

(1986) 10 BOM CK 0024

In the Bombay High Court

Case No : Criminal Revision Application No. 149 of 1985

State of Maharashtra

APPELLANT

Vs

Padmashi Velji Chheda and Others

RESPONDENT

Date of Decision : 08-10-1986

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 16, 7
Prevention of Food Adulteration Rules, 1955 — Rule 14

Citation : (1986) 3 BomCR 534

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : P.M. Vyas, P.P, for the Appellant;

Judgement

V.S. Kotwal, J.—The order of discharge which is being challenged by the State deserves to be confirmed because the said challenge has no merits at all.

2. The first 3 respondents are the partners of the 4th respondent firm, while respondent No. 5 is the manufacturer of the commodity of food known as "Ghee". On 22nd August, 1978 the complainant, the Food Inspector alongwith accused No. 5 and other Food Inspector and a witness went to the business premises of the said firm where accused No. 5 had sold Ghee. The firm was dealing in that commodity on retail basis and thus the commodity was stored in the premises for sale to the public. The complainant purchased 450 grams of Ghee from one of two sealed tins on payment of the price. All the procedural formalities were observed when it was divided into three samples and all were properly sealed with the signature of the panchas as also containing the seal of the Department as per the sample. A detailed panchnama was drawn and other documents were prepared as per the information given by the accused. Accused No. 1 had issued the receipt for payment of the price of the sample purchased, though it does not clarify as to whether all the accused were present in the shop. In due course, one sample was sent to the Public Analyst, Bombay, who had analysed and sent his report to the complainant and the Local Health Authority.

The two samples were retained by the Local Health Authority. The complainant, however, informed the Local Health Authority that the report of the Public Analyst, Bombay, contained deficiencies and, therefore, requested that Authority to forward one sample from their possession to the Public Analyst at Pune. The Local Health Authority, complied with that request and in due course the Public Analyst at Pune forwarded its report to the Local Health Authority which in turn forwarded its copy to the accused so as to give an opportunity to the accused to move the Court for sending the sample to the Central Food Laboratory at Calcutta after filing of the complainant, the accused did not exercise that option. The complainant, on obtaining the sanction, filed his complainant in the Court of the learned Metropolitan Magistrate, 28th Court, Esplanade, Bombay, which is the subject matter of Criminal Case No. 155/S/79, for an offence u/s 16(1)(a)(i) read with section 7(i) of the Prevention of Food Adulteration Act, 1954 against all the four accused as well as the firm.

3. The accused denied the allegations and claimed to be innocent. They canvassed that the mandatory Rules have not been observed and, therefore, the prosecution is not sustainable. They also maintained that the commodity was not adulterated.

4. After certain evidence was led, the prosecution asked for framing of the charge, while the accused prayed for discharge. The plea of the accused found favour with the learned Magistrate who discharged the accused under a speaking order dated 7th of March, 1984, against which this Revision has been filed by the State.

5. Shri Vyas, the learned Public Prosecutor for the State submits that at least one ground on which acquittal was recorded is unsustainable in view of the decision of the Supreme Court in that behalf. As regards the other two grounds, the learned Public Prosecutor submits that the trial Court has not appreciated the evidence correctly in that behalf. Accused, though properly served, have not bothered to appear either in person or through any Counsel. However, with the assistance of the learned Public Prosecutor all the material features are considered and examined.

6. The order of acquittal is based on three grounds prominently. The first ground is based on non-compliance of Rule 9-A of the Rules framed under the Act. The said Rule prescribes that immediately after launching of the prosecution, the Local Health Authority has to forward a copy of the report Public Analyst to the person concerned and this is in consonance with the provisions contained in section 13 of the Act. The object behind this is manifested by the fact that though the Food Inspector himself forwards one sample to the Public Analyst, the accused has an option to arrange for sending another sample, which is retained by the Local Health Authority through the Court to the Central Laboratory at Calcutta, because report of that laboratory would prevail over the Public Analyst's report. The accused has to apply within 10 days to the Court. Rule 9-A stipulates that the said report is to be forwarded to the accused by the Local

Health Authority immediately after institution of the prosecution. The learned Magistrate held that there is non-compliance of this Rule which goes to the root of the prosecution and that is one of the grounds on which order of discharge was passed. It is to be noted that the raid was effected on 22nd August, 1978. One sample was forwarded by the complainant to the Public Analyst at Bombay on 23rd August, 1978. The complainant received the report of the Public Analyst from the Local Health Authority on 13th September, 1978. He, however, found that the said report was defective and, therefore, he requested the Local Health Authority to send additional sample to the Public Analyst at Pune and accordingly that sample was sent. As to when the report from the Public Analyst at Pune was received by the Local Health Authority is not clarified. However, it is in evidence that it was forwarded to the complainant and ultimately the complaint was filed on 28th of June, 1979. The complainant informed the Local Health Authority on 4th of July, 1979 to send a copy of the Public Analyst's report from Pune to the accused. The Local Health Authority sent that copy to the accused on 20th July, 1979. Thus, it is clear that the complaint was filed on 28th June, 1979, a copy of the Public Analysts' report was forwarded to the accused by the Local Health Authority on 20th July, 1979.

7. On the basis of these facts, the learned Magistrate held that there is non-compliance of Rule 9-A because Rule 9-A stipulates and prescribed that the report of the Public Analyst shall be forwarded by the Local Health Authority to the accused "immediately" after launching of the prosecution and the learned Magistrate was of the opinion that there is a delay of 22 days and, therefore, it does not fit in with the requirements of Rule 9-A of not having sent the report immediately. The learned Magistrate for that purpose placed reliance on the judgment of the learned Single Judge of this Court in the matter of *The State of Maharashtra v. Tukaram Baburao Mane*, 1982 CLJ 1462, wherein Pendse, J., has ruled that if the report is not sent as stipulated by Rule 9-A, it amounts to non-compliance and it is fatal to the prosecution, unless there is a reasonable explanation in that behalf. This controversy, however, is set at rest in view of the ratio of the judgment of the Supreme Court in *Tulsiram Vs. State of Madhya Pradesh*, . There a similar question was posed because the complaint was filed for a similar offence on 29th November, 1979, while the copy of the report of the Public Analyst was forwarded by the Local Health Authority to the accused on 17th December, 1979 and, therefore, an identical argument was canvassed that since the report was not forwarded "immediately", there is non-compliance of Rule 9-A. This contention has been negated by the Supreme Court in terms holding that the concept of "immediately sending" cannot be extended to mean that it must be sent forthwith and also that any delay, howsoever short it may be would be fatal to the prosecution. It was indicated that the expression "immediately" is used to convey a sense of continuity rather than urgency. It is not to be understood to mean the very next instant or the very next day. The whole object behind this Rule according to that ratio is to enable the accused to apply to the Court to have one sample analysed by the Central Food Laboratory

at Calcutta. But the idea is not to penalise the prosecution and provide a technical defence. The Supreme Court then observed :---

"First to construe "immediately" as meaning "at once" or "forthwith" and next to hold delay to be fatal to the prosecution would perhaps be to make Rule 9-A ultra vires section 13(2). We do not think it is permissible to interpret Rule 9-A in such a way. The real question is, was the Public Analyst's Report sent to the accused sufficiently early to enable him to properly defend himself by giving him an opportunity at the outset to apply to the Court to send one of the samples to the Central Food Laboratory for analysis? If after receiving the Public Analyst's Report he never sought to apply to the Court to have the sample sent to the Central Food Laboratory, he may not be heard to complain of the delay in the receipt of the report by him, unless, of course, he is able to establish some other prejudice."

8. In view of this clear dictum and mandate under the ratio, the first point that found favour with the learned Magistrate does not exist any more, though, of course, the question of prejudice may still survive.

9. However, the other two points which found favour with the learned Magistrate are so formidable that their validity cannot be challenged by the State and order of discharge becomes fully justified on those counts.

10. The first out of these two points is that the Report of the Public Analyst at Bombay and the Report of the Public Analyst from Pune contained variance, almost on every point and that is not only a marginal variance but there is a vast difference and discrepancy between the two. The prosecution are unable to explain the significant situation which makes it impossible to place reliance on either of them. This has been discussed by the learned Magistrate in details. Thus, in the first Report it is mentioned that it contain 100 percent Vanaspati whereas the second Report shows that there is foreign fat 93.6 percent. The first Report had not shown the fat percentage at all. The moisture percentage in the first report is 9.14 whereas in the second Report it is 0.02. The percentage of free fat acid in the first Report is 1.92, while it is 1.35 in the second Report. It is unnecessary to multiply these illustrations which makes it absolutely clear that both the Reports do not tally on any material particular but there is vast difference and discrepancy between the two. Furthermore, as to how the commodity was said to be adulterated was not clarified in the first Report at all. What is of importance is that even the complainant admits that the first Report was utterly defective and that is why he had asked the Local Health Authority to send the second Report to the Public Analyst at Pune. On this count, therefore, the defence must succeed as has been rightly held by the learned Magistrate.

11. The second count on which the defence equally must succeed is also a formidable ground. It is apparent, as is clarified from the narration of the prosecution case, that one sample was sent to the Public Analyst at Bombay, while the second sample was sent to the Public Analyst at Pune by the Local

Health Authority on the request of the complainant, because the first Report was defective. Thus, the Local Health Authority had in their possession left with only one out of the three samples. The purpose always is that one sample, if demanded, is to be given to the accused, while the second sample is to be retained in the Court where the complaint is filed so that if an occasion arises, that sample can be sent to the Central Food Laboratory at Calcutta, as is permissible under the various provisions of Act and the Rules, including section 13. However, in the instant case only one sample was sent to the Court. It is true that the accused did not exercise his option of moving the Court within ten days from the receipt of the Report for sending the sample to the Central Food Laboratory at Calcutta. However, two things are annexed to this situation. Under sub-section (2) of section 13 of the Act, the accused has a right to move the trial Court within 10 days from the receipt of the Report from the Local Health Authority for sending the sample to the Central Food Laboratory, and under sub-clause (2-A) of section 13 of the Act, the Court had to call upon the Local Health Authority, if such an application is made by the accused, to send one sample to the Court. Under sub-clause (2-B) it is after the receipt of such sample within five days from the Local Health Authority that the Court has to satisfy itself that the sample is received in a sealed condition and there is no tampering or no leakage. This has nexus with the provisions of Rule 14 under which it is prescribed as to how the packing of the sample is to be made by the Food Inspector when the sample is taken from the accused. If the Court is satisfied that the fastening is intact, then it has to forward that sample to the Central Food Laboratory and that Report or Certificate would prevail over the Report of the Public Analyst and would have a conclusive tendency about the evidentiary value. Now, in the instant case it is fully established on evidence that the sample that was with the Local Health Authority was ultimately sent to the Court, though it is not clarified under what circumstances and even though the accused had not applied for the same. Nonetheless it is an accepted position that when that sample was received by the Court, there was apparent leakage which is accepted by the Clerk of the Court examined at the trial and it is conceded by the prosecution that the leakage was on account of the defect in the process of packing and thereby not complying with the provisions of Rule 14. This would also give an additional ground about the prejudice that is being caused to the accused, because in the instant case even if the accused had asked for sending the sample to the Central Food Laboratory at some stage, the purpose would have been frustrated, because the only sample available was in a tampered condition. The prejudice would be, therefore, apparent. This third point has also been correctly dealt with by the learned Magistrate.

12. In view of all these features, the order of discharge is fully justified, since no case has been made out against the accused which, if unrebutted, would warrant his conviction, as stipulated by section 245(1) of the Code of Criminal Procedure, as has been rightly found by the learned Magistrate. In view of this situation, there is no propriety whatsoever to continue the prosecution by framing of the

charge, because the deficiencies are already brought on record and which deficiencies are enough to oust the prosecution from the Court. The learned Magistrate has recorded a very reasoned order. The first count of non-compliance of Rule 9-A made not available in view of the decision of the Supreme Court cited (supra), however on the other two counts, the question of prejudice is relevant as is accepted by the Supreme Court, and considered in the context, the leakage in the sample is bound to cause prejudice to the accused and from that point of view also the first count under Rule 9-A can be availed by the defence, though to a limited extent. Any way, the order of discharge is not open to a challenge at all.

13. The order recorded by the learned Magistrate discharging the respondent-accused is confirmed.