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

+ CRL.L.P. 523/2015

DELHI ADMINISTRATION

..... Petitioner

Through: Ms. Radhika Kolluru, APP

versus

AKHILESH KUMAR

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

09.08.2016

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1. The present leave to appeal is directed against the order of acquittal passed by the Ld. ACMM under Section 378 (4) Cr.P.C., 1973. The same was initially filed before the Court of Sessions as a Criminal Appeal under Section 378 (1)(a), Cr.P.C. During the pendency of the said criminal appeal, the Supreme Court in *Subhash Chand v. State (Delhi Administration)*, (2013) 2 SCC 17, held that the complainant can challenge the order of acquittal by filing an application for leave to appeal in the High Court, and not in the Sessions Court. In pursuance of this direction by the Supreme Court, the present leave to appeal has been preferred under Section 378 (4) of Cr.P.C.

2. The impugned judgment dated 30.11.2009 has been passed by the learned ACMM-II in C.C. No.117/1993 titled Delhi Administration v.

Akhilesh Kumar in the complaint preferred by the petitioner under Section 7/16 of Prevention of Food Adulteration Act, 1954 ('PFA') for the violation of provisions of section 2(ia) (a) & (m) of the PFA and Rule 44 (1) of the PFA rules, 1955. By the impugned judgment, the respondent/accused has been acquitted.

3. The petitioner purchased a sample of '*Khoa*' on 13.02.1993 from the respondent. *Khoa* had been found stored for sale for human consumption, and the respondent was found conducting business of the same. The said sample of *Khoa* was taken from an open tasale. The sample was taken after cutting the whole contents with the help of clean and dry Khurpa in a clean and dry tray and after mixing them properly. The said sample was divided into three equal parts and put in separate clean and dry bottles and 20 drops of formalin were added to each bottle. Each bottle containing the sample was separately packed, fastened, marked and sealed. One sample was sent to the Public Analyst. He analysed the sample and vide his report dated 25.02.1993 found it not conforming to the standards, as the 'milk fat' of the finished product was less than the prescribed minimum limit of 20% and it contained starch which is not a natural constituent of milk.

4. Upon a complaint being preferred and the accused being summoned, he exercised the right of option for examination of the second counterpart of the sample by Director, CFL, Mysore. According to the certificate dated 10.08.1993 of the Director, CFL, the sample did not conform to the standards laid down for Khoya under the provisions of PFA Act and Rules since the 'milk fat' content was below the minimum specified limit of 20.0% on finished product basis. As per the report of the Public Analyst the milk fat of the finished product was found 11.27%

and the result of Director, Central Food Laboratory, Mysore, milk fat on product basis was found 12.56%. The difference of analysis in respect of milk fat of the finished products in respect of Khoa by the report two analysis is not within acceptable range of .3%. Consequently, the Ld. ACMM concluded that the samples taken were not representative and hence, the accused stands acquitted.

5. The learned ACMM while acquitting the accused placed reliance on the judgment of this Court in *Kanshi Nath v. State*, 2005 (2) FAC 219, wherein this Court has held as follows:

“12. 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.”

13. 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 be 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 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 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”.*

(Emphasis Supplied)

6. The ratio of the aforesaid judgement squarely applies in the facts at hand. In view of the aforesaid position, I find no perversity in the impugned judgment or lack of appreciation of the evidence by the learned ACMM. I find no merit in this petition.

VIPIN SANGHI, J

AUGUST 09, 2016