

(1967) 02 BOM CK 0022
In the Bombay High Court
Case No : Criminal Appeal No. 1697 of 1965

The State	Vs	APPELLANT
Munafkha Lukmankha Pathan		RESPONDENT

Date of Decision : 01-02-1967

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 221, 223, 225
Defence of India Rules, 1962 — Rule 125(3), 125(9), 141(2)
Essential Commodities Act, 1955 — Section 3

Citation : AIR 1968 Bom 298 : (1967) 69 BOMLR 715 : (1968) CriLJ 1048 :
(1967) ILR (Bom) 1286

Hon'ble Judges : M.V. Paranjape, J

Bench : Single Bench

Advocate : R.A. Jahagirdar, Asst. Govt. Pleader, for the Appellant; H. H. Ponda, for the Respondent

Judgement

(1) In this appeal the State challenges the order of acquittal passed in favour of the accused who is respondent before me. The respondent was charged before the learned Judicial Magistrate, First Class, Nandurbar, for having committed offences punishable u/s 7(1) of the Essential Commodities Act, 1955, and sub-rule (9) of Rule 125 of the Defence of India Rules, 1962.

(2) The case of the prosecution against the accused was that on the 1st November 1964 at about 8.30 a. m. P. S. I. Nalwade who was attached to the Dhadgaon Police Station raided the grocery shop of the accused at Dhadgaon, District Dhulia, on information received by him that the accused possessed foodgrains weighing more than 25 Quintals and further that he had not made a declaration of his stocks to the authorities as required in the relevant orders which I will refer to presently. In the search that P. S. I. Nalwade took of the shop of the accused he found that the accused had stored in his shop 8 Quintals and 57 Kilograms of grain known as "Dadar" 7 Quintals and 37 Kilograms of wheat, 1 Quintal and 83 Kilograms of rice, 2 Quintals and 99 Kilograms of gram flour, 80 Kilograms of gram Dal, 2 Quintal and 40 Kilograms of Maida and 31

Kilograms of wheat flour. Thus, the total quantity of foodgrains which was found to be stored by the accused in his shop was 25 Quintals and 27 Kilograms. The prosecution case was that the accused was carrying on the business of sale and purchase of foodgrains without licence as required by the Maharashtra Foodgrains Dealers' Licensing Order, 1963, (hereinafter referred to as "the Licensing Order"), which was issued under S. 3 of the Essential Commodities Act, 1955, and therefore the accused was guilty of an offence punishable u/s 7(1) of the Essential Commodities Act, 1955. The prosecution case further was that the accused had stored these foodgrains without declaring them as required by the Maharashtra Foodgrains (Declaration of Stocks) Order 1964, (hereinafter referred to as "the Declaration of Stocks Orders) issued under Rule 125 of the Defence of India Rules, 1962, and that therefore the accused was guilty of the offence punishable under sub-rule (9) of rule 125 of the said Rules.

(3) The accused admitted that a search was made in his shop by P. S. I . Nalwade on the day in question and foodgrains were attached from his shop, but his case was that the foodgrains that were attached were not weighing 25 Quintals and 27 Kilograms. His defence further was that the two Order, viz., the Licensing order and the Declaration of Stocks Order, were not duly published and consequently he could not be held guilty of the offences charged against him. He also pleaded that he was an agriculturist and therefore was not liable to declare stock up to 25 Quintals of foodgrains under the Declaration of Stocks Order.

(4) The learned trial Magistrate has held relying upon the evidence of prosecution witness P. S. I. Nalwade that in the raid that took place on the day in question 25 Quintals and 27 Kilograms of various kinds of foodgrains as deposed to by the witness were found in the shop of the accused. The learned Magistrate has also held that the accused was not an agriculturist but was a dealer within the meaning of expression as used in the Licensing order. But the learned Magistrate has held that none of two orders in question was duly published as required by law and therefore the learned Magistrate has acquitted the accused. Aggrieved by this order of acquittal the State has come before me in appeal.

(5) With regard to the Declaration of Stocks Order, this is what the learned Magistrate has said after discussing the evidence of publication of the Order by beat of drum led on behalf of the prosecution.

"Even, if it is presumed that the above publication was made ditto as per Exhs. 32 and 33 it can hardly be said that it was the publication consistent with clause 3 of the Maharashtra Foodgrains (Declaration of Stocks) Order, 1964. The above clause lays down that every person, shall not later than 5th of each month furnish in writing to the specified officer a full and correct statement in the form set forth in Schedule "B" in respect of each of the foodgrains held by him at any place in the State on the last date of the preceding month."

The learned Magistrate, therefore, has held that the publication by beat of drum of the said Order was not in terms of the Order itself and therefore the learned

Magistrate has acquitted the accused of the offence of contravention of the said Order:

(6) As regards the Licensing Order, this is what the learned Magistrate has stated:- "Similarly regarding the publication of the Maharashtra Foodgrains Dealers" Licensing Order, 1963, the position is still worse. It was not at all published by the beat of drum."

The learned Magistrate has also discussed the evidence led on behalf of the prosecution to show that the accused was present at a meeting of traders of Dhadgaon where this order was explained by Sonwane Extra Head Karkun of Dhagaon. But he had not accepted that evidence of the prosecution and therefore has held that this Order was also not duly published. Consequently the learned Magistrate has acquitted the accused of the offence of contravention of this order also.

(7) Mr. Jahagirdar, who appears on behalf of the State, contends that so far as the Licensing Order is concerned, the learned Magistrate was in error in assuming that under the provisions of the Essential Commodities Act, 1955, it was necessary to explain the Order to the accused. The learned Counsel further contends that the learned Magistrate erred in acquitting the accused for want of evidence to show that the order was explained to the accused. Mr. Jahagirdar relies upon the provisions of clause (a) of sub-s (5) of the said Act and contends that what was required for the due publication of the Order was only a notification of the said Order in the official Gazette, if the Order was of general nature and issued under the provisions of S. 3 of the Act, Mr. Jahagirdar says that the Licensing Order issued by the Maharashtra Government of 1963 was admittedly an order of a general nature as contemplated by clause (a) of sub-s. (5) of S. 3 of the Essential Commodities Act, 1955, and therefore, for its due publication what was required was its notification in the Official Gazette, which has been done Mr. Jahagirdar, therefore contends that the learned Magistrate was in error in holding that the Order was not duly published. Mr. Jahagirdar says that the law nowhere requires that Order was required to be explained to the accused before it could be said to be duly published as required by law. Mr. Ponda, who appears on behalf of the accused, has not been able to point out any provisions which will require the Order to be explained to the accused in order that the order could be said to be duly published. In my opinion, the submission made by Mr. Jahagirdar is well founded.

(8) Section 3 of the Essential Commodities Act, 1955 is as follows:

"3 (1) If the Central Government is of opinion that it is necessary or expedient, so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order provide for regulation or prohibiting the production, supply and distribution thereof and trade and commerce therein." And without prejudice to the generality of the powers conferred by sub-s (1), power for regulating the

purchase, sale or storage for sale of foodgrains has been conferred upon the State Government by the provisions of sub-s. (2) of S. 3 Section 5 of the Act enables the Central Government to delegate the State Government the power to make orders under S. 3 in relation to such matters and subject to conditions, if any, as may be specified in the notification. A notification has accordingly been issued on 8th July 1961 delegating these powers under s. 3 of the Essential Commodities Act, 1955, to the Government of Maharashtra in exercise of these powers has issued the order known as the Maharashtra Foodgrains Dealers' Licensing Order 1963.

(9) Sub-section (5) of the Act is in the following terms:-

"(5) An order made under this section shall, -(a) in the case of an order of general nature x x x be notified in the official Gazette."

Therefore, for the purpose of publication of an order issued under s. 3 of the Act what is required is only the publication of the order in the Official Gazette. The Order issued by the Maharashtra Government Gazette, part IV-A, dated 14th February 1963 at P. 253. Therefore in my opinion, there is no scope for argument that the Order has not been duly published. I do not know wherefrom the learned Magistrate got the idea of explaining the order to the accused before the Order has not been duly published, as has been held by the learned Magistrate. The law does not require that when an order is made u/s 3 of the Essential Commodities Act, such an order should be explained to the accused. If the officials of the State have gone out of their way and explained that Order to the traders in meeting of the traders, it was of necessary by law but it was merely for the purpose of facilitating the work of the traders and avoiding any confusion in their minds. For the legal publication of the order it is not necessary that the order should be explained to the traders because that is not required by any provisions of the Act or any of the Orders issued thereunder. It is also not necessary, that an order issued under S. 3 of the Essential Commodities Act should be published by beat of drum. Every citizen is presumed to know the law. It is only in cases where a special mode of publication is prescribed that it can be said that the order is not duly published if that mode of publication is not adopted by the issuing authority. For an order to be issued under S. 3 of the Essential Commodities Act the mode of publication is a notification in the Official Gazette. That mode is shown to have been adopted and therefore for its due publication it was not necessary that the order should have been advertised by beat of drum. In my opinion, the learned Magistrate has fallen into an error in blaming the prosecution for not producing convincing evidence about the publication of this Order by beat of drum and explaining it to the accused in the meeting of traders. It was not necessary. The conclusion, therefore, that I arrive at so far as this aspect of the matter is concerned is that the prosecution has proved beyond doubt that the order was duly published.

(10) But Mr. Ponda contends that the accused will still be entitled to retain his acquittal because the charge that was framed by the learned Magistrate under

the Licensing Order did not mention that the accused had no licence. The prosecution has led the evidence of Inspector Jagtap to show that the accused had no licence as required by the Licensing Order. Mere non-mention of this in the charge, assuming that that mention is required, would not in my opinion be enough for holding that the accused is not guilty of the offence charged against him. No prejudice has been shown to have been caused to the accused by the failure on the part of the learned Magistrate-assuming that it is a failure-in mentioning in the charge that the accused had no licence under this order. Therefore, in my opinion there is no substance in this argument of Mr. Ponda.

(11) The next argument advanced by Mr. Ponda is that it has not been established by the prosecution that the accused was a dealer as defined by the Licensing Order. The argument of Mr. Ponda is that for the purpose of attracting the provisions of this order what the prosecution must prove is that the accused was doing the business of either purchase or sale or storage for sale of any foodgrains to which this order applies, in excess of ten Quintals at any time. Mr. Ponda says that what the prosecution has to prove is that on the day in question i.e. on 1st November 1964 not only the accused had stored the quantity of foodgrains as deposed to by prosecution witness P. S .I. Nalwade but the prosecution has also to prove that the accused is a retail dealer. Mr. Ponda says that the prosecution has not proved that the accused was engaged in the business of purchase or sale or storage for sale or any more of these foodgrains in quantity of ten Quintals or more at any one time and therefore, the prosecution has not proved that the accused was a dealer. Therefore, according to Mr. Ponda, it was not necessary for the accused to take licence under sub-clause (1) of Clause 3 of the said Order and since it was not necessary for him to take such a licence it cannot be said that the accused was guilty of contravention of that clause.

(12) In order to appreciate this argument it is necessary to take note of the definition of the word "dealer" as given in sub-clause (a) of Clause 2 of the Licensing Order and a note must also be taken of the requirement of taking a licence under sub-clause (1) of Clause 3 of that Order, sub-clause (a) of Clause 2 of the Order defines a dealer in the following terms: ""dealer" means a person engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of ten Quintals or more at any one time." This definition has thereafter undergone an amendment but we are not concerned with the amended definition. Under the unamended definition which applies to the facts of this case, what was required to be proved by the prosecution was that the accused was engaged in the "business" of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of ten quintals or more at any one time. It is admitted on behalf of the prosecution before me that the prosecution before me that the prosecution has not proved that the accused was engaged in the business of sale of any of the foodgrains in quantity of ten Quintals or more at any time. But what was contended by Mr. Jahagirdar on behalf of the State was that for the purpose of this definition it is not necessary

for the prosecution to establish that the accused was engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of ten quintals or more at any one time. According to Mr. Jahagirdar, it is enough if the prosecution establishes that the accused was engaged in the business of purchase, sale or storage for sale, of any of the foodgrains, and if the prosecution further proves that the accused was in possession of stocks of foodgrains in excess of ten quintals, then, according to Mr. Jahagirdar, the requirements of the definition of "dealer" as given in sub-clause (a) of Clause 2 of the Licensing Order are satisfied. In my opinion, Mr. Jahagirdar is not correct when he makes that submission. On plain reading of this sub-clause, what is required is that the prosecution must establish, before a person can be said to be a dealer, that he was engaged in the business of purchase, sale or storage for sale of any one or more of the foodgrains and that such business of purchase, sale or storage for sale must be in quantity of ten quintals or more at any one time. In the absence of any evidence to show that the accused was engaged in the business of purchase, sale or storage for sale of foodgrains in quantity of ten quintals or more at any time the accused could not be classified as a dealer within the meaning of that expression as used in sub-clause (a) of Clause 2 of the Licensing Order. Consequently it would not be necessary for the accused to take a license as contemplated by sub-clause (1) of Clause 3 of the said order. The prosecution also cannot rely upon the presumption arising under Clause 3 (2).

(13) The presumption that has to be raised under sub-clause (2) of Clause 3 of the said Order is only to this extent, namely, that if the quantity of foodgrains found to have been stored by the accused is in excess of ten quintals or more at any one time, then it should be deemed that such a storage was done by the accused for the purpose of sale, unless the contrary is proved by the accused. In other words, if the quantity found with the accused is in excess of the one contemplated by Sub-clause (a) of Clause 2, then a presumption arises that the storage of that quantity was made by the person storing it for the purpose of sale. But that does not mean that the person so storing the foodgrains would be presumed to be doing the business of storage of foodgrains for sale. Storage for sale is different from doing business in the storage for sale. Therefore, the presumption under sub-clause (2) of Clause 3 of the said Order will also not come to the assistance of the prosecution.

(14) Mr. Ponda has drawn my attention to a ruling reported in Manipur Administration Vs. M. Nila Chandra Singh, where the Supreme Court was considering similar terms of an order issued by the Manipur Administration, called the Manipur Foodgrains Dealers Licensing Order, 1958, sub-clause (2) of Clause 3 of that order identical in terms as sub-clause (2) of Clause 3 of the present Licensing Order. This is what the Supreme Court has said while construing the provisions of sub-clause (2) of Clause 3 of the Manipur Foodgrains Dealers Licensing Order, 1958:-

"What does this presumption amount to? It amounts to this and nothing more that the stock found with a given individual of 100 or more maunds of the specified foodgrains had been stored by him for the purpose of sale. Having reached this conclusion on the strength of presumption the prosecution would still have to show that the store of the foodgrains for the purpose of sale thus presumed was made by him for the purpose of carrying on the business of store of the said foodgrains. The element of business which is essential to attract the provisions of Clause 3 (1) is thus not covered by the presumption raised under Clause 3 (2). That part of the case would still have to be proved by the prosecution by other independent evidence."

Therefore, if the prosecution wants to rely on the presumption raised by sub-clause (2) of Clause 3 of the Licensing Order, the prosecution must fail because the prosecution has not led any evidence to show that the accused was doing the business of storage of foodgrains for sale. In the facts of this case what the prosecution has proved is that on the day in question foodgrains in excess of 25 quintals were found on the premises of the shop of the accused. That alone is not enough for the purpose of proving that the accused was engaged in the business of storage of foodgrains for sale. In order that the prosecution may succeed in showing that the accused was engaged in the business of storage of foodgrains for sale, the prosecution will be required to establish a certain amount of continuity and there is no evidence in the fact of this case to establish that continuity. Therefore, in my opinion, the prosecution has failed to prove that the accused was engaged either (1) in the business of purchase of sale of foodgrains in quantity of 10 quintals or more at any one time, or (2) in the business of storage for sale of foodgrains in the said quantity at any one time. Since the prosecution has not shown that the accused answered the description of the word "dealer" as defined in this Order, it automatically follows that the accused was not required to take licence as contemplated by sub-clause (1) of Clause 3 of the Order and consequently the accused cannot be said to have committed any offence of storing foodgrains for sale without a licence. The result therefore, is that the acquittal of accused is confirmed so far as this charge is concerned, though for reasons different from those given by the learned Magistrate.

(15) So far as the charge under the Declaration of Stocks order is concerned, the learned Magistrate has held that under sub-rule (1) of R. 141 of the Defence of India, Rules, 1962 the prosecution must establish that the Order was duly published as contemplated by that sub-rule. Sub-rule (1) of R. 141 of the Defence of India Rules, 1962, provides as follows:-

"(1) Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature of affecting a class of persons, publish notice of such order in such manner as may, in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns....."

We are not concerned with the rest of the Rule. What the learned Magistrate says is that the prosecution has not proved that the Order was published in the sense that it was made known to the accused. For arriving at that conclusion the learned Magistrate has relied upon the ruling of a Division Bench of this Court reported in *Emperor v. Mhatarji Bhau Patil*, 47 Bom LR 143=AIR 1945 Bom 389. That was a decision on the construction of R. 119 of the Defence of India Rules, 1939. What was held in that case was that an order made under R. 116 of the Defence of India Rules, 1939, requiring all persons including agriculturists in the villages of the District to declare stocks of certain cereals, viz., Bajri, Jawar, Nagli, Paddy and rice, before the stipulated time, was not properly published if it only appeared in the Bombay Government Gazette. The learned Judges who decided that case relied upon an earlier decision of this Court, *Emperor v. Leslie Gwilt*, 47 Bom LR 431=AIR 1945 Bom 368 in which it was held that the mere publication of a notification in the Government Gazette is not sufficient to charge a person with liability for infringement of the terms of the notification, and that it must be proved by the prosecution that it was published in such a manner as the District Magistrate considered proper. While considering the question whether under R. 119 of the Defence of India Rules, 1939, it was obligatory on the issuing authority to publish the Order in a manner other than the one of publication in the Official Gazette, the learned Judges observed as follows:-

"Even though the manner of Publication by beat of drum may be considered as proper, it is essential that all the material contents of the order must be so announced in that manner"

The learned Judges, therefore, held that non-publication of the order itself by beat of drum was fatal to the prosecution because the Order, in that eventuality, could not be said to have been duly published as required by R. 119 of the Defence of India Rules, 1939. The learned Magistrate relying upon this authority, held that since the prosecution has not proved in the facts of this case that the order itself was not published with its translation in the local language by beat of drum the Order could not be said to have been duly published and the learned Magistrate, therefore, held that the accused was not guilty of the contravention of this Order.

(16) What the learned Magistrate has forgotten is that in the Defence of India Rules, 1962, provision has been made by sub-rule (2) of R. 141 for such contingencies and it is provided:-

"(2) If in the course of any judicial proceedings a question arises whether a person was duly informed of an order made in pursuance of these Rules, compliance with sub-rule (1) or where the order was notified, the notification of the order shall be conclusive proof that he was so informed:....."

The word "notified" has been defined in sub-rule (3) of R. 2 and it is in the following terms "'notified" and "notification" mean notified and notification respectively in the Official Gazette." Therefore, in the Defence of India Rules,

1962, the position is altogether different from the one available under the Defence of India Rules, 1939. In the Defence of India Rules 1939 there was no provision similar to the one contained in sub-rule (2) of R. 141 of the Defence of India Rules, 1962, and therefore, there was no scope for argument that the expression "published" as appearing in R. 119 of the said rules would mean published in such manner as to bring to the notice of the accused. But the matter is now put beyond doubt by the introduction of sub-rule (2) of R. 141, which says that if the order made under any of these Rules is notified in the Official Gazette, it shall be conclusive proof that the accused was informed on the said Order. Therefore, in view of sub-rule (2) of Rule 141 it is impossible to contend that notification of the Order issued under R. 125 (3) of the Defence of India Rules is thereof. The learned Magistrate seems to have fallen into this error because it appears that the provisions of sub-rule (2) of R. 141 were not pointed out to him. In my opinion, the learned Magistrate was in error in holding that the Declaration of Stocks Order, 1964, was not duly published.

(17) But Mr. Ponda, who appears on behalf of the accused contends that even of this finding, which was the sole basis of the learned Magistrate's order of acquittal, is set aside by me, still the accused would be entitled to retain his acquittal because Mr. Ponda contends that it has not been shown by the prosecution that the accused was not an agriculturist and Mr. Ponda contends that if certain of the foodgrains which are not covered by the Declaration of Stocks Order are excluded from the total quantity of 25 Quintals and 27 Kilograms, the quantity found with the accused would be less than 25 Quintals and therefore, the accused could not be said to be guilty of not declaring his stock. The argument proceeds to say that the accused had raised a defence that he was an agriculturist and therefore, was entitled to have a stock of foodgrains to the extent of 25 Quintals, without declaring the same. In support of that defence, Mr. Ponda says, the accused had relied upon certain extracts of the revenue records produced by him in his statement under S. 342 Cr. P. C. Mr. Ponda has also relied upon a receipt issued by the Maharashtra State Co-operative Marketing Society for purchase of jowar from the accused by the Society. This receipt was also produced by the accused in his statement under S. 342. The prosecution has led the evidence of P. S. I. Nalwade and Inspector Jagtap to show that the accused is a trader dealing in grocery articles and grain. Therefore, the prosecution has proved that the accused was a person other than a producer. If it was the contention of the accused that he was a producer and, therefore entitled to have a stock of foodgrains in excess of 10 Quintals and less than 25 Quintals. The extracts of the Revenue records produced by the accused in his statement under S. 342, Cr. P. C. themselves show that the lands are owned by some other persons and they are in possession of such persons. The name of the accused nowhere appears in any of these extracts. Therefore, in my opinion, these extracts will not be of any avail to the accused to show that he is an agriculturist. Reliance is placed by Mr. Ponda upon the receipt issued by the Maharashtra State Co-operative Marketing Society in favour of the accused. That

receipt is date 19th April 1965. We are concerned with an offence that took place on 1st November 1964. Therefore, ex facie that receipt will not be of any assistance to the accused to show that on 1st November 1964, he was an agriculturist entitled to retain stock of foodgrains in excess of 10 Quintals and less than 25 Quintals. Besides, this receipt only shows that on 19th April 1965 the accused had sold 2 Quintals and 30 Kilograms of jowar to the said Society. There is nothing in this receipt to show that this sale was made by the accused because he was an agriculturist or as an agriculturist. Therefore, in my opinion, this receipt also will not be of any assistance to the accused in showing that he was an agriculturist and therefore, entitled to have stock of foodgrains in excess of 10 Quintals and less than 25 Quintals. In this view of the matter, I need not consider whether certain kinds of foodgrains which were found in the shop of the accused on the day in question are covered by the Declaration of Stocks Order or not.

(18) The accused is a trader doing business as a retailer in various commodities. He deals in foodgrains. He deals in grocery and also in cloth. Therefore, in my opinion, it could not be said that the accused had no mens rea in not declaring his stock as required by the Declaration of Stocks Order. It is not his case that he is an illiterate person. There is some evidence to show that a meeting of the traders of Dhadgaon was held by Sonwane, Extra Head Karkun at Dhadgaon, in which he had explained this Order to the traders assembled in the meeting. It may be, as found by the learned Magistrate, that the accused was not present at this meeting. But it is inconceivable that the accused would not have got knowledge of this order after the meeting. Therefore, in the facts of this case I am satisfied that the contravention of this Order by the accused was with full knowledge that the Order required him to declare the stocks of foodgrains held by him. Therefore, in my opinion, the learned Magistrate was in error in holding that there was no mens rea established.

(19) The result, therefore, is that the acquittal of the accused in respect of the offence u/s 7(1) of the Essential Commodities Act, 1955 will be confirmed and the appeal will be dismissed to that extent. The accused will be convicted under sub-rule (9) of R. 125 of the Defence of India Rules 1962, in that he failed to declare the stock of foodgrains with him, which was in excess of the permissible quantity, within the time allowed to him and was guilty of the offence of contravention of the provisions of the Maharashtra Foodgrains (Declaration of Stocks) Order, 1964. Considering the fact that the stocks held by the accused at the material time were not far in excess of the permissible limits and considering the fact that the place where the accused is carrying on his business is a small village, I think the ends of justice will be met if the accused is sentenced to pay a fine of Rs. 10 in default to undergo 7 days' S. I. The order of acquittal of the accused in respect of this offence is therefore, set aside and the appeal is allowed to that extent.

(20) Order accordingly.