

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 1070 of 2008

BAL KISHAN

..... Appellant

Through: Mr. Saket Sikri with
Mr. Ajay Pal Singh and
Mr. Prannoy Dey, Advocates.

versus

DEPARTMENT OF PFA

GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP for the State

CORAM: JUSTICE S. MURALIDHAR

ORDER

16.12.2014

1. The present appeal is directed against the impugned judgment dated 17th November 2008 passed by the learned Additional Sessions Judge ('ASJ') in CC No. 101 of 1998 holding the Appellant guilty of the offence under Section 7 punishable under Section 16 (1A) of the Prevention of Food Adulteration Act, 1954 ('PFA Act') and the order on sentence dated 19th November 2008, sentencing him to two years' rigorous imprisonment ('RI') with a fine of Rs,5000 and in default to undergo RI for five months.

2. The case of the prosecution is that on 21st August 1998 at around 1.45 pm, Food Inspector ('FI') D.V Singh (PW-2) along with FI R.P Singh (PW-5) purchased a sample of mustard oil from the Appellant from his shop at M/s Bansi Oil Mills, 96, Khanna Market. PW-2 collected the sample of 375 grams of mustard oil kept in an open tin

having no label declaration. After homogenising it by mixing with the help of a clean and dry measure already lying in the tin, PW-2 divided the sample into three equal parts and put them in three separate clean and dry bottles. The samples were then packed, fastened, marked and sealed according to the PFA Act and Rules. One sample was sent to the public analyst ('PA'). The report dated 28th August 1998 of the PA stated that the sample did not conform to the standards laid down under Item No.A.17.06 of Appendix 'B' of the PFA Rules, 1955 since it showed the presence of argemone oil.

3. On 3rd September 1998 a complaint was filed under Section 16 of the PFA Act against the Appellant before the competent court. At the instance of the Appellant the second sample was sent to the Central Forensic Laboratory ('CFL') Calcutta for testing. The report dated 5th November 1998 of the CFL (Ex.PW3/A) showed that the sample tested positive for argemone oil. The case was thereafter committed by the learned Metropolitan Magistrate to the court of learned ASJ and charges were framed against the Appellant on 18th January 2001 for the offences under Section 7 read with Section 16 (1A) of the PFA Act.

4. The prosecution examined six witnesses. When the evidence was put to the Appellant under Section 313 of the Code of Criminal Procedure ('Cr PC') he claimed to be innocent. He stated that he had merely purchased 2kg of mustard oil, and he had not made the adulteration as he was not the manufacturer. The Appellant examined Sanjay Tikkoo, Scientist from Mustard Research & Promotion Consortium as DW-3.

5. The trial Court on analysis of the evidence held that the prosecution had successfully proved its case against the Appellant beyond reasonable doubt. In the impugned judgment, the trial Court came to the following conclusions:

(i) Since Section 7 of the PFA Act was an exception to the rule of *mens rea*, the ignorance of the Appellate about the nature, substance or quality of the food was no defence.

(ii) The reports of both PA as well as CFL proved that the sample tested positive for argemone oil. The evidence of Satya Prakash, PA (PW-3) proved that the presence of argemone oil was injurious to health.

(iii) The mere presence of argemone oil, irrespective of the percentage of the adulteration, was sufficient to attract the offence under Section 7 read with Section 16 (1A) of the PFA Act.

(iv) Scientific literature showed that the chance of inadvertent adulteration of mustard seeds by argemone seeds was very remote.

(v) Since DW-3 stated that the Thin Layer Chromatography ('TLC') method of testing showed the presence of argemone oil to the extent of .005% and the presence of more than .01% showed fluorescence, the report of the CFL corresponded to the finding that the percentage of argemone oil in the sample was above .01%.

6. It is submitted by Mr. Saket Sikri, learned counsel for the Appellant, that in terms of the proviso of Section 2 (m) of the PFA Act, if the quality and purity of the article was shown to have fallen below the prescribed standard "solely due to natural causes and beyond the control of human agency", the article should be not "deemed to be

adulterated”. Referring to the answers given by the prosecution witnesses in their cross-examination and the depositions of the defence witnesses, he submitted that it is very difficult to differentiate between the mustard seeds and the argemone seeds. In other words, it was possible that there was mixture of argemone seeds in the mustard seeds which resulted in the presence of argemone oil in the mustard oil bought from the Appellant’s shop and this was entirely beyond the control of the Appellant.

7. The Court finds that PW-7 has specifically answered “The mustard seeds and argemone mexicana seeds are similar and grow in the same season and during harvesting they are mixed up even by farmers”. However, in terms of the proviso of Section 2(m) of the PFA Act, it is not enough to show that the fall in standards was only due to natural causes but that it was also “beyond the control of human agency”. In this regard the Court would like to observe that in order to show that the adulteration had taken place “beyond the control of human agency” it has to be shown that despite the best efforts the adulteration could not be prevented. Positive evidence then have to be led by the accused to show that at the stage of manufacturing, all possible efforts were made to ensure that the adulterated product did not enter the market and further that despite such efforts, and for reasons beyond control, the adulterated product entered the market. In the present case it should have been possible for the manufacturer to show that tests were conducted, even as the product left the factory premises, to ensure that the product that was meant for the market had no presence of argemone oil and that despite those tests the adulterated product entered the

market. However, in the present case that kind of evidence is absent. Further, the Court notices that in the impugned judgment of the trial Court in para 20 a reference is made to a publication of the Ministry of Food and Civil Supplies which suggests that “Mustard seeds mature much earlier than argemone seeds and hence, accidental contamination is not likely”. Consequently, the above submission of learned counsel for the Appellant is rejected.

8. It was next submitted that there was no positive evidence to show that the measure which was used to lift the sample was itself clean and dry. In support of this argument reliance is placed on the decision dated 10th December 2013 in CrI.A.192/2005 (*Delhi Administration v. Suraj*) and the decision in *Corporation of Calcutta v. Gopal Chandra Dey 1980 AIPFAJ 320*.

9. In the present case, PW-2 stated that “The mustard oil in question was contained in an open tin with stainless steel with no label declaration. I homogenised the contents of the mustard oil in the tin with the help of a clean and dry measure lying in the tin already”. Therefore, it is apparent that there was no occasion for the FI to use any other measure to lift the sample. This distinguishes it from the facts of the cases cited by learned counsel for the Appellant.

10. It is next submitted that there was no attempt to associate any independent witness and therefore the entire process of lifting the sample stood vitiated. The Court finds that PW-2 and PW-3 have consistently spoken about the efforts made to join the witnesses and

neighbouring shopkeepers in the proceedings but none of them agreed. In his examination in chief PW-2 stated: "I also made efforts to join some public witnesses in the proceedings by requesting some customers and neighbours but none came forward..". It is not possible for this Court to draw an inference that there was any deliberate failure to associate any independent witness in the proceedings and that on that score the entire sample proceedings should fail.

11. It was next submitted by Mr. Sikri that the method used to test the sample i.e. TLC method was not a reliable method and that the evidence of DW-3 in this regard has not been discussed by the trial Court. The Court finds that in the impugned judgment in para 18 the trial Court sets out what has been stated by DW-3 and concludes that the TLC method used by the CFL should be taken to indicate that the presence of argemone oil was above .01%. However, what has not been further discussed is the point made by DW-3 that both mycotoxin and argemone oil give similar fluorescence under the UV lamp and unless the High Performance Liquid Chromatography ('HPLC') test was conducted the two contaminants i.e., argemone oil and mycotoxin could not be distinguished. DW-3 also sought to suggest that the presence of more than 1% of argemone oil in mustard oil might cause dropsy and anything below that would be safe.

12. The fact remains that the PFA Act does not require any particular percentage of argemone oil to be present for the food sample to be declared to be adulterated. Item no. A.17.6 of Appendix B of the PFA Rules states that the test for argemone oil should be "negative". This

has been reiterated by the insertion in 2001 of a separate entry in that regard. Be that as it may, given the wording of the PFA Rules, the conclusion of the trial Court that the mere presence of argemone oil irrespective of its percentage would be sufficient to conclude that the sample is adulterated cannot be faulted.

13. There is, however, another aspect of the matter that requires consideration. This concerns the variations in the two test reports of the PA and CFL beyond the permissible limit i.e. 0.3% which could give rise to a legitimate doubt whether the samples sent to the two authorities were truly representative of the food article purchased.

14. Although, the trial Court does not appear to have dealt with this particular issue, this Court finds that in the evidence of DW-3, the limitation of adopting the TLC test was specifically adverted to.

15. The Court finds that there were certain common parameters tested both by the PA as well as the CFL. In the report of the PA (Ex.PW1/E) the parameters tested gave the following results:

- “1. B.R. at 40C : 60
- 2. Iodine value : 110.16
- 3. Saponification value: 169.13
- 4. Acid value : 0.92
- 5. Baudouin’s test: Negative.
- 6. Test for cottonseed oil : Negative.
- 7. Test for argemone oil: Positive

8. Polybromide test: Negative.
9. Test for castor oil: Negative.
10. Test for mineral oil: Negative.
11. Test for HCN : Negative.
12. Synthetic Colouring matter: Negative.
13. Test for TOCP/TCP: Negative.
14. B.T.T. (Acetic acid method): 26.6C”

16. In the report of CFL (Ex.PX), the parameters tested gave the following results:

“Butyrefractometer reading at 40C :	59.6
Saponification value :	178.4
Iodine value :	106.3
Acid value :	2.64
Bellier test :	29.6C
(Turbidity temperature-acid method)	
Baudouin test (for sesame oil) :	Negative
Polybromide test :	Negative
Test for mineral oil :	Negative
Test for Cottonseed oil :	Negative
Test for Argemone oil by T.L.C. :	Positive
Test for Hydrocyanic acid :	Negative
Test for Castor oil by T.L.C. :	Negative.”

17. A comparison of the two test reports shows that the variations on the values of the following parameters i.e. saponification value, iodine value, acid value and the BTT (acetic acid method) are more than 0.3%.

In *MCD v. Bishan Sarup* 1972 FAC 273 the Full Bench of this Court held that the report of the CFL in terms of Section 13(5) of the PFA Act was final and conclusive evidence of the facts stated therein. However, the presumption attaching to the certificate was "only in regard to what is stated in it as to the contents of the sample actually examined by the Director and nothing more." The Full Bench held:

"Even after this certificate, it is open to the accused to show that in the facts of a given case and on the concrete objective grounds that he may prove on the record the sample sent for analysis to the Director could not be taken to be a representative sample of the article of food from which it is taken and if this contention is found to be correct, conviction based on the certificate will not be sustainable."

18. The above decision was reiterated in *Kanshi Nath v. State*, 24(2005) DLT 413. In that case again there were variations in the test results of the PA and CFL in respect of the samples of *dhania* powder taken from the Appellant's shop. In his cross-examination the Director CFL stated: "If the sample is representative and is examined by two different experts under ideal conditions the total analytical variation may be $\pm .3\%$." The Court then concluded that although in terms of Section 13(3) of the PFA Act the certificate of the CFL would supersede the report of the PA, the difference in the two can still be looked into by the courts for ascertaining as to whether the samples were representative or not. The Court held in para 7 as under:

"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 $\pm 0.3\%$, 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 $\pm 0.3\%$. 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."

19. The above legal position was reiterated in *State v. Mahender Kumar* (decision dated 24th January 2008 in Criminal Appeal No. 54 of 1990) and more recently in *Food Inspector v. Naresh Kumar* (decision dated 23rd April 2014 in Crl.L.P. No. 748 of 2013) In the latter case, reliance was placed by the FI on the decision of the Full Bench of the Gujarat High Court in *Prahladbhai Ambalal Patel v. State of Gujarat 1984 Crl. LJ. 1642* in support of the submission that once the accused has exercised his right under Section 13 (2) of the PFA Act and a second sample was sent for testing to the CFL, then for no purpose whatever can the report of the PA be referred to thereafter. Repelling the said contention, this Court noted that the judgment of the Full Bench Gujarat High Court had not taken note of the decision of the Full Bench judgment of this Court in *Municipal Corporation of Delhi v. Bishan Sarup* (*supra*). Since the decision of the Full Bench of this Court was of a binding nature as far as this Court was concerned, the Court in *Food Inspector v. Naresh Kumar* was not persuaded to take a view different from what has been held in *Kanshi Nath v. State*.

20. Resultantly, as far as the present case is concerned, since the

variations in the test reports of the PA and the CFL on at least three parameters are beyond the permissible limit of 0.3% as explained by this Court in the above decisions, it can be concluded that the two test samples sent to the PA and the CFL cannot be said to be truly representative of the food articles purchased. Consequently, the benefit of doubt in this regard enures to the Appellant.

21. Accordingly, the Court sets aside the impugned judgment dated 17th November 2008 and the order on sentence dated 19th November 2008 of the trial Court and acquits the Appellant of the offence under Section 7 read with Section 16 (1A) of the PFA Act. The appeal is allowed. The bail and surety bonds of the Appellant shall continue for a period of three months in terms of Section 437-A Cr PC.

22. The trial Court record along with a certified copy of this order be sent to the trial Court forthwith.

S. MURALIDHAR, J.

DECEMBER 16, 2014
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