Mohd. Ismail Hasan Mir and another Vs State of Maharashtra and another

Court: Bombay High Court

Date of Decision: Dec. 16, 1975

Acts Referred: Prevention of Food Adulteration Act, 1954 â€" Section 13, 13(2), 16, 2, 2(11)(a)

Citation: (1976) MhLj 613

Hon'ble Judges: P.B. Sawant, J

Bench: Single Bench

Advocate: V.B. Ganatra with H.K. Kulkarni, for the Appellant; P.P. Hudlikar, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

P.B. Sawant, J.
The two accused have preferred this revision application against the order of their conviction and sentence u/s 7 read with

section 16 of the Prevention of Food Adulteration Act, 1954, (hereinafter referred to as the said Act) passed against them by the Judicial

Magistrate, First Class, Patoda, and confirmed by the Additional Sessions Judge, Bhir.

2. Accused No. 1 is the owner of a Kirana shop situate at Patoda and accused No. 2 was at the relevant time working as accused No. Vs servant

in the said shop. On 12-6-1973, accused No. 2 sold to the complainant--Food Inspector Patankar, Besan (gram flour) in the quantum of 600

grams in the presence of the complainant"s companion--Food Inspector Patil and two panchas. The complainant then divided the said 600 grams

of Besan in three equal parts and filled them in three clean dry plastic bags. These bags were then wrapped in three brown envelopes and were

properly sealed and labelled with the signatures of the panchas. He then gave one packet to accused No. 2 and obtained a receipt for the same. A

Panchanama was prepared of all the formalities which were followed in demanding the sample and collecting it. One of the packets retained by the

complainant was sent by him with the original of the memorandum in Form VII to the Public Analyst, Aurangabad. He also sent separately the

impression of the specimen seal together with the duplicate of the said memorandum in Form VII to the Public Analyst. After the receipt of the

report from the Public Analyst, which showed that the Besan was adulterated inasmuch as it contained Watana flour (Picum arvenuo Linn and

Picum activum Linn), a copy of the said report was given to the accused and thereafter both the accused were charge-sheeted and prosecuted

before the learned Judicial Magistrate, First Class at Patoda.

3. It appears that in the trial Court, the complainant was examined by the prosecution on 19-7-1974. Thereafter the complainant was cross-

examined on 21-8-1974. An application was then made to learned Magistrate on behalf of the accused that the sample which was in their

possession may be sent to the Director of the Central Food Laboratory, Calcutta, for his certificate under subsection (2) of section 13 of the said

Act and the Court accepting the said application and after examining that the sample was in perfect and sealed condition sent it to the said Director

on 19th/22nd October 1974. The certificate of the Director which is dated 6-12-1974 was thereafter received which shows that the sample

contained lakh dal or what is technically called lathyrus sativus. The trial then proceeded before the learned Magistrate and at the trial, on behalf of

the prosecution, in addition to the complainant who was examined before the receipt of the said certificate from the Director, Central Food

Laboratory, Calcutta, Zumbarlal Kankariya (P. W. No. 2) who acted as a Panch for the Panchanama of the collection of. the sample; Syed

Mehmood (P. W. No. 3) the other Panch of the said Panchanama; Madhukar Gopal Patil (P. W. No. 4) the Food Inspector who had

accompanied the complainant to the shop of the accused, and Shankar Dattatraya Oak"" (P. W. No. 5) the Public Analyst at Aurangabad who had

analysed the sample which was sent to him by the complainant, were examined.

4. On behalf of the defence, no eviction was led. However they pleaded not guilty to the charge.

5. Both the Panchas examined by the prosecution turned hostile. They were cross-examined by the prosecution. Accepting the prosecution

evidence, the learned Judicial Magistrate came to the conclusion that the accused were guilty of the breach of the provisions of section 2 (11 (a) of

the said Act and therefore convicted both of them for an offence u/s 7 read with section 16 of the said Act and sentenced each of them to R. I. for

six months a ad to pay a fine of Rs. 1000 and in default to undergo R. I. for further two months. Against the said order of their conviction and

sentence, both the accused preferred an appeal before the Sessions Judge, Bhir, and the Additional Sessions Judge who heard the said appeal

confirmed both the conviction as well as the sentence of the accused and dismissed their appeal. It is against the said order dated 30-4-1975

passed by the Additional Sessions Judge, confirming their conviction and sentence that the present revision application has been preferred in this

Court.

6. Mr. Ganatra, who appears for the revision petitioners, has attacked the order of conviction passed by the Courts below on five counts, on the

merits of the case. His first contention is that the identity of the sample collected from the accused and sent to the Public Analyst has not been

established. His second contention is that there is infraction of Rule 22 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to

as the said Rules) made under the said Act while sending the sample for analysis both to the Public Analyst as well as to the Director of the Central

Food Laboratory, Calcutta. Thirdly, he contended that the accused have been convicted without following the principles of natural justice as well

as in breach of the provisions of the Code of Criminal Procedure, 1898, in that behalf, inasmuch as they were not charged for the offence for

which they were convicted. His fourth contention was that the provisions of section 342 of the Criminal Procedure Code were not followed

properly by the trial Court since the circumstance appearing against the accused were not put to the accused and they were not given an

opportunity to explain the same, which has resulted in injustice to them. His last contention was that the sanction for prosecuting the accused was

ineffective inasmuch as the accused have been prosecuted on certain facts which were not before the sanctioning authority when the said sanction

was given. In addition to the above contentions on the merits of the case, Mr. Ganatra also submitted that the Courts below had failed to exercise

the discretion vested in them by law in the matter of awarding sentence to the accused because of mis-conception of the discretion vested in them,

and as such even the sentence awarded to the accused was improper and illegal.

7. Mr. Hudlikar appearing for the State on the other hand contended that there was sufficient evidence on record to establish the identity of the

sample collected from the accused and that sent to the Public Analyst as well as to the Director of the Central Food Laboratory, Calcutta. He

further contended that there was no infraction of Rule 22 of the said Rules in as much as proper quantity of the article purchased from the accused

was sent to the Public Analyst as well as to the said Director. According to him further, the charge framed showed that the accused were charged

for an offence of selling adulterated food. Even otherwise, both the report of the Public Analyst as well as the certificate obtained from the Director

of the Central Food Laboratory, Calcutta, and the evidence given by the complainant--Food Inspector, had sufficiently made the accused aware

of the charge against them and therefore no injustice whatsoever was caused to the accused. He also contended that there was sufficient

compliance with the provisions of section 342 of the Criminal Procedure Code, and the sanction given for prosecuting the accused was both

effective and legal inasmuch as the accused were authorised to be prosecuted for the offence of selling adulterated stuff and they were in fact tried

for the said offence. It was also his contention that the offence fell under clause (a) of sub-section (1) of section 2 of the said Act and therefore

both the Courts had rightly sentenced the accused and therefore no interference with the said sentence was called for from this Court.

8. I am of the view that the accused are entitled to succeed in this revision application on two grounds viz., that the identity of the sample has not

been established, and secondly, the accused have been convicted for an offence for which they were not charged. In view of my finding in favour

of the accused on the said two points, it is not necessary for me to answer to other points raised in this case. My reasons for the said finding areas

follows:

9. As regards the issue with regard to the identity of the sample, the admitted position is that the report of the Public Analyst at Aurangabad which

is Ex. 18 on record, mentions the analysis of the sample as follows:

Total Ash% -- 3.25

Ash insoluble in Hol% -- a trace

Microscopic examination -- above the presence of Watana Starch and Besan.

Hol test -- Pink colour above the presence of Wataoa starch.

The said report further states the opinion of the Public Analyst, and the same is that the sample is adulterated u/s 2 (1) (c) of Prevention of Food

Adulteration Act, 1954, meaning the said Act. It also further states that the sample consists of a mixture of Besan and Watana flour. The Public

Analyst who has given the said report and who has been examined as a prosecution witness, has also asserted in his deposition in Court, the said

opinion which he has given in the said report Ex. 18. The sample was admittedly collected on 12-6-1973 and sent to the Public Analyst on 14-6-

1973. The report of the Public Analyst is dated 9-8-1973. The evidence further shows that the complainant had given one sample to the accused

on 12-6-1973 when it was collected from them. After the evidence of the complainant--Food Inspector was over, an application was made to the

learned Magistrate, on behalf of the accused, for sending the sample in their possession, to the Director of the Central Food Laboratory, Calcutta,

and from the judgment of the learned Magistrate, it appears that after verifying that the seal and the label on the sample in the possession of the

accused were intact, the same was sent to the said Director on the 19th/22nd October 1974. It appears that it was received at Calcutta on 8-11-

1974, and the said Director has given his certificate in connection with the said sample, which is dated 6-12-1974. Although the certificate has not

been given any exhibit number, it is an admitted position, as is apparent from the judgments of both the Courts below, that it was this certificate

which was made the basis of further proceedings in the prosecution. This certificate shows the analysis of the sample as follows: --

Physical examination -- Free from insect infestation.

Total ash. -- 2.5%

Ash insoluble in Hol -- 0-05%

Test for Kesari Dal -- Positive

Added Coaltar colour -- Absent.

Microscopic examination -- Cicer arietinum along with lathyrus sativus present.

It further mentions the opinion of the Director that the sample of Besan is adulterated. It is not disputed that ""lathyrus sativus"" is _what is known as

Lakh Dal"" which is not the same thing as Watana flour. It must further be noted that neither Ex. 18, which is the report of the Public Analyst,

mentions the presence of lathyrus sativus or Lakh Dal nor does the said certificate of the Director mention the presence of Watana flour. It is

therefore apparent from the said report Ex.18 and the said certificate of the Director that they do not relate to the same substance. Mr. Hudlikar,

the learned Prosecutor, conceded that he was unable to say that the said two different analysee on record, were of the same substance. In view of

the fact that the certificate received from the Director showed different components and a different analysis of the sample sent to him, it was

incumbent on the prosecution, to prove beyond reasonable doubt that the sample which was analysed by the Public Analyst was the counter-part

of the substance or the sample which was analysed by the said Director, Central Fond Laboratory, Calcutta. Admittedly this was not done. In the

absence therefore, of any evidence on record to show that the two counter-parts of the same Besan would show the said two different ingredients,

it is difficult to say that the two samples analysed by the Public Analyst and the Director were the counter-parts of the-very same Besan. I am,

therefore, of the view that in the present case, the prosecution has not, beyond reasonable doubt established that the sample which was collected

from the accused on 12-6-1973 was identical with that which was analysed by the Public Analyst as per his report (Ex. 18) dated 9-8-1973.

10. As a matter of fact, since the Courts below have proceeded to convict the accused not on the basis of the report Ex. 18, but on the basis of

the certificate dated 6-12-1974 received from the Director, the identity between what was collected from the accused on 12-6 1973 and what

was analysed by the Public Analyst, Aurangabad, as per his report dated 9-8-1973 would be irrelevant. However, the said point of identity

becomes material in the present case because the other points raised on behalf of the accused have a bearing on the same. In particular, it must be

remembered in this connection that although the accused came to be convicted ultimately on the basis of the certificate of the Director, the

prosecution and the trial bad from the very beginning proceeded on the basis of the said report Ex. 18. In fact the Sanction for the prosecution

which was given on 16-11-1973 was also on the same basis viz. the report Ex. 18. The complaint which was filed by the complainant Food

Inspector on 4-1-1974 also had only the same report as its foundation, and what is more, the charge which was framed against the accused by the

trial Court on 31-7-1974, had its basis not the certificate dated 6-12-1974, but only the said report Ex. 18.

11. Coming now to the second contention which according to me is the most important aspect of the present proceedings viz. that the accused

have been convicted for a charge which they were not called upon to meet and in fact which was not framed by the trial Court. A perusal of the

charge framed by the trial Court against the accused, shows that the same does not even mention that the accused were being charged even on the

basis of the report Ex.18. The said charge framed on 31-7-1974 is as vague as it could be and reads as follows:

That you on or about the 12th day of June 1973 at about 5 P.M. at village Patoda stored for sale a Besan i.e. floured gram as adulterated article in

the shop Known as Messrs Mohd. Ismail Kirana shop situate at Patoda owned by you Accused No. 1 and sold the same through accused No. 2

adulterated Besan and adulterated food as per provisions of section 2 (1) (a) and (c) of the Bombay Prevention of Food Adulteration Act, 1954 in

contravention of section 7 of the said Act punishable u/s 16 of the said Act and thereby committed offence punishable u/s of the Indian Penal Code

and within my cognizance.

12. As is clear from a reading of the aforesaid recitals in the said charge, all that the accused are charged with are for selling adulterated Besan and

adulterated food as per the provisions of section 2 (1) (a) and(c) of the Bombay Prevention of Food Adulteration Act, 11*54, in contravention of

section 7 of the said Act punishable u/s 16 of the said Act. Now apart from the fact that there is no such Act as the Bombay Prevention of Food

Adulteration Act, 1954, (an error which may be ignored as an inadvertent one), the charge does not apprise the accused o! the precise nature of

the adulteration of which they are guilty. It must in this connection be noted that sub-section (1) of section 2 of the said Act, while defining what is

as adulterated article of food, mentions no less than 12 different manners in which, for the purposes of the said Act, an article of food may be

adulterated. Therefore mere telling the accused that they are being charged for selling an adulterated food article will not be sufficient to apprise

them of the nature of the offence which they have committed, and it cannot be said that the accused had a reasonable opportunity to meet the case

against them in view of the said vague charge. In this connection, it must also be noted that section 223 of the Code of Criminal Procedure, 1898,

which governs the -present case, makes it obligatory to mention the particulars of the manner in which an offence is committed when the nature of

the case is such that the particulars mentioned in sections 221 and 222 of the said Code do not give the accused sufficient notice of the matter with

which he is charged. In view of the fact, as stated earlier, that there are 12 different kinds of adulteration, it was obligatory in the present case to

give in the charge the particular kind of adulteration for the offence of which, the accused were charged. The charge as framed cannot be said to

have given sufficient notice of the matter with which (he accused were charged. This aspect of the matter assumes a vital importance in the present

case because admittedly the accused have been finally convicted not on the basis of the report (Ex. 18) given by the Public Analyst and which is

dated 9-8-1973, but they have been convicted on the basis of the certificate of the Director of the Central Food Laboratory, Calcutta, which is

dated 6-12-1974. Mr. Hudlikar, for the State, no doubt tried to argue that the Public Analyst''s report Ex. 18 dated 9-8-1973 was given to the

accused before the complaint was filed on 4-1-1974 and the charge was framed on 31-7-1974. But when he was faced with the difficulty that the

accused were not convicted on the basis of the Public Analyst''s report Ex.18 dated 9-8-1973, he had to concede that it was not open for the

State to argue that in view of the report dated 9-8-1973 with which the accused were furnished, no injustice was caused to them on account of the

vagueness of the charge as framed.

13. As has been stated earlier, the aforesaid charge was framed on 31-7-1974. The same can only be on the basis, if at all, of the report Ex.18

and the complaint dated 4-K1974. It can never be argued and indeed it was not, that the said charge had even a remote connection with the

contents of the Certificate dated 6-12-1974 received from the Director, Central Food Laboratory, Calcutta. In fact, as the record shows, the

complainant--Food Inspector was examined on 19-7-1974 and he deposed to the report dated 9-8-1973 and the facts based upon them. The

charge was framed on 31-7-1974 after his examination in chief, and he was subsequently cross-examined on behalf of the accused on 21-8-1974

on the basis of the report dated 9-8-1973 and the said charge dated 31-7-1974. It is only after the evidence of the complainant was over that an

application was made on behalf of the accused under sub-section (2) of section 13 of the said Act, and the sample in the possession of the

accused was sent to the Director, Central Food Laboratory, Calcutta, by the Court on the 19th/22nd October 1974. The certificate received from

the said Director is dated 6-12-1974. That is strange, although this certificate showed, as has been pointed out earlier, different foreign material in

the sample of Besan in question, there was no alteration of the charge by the trial Court. The trial proceeded on the basis of the same charge.

According to the trial Court, the report of the Public Analyst at Ex. 18 was superseded, by the said certificate dated 6-12-1974 received from the

said Director, and therefore the Court proceeded to convict the accused on the basis of the said certificate viz. that the sample in question

contained"" not Watana flour but Lakh dal.

14. What is more important to note is that accused No. 1, while he was under examination u/s 342 of the Criminal Procedure Code, was not even

asked any question with regard to the certificate dated 6-12-1974 received from the said Director. Accused No. 2 was only confronted with a

vague question based upon the said certificate and the said question was that the opinion of the said Director, Calcutta, showed that the Besan in

question was ""adulterated"". This question was also as vague as it could be, since it was not put to accused No. 2 that according to the certificate, it

was not Watana flour but Lakh dal which was found mixed with the said sample of Besan. What is more, the trial Court till the end proceeded on

the basis that the accused had to meet the case as made out both in the Public Analyst''s report Ex. 18 and the certificate of the Director. The

Court questioned, u/s 342 of the Criminal Procedure Code, the accused No. 1 on the basis of the report Ex. 18 only and the accused No 2, on

the basis of both the certificate and the, said report. Till the end neither the accused knew what charge they had to meet, nor, it appears, the Court

was clear, as to on what basis the accused, were being tried. It is no doubt argued by Mr. Hudlikar that the said certificate was requested for by

the accused themselves. It is not the case of the accused that they had not seen the said certificate and therefore it should be presumed that the

accused knew that they were to meet the case of the prosecution based upon the said certificate dated 6-12-1974. He therefore submitted that in

this view of the matter, no injustice was caused to the accused, and therefore the absence of the charge on the basis of the said certificate or the

non-alteration of the old charge which was based on the Public Analyst''s report (Ex. 18), should be deemed to be an irregularity not resulting in

injustice to the accused. It is not difficult to repel this line of argument, Whether the absence of a charge or of a precise charge in a given case is a

mere irregularity not resulting in injustice and therefore curable or not, will depend upon the facts of each case. In view of the peculiar facts of this

case which have been pointed out above, it cannot be argued that the accused, in the present case, were not prejudiced to their detriment. Similar

argument was advanced before the Supreme Court in a case under this very Act which is reported at page 911 in the publication ""The Unreported

Judgments (Supreme Court) 1975"". It was (Bhim Sen Vs. The State of Punjab,) by Bhagwati and Sarkaria JJ. In paragraphs 6 and 7 of the said

judgment, the Court held, while repelling a similar contention, as follows:

Before we part this case, we must refer to one other contention urged on behalf of the State in a desperate attempt to sustain the conviction That

contention was that according to the certificate of the Director, Central Food Laboratory, which superseded the report of the Public Analyst, the

sample of "aerated water1 sold by the appellant contained non-permitted coal tar dye and consequently, it was adulterated and the appellant was

rightly convicted for selling it.

But the short answer to this contention is that it did not form the subject matter of the charge against the appellant nor was it put to him in his

examination u/s 342 of the Code of Criminal Procedure, and it is, therefore, not open to the State to urge this ground for the first time at this stage

in order to support the conviction.

15. According to me, the aforesaid observations of the Supreme Court are a complete answer to the said contention raised on behalf of the State.

I am therefore of the view that the accused are entitled to succeed in this revision application on the said short point viz. that they have been

convicted for an offence with which they were not charged and the said irregularity cannot be cured for the first time at this stage.

16. In view of my findings on the first two contentions in favour of the accused, I consider it unnecessary to go into the other contentions which

were raised on behalf of the petitioners.

17. In the result, I allow the revision application, set aside both the conviction as well as the sentence of the accused and acquit them of the offence

with which they were charged, and make the rule absolute. Fine, if any, paid by the accused to be refunded to them. Bail bonds to be cancelled.

18. Before parting with this case, however, I may observe that as revealed by the facts of the present case, the Courts below are likely repeat the

mistakes committed by the lower Courts in the present case. When the certificate received by the Director of the Central Food Laboratory,

Calcutta, u/s 13 (2) of the said Act, reveals adulteration of a different kind than the one mentioned in the report of the Public Analyst, on the basis

of which the complaint is filed and the charge is already framed, it is necessary for the Court to either cancel the earlier charge or amend the same

in the light of the certificate, and give proper opportunity to the accused to meet the case of the prosecution based upon the said certificate. It must

be remembered that under sub-section (3) of section 13 of the said Act, such certificate supersedes the report of the Public Analyst, and the

prosecution can thereafter proceed only on the basis of the said certificate, and the earlier report of the Public Analyst will be of no avail. If is also

necessary, as has been discussed in the earlier part of this judgment, to ascertain, in cases where the certificate and the report differ from each

other, whether the sample sent to the Public Analyst and that sent to the Director, Central Food Laboratory, Calcutta, are counterparts of each

other, by bringing the necessary evidence in that behalf, on record. Failure to do so is likely to prove fatal to the prosecution. It is further advisable

that the charge framed states the precise nature of adulteration for which the accused is prosecuted. It is hoped that the Courts below will keep the

observations in mind while trying cases under the Act.

19. A copy of these observations may be circulated for the guidance of the lower Courts.