(1984) 01 GAU CK 0010

Gauhati High Court

Case No: None

State of Assam		APPELLANT
	Vs	
Bhawarilal Kundalia and Another		RESPONDENT

Date of Decision: Jan. 3, 1984

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 378, 417
- Prevention of Food Adulteration (Extension To Kohima And Mokokchung Districts) Repeal Act, 2002 - Section 2
- Prevention of Food Adulteration Act, 1954 - Section 16, 20

Citation: (1985) CriLJ 56

Hon'ble Judges: T.N. Singh, J; K.N. Saikia, J

Bench: Division Bench

Judgement

K.N. Saikia, J.

This appeal is from the judgment of the Chief Judicial Magistrate, Sibsagar acquitting the respondents of charges u/s 16(I)(a)(i) of the Prevention of Food Adulteration Act (shortly, "the Act").

2. On 12-5-73 the District Food Inspector, Sibsagar, Jorhat collected sample of arhar dahl from the premises of Tolaram Kundalia firm, A.T. Road, Jorhat, which the Public Analyst reported to be coloured with "Metanil Yellow" which was prohibited. The respondents, who were partners, were charged u/s 16(I)(a)(i) of the Act to which they pleaded not guilty.

3. At the trial prosecution examined three witnesses while defence examined none. The.Public Analyst was examined as a Court witness. The learned trial Court acquitted the respondents mainly on two grounds, namely, (i) the collection of the sample made by the Food Inspector was illegal, the notice being issued after the sample packets were numbered and a number put on the notice and (ii) the Public Analyst having not given the data of the analysis in his report the Court was unable

to form any opinion about it and hence benefit of doubt would go to the accused. Hence this appeal.

4. The learned Public Prosecutor, Mr. C.R. De, submits inter alia that the trial Court fell into an error in holding that the collection of the sample made by the Food Inspector was illegal, in face of the clear evidence that the notice was served before the sample was collected ; and (hat the learned trial Court committed error of law in rejecting the Public Analyst''s certificate solely on the ground that the data of the analysis were not stated therein, overlooking the fact that Metanil Yellow is a prohibited coal tar dye and its very presence is sufficient for punishment u/s 16 of the Act.

5. Mr. Chakravorty, the learned Counsel for the respondents, submits that this appeal by the State is not maintainable as the District Food Inspector was the complainant, and he supports the acquittal. He further submits that without the data it would not be possible for the Court to form an opinion and that the very fact that the number of the packet was put on the notice amply proved that the notice was served after the sample was divided and their packets numbered and, as such the trial Court committed neither an error of fact nor an error of law.

6. As regards the service of the notice, the District Food Inspector, as P.W. 1, deposed that on 12-5-73 he inspected the Tolaram Kandalia firm, in presence of witnesses Madan Chandra (P.W. 3) and Sankarlal Moheswari (P.W. 2) when the respondent 1, Bhawrilal Kundalia was present and he (the witness) issued notice in Form VI stating therein that sample of Arhar Dahl would be taken, read over toBhawrilal Kundalia explaining that "After taking the sample of Arhar Dahl, I will send the same to Public Analyst for analysis whether it is good or bad". Bhawrilal Kundalia told that he himself and S.K. Kundalia were partners of that firm. Bhawrilal Kundalia, the District Food Inspector himself and two witnesses signed the notice in Form VI (Ext. 1). He, clearly stated in cross-examination that after taking up the sample he put the number there. The packet was made after issuing notice and payment. He also stated that after serving Form VI he did not make any alteration or change in it and it was not a fact that he did the writing in Form VI and other documents at the same time.P. W. 3, Madan Bora, corroborated P W. 1 that after having written Form VI P.W. read over the same to Bhawrilal Kundalia and explained that after taking the sample the same would be sent to Shillong for analysis. Price was paid and sample of Arhar Dahl aken which was divided equally into three parts, put intoseparate polythylene bags which were fastened, wrapped, lebelled and sealed. In cross-examination he clearly stated that Form VI as written first on the spot and then explained. The District Food Inspector did not write on it second time. He took the sample after Form VI was written and explained. He further stated in cross-examination that after completing the work of taking sample of Arhar Dahl the form VI for Mug Dahl was given P.W. 2, Sankarlal Moheswari, stated that after taking the sample the Food Inspector called him and the documents were written in his

presence. Exts. 1(3) and 2(2) and Material Ext. 1(5) are his signatures. According to him on going there he simply put his signatures thereon and did not see who had signed M. Ext. 1. His evidence in this regard is, therefore, not specific. On the basis of the evidence on record we are of the view that the trial Court misdirected itself in holding that in view of the fact that the number of the sample was already written in Form IV (Ext. 1) proved that the notice was served after the sample was packed and numbered and hence the collection of that sample was illegal ; and this finding cannot be sustained. It is not naturally improbable to put a number in the notice in advance and the corresponding packet subsequently given the same number. There is no evidence to the effect that the notice was prepared after the sample was taken, divided, packed and numbered. The finding of the trial Court to that effect is, therefore, erroneous.

7. The report of the Public Analyst (Ext. 4) is to the following effect :

I hereby certify that I.P.K. Das, Public Analyst for Assam duly appointed under the provisions of the Prevention of Food Adulteration Act, 1954 received on the 21st day of May, 1973 from Shri S.R. Baruah, District Food Inspector, Jorhat vide No. DFI-7/73/217, dt. 12-5-73 by Registered Postal Parcel a sample of Arhar dahl No. B-152/73 from vendor Sri Bhawarilal Kundalia, Partner "Tolaram Kundalia Firm" A.T. Road, Jorhat collected on 12-5-73 at A.T. Road, Jorhat for analysis properly sealed and fastened, and that 1 found the seal intact and unbroken.

The seal fixed on the container of the sample tallied with the specimen impression of the seal separately sent by the Food Inspector and the sample was in a condition fit for analysis.

I further certify that I have caused to be analysed the aforementioned samples, and declare the result of my anlysis to be as follows :

Physical Arhar dahl coloured yellow.

Coaltar dye""Metanil Yellow" present in the dahl and am of the opinion that the same is a sample of arhar dahl coloured with "Metanil yellow" which is prohibited.

The Public Analyst when examined as Court witness, stated that the report of examination of the sample was on the basis of both physical and chemical tests and that the physical test in the instant case was on the basis of visual examination. Chemical reagents are also used in the chemical test. In chemical test coaltar dye metanil yellow was detected and confirmed and the reports were despatched to the officers concerned immediately after the report was signed.

He further stated that the examination was done by his assistants who recorded the details of the examination and the data were placed before him for his physical checking and opinion. In cross-examination he stated that he did not carry out examinations himself. But the details of calculations on the basis of which the data shown in the report were arrived at were not given in his report. They "do not give

such data." Without the data being placed before him he could not given any opinion in any sample. He further stated that there was no watertight compartment between physical and chemical tests. The data of analysis had not been mentioned in his report. The data on which he certified is also not mentioned in his report. Further cross-examined, he stated that the process adopted for detection and confirmation of metanil yellow was by chromatography. It indicated the characteristics of a particular dye including the metanil yellow. From the characteristics found out in the test and also the characteristics obtained from the contracted sample of metanil yellow they established presence of metanil yellow in food samples. The following were the characteristics.

(1) R.F. value

(2) Coloured reactions with different chemical reagents.

He admitted that Metanil yellow was a coaltar based product of diaze group and Metanil was an organic dye and was not likely to contain metal or any member of the halogen family. Metanil yellow could be extracted from the article of food and percentage of colouring matter could be estimated. But in the instant case the percentage was not determined as Metanil Yellow was a prohibited dye under Rules 28 and 29 of the Food Adulteration Rules. He reiterated in cross-examination that his findings in the instant case was based not only on physical examination but also on the basis of chemical test.

8. The trial Court observed that in the instant case the Public Analyst has not given any data of the examination and the Court was therefore kept in dark about those data and was unable to form any opinion and as a result the benefit would go to the accused.

9. Under Rule 28 of the Prevention of Food Adulteration Rules (shortly, the Rules) no coaltar dyes or a mixture thereof except those mentioned in the Rule shall be used in food. Metanil yellow is not mentioned in the Rules. Thus the use of Metanil yellow is prohibited and an article of food shall be deemed to be adulterated if any colour other than the prescribed colours within the prescribed quantities is used ; and the article in question will come within the mischief of Section 2(J) of the Act, The Arhar Dahl in question being coloured with Metanil Yellow must be held to be adulterated. The fact that the colour is a prohibited one under the Rules itself would be enough and its percentage would be immaterial. In Re: V.K. Abdul Azeeze and Another, ,it has been held that Rule 28 of the Rules insists that coaltar dyes except those mentioned therein should not be used in foodstuffs. Where the analysis shows that such a prohibited dye is used, the foodstuff must be considered adulterated under the Act irrespective of the quantity of the adulterant. Where extraneous matter of a type like prohibited varieties of coaltar dye is used, the Analyst''s report certifying to its presence in the food without specifying the exact quantity of the adulterant is sufficient to support a conviction. In such a case there is no need for the Court to

insist that the report should contain the technical process by which the presence of the dye was identified. So also in State Vs. Chelliah Filial and Another, , it has been held that Metanil Yellow being a prohibited variety of coaltar dye the question of variations of data does not arise and has no consequence. In Municipal Corporation of Delhi Vs. Satpal Kapoor and Another, ,it has similarly been held that when the foreign substance happens to be one, the presence of which is absolutely prohibited in that particular article of food, it would be unnecessary to state the quantity, and the Analyst''s report certifying to its presence in the food without specifying the exact quantity of the adulterant is sufficient to support a conviction. Thus, it is settled law that when certificate shows that Metanil Yellow, a prohibited coaltar dye was used, there is no need for the Court to insist that 1 the report should contain the technical process by which the presence of the dye was identified. If the defence had any bona fide dispute as to the correctness of the Analyst''s report it was always open to them, as provided for in Section 13 of the Act, to send a sample for analysis by Central-Food Laboratory. In the instant case the coaltar dye ''Metanil yellow'' is named.

10. The learned Counsel for the respondents relies on Newby v. Sims 1894 1 QB 478 where the certificate of analysis declared the result of the analysis as follows :

I find that the sample contained an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent of the entire sample. I am of opinion that the sample is not a sample of genuine rum.

It was held that the certificate ought to have stated the proportion of water mixed with the rum, and was insufficient and a conviction could not be supported. This case is clearly distinguishable on facts. In our instant case the use of Metanil yellow is absolutely prohibited , and the percentage of presence would be immaterial.

11. In Prem Ballab and Another Vs. The State (Delhi Admn.), it has been ruled that where no colouring matter is permitted to be used in an article of food, what is prescribed in respect of the article is that no colouring matter shall be used and if any colouring matter is present in the article in breach of that prescription, it would clearly involve violation of Section 2(1) of the Act. In Dhian Singh Vs. Municipal Board, Saharanpur, their Lordships of the Supreme Court, while rejecting the contention that the report of the analyst could not have afforded a valid basis for founding the conviction as the data on the basis of which the analyst had reached his conclusion was not found in that report or otherwise made available to court, held the view of law on the subject taken in Nagar Mahapalika of Kanpur Vs. Sri Ram and Another, to be correct. Therein it was observed :

that the report of the public analyst u/s 13 of the Prevention of Food Adulteration Act, 1954, need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in Section 2(1) of

the Act.

Thus, the report of the Public Analyst need not contain the mode or test applied but should contain the result of analysis which would be the data from which it could be inferred whether the article of food was or was not adulterated ; and if this relevant data is given in the report the accused can be convicted on the basis of such report. By "data" is meant the result from which it can be inferred whether the article is adulterated or not. In the instant case the statement of the result of analysis, namely, presence of Metanil Yellowwould constitute the data from which it could be inferred that Arhar Dahl was adulterated within the meaning of Section 2(J) of the Act. It would not be necessary to state by what mode or applying what test this data was arrived, at. Besides, in the instant case the Public Analyst''s report was not superseded and the Public Analyst was thoroughly cross-examined and he clearly stated that he applied both physical and chemical tests.

12. We are unable to accept the submission that this criminal appeal by the State is not maintainable on the ground that the complainant was the District Food Inspector and not the State. In the offence report the name of the complainant is given as Sri S. R. Baruah, District Food Inspector, Sibsagar, Jorhat C/o. Civil Surgeon, Sibsagar, Jorhat, This shows it to be a complaint by an officer of the State and not by a private person. The application u/s 378(4), Cr.P.C. (new) read with Section 417(3), Cr.PC (old) for special leave to appeal was made by ''State'' on the complaint of District Food Inspector, Jorhat and special leave was granted by this Court on 12-6-75. In the memo of appeal the State is shown as the appellant and the appeal was admitted by this Court on 19-6-75.

13. u/s 417(1), Cr.PC (old), the State Government might, in any case, direct the public prosecutor, to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Under Sub-section (3) thereof, if such an order of acquittal was passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in that behalf, the complainant might present such an appeal to the High Court. u/s 378, Cr.PC (New) save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. This provision is not subjected to Sub-section (4) thereof. Sub-section (2) deals with appeals in cases investigated by Delhi police Establishment. Sub-section (3) provides that no appeal under Sub-section (1) or Sub-section (2) shall be entertained except with the leave of the High Court. Sub-section (4) provides that if such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. Sub-section (I) having not been made subject to Sub-section (4)

there is room for interpreting that the former also includes the latter class of appeals. It is, however, not necessary to decide that point in this appeal. In Municipal Corporation of Delhi Vs. Jagdish Lal and Another, where the offence under the Prevention of Food Adulteration Act was committed within the Delhi Municipal Corporation area, the Supreme Court held that for prosecution u/s 20 of that Act the complaint could be filed either by the Municipal Corporation or by a person authorised by it in that behalf by a general or special order and that when the Municipal Prosecutor was authorised by resolution of Municipal Corporation to file complaint, in filing the complaint he acted only in a representative capacity and the Municipal Corporation was the complainant within the meaning of Section 417(3), Cr.P.C. (old). The maxim qui per alium facit per seipsum facere videtur the who does an act through another is in law deemed to do it himself) is applicable in such cases. Section 20(1) of the Act after the Amendment Act, 1964 and before amendment in 1976 provided as follows :

20(1). No prosecution for an offence under this Act shall be instituted except by, or with the written consent of the Central Govt. or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority.

This provision was applicable to the instant case as the sample was collected on 12-5-73, Mr. De states that the District Food Inspectors have been authorised by the State Government by order in this behalf ; and the statement has not beer controverted by Mr. Chakravorty. It must, therefore, be held that the complaint was lodged on behalf of the State which was the complainant in the eye of law and, as such, the appeal by the State is maintainable. The decisions in State Vs. Ishwar Saran, and in State Vs. Prem Prakash Jauhar, ,which are relied on by Mr. Chakravorty, have not be understood in light of the subsequent pronouncement of the Supreme Court on the question. The cases also are distinguishable on facts as to who and in what capacity the complaints and appeals were filed. In any view of the matter, we are of the opinion that the right of the State to prosecute, whether in the trial or in the appellate Court, any person, for any offence, under any law, has not been taken a way by Section 20(1), it is merely a delegatory provision which additionally embraces a "local authority" in the category of prosecuting authority. We may further note that, in the instant case, the complainant was not, unlike in one of the cases cited, the servant, agent or delegate of the Municipal Board ; he was an officer or servant of the State Govt. and filed the complaint as such and not as a private person.

14. For the foregoing reasons the view taken by the trial Court that in the absence of "any data of the examination" the Court was kept in dark about those data and was unable to form any opinion and as a result benefit would go to the accused, must be held to be erroneous. ''Data'' means the result of the analysis from which it would be inferred whether the article was adultereated or not. This data, namely, presence of

Metanil yellow was very much there in the report which would, therefore, be sufficient to found conviction. In the result, the impugned judgment of acquittal is set aside and the appeal is allowed.

15. Having set aside the acquittal, we convict the respondents u/s 16(I)(a)(i) of the Act. As regards the sentence we find that the sample was collected on 12-5-73 and the judgment of acquittal was passed on 30-12-74. Special leave to appeal was granted on 12-6-75 and this appeal was admitted on 19-6-75. Nearly a decade has rolled by since the taking of sample and the appeal has somehow taken more than seven years for disposal. Under the above circumstances we are of the view that custodial sentence after such a long time may be rather stringent and this is sufficient reason for imposing a lesser than the prescribed minimum punishment. Following Sarjoo Prasad Vs. The State of Uttar Pradesh, we feel that ends of justice and crime control will be met if each of the respondents is sentenced to pay a. fine of Rs. 1000/- (One thousand), and, in default, each to undergo rigorous imprisonment for six months, and we do sentence them so. The appeal is allowed.

T.N. Singh, J.

16. I agree.