
(1978) 06 BOM CK 0040
In the Bombay High Court

State of Maharashtra

APPELLANT

Vs

Jawaharlal Shamlal Ujawane

RESPONDENT

Date of Decision : 15-06-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 258(2), 484(2)

Citation : (1979) CriLJ 530 : (1979) MhLj 50

Hon'ble Judges : Lentin, J;Joshi, J

Bench : Division Bench

Judgement

Lentin, J.—The State of Maharashtra has preferred this appeal for enhancement of the sentence passed by the learned Joint Civil Judge and J. M. F. C. Gondia, sentencing the respondent to pay a fine of Rs. 300/-in default to suffer rigorous imprisonment for one month after convicting him u/s 258 (2) Cr.P.C. of offences punishable under Section 27 (b) read with Sections 18 (a)(i) and 18 (a)(ii) of the Drugs and Cosmetics Act, 1940.

2. The respondent is the proprietor of a shop known as "Jawaharlal Medical Stores" at Salekasa, a village in Tah. Gondia. On 18th November 1970, on an inspection of the respondent's shop, the Drugs Inspector found a stock of 4 dozen bottles of a drug labelled simply, "Santonine (India)", with no obtain information, to wit, the name of the manufacturer, batch number and so forth. Thereupon the sale of the drug was prohibited and on 21st April 1971 samples were taken. The Public Analyst made his report stating that the sample was not of standard quality, that it was not even Santonine and that the test showed presence of magnesium and sulphate. A report was lodged with the police by the Drugs Inspector, The stock of Santonine in the shop was seized and the Drugs Inspector lodged his complaint against the respondent and his brother, who was present in the shop at the time of inspection by the Drugs Inspector. In the trial Court, the respondent's brother was acquitted. Against the respondent, the learned Magistrate held that the respondent had stocked for sale the drug "Santonine" which was not of standard quality and was not labelled in the

prescribed manner. On that finding, the learned Magistrate convicted and sentenced the respondent as stated in the opening part of this judgment. Hence the present appeal by the State for enhancement of sentence.

3. Mr. Manohar, the learned Counsel appearing on behalf of the respondent urged that this was not a case for enhancement or even conviction, but was a case for acquittal, by reason of breach of certain mandatory rules framed under the Drugs and Cosmetics Act, 1940 (referred to hereafter as "the Act"). He also challenged the maintainability of the appeal.

4. Elaborating his first contention, Mr. Manohar invited our attention to R. 37 which prescribed the procedure for despatch of sample to the Government Analyst and to Rule 46 which lays down the procedure to be followed on receipt of the sample. Sub-rule (1) of Rule 57 provides that the portion of sample or the container sent by an Inspector to the Government Analyst for test or analysis under Sub-section (4) of Sec 23 of the Act shall be Sent by registered post or by hand in a sealed packet, enclosed together with a memorandum in Form 18 in an outer cover addressed to the Government Analyst. The provisions of Section 23 (4) are not material for the purpose of this judgment. Sub-rule (2) of Rule 57 provides that a copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the Government Analyst separately by registered post or by hand.

5. Rule 46 provides, in so far as is material for this judgment, that on receipt of a package from an Inspector containing a sample for test or analysis, the Government Analyst shall forthwith supply to the Inspector a report of the result of the test o-r analysis, together with full protocols of the tests or analysis applied. It was the grievance of Mr. Manohar that the provisions of Rules 57 and 46 have been breached in this case, with the result that the order of conviction and sentence passed by the learned Magistrate should be set aside and the respondent should be acquitted.

6. There is considerable force in this contention of Mr. Manohar. Coming to R. 57 (1) and (2), on 21st April 1971, the sample was collected and on 26th April 1971, was forwarded to the Government Analyst. How it was done, is not known. It is not disputed that in this case, if at all the requirements of Rule 57 (1) and (2) were carried out, they do not appear on record. Hence there is nothing to show that these requirements were in fact carried out in the manner laid down in Rule 57 (1) and (2).

7. Coming to the requirements of R. 46, on 26th May 1971, the Government Analyst gave his certificate, stating that the sample was not of standard quality as defined in the Act, that the sample was not "Santonine", and that the sample gave I.P. Qualitative tests for the presence of Magnesium and sulphate. The report of the Government Analyst reads as under:

Details of the results of Test or Analysis with Protocols of Tests applied.

Batch No. Proper Name : Santonine. Observation on labelling :
Outer Label : Santonine India (Hand written). Container label : Santonine,
India. Description : White Crystalline Powder. Identification : The sample does
not comply with I. P. Identification tests for Santonine. The sample gives
qualitative tests for Magnesium and Sulphate.

Now, it is not in dispute that it is not known what the "protocols of tests applied" were. The report is silent on this point, and so is the record. In view of the provisions of Rule 46 which are mandatory, the Government Analyst was bound to furnish to the Inspector the full protocols of the tests applied. Admittedly, this has not been done. This lacuna, in our opinion was a fatal hurdle in the path of the prosecution.

8. The Analyst has not given evidence, nor is there anything on record to indicate what test was applied to reveal the alleged presence of Magnesium and Sulphate. If the prosecution had led the evidence of the Analyst, he could have been cross-examined and the prosecution case could have been tested on this point also. This was a lacuna which must militate against the prosecution.

Rules 57 (1) and (2) and 46, with which we are concerned, are mandatory. It is, therefore, imperative that they must be strictly observed. It must also be manifest from the record that they have been so observed to the letter and not only in substance or spirit. These rules are framed as a measure of security and safeguard not only to an accused but also to the officers of the department. Their observance must not, in the interest of justice, be left to conjecture or inference. A strict observance of these rules can also enable the prosecution to prove its case, which in this case, on the aspect of the drug not being of standard quality, it has failed to do beyond reasonable doubt, the benefit whereof must go to the respondent.

9. In the result, we uphold Mr. Manohar's first contention and hold that the conviction of the respondent-accused u/s 18 (a)(i), namely stocking of a drug which is not of standard quality, cannot be sustained.

10. The matter, however, pertaining to the charge u/s 18 (a)(ii) of the Act, stands on a different footing. That section prohibits, inter alia, the stocking of any misbranded drug or misbranded cosmetic. We are not concerned with the latter. Section 17 (e) provides that a drug shall be deemed to be misbranded if it is not labelled in the prescribed manner. The manner of labelling is provided by Rule 96 as prevailing prior to the amendment of 1977. It states, in so far as is material to this case, that the following particulars shall be either printed or written in indelible ink and shall appear in a conspicuous manner on the label of the innermost container of any drug and on every other covering in which the container is packed, viz., (a) the name of the drug and (b) the name and address of the manufacturer. It further provides that every drug shall bear on its label a distinctive batch number that is to say, the number by reference to which details of manufacture of the particular batch from which the substance in the container

is taken are recorded and are available for inspection; the figure representing the batch number being preceded by the words "Batch No." or "Batch" or "Lot Number" or "Lot No." or "Lot" or any distinguishing prefix It further provides that every drug manufactured in India shall bear on its label the number of the licence under which the drug is manufactured, the figure representing the manufacturing licence number being preceded by the words "Manufacturing Licence Number", or "Mfg. Lie. No." or "M. L.".

11. Out of the 4 dozen bottles found stocked by the respondent in his shop, not a single bottle bore anything but the label "Santonine (India)". The name of the manufacturer, the licence number, the batch number and other mandatory particulars required by Rule 96 were conspicuous by their absence. Thus it is abundantly clear that the respondent cannot escape the consequences of his act in stocking in his shop a misbranded drug in violation of Section 18 (a)(ii) of the Act. We agree with the finding of the learned Magistrate on that count and uphold the conviction. We, however, set aside the sentence of fine of Rs. 300/- which we find too lenient and inadequate. Stocking of a misbranded drug is a serious and heartless offence, having unforeseen repercussions on the person who, for no fault of his, consumes it in all good faith. It is a hazard to the health, safety and well-being of society at large. We impose a fine of Rs. 1,000/- in default 6 months" R- I. which we trust will act as a deterrent to the respondent and those like minded. If we do not impose a jail sentence on the respondent, it is not out of sympathy but because the prosecution has failed to establish beyond reasonable doubt that the drug was not of standard quality.

12. Coming to the maintainability of the appeal, Mr. Manohar urged that it was not open to the appellant to file this appeal under the provisions of the Criminal Procedure Code of 1973 but should have filed a revision, petition under the Criminal Procedure Code of 1898.

13. We do not agree. On the aspect, a perusal of the repealing Section 484 (2) of the Criminal Procedure Code, 1973, is material, and reads as under:

(2) Notwithstanding such repeal,

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then such appeal, application, trial inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), as in force immediately before such commencement, (hereinafter referred to as the old Code), as if this Code had not come into force.

14. The Criminal Procedure Code of 1973 came into force on 1st April 1974. On that date, the trial was pending before the learned Magistrate, who gave his judgment on 31st October 1974, viz., after the new Criminal Procedure Code came into force. Now, on a plain reading and construction of Section 484 (2) of the Criminal Procedure Code of 1973, it is abundantly clear that the old Code

would apply only to appeals, applications, trials, inquiries, or investigations pending immediately before the date on which the new Code came into force. There is nothing in the phraseology of Section 484 (2) to save the provisions of the old Code from being invoked and implemented for the purpose of appeals, revisions, etc. filed after the commencement of the new Code, against orders passed in those pending proceedings. Section 484 (2) brings to the forefront that the old Criminal Procedure Code shall apply to appeals, applications, trials, inquiries or investigations pending immediately before the date on which the new Code came into force and that it does not save the old Code for the purpose of appeals, revisions, etc., to be filed after the commencement of the new Code arising against any proceedings which had been filed in the trial Court before the Coming into force of the new Code. Clause (a) of Sub-section (2) of Section 484 says in explicit and unmistakable terms that, notwithstanding the repeal of the old Code, any appeal, trial, inquiry or investigation, which was pending on the date of the new Code coming into force, shall be disposed of and continued in accordance with the provisions of the old Code as if the new code had not come into force, and there is nothing specific in respect of appeal or revision arising out of such trials. In view of Clause (a) of Sub-section (2), the provisions of the old Code would apply to pending proceedings at whatever stage they might be. In our view, there is nothing in that clause from which it can be spelt out that the provisions of the old Code are to apply to the present appeal filed by the State, empowered to do so under the provisions of the new Code. The present appeal having been filed after the new Code came into force, the provisions of the new Code would apply and the appeal would be maintainable. In coming to this conclusion, we are fortified by the decisions of the Madhya Pradesh and Himachal Pradesh High Courts in *Firm Chironjilal Ramjibhai and Co. Vs. Chunarmal Motiram and Co. and Others*, and in *Bagga Singh Vs. The State of Himachal Pradesh and Another*, and by the decision of the Full Bench of the Patna High Court in *Ram Beyas Singh and Others Vs. The State of Bihar*, with which we respectfully agree.

15. It was, however, urged on behalf of the respondent that if the appellant is allowed to take recourse to the provisions of the new Criminal Procedure Code and to file an appeal thereunder, the respondent would be deprived of a vested right, viz., to urge for an acquittal. The fallacy of this contention lies in that this is exactly what, in the present appeal, the respondent has done, and successfully, on one charge. We fail to see what vested right the respondent can possibly have, which he has been deprived of or prevented from exercising. learned Counsel was unable to suggest a single factor to show that the respondent was prejudiced, and rightly so, for there is none. We hold that in view of the provisions of Section 484 (2) of the new Criminal Procedure Code, the present appeal filed is maintainable and we reject the contention to the contrary.

16. In the result, the appeal partially succeeds- We set aside the judgment and order of the learned Magistrate in so far as the same pertains to conviction of the respondent u/s 18 (a)(i) read with Section 27 (b) of the Drugs and Cosmetics

Act, 1940 and acquit the respondent of that charge. While we confirm the judgment and order of the learned Magistrate in so far as the same pertains to the conviction of the respondent u/s 18 (a)(ii) read with Section 27 (b) of the Drugs and Cosmetics Act, 1940, we, however, set aside the sentence of Rs. 300/- in default to suffer one month's R. L, as we find it inadequate. We sentence the respondent to pay a fine of Rs. 1,000/- in default whereof the respondent shall suffer rigorous imprisonment for a period of six months. The fine shall be paid within two weeks from the date of the signing of this judgment.