

R-49

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 06.03.2014*
Judgment delivered on: 12.03.2014

+ CRL.A. 172/2006

DELHI ADMINISTRATION Appellant

Through Mr.Navin K.Jha, APP.

versus

SANJAY NAGAR Respondent

Through Mr.D.K.Mathur, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment dated 30.9.2004 whereby respondent has been acquitted of the offence under Section 16 of the Prevention of Food Adulteration Act (hereinafter referred to as the PFA).

2 The case of the complainant is that on 18.4.1995 at about 8.00 a.m. Inspector Dharam Pal Singh (PW-2) had purchased a sample of cow milk from the appellant Sanjay Nagar from his shop at Nagar Dairy, Yamuna Vihar, Delhi where the said food article was stored for sale. A sample consisting of 750 ml cow milk was taken from an open drum having label declaration of "Cow's Milk". The sample was

divided into three equal parts and kept in separate clean and dry bottles; 20 drops of formalin were added to each bottle; each bottle was separately packed. Panchnama was prepared at the spot; the other documents were also prepared at the spot. One counterpart of the sample was sent to the Public Analyst for his report. It had given report on 26.4.1995. This report reads as under:

“Milk fat – 5.2%

Milk solids not fat – 6.7%

Test for starch and sugar – Negative

Test for carbonate and bicarbonate- Negative

Test for Hydrogen peroxide and Urea – Negative”

and am of the opinion that the sample does not conform to standard because Milk solids not fat is less than the prescribed minimum limit of 8.5%.”

3 This report had concluded that the provisions of Section 2(ia) (m) have been violated and the respondent was liable for having committed an offence punishable under Section 16(1) read with Section 7 of the PFA Act.

4 Challan was filed. After initiation of the proceedings accused preferred to exercise his right under Section 13(2) of the PFA Act and accordingly the second counter part of the sample was sent to Director CFL for his analysis. This report is dated 25.10.1995. It reads herein as under:

“1. Milk fat % *4.9*

2. Milk solids not fat % *6.4*

3. Test for starch

Negative

4. Test for sucrose

Negative

and I am of the opinion that the sample does not conform to the standards laid down for cow milk under the provisions of PFA Act 1954 and Rules thereof, in that:

a. Milk solids not fat content falls below the minimum requirement of 8.5%”

5 Statement of the accused was recorded. He denied the allegations. He submitted that he was not selling milk. No public person was joined at the time when samples were taken. The measures were not taken for taking the sample in clean and dried bottles.

6 One witness was produced in defence.

7 On behalf of the State arguments have been addressed in detail. It is pointed out that the acquittal of the appellant had led to an injustice and there was no reason whatsoever on the part of the trial judge to have acquitted the appellant as both the reports i.e. the report of the Public Analyst dated 26.4.1995 and the report of the Director, CFL dated 25.10.1995 had found the cow milk sample to be adulterated and in this view of the matter the acquittal of the appellant suffers from a clear illegality; it is liable to be set aside. Learned counsel for the appellant has placed reliance upon a judgment of the Full Bench of this Court reported as ILR (1970) I Delhi 518 Municipal Corporation of Delhi Vs. Bishan Sarup Etc. where also a cow milk sample had been taken and where both the reports i.e. the report of the Public Analyst and the report
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of the Director CFL had noted the sample to be adulterated, the court had concluded that the conviction of the appellant cannot be faulted with. It is submitted that the same ratio has to be applied in this case as well.

8 Arguments have been refuted by the learned counsel for the respondent. It is submitted that the judgment of acquittal can be interfered with only if there is a patent illegality or there is a perversity which is noted on the face of the record and this is not so in the instant case. It is stated that the two reports i.e. the report of Public Analyst and the report of the Director CFL have extreme variations and the trial judge has thus rightly concluded that the samples which were obtained were not representative samples; submission being that even after the accused had exercised his right under Section 13(2) of the said Act it was open for him to plead that the samples were not a representative sample. To support this submission reliance has been placed upon a judgment of this Court reported as 2005(3) JCC 1637 Kanshi Nath Vs. State as also another judgment of this Court reported as 2008 (1) JCC 582 State Vs. Mahender Kumar & Ors. It is stated that in this case also where a variation in the sampled commodities was more than 0.3% the accused had been given benefit of doubt. It is pointed out that the trial judge had additionally noted that there was also no homogenization of the sample and the subsequent statement of the Food Inspector on oath in Court was thus a substantial improvement; on no count does the impugned order call for any interference.

9 Arguments have been heard. Record perused.

10 First and foremost, this Court has to note the legal proposition that a judgment of acquittal cannot easily be interfered with; unless and until there is a patent illegality or a perversity which is clear and glaring the impugned order may not be disturbed.

11 Powers of the court in an appeal against an order of acquittal are limited. In Ghurey Lal vs. State of U.P. 2008 4 CCC SC 49 (judgment relied upon by the counsel for the non-applicant) it has been held that the principles to overrule a judgment of acquittal by a trial court should be strictly followed; the said principles over the years have been crystallised and the rules have to be strictly adhered to. The following rules had been enunciated in this case:-

“1. The appellate court may only overrule or otherwise disturb the trial court’s acquittal if it has “very substantial and compelling reasons: for doing so.

A number of instances arise in which the appellate court would have “very substantial and compelling reasons” to discard the trial court’s decision. “Very substantial and compelling reasons” exist when:

- i) The trial court’s conclusion with regard to the facts is palpably wrong;*
- ii) The trial court’s decision was based on an erroneous view of law;*

- iii) *The trial court's judgment is likely to result in "grave miscarriage of justice";*
- iv) *The entire approach of the trial court in dealing with the evidence was patently illegal;*
- v) *The trial court's judgment was manifestly unjust and unreasonable;*
- vi) *The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*
- vii) *This list is intended to be illustrative, not exhaustive.*

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached- one that leads to acquittal, the other to conviction- the High Courts/appellate courts must rule in favour of the accused."

12 The reports of the Public Analyst and the report of the Director CFL have been re-produced supra. Whereas the report of the Public Analyst has noted the Milk Fat to be 5.2% and Milk Solids not Fat to be 6.7%, the report of the Director CFL has reported the Milk Solids not Fat to be 6.4%. There was a variation of 0.3%. Both the reports had opined that the sample does not conform to standard because Milk Solids not fat is less than the prescribed minimum limit of 8.5%.

13 There is no doubt to the legal proposition that once the accused

has exercised his right to get second counterpart of the sample analysed from the Director CFL this report will supersede the report of the Public Analyst. There is also no doubt to the additional proposition that even if the Director CFL has given his report, such a report would be binding only if the prosecution has been able to establish that the sample which was sent for analysis was in fact a representative sample. In this context the observations made by a Bench of this Court in Kanshi Nath (supra) are relevant; they are extracted herein as under:

“Coming to the next controversy, i.e., with regard to the representativeness of the sample, it is clear from the Full Bench decision in MCD v. Bishan Sarup (Supra) that if the samples are not representative, then any test report based on it would not indicate the true position. That being the case, a conviction cannot be founded on such a test report. Upon an examination of the cases mentioned by Mr. Mittal, it also becomes clear that although in terms of Section 13 (3) of the PFA Act, the Director’s certificate would supersede the Public Analyst’s report, the difference in the two can still be looked into by the courts for ascertaining as to whether the samples were representative or not. Mr. Sharma had placed reliance on the Supreme Court decision in Calcutta Municipal Corporation (supra) and particularly on paragraph 14 thereof which reads as under:-

“14. Thus the legal impact of a certificate of the Director of Central Food Laboratory is three-fold. It annuls or replaces the report of the Public Analyst, it gains finality regarding the quality and standard of the food article involved in the case and it

becomes irrefutable so far as the facts stated therein are concerned.”

A careful reading of the Supreme Court decision reveals that the certificate of the Director, CFL supersedes the report of the Public Analyst and is conclusive as regards the quality and standards of the sample tested. There is no quarrel with this and there can be none. But, this does not enable us to detract from the ratio of the Full Bench decision of this court in the case of MCD v. Bishan Sarup (Supra) that even after such a certificate is issued by the Director, CFL, it would still open to the accused to establish, if he can do so on concrete grounds, that the sample tested was not a representative one. To this extent, the argument raised by Mr. Sharma that once the certificate of the Director, CFL is obtained, then that is final and conclusive and the Public Analyst's report cannot be looked into at all for any purpose whatsoever, is not quite tenable. If the variation in the two reports is substantial enough, then the Public Analyst's report can certainly be looked into to establish this variation so as to support the contention of the petitioner that the sample was not representative. As indicated above, the Director, CFL who was examined as CW-1 in cross-examination has clearly stated that if the content of common salt as quantified by the two experts would have a variation of more than .3%, then the samples would not be representative. This is an opinion of an expert and one has to go by it. In the facts of the present case, we find that the variation, as indicated above, is more than .3%. Therefore, on the facts of the present case, it can be said that the variation is beyond

the acceptable range and would clearly imply that the samples were not representative. In view of this finding and in the background of the law which is well settled, no conviction can be sustained.

14 Thus even though the report of the Director CFL is final and binding but this does not take away the right of the accused to establish that the sample was not a representative one and for this purpose he can look back to the report of the Public Analyst to establish variations in the two report if any.

15 As noted supra, there is a variation of 0.3% noted in the Non Fatty Milk Solid in these reports that is the report of the Public Analyst and the report of the Director CFL. That apart the Milk Fat recorded by the Public Analyst is 5.2% and the Milk Fat recorded by the Director CFL is 4.9%; in this part of the report also there is a variation of 0.3%.

16 In Kanshi Nath (supra) the court had noted that where variation in two reports is more than 0.3% such a variation is beyond the acceptable range and thus would clearly imply that the sample is not a representative sample.

17 This position was reiterated by a Bench of this Court in the case of Mahender Kumar (supra). In that case also the sample which was sent to the Public Analyst and the sample which was sent to Director CFL subsequently contained variations which were noted to be not insignificant and being more than 0.3%; which is the permissible limit; it was noted that the sample was not a representative sample.

18 In the instant case the variation 0.3%. It is not more than 0.3% as has been pointed out by the learned public prosecutor.

19 However, this was not the only reason which had weighed in the mind of the trial judge while ordering the acquittal of the respondent. The court had also noted that the procedure of taking the sample by proper homogenization had not been adequately adhered to. In this context the trial judge had returned the following finding:

In the present case I find that the witnesses of the complainant have deposed that plunger which used for homogenization was clean and dry. I also find that they have deposed that the “cow’s milk” i.e. the sampled commodity was taken by using two measures of 1 litre and 500 ML. There is no evidence brought on the record that the same were clean and dry as required under the PFA Act. I do not find even the iota of evidence on the file which could show that the plunger, 500 ML measure of 1 litre measure were clean and dry or were without any contents before the conducting the sampling procedure. The complainant was under an incumbent duty and bounden obligation to show beyond all shadow of doubt that the intervening vessels used while taking the sample were clean and dry which has not been done in the present case.

.....

In the present case under consideration, it is clear that the sample has not been properly homogenized. I find that in the complaint under consideration it has been specifically averred that the sample was taken after proper homogenization with help of a clean and dry plunger. In the evidence of the complainant’s witnesses it is testified that the sample was taken after proper homogenization with help of a clean and dry

plunger by rotating it in all possible directions i.e. clockwise, anti-clockwise, up and downwards several times. In the documents prepared like the form VI it is mentioned that the sample was taken after proper homogenization with help of a clean and dry plunger. In the panchnama there is no mention at all about the homogenization. In the evidence of the complainant's witnesses it is testified that the sample was taken after proper homogenization with help of a clean and dry plunger by rotating it in all possible directions i.e. clockwise, anti-clockwise, up and downwards several times. Thereafter it was divided into three equal parts in three clean and dry bottles and 20 drops of formalin were added to each bottle. It is clear from the respective testimonies of the complainant's witnesses that there has been an improvement at the evidence stage which is not permissible. No latitude can be granted to the Food Inspector to make an improvement in the case at the time of trial and this material fact having been proved that the milk was not stirred properly before taking the sample entitles the accused to acquittal. The omission of the fact regarding stirring of the milk in a case in which sample of milk is taken assumes importance as its later introduction in evidence amounts to improvement on the part of the witnesses to bring their statements in conformity with the law on the subject and entitles the accused to acquittal.

Therefore, it is clear that when the sample was taken, there was no proper homogenizing and mixing of the sample.

20 It is a matter of record that the Panchnama which is the first document prepared at the spot (Ex.PW-2/C) is absolutely silent as to
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whether the samples which had been taken were homogenized or not; Ex.PW-2/C only recites that the Food Inspector divided the article of food into three equal parts and put them into three clean and dried bottles; 20 drops of formalin were added in each them. There is no whisper in this document about the homogenization of the milk before the samples were obtained.

21 Thus not only was the sample not in a representative sample; but the prosecution had also failed to establish that the samples which had been taken were after homogenization. In this background, the impugned judgment acquitting the respondent on the aforementioned grounds suffers from no infirmity. It does not call for any interference.

22 Appeal dismissed.

INDERMEET KAUR, J

MARCH 12, 2014

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