HIGH COURT OF GUJARAT

M B RISALDAR
V/S
RADHESHYAM RAMDHAR AGARWAL

Date of Decision: 03 July 1980

Citation: 1980 LawSuit(Guj) 121

Hon'ble Judges: V V Bedarkar

Eq. Citations: 1980 (2) GLR 136, 1981 CrLR 217

Case Type: Criminal Appeal

Case No: 1148 of 1978

Subject: Food Adulteration

Head Note:

[A] Prevention of Food Adulteration Rule - R.22 - Rule in respect of proportion of quantity to be taken for the purpose of analysis is directory and not mandatory - In case of public analyst being able to analysis than merely because quantity available was less does not result in non-compliance of the rules. [B] Prevention of Food Adulteration Rules - R.22 - Food Inspector while loading evidence state that be had put quantity in clean bottles - There is no evidence that the bottles were cleaned or washed in his presence - Person who washed the bottles was not examined - It was held that it was not proved that the Food inspector had established that the bottles were clean and dry as per the provision of the Rules.
Prevention of Food Adulteration Rules - Rule 22 - Rule regarding propor- tion of the quantity to be taken for analysis is directory and not mandatory- If public analyst able to analyse then merely because quantity available was less does not result in non-compliance of the rules. Prevention of Food Adulteration Rules -

Rule 22-Food Inspector leading evidence that he had put quantity in clears bottles - No evidence that the bottles were cleaned or washed in his presence - Person who washed the bottles was not examined - Held that it was not proved that the Food Inspector had proved that the bottles were clean and dry as required under the rules. Rajal Das Pamani v. State of Maharashtra State of Kerala v. Alasserry Mahmmed State of Maharashtra v. Ram Murat Dube referred to.

Acts Referred:
Prevention Of Food Adulteration Rules, 1955 R 22

Final Decision: Appeal dismissed

Advocates: K V Valikarimwala, N R Oza, K R Vyas,K S Nanavati, J V Desai

Reference Cases:
Cases Cited in (+): **9**
Cases Referred in (+): **3**

Judgement Text:-

Bedarkar, J

[1] The prosecution case is that on 15th February, 1971 at the restaurant of the accused which is known as Agrawal Restaurant, food inspector Manubhai A. Pandya purchased Jalebi prepared in oil. It is the prosecution case that the oil used in Jabeli was not according to the prescribed standard and, therefore, the accused was prosecuted.

[2] The learned Magistrate acquitted the accused on two counts. One count was that the prosecution failed to prove that the public analyst was sent sufficient quantity of Jalebi to extract sufficient quantity of oil as per Rule 22 which says that 125 Gms. of edible oil shall be sent to the public analyst. This, the learned Magistrate held on the strength of the judgment of the Supreme Court in Rajal Das Pamanani v. State of Maharashtra, A.I.R. 1975, S C. 189, wherein it was held that the accused cannot be convicted unless sufficient quantity for analysis as laid down under Rule 22 is analysed. The second count was that there was no sufficient evidence to come to the conclusion that the jar or bottle in which the muddamal Jalebi was placed were cleaned and dried.

[3] So far as the first count of acquittal is concerned, it is submitted by Miss Valikarimwala who appears for the appellant that the judgment is no longer a good law, because by a later judgment, viz. State of Kerala v. Alasserry Mohmmed, A.I.R. 1978, S.C. 933, this judgment in A.I.R. 1975, S C. 189 is over-ruled. It is the submission of Miss Valikarimwala that even otherwise, the requirement of sending the prescribed quantity of Jalebi is followed, and also it is for the public analyst to say whether he can analyse with the given quantity or not. This arguments was advanced by her mainly because on behalf of respondent No. 1, it was attempted to be shown that according to the evidence of the public analyst, Shri S. S. Bhatt, Ex. 37, even though the sample of Jalebi of the quantity of 500 Gms. was sent to him, which is in consonance with Rule 22, he had taken about 100 to 150 Gms. of Jalebi and it was powdered and then it was put in ethyl as it is the function of ethyl to separate oil from the other articles. It was, therefore, submitted that when only 100 to 150 Gms. of Jalebi powder might have been taken, how can there be sufficient quantity for analysis because oil available therefrom would be hardly about 25 gms to 50 gms. Unfortunately, no question is put to the public analyst as to how much quantity of oil was available. But even then, reading the judgment of the Supreme Court in the case of State of Kerala v. Alasserry Mohmmed, it is very clear that the quantity now becomes immaterial. What is necessary is that - whether it was possible for the public analyst to analyse the article or not. In this judgment, it has been specifically observed as follows :

> "Rule 22 is directory and not mandatory. Applying the salutary principles of interpretation of statutes, the use of the word 'shall' in sub-sec. (3) of sec. 11 and in Rule 22 indicates on its face that an imperative duty has been cast upon the food inspector to send a sample in accordance with the prescribed rules. But the mere use of the word 'shall' does not invariably lead to this result. The whole purpose and the context of the provision has to be kept in view for deciding the issue. The whole object of sec. 11 and Rule 22 is to find out by a correct analysis, subject to further verifications and tests by the Director of the Central Laboratory or otherwise, as to whether the sample of food is adulterated or not. If the quantity sent to the Public analyst, even though it is less than that prescribed, is sufficient and enables the Public Analyst to make a correct analysis, then merely because the quantity sent was not in strict compliance with the Rules will not result in the nullification of the report and obliterate its evidentiary value. If the quantity sent is less, it is for the public Analyst to see whether it is sufficient for the analysis or not. If

he finds it insufficient, here is an end of the matter."

The last portion of these observations is very important and, therefore, if the public analyst can analyse, then merely because the quantity available was less cannot result in non-compliance with the mandatory rule so as to lead to consequential acquittal.

[4] In the instant case, there is another aspect. The food article which was attached by the inspector was Jalebi and after receiving Jalebi, the public analyst had to test it for the purpose of oil and it would be in his discretion as to how much quantity of the sample be taken for mak ing it sufficient for the purpose of analysis. It is not shown that 500 Gms. of Jalebi sent as sample to the public analyst was, in any way, in breach of Rule 22. So on this count, I think that the appellant is quite justified in challenging the acquittal.

[5] It is the case of the accused further that the bottle in which sam pies were taken is not proved to be cleaned and dried. On this count, the learned Magistrate accepted the contention of the accused and acquitted him. Miss Valikarimwala, the learned Advocate for the appellant very strongly urged before me that this finding arrived at by the learned Magistrate is not justified.

It is the submission of Miss Valikarimwala that the evidence of the food inspector Manubhai Pandya very categorically showed that he had transferred the samples in three glass bottles which were cleaned and dried. It is her submission that when the food inspector has stated so in clear terms, it should be presumed that he had followed the official act properly and the learned Magistrate should not have doubted that testimony. I quite agree with her that if the testimony of the food inspector had remained as it was, then there was no ground to doubt it and the court was not justified in creating a doubt. But during the cross-examination, questions were put to the food inspector specifically as to under what circumstances he found that the bottles were dried and cleaned. For that, he has merely to say that looking to the bottles by nacked eyes, he found them to be dried and cleaned. He was put specific questions and he stated that the utensil and the bottle were taken by him from his cupboard. He did not know how many bottles were there in his cupboard at that time this can be justified because

of the time of deposition one would not know how many bottles were there in the cupboard when he went for raid. He may not also know as to when those bottles were used. But the important evidence is that the bottles were kept in the cupboard by his peon after washing. He could not say when they were kept. He also could not say when the peon washed the bottles. All this evidence can be appreciated because he may not remember when the peon washed the bottles at time of deposition nor can he remember as to when they were put in the cupboard. The most important answer is that the bottles were washed by peon Bagare according to his instructions. But then he had to admit that they were not washed in his presence. So all the evidence given by him that bottles were dried and cleaned and they were cleaned and put by the peon under his instructions goes away by a sentence that they were not washed in his presence. If the bottles are not washed in his presence, how can it be said that they were cleaned by the peon according to his instructions and direction? In order to prove that instructions were properly followed, the person who gives instructions has to testify that actual procedure was done in his presence according to his instructions. If he does not say so and merely states that the peon washed the bottles according to his instructions, it is merely a statement on assumption and not a statement of fact. On this count, the learned Magistrate relied on an unreported judgment printed at 1977, U. C. R. (Bom.) 530, which is a judgment of Jahagirdar, J. in the case of the State of Maharashtra v. Ram Murat Dube, in Criminal Appeal No. 98 of 1976 decided on 15th April, 1977. In that case, evidence was given by the food inspector that he did not clean or dry the bottles in which samples were taken. But the deposed that, that part of the work was done by his assistant. To a pointed question in the cross-examination, he admitted that he did not know when the assistant did it. On this evidence, the Bombay High Court held that it was, therefore, impossible to hold that the food inspector who has been examined proved that the bottles were cleaned or dried as required under the rule. This could have been proved by the assistant who is alleged to have done that part of the work.

[6] There is no judgment of this Court or the Supreme Court showing to the contrary. Even I feel that when a witness testifies to the effect that the glass bottles were cleaned and dried, a mere visual appearance to the nacked eye may not be sufficient

sometimes. If no questions might have been put to him as to how he can say that the glass bottles were cleaned and dried, probably the matter would have ended there. But he has given out that the peon had cleaned and dried the bottles and put them into the cupboard. In this state of the evidence, it was the duty of the prosecution to examine that peon to show that bottles were properly cleaned and dried and they were put into the cupboard and properly closed. It is true that I would not go to the extent of observing as the learned Magistrate has done that there might be some microscopic dirt remaining in the bottle. But then there should be evidence that it was properly cleaned and if that direct evidence is there and then after looking by a nacked eye also, the bottles looked cleaned and dried, then the matter is with the prosecution. But if the evidence is not there, then benefit of that must certainly go to the accused.

Appeal dismissed.