State of Kerala Vs V.P. Enadeen

Court: High Court Of Kerala

Date of Decision: Sept. 24, 1970

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 20(1)
Evidence Act, 1872 â€" Section 20(1), 57, 60, 81
Penal Code, 1860 (IPC) â€" Section 332
Prevention of Food Adulteration Act, 1954 â€" Section 11, 13, 16(1)(a)(i), 2(1), 20

Citation: (1971) KLJ 177

Hon'ble Judges: P.T. Raman Nayar, C.J; V.P. Gopalan Nambiyar, J; K.K. Mathew, J

Bench: Full Bench

Advocate: M.M. Abdul Khader, for the Appellant; K. Shahul Hameed and P.P. Mathew, for the Respondent

Judgement

P.T. Raman Nayar, C.J.
The prosecution in this case, for an offence u/s 16 (1) (a) (i) read with section 7(1) of the Prevention of Food

Adulteration Act 1954, (the Act for short) was instituted by a person who claimed that he was competent to do so under sub-section (1) of

section 20 of the Act. The sub-section, so far as is material, runs thus:

20 Cognizance and trial of offences:--(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of

the Central Government 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.

The complaint itself stated (and the complainant also gave evidence to the same effect as P. W. 1) that the State Government had, by a gazette

notification dated the 4th May (sic. March) 1967, appointed the complainant as a Food Inspector u/s 9 of the Act, and, by another notification of

the same date u/s 20 (1) authorised all Food Inspectors to institute prosecutions for offences under the Act An issue of the official gazette--a

gazette extraordinary of the 8th March 1967--containing these notifications has been produced before us, and, u/s 81 of the Evidence Act, we

presume it to be genuine. There is there a notification dated the 4th March appointing P.W. 1, the complainant in this case, as a Food Inspector for

the local area with which we are here concerned. And there is another notification of the same date which runs as follows:

Under sub-section (1) of section 20 of the Prevention of Food Adulteration Act, 1954 (Central Act 37 of 1954), and in suppression of

Notification No. 84493/D2/HLD, dated 3rd February, 1966, published in Part I of the Gazette dated 15th February 1966, the Government of

Kerala hereby authorise the Food Inspectors appointed under the said Act to institute prosecutions for offences under the said Act.

The charge against the accused in this case was that he had ""sold"" gingelly oil which was adulterated to the complainant, P.W.1, The learned

magistrate who tried the case found that the accused had done so and was therefore guilty of the offence with which he was charged. But,

following the decision of a single judge of this Court in Criminal Appeal No. 63 of 1969, the magistrate held that the complainant''s appointment as

Food Inspector had not been properly proved and that therefore he was not satisfied that the complainant was a person duly authorised u/s 20 of

the Act to institute the prosecution. He was apparently prepared to take judicial notice of the authorisation of all Food Inspectors to institute

prosecutions for offences under the Act, whether under clause (1) of section 57 of the Evidence Act as a law in force, or, as was held in Abdulla

Haji v. Food Inspector 1967 KLT 577, as constituting a function of a Food Inspector and therefore falling within clause (7) of that section, a Food

Inspector being undoubtedly a person filling a public office, we do not know. However, that is not a question that was raised either before him or

before us, and we do not think it necessary to say anything more about that than that it seems to us that that was a matter of which the learned

magistrate was entitled to take judicial notice. In this view of the matter, namely, that the complainant had not proved that he was a Food Inspector

and therefore had not shown that he was covered by the notification authorising Food Inspectors to institute prosecutions, the learned magistrate

acquitted"" the accused-Against that ""acquittal"" this appeal has been brought under sub-section (1) of section 417 of the Criminal Procedure Code,

and, in the view that there are conflicting decisions of this Court regarding the question involved, the appeal has been referred by the single judge

who first heard it to a division bench, and, in turn, by the division bench to a full bench.

2. We might at the outset observe that, although the learned magistrate called it an acquittal, what he actually did was to discharge the accused

from the case and not acquit him. If, as he thought, the complainant was not a person authorised to institute a prosecution u/s 20 (1) of the Act, the

magistrate had no jurisdiction to take cognizance of the case. He could no more acquit than he could convict. But, however that might be, since the

learned magistrate purported to acquit the accused, he should think that section 417 of the Criminal Procedure Code is attracted. The question is,

however, only academic since, even if section 417 is not attracted because there is no acquittal, section 439 would be, and, ex hypothesi, the bar

in sub-section (4) thereof against the conversion of a finding of acquittal into one of conviction would not apply.

3. The question then is, has it been proved that the complainant in this case is a Food Inspector appointed under the Act within the meaning of the

notification u/s 20 (1) thereof so as to be a person authorised under that notification to institute prosecutions for offences under the Act. It would

appear that what is meant by the words, ""Food Inspectors appointed under the said Act"" is, persons filling, for the time being, the office of Food

Inspector - surely the intention cannot be to authorise persons who though appointed to that office in the past have ceased to fill it. If that be so, the

fact to be proved or the fact in issue would be that that complainant filled that office at the time he instituted the prosecution, and the fact of his

appointment to the office would be only a relevant fact for the purpose of proving this fact in issue. The complainant as P.W.1 gave evidence to the

the effect that he was a Food Inspector. Speaking for myself - I gather that my learned brethren have their own reservations in the matter - I

should have thought that the fact that a person fills a particular office is a fact which he (or, for that matter, others who know him) can perceive, if

not by any particular sense, in some manner or other and that, when a person gives evidence to the effect that he fills a particular office, he is giving

direct evidence of that fact within the meaning of section 60 of the Evidence Act. If that evidence is challenged in any way--and in this case it was

not challenged--it would be time enough for him to think of producing of evidence such as, for example, the order of his appointment, where the

appointment is in writing, in order to prove the fact in issue, namely, the fact that he fills the office. If he does not do that, it would be a matter of

appreciation of evidence as to whether he should be believed, but there can be no denying that his oral evidence on the question is relevant and

admissible. (Surely, in every prosecution, say, for an offence u/s 332 I.P.C., it should not be necessary to produce and prove the order appointing

the victim of the offence to the office concerned. Unless it is effectively challenged, his own testimony to the effect that he holds the office

concerned, is every day being accepted, and, in my view rightly accepted as proof of that fact. So would be the testimony of his colleague or

subordinate or anybody else who knows that fact. If I were to give evidence that my learned brethren are judges of this Court, I do not suppose it

would be said that that is not direct and admissible evidence of that fact or that the court would insist on the production and proof of their warrants

of appointment which I have not seen). P.W. 1''s evidence on the point being unchallenged I should think it should have been accepted by the

learned magistrate as proving that he was a Food Inspector.

4. Assuming, however, that, in terms of the notification u/s 20 (1) of the Act, what is to be proved is not so much that P.W.1 was filling the office

of Food Inspector at the relevant time as that he had been appointed thereto under the Act, there was a copy of the notification appointing him as

Food Inspector received in evidence in the case and marked Ex. P-6. It is true that this was neither an issue of the gazette in which the notification

appeared nor a certified copy thereof--under section 9 of the Act the appointment of a Food Inspector has to be by notification in the official

gazette--but only a copy certified to be a true copy by the complainant himself. No objection was taken when Ex. P-6 was received in evidence

either on the ground that the conditions requisite for the reception of secondary evidence had not been made out, or on the ground that this

particular type of secondary evidence was not permissible, and, that being so, we do not think that objection can now be taken to Ex. P-6 having

been received in evidence. If Ex. P-6 was received in evidence as proof of the notification in the official gazette appointing the complainant as a

Food Inspector, we should think that the fact that he was so appointed has been duly proved and that therefore the authority to institute a

prosecution under the notification u/s 20 (1) of the Act has been established.

5. We might add that, if what is required to be proved in terms of the notification u/s 20 (1) of the Act is the accession of P.W. 1 to the office of

Food Inspector, then that was matter of which the court was bound to take judicial notice under clause (7) of section 57 of the Evidence Act, the

fact of his appointment having been notified in the official gazette--that fact, it will be remembered, was asserted in the complaint so that it was not

as if the Court was not made aware of it. If the Court had any doubt on the point it was its duty to resort to the appropriate document of reference,

namely, the official gazette, or, if it could not readily find this document, to call upon the complainant to produce the document. (That is clearly the

implication of the closing words of the section. It is only if, after being called upon to do so, the person concerned fails to produce the appropriate

book or document of reference, that the Court can refuse to take judicial notice). Not having done so, and the fact of the complainant''s

appointment as Food Inspector not having been challenged, it was not open to the Court to say, after the close of the trial, that it would not take

judicial notice of the complainant''s appointment as Food Inspector--the least it should have done was to call upon the complainant to produce the

gazette notification, and, it was only if he failed to do so that it could have refused to take judical notice.

6. The decisions responsible for this case coming before a full bench, namely, the decisions in Pyli v. State of Kerala 1966 KLT 102,

Chandrasekharan v. State 1966 KLT 638, and Executive Officer v. Bharathan 1967 KLT 161 deal with notifications of a different kind and we

do not think it necessary to canvass the correctness or otherwise of those decisions. Criminal Appeal No. 63 of 1969 which seems to be on all

fours with the present case was, we hold, wrongly decided.

7. The reason given by the learned magistrate for his so-called acquittal was clearly wrong, but, on the merits, we do not think that the accused is

guilty. The case against the accused is that he ""sold"" gingelly oil which was adulterated within the meaning of clauses (a) and (1) of the definition of

adulterated"" in section 2(1) of the Act. One of the three samples taken by the complainant, P.W. 1, was sent to the Public Analyst for analysis, and

his report has been marked as Ex. P-5 in the case. We thought it necessary to have the evidence of the Public Analyst and we have accordingly

examined him as a witness u/s 428 of the Code. His evidence shows that the first sample he received from P.W.1 could not be analysed since the

bottle in which it came was broken and the contents completely spilled when it reached him. Therefore, he called for another sample and it was the

second sample he received from P.W. 1 that was analysed by him and with regard to which he issued the certificate, Ex. P-5. Now P. W. 1 in his

evidence does not speak of this second sample at all, and it is clear from the date of dispatch given by him that it is in respect of the first sample he

sent that he gave evidence to the effect that he had taken the sample from the accused''s stop. There is no evidence whatsoever to show that the

second sample, the sample that was analysed by the Public Analyst, C.W. 1 was taken from the accused.

8. That is not all. So far as clause (a) of section 2(1) of the Act is concerned, there is no evidence to show that P. W. 1 as the purchaser

demanded gingelly oil, or that the oil purchased by him purported to be or was represented to be gingelly oil. C.W. 1''s evidence, as also his

report, Ex. P-5 show that the sample analysed contained about 50 % of groundnut oil. Groundnut oil being cheaper than gingelly oil, there can be

no doubt that the oil ""sold"" by the accused (assuming that it was the oil analysed) was adulterated if indeed, P.W. 1 had demanded gingelly oil or

the oil purported to be, or was represented to be, gingelly oil. But as we have said, there is no evidence whatsoever to that effect, for, all that P.W.

1 said in the course of his testimony was that he purchased gingelly oil from the accused. It is said that this statement implies that either P.W. 1

must have asked for gingelly oil, or that the oil must have purported to be or must have been represented to be gingelly oil. That might well be a

possible implication but not, we think, a necessary implication, and we do not think that what is only a possible implication of a statement made by

a witness can be relied upon to found a criminal conviction.

9. Nor is that all. On application made by the accused under sub-section (2) of section 13 of the Act, the sample given to him under clause (1) of

sub-section (1) of section 11 was sent by the Court to the Director of the Central Food Laboratory. The Director''s certificate has been marked as

Ex. C-1. Under sub-section (3) of section 13 of the Act, it supersedes the report of the Public Analyst, and, under the proviso to subsection (5) it

is final and conclusive evidence of the facts stated therein. Ex. C-1 read in the light of the expert evidence of C.W. 1 makes it quite clear that there

was no admixture of groundnut oil with the gingelly oil in question, and, that being so, there can be no question of any adulteration within the

meaning of clause (a) of section 2(1) of the Act.

10. Turning now to clause (b) of section 2(1), the only respect in which the gingelly oil in question falls below the prescribed standard of quality

and purity is, so far as the Director''s certificate, Ex. C-1, is concerned, that its content of free fatty acid as Oleic acid was 4% whereas the

maximum permissible is 3%. (See rule 5 and A. 17.11 of Appendix B to the rules made under the Act). Now, the sample was taken from the

accused on 10-10-1968. It was analysed by the Public Analyst C.W. 1, between the 22nd and the 28th November, 1968, and, his evidence is

that as his certificate Ex. P-5 shows, he found the free fatty acid as Oleic acid content to be only 3.5% as against the Director''s 4%. The analysis

by the Director was, it would appear, only in June 1969 and the expert evidence of C.W.1 shows that it is quite possible that, the excess of 5%

over the permissible limit found by him and the further increase of 5% found by the Director was due to keeping. Therefore there is no knowing for

certain that when the ""sale"" took place the content was beyond the permissible 3%. We dismiss this anneal and well and truly acquit the accused.