the accused sold or the article, which was mixed with some water which was already there in the container used. This is not to suggest that the water in the bottle might have been deliberately put in, but it is quite possible that while cleaning those bottles some water remained in them and Rule 14 which required that the bottles should be clean and dry was not complied with. Therefore, in the absence of any reliable evidence on this point led by the prosecution, the prosecution case must fail.

13. Mr. Thobde tendered a compilation of judgments and relied upon particularly in State of Maharashtra V/s. Vilas Madhavrao Tundulwar 2018 ALL MR (Cri) 2100 to submit that the provisions under Rule 14 of PFA Rules 1955 are mandatory and the non compliance of the said rule will vitiate the prosecution. Paragraphs 10 to 12 of the said judgment read as under:

10. On the ground of breach of Rule 14 of the Rules, 1955, Mr. V.A. Laghate the learned Counsel for the respondent, invited my attention to the Rule 14 of the Rules, 1955, which reads as under:

"14. Manner of sending samples for analysis - Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed."

11. In this regard, according to the complainant the sample bottles in which the sample was taken were not cleaned on the spot before the panchas and the accused. It is to be noted that the panchanama does not speak of the fact that the bottle was cleaned. Moreover, after filling the oil in the bottle and cleaning it by lid, the mouth of the bottle was not sealed. The panchanama (Exhibit-40) indicates that the sample of groundnut oil which was purchased was divided into three equal parts and poured in a clean, empty and dry bottle and lid was affixed to it tightly thereafter the label was pasted by means of gum. Significantly, the panchanama is silent on the aspect of sealing. According to the complainant after purchasing the groundnut oil, the samples were divided in three equal parts and they were put in three cleaned, dry and empty bottles. Thereafter, the cork of each bottle was sealed and each bottle was labelled. The ends of the wrapper were folded and pasted. However, the bare testimony of the complainant on this aspect cannot be relied upon and it is missing in panchanama (Exhibit-40).

12. This Court in case of Bhojmal Dhanumal Kundal and another V/s. Shirpur Warwade Municipal Council, Shirpur and another, reported in 1986 Cri.L.J. 931 held that, the provisions under Rule 14 of Rules, 1955 are mandatory and the non compliance of the said Rule will vitiate the prosecution.

14. Mr. Thobde also relied on Tamil Nadu Electricity Board V/s. Rasipuram Textile Private Limited (2008) 17 Supreme Court Cases 285 to submit that Section 49A of the Electricity Act is similar to Section 17 of PFA and it was obligatory on the part of the complainant not only to make requisite averments in the complaint or the FIR but also to prove that each partner of accused nos.5, 11 and 15 were in charge of or otherwise responsible for the conduct of the affairs of the firm and that has not been done.

All these lead only to one conclusion, the impugned judgment does not call for any interference.

15. The Apex Court in Chandrappa & Ors. V/s. State of Karnataka (2007) 4 SCC 415 in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on

record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting the accused, the Trial Court observed that the prosecution had failed to prove its case.

17. In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

18. Appeal dismissed.