

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION*

*CRIMINAL APPEAL NO. 138 OF 1997
Along with
CRIMINAL APPEAL NO. 141 OF 1997*

A N D

*CRIMINAL APPEAL NO. 140 OF 1997
Along with
CRIMINAL APPEAL NO. 142 OF 1997*

The State of Maharashtra
(Through: S.S.Kulkarni
Age : 44 yrs.
Food Inspector, Pune
Food & Drug Administration
(MS) 1791/93 New Guruwar Peth,
Pune : 411 042.

.. Appellant

Vs

Satyanarayan Bhagetrām Agarwal
Age : 38 yrs.
Proprietor of
M/s S.B.Agrotech Wagholi, Tq.Haveli.

.. Respondent

Mrs.M.R.Tidke -Additional Public Prosecutor, for the Appellant, in
all Appeals.

Mr.S.R.Nargolkar a/w Mr.Aumkar Joshi, for the Respondent in all
Appeals.

Coram : N.M.Jamdar, J.

Date : 19 June 2017.

Oral Judgment :

These Appeals arise from common incident and have identical facts and common reasoning of the learned Trial Judge, hence by consent of parties are disposed by this common judgment.

2. Appeal No. 138 of 1997 and No.141 of 1997 are filed by the State of Maharashtra through the Food and Drug Administration Department challenging the judgment and order passed by the Chief Judicial Magistrate, Pune acquitting the Respondents of the offences punishable under the Prevention of Food Adulteration Act, 1954 in respect of stock of coconut oil, in the quantities of 200 ml and 500 ml respectively. The Appeal No.138 of 1997 arises from Criminal Case No. 107 of 1993. Appeal No.141 of 1997 arises from the Criminal Case No. 106 of 1993.

3. Appeal No.140 of 1997 is filed by the State seeking enhancement of sentence awarded by the learned Magistrate in Criminal Case No.107 of 1993. Appeal No.142 of 1997 is filed by the State for enhancement of sentence in Criminal Case No.106 of 1993.

4. The case of the prosecution in these Appeals briefly is as under : The Respondent is a proprietor of one M/s.Agrotech, Wagholi, Tq.Haveli, District -Pune. The Food Inspector along with Assistant Commissioner, the Sampling Assistant of the Food and Adulteration Department visited the premises of M/s.S.B.Agrotech, Wagholi, on 13 June 1993. At the time of visit, the shop was closed. The original Accused No.1, the wife of the present Respondent-Accused No.2, was in an adjoining shop. The party asked the Accused No.1 to open the shop. According to the prosecution after the shop was opened, it was found that the Respondent used to sell coconut oil after repacking into bottles of 200 (250) ml and 500 ml of brand 'Parijat' coconut oil. Samples were accordingly collected after following the procedure with sealing the bottles with the signatures of the Assistant Commissioner. The samples were coded and under due procedure, they were sent for analysis on 14 June 1993 to the Public Analyst. The samples were accordingly analysed. The report obtained showed that the samples did not conform to the standards of coconut oil under the Prevention of Food and Drug Administration, Rules 1955. Accused did not hold license for repacking and manufacturing the coconut oil. Accordingly, complaints were filed against the Accused i.e. Respondent and original Accused no.1, after obtaining sanction.

5. As regards 200 gm bottles R.C.C.No.106 of 1993 was tried before Chief Judicial Magistrate, Pune and in case of 500 gm

bottles R.C.C. No.107 of 1993, was tried. Charge was framed under section 7(i) and 7(iii) of the Act of 1954 and Rule 50 of the Rules of 1955 r.w. section 16 of the Act of 1954 in respect of both the trials. On behalf of prosecution, the Food Inspector-Sharad Shankarrao Kulkarni, Assistant Commissioner - Sopan Ramchandra Patil, and Ajit Narayan Vanjari-Public Analyst, were examined. The report of the Public Analyst was also placed on record.

6. The learned Magistrate acquitted the Accused no.1 of all the charges. Accused No.2 was acquitted in respect of charge under section 7(i)(iii) of the Act of 1954. The Accused no.2 was however convicted for contravening Rule 50 of Rules, of 1955 and was sentenced to simple imprisonment till rising of the Court and pay fine of Rs.500/-.

7. As stated above in respect of these two different verdicts in two different trials, two appeals have been filed challenging the acquittal of the Respondent. Two appeals have been filed by the State for enhancement of sentence. It is informed that no appeal is filed by the State in respect of acquittal of the Accused No.1.

8. I have heard Mrs.Tidke, learned Additional Public Prosecutor for the Appellant-State and Mr.Nargolkar, learned counsel for the Respondent in all the Appeals.

9. Firstly, the Appeals challenging the order of acquittal are taken up for consideration.

10. According to the prosecution, the Respondent was guilty of the offences charged since the sample which was taken after following due procedure and was duly analysed as per the rules, showed that the stock of oil was not as per the standard set by the Rules of 1955 and the Respondent had committed adulteration in respect of oil. Ms.Tidke, the learned APP contended that the sole reason why the Respondent was acquitted was the authority who took sample was not authorised, which is a perverse view. The learned Magistrate has erroneously held that he had no jurisdiction to collect the samples. It was submitted on behalf of the State that no material was placed on record by Respondent-Accused regarding jurisdiction and in any case once the report of the Public Analyst demonstrated that there was an adulteration, the question of jurisdiction of the authority does not arise.

11. Mr.Nargolkar, the learned counsel for the Respondent relied on decision of the Apex Court in the case of *Municipal Corporation of Delhi V. Laxmi Narain Tandon etc.* ⁻¹ and contended that the Authority did not have jurisdiction in respect of Wagholi area where the shop was situated and therefore, it cannot be said that the sample was obtained through a lawful method. Mr.Nargolkar also submitted that the Respondent was admittedly not present when the

1 AIR 1976 Supreme Court 621

samples were taken.

12. Before proceeding further with the discussion, it will be necessary to refer to the dicta of the Apex Court in the case of *Municipal Corporation of Delhi*. The Apex Court in paragraph 14 observed thus -

'From a conjoint reading of the above referred provisions, it will be clear that the broad scheme of the Act is to prohibit and penalise the sale, or import, manufacture, storage or distribution for sale of any adulterated article of food. The terms "store" and "distribute" take their colour from the context and the collocation of words in which they occur in Sections 7 and 16. "Storage" or "distribution" of an adulterated article of food for a purpose other than for sale does not fall within the mischief of this section. That this is the right construction of the terms "store" and "distribute" in Section 16(1) will be further clear from a reference to Section 10. Under that section, the Food Inspector, whom the Act assigns a pivotal position for the enforcement of its provisions, is authorized to take samples of an article of food only from particular persons indulging in a specified course of business activity. The immediate or ultimate end of such activity is the sale of an article of food. The section does not give a blanket power to the Food Inspector to take samples of an article of food from a person who is not covered by 1. any of the sub-clauses of Sub-section (1)(a) or Sub-section (2). The three sub-clauses of Sub-section (1)(a) apply only to a person who answers the description of a seller or conveyer, deliverer, actual or potential, of an article of food to a purchaser or consignee or his consignee after delivery of such an article to him. Sub-section (2) further makes it clear that sample can be taken only of that article of food which is "manufactured", "stored" or exposed for sale. It follows that if an article of food is not intended for sale and is in the possession of a person who does not fulfil the character of a

seller, conveyer, deliverer consignee, manufacturer or storer for sale such as is referred in Sub-sections (1)(a) and (2) of the section, the Food Inspector will not be competent under the law to take a sample and on such sample being found adulterated, to validly launch prosecution thereon. In short, the expression "store" in Section 7 means "storing for sale", and consequently storing of an adulterated article of food for purposes other than for sale would not constitute an offence under Section 16(1)(a).'

Two things are therefore clear that, the officer must be lawfully authorised and the storage must be for the purpose of sale.

13. In the cross-examination, witness Sopan Patil admitted that it was not predetermined to go to Wagholi to take samples and on the spot they decided that samples be taken out. Thereafter the Accused no.1 was asked to open the shop and samples were taken when the Respondent was not present. The authorities simply asked Accused No.1 to open the closed premises and drew samples. The fact that the samples were drawn when the Respondent was not present is held as a factor in favour of the Respondent by the learned Magistrate.

14. Apart from this position, it is vehemently contended by Mr.Nargolkar that when the samples were obtained, the authority was not duly empowered to do so having no territorial jurisdiction. The learned counsel has drawn my attention to the written submissions filed by the Respondent-Accused in the Trial Court wherein the Gazette notification in respect of the areas of the Municipal

Corporation have been placed on record. A specific defence was taken that Wagholi did not fall within the limits of the Municipal Corporation when the samples were taken and the authorities who took the samples did not have jurisdiction in respect of Wagholi area. The learned Magistrate has held this point against the prosecution for their failure to demonstrate that Wagholi area fell within the jurisdiction of the concerned officers who took the food sample. The Apex Court in the case of *Municipal Corporation of Delhi* has emphasized that the officer who obtains food samples has a pivotal position under the Act and his authority to draw samples is circumscribed by the provisions of the Act and the Rules. Though in the memo of the Appeals a ground is taken by the State that the finding of the Trial Court that the concerned Authority did not have jurisdiction is incorrect, nothing is demonstrated either through the evidence or by any material on record that the concerned Authority had the jurisdiction to take samples from Wagholi area. Nothing is placed or argued to discredit the finding of lack of power to draw the samples. In view of this position, I do not find that any case is made out for reversing the order of acquittal passed by the learned Magistrate in both the trials.

15. Turning now to the Appeals filed by the State regarding enhancement of the sentences. In both these cases the learned Magistrate, after holding that the Respondent is guilty of offence punishable under section 7(v) of the Prevention of Food Adulteration

Act, 1954 and Rule 50 of Rules of 1955 read with section 16 of the Act, sentenced the Respondent to suffer simple imprisonment till rising of the Court and to pay fine of Rs.500/-.

16. As regards the aspect of enhancement, it was contended by Ms.Tidke the learned APP that section 16 of the Act of 1954 does not give any discretion to the Magistrate in the matter of minimum sentence to be imposed. For the contravention of the provisions of the Act and Rules, minimum punishment of six months is provided which may extend to three years and fine which shall not be less than Rs.1000. The learned APP contended that having once found that the Respondent was guilty of breach of the provisions of the Act and the Rules, punishment of simple imprisonment till rising of the Court and fine of Rs.500 is not only perverse, but illegal. It was contended that in the circumstances the punishment needs to be suitably enhanced looking at the nature of the offence.

17. Mr.Nargolkar the learned counsel for the Respondent submitted that the learned Magistrate in the various places in the judgments has referred to different provisions. At one place it is stated that there is breach only of Rule 50 of Rules of 1955. He submitted that in that position, the second proviso to section 16 of Act of 1954 applies, which states that the sentence may extend to three months and fine which may extend to Rs.500 and no minimum is provided for. Mr.Nargolkar submitted that since section 7 is not held against Respondent and considering the circumstances brought

on record the sentence imposed need not be enhanced. Mr.Nargolkar submitted that even assuming the finding is that section 7 of the Act of 1954 is attracted, in view of section 377(3) of Code of Criminal Procedure, the Respondent is entitled to argue in an appeal for enhancement that he should be acquitted or for further reduction of the sentence. The learned counsel relied on the decision of the Apex Court in the case of *Municipal Corporation of Delhi* to contend that simplicitor storage with the intention to contravene the provisions of the Act, is not punishable under section 7 of the Act of 1954.

18. The perusal of the judgments and orders passed by the learned Magistrate, in which there is a common reasoning, shows that there is no clarity as to which provision is put against the Respondent. In the charge, the learned Magistrate has referred to section 7(i) and (iii). In the points for determination, framed by the learned Judge section 7(iv) is referred to, which is not attracted even by the case of the prosecution. While framing the charge section 7(iv) is referred and in the operative portion wherein the Respondent is convicted section 7(v) is mentioned. In the operative portion where conviction is recorded section 7(v) has been referred which is a general section. There cannot be such uncertainty about the nature of offence in a criminal prosecution and the clear and cogent case should be made out.

19. Section 7 of the Act of 1954 reads thus -

7. Prohibitions of manufacture, sale, etc., of certain articles of food.—No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

- (i) any adulterated food;*
- (ii) any misbranded food;*
- (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;*
- (iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority [in the interest of public health;]*
- (v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; [or*
[(vi) any adulterant.] 26 [Explanation.—For the purposes of this section, a person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale.]

Section 7 prohibits any person to manufacture for sale, or store, or sell or distribute. The categories which are listed from (i) to (vi). The argument of Mr.Nargolkar is that section 7 itself is not attracted in the case.

20. In the cases at hand, the prosecution case is that shop / godown where the oil bottles were stated to be stored was closed and the authorities directed the accused No.1 to open the same. Based on this position, prosecution is lodged against the Respondent for contravention of section 7 of the Act. In the decision of the *Municipal Corporation of Delhi*, the Apex Court has made it clear

that mere storage without any intention to sell does not attract provisions of section 7. The storage must be with an intention to sell the articles. In the present case it is a defence of the Respondent that he had applied for license and awaiting it and only after the license would be issued that he would be proceeding to sell articles. As per the case of the prosecution itself the premises were closed and there was no evidence of whatsoever nature of any sale of these articles. All that has been brought on record by the prosecution is storage of the articles. In view of the decision of the Apex Court referred to above, the simplicitor storage would not attract the provisions of section 7 for absence of any indication of sale. Therefore, there is no question of conviction of the Respondent under section 7 of the Act of 1954.

21. Section 16 of the Act of 1954 specifies penalty for the breach of Rules framed for the Act of 1954. Rule 50 prohibits stocking of any articles of food including prepared food and ready to serve food, apart from other contingency specified therein.

22. Section 16(1)(a) of the Act of 1954 has two categories- sub-clause (i) and (ii). Sub-clause (i) refers to food articles which are adulterated and clause (ii) refers to the food articles other than the ones referred in clause (i). The second proviso to section 16 provides for a punishment for a term which may extend to three months and a fine which may extend to Rs.500/- in respect of contravention of any rules made under clause (a) or clause (g) of sub-section 1(A) of

section 23 of the Act. Rule 50 is referable to section 23(1-A)(g) of the Act. Clause (g) of section 23(1-A) empowers government to define conditions of sale or conditions for license of sale of any articles. It is in furtherance of this Rule 50 has been framed regulating the manner of stocking and selling and distributing food articles.

23. The resultant position that emerges is that the Respondent had stored the food articles without license on that particular date which could be said to be in breach of Rule 50. However, in view of second proviso of section 16 of the Act, this action of the Respondent does not entail minimum penalty of six months, but a sentence which may extend to three months and a fine of Rs.500. In view of this position, it will have to be seen whether imposition of punishment of simple imprisonment till rising of the Court and fine of Rs.500/- in the facts of the present case was proper and whether it needs to be enhanced.

24. The Respondent-Accused was heard on the point of sentence and he had stated that he had applied for license and before he had actually started selling the products a prosecution was lodged and he had obtained the license thereafter. Nothing has been shown that this factual position, which weighed with the learned Judge, is incorrect. Once this factual position is established then the breach on the part of the Respondent is only of storage of food article awaiting

the issue of license. Nothing has been brought on record that he had any intention to start selling food articles prior to his obtaining the license.

25. One cannot be oblivious of the fact that the incident has taken place in the year 1993 i.e. almost 24 years ago and the appeals themselves have come up for hearing after a period of twenty years. In these circumstances, I do not find that the punishment of Rs.500/- fine and simple imprisonment till rising of the Court, needs to be enhanced. It cannot be said that the discretion used by the learned Magistrate to impose this punishment in the facts of the present case was so perverse that the punishment needs to be increased after a lapse of twenty years.

26. In the circumstances, there is no merit in all the Appeals. The Appeals are accordingly dismissed.

(N.M.Jamdar, J.)