

Before. Pritpal Singh and K. S. Tiwana, JJ.

STATE OF PUNJAB and another,—Appellants.

versus

JAGAN NATH,—Respondent.

Criminal Appeal No. 502-DBA of 1984.

May 30, 1986.

Code of Criminal Procedure (II of 1974)—Sections 2(d), 2(ia) (iii) 190 and 378—Prevention of Food Adulteration Act (XXXVII of 1954)—Sections 7 and 16(1)(a)(i)—Prevention of Food Adulteration Rules, 1955—Appendix 'B' Rule A. 11.01.11—Sample of milk taken from vendor found to be adulterated—Complaint filed by the Food Inspector against the vendor—Accused acquitted of the charge and appeal against acquittal filed by the State Government—State Government—Whether has locus standi to file the appeal—Complaint filed not stating that milk was stirred to make it homogenous—Said omission—Whether fatal to the admissibility of the complainant—Said omission—Whether plays a role in the appraisal of the evidence produced by the prosecution—Trial Court—Whether justified in recording the acquittal for the charge under Section 7 read with Section 16(1)(a)(i) of the Act.

Held, that an appeal against acquittal is filed under Section 378 of the Code of Criminal Procedure, 1974. The aforesaid section is in general terms and would take in its purview all types of cases since the expression used in the sub-section is "in any case". As such the State Government is competent to file an appeal against acquittal in all cases. The State of Punjab, therefore, has the *locus standi* to file the appeal.

(Para 2)

Held, that the definition of the term 'complaint' has not been given in the Prevention of Food Adulteration Act, 1954, nor any *proforma* of the complaint has been provided. The matter has, therefore, to be considered by looking upon the definition of the term in Section 2(d) of the Code. A reading of the definition of 'complaint' as well as the provisions of Section 190 of the Code indicate that a criminal complaint is required to contain only those facts which constitute the alleged offence. In the light of the aforesaid definition it has to be considered as to what are the facts which constitute the offence of adulteration of milk envisaged by the Act. According to Section 7 of the Act, no person can sell any adulterated food and according to section 2(ia)(m) of the Act milk meant for sale must adhere to the standard prescribed in Rule

A.11.01.11 of Appendix 'B' of the Prevention of Food Adulteration Rules, 1955. Thus, the essential ingredients of a complaint in the case of adulterated milk are that the milk was for sale, that its sample was taken by the Food Inspector which was got analysed and that the sample was found adulterated. There is no provision in the Act or the Rules prescribing the method of taking sample nor is there any statutory requirement of making the milk homogenous. In these circumstances, the omission of the factum of making the milk homogenous in the complaint is not fatal to the admissibility of the complaint and this omission does not entitle the Magistrate to refuse to take cognizance of the offence. The omission, however, plays an important role in the appraisal of evidence. Therefore, there is no gain saying that before the sample of milk is taken by the Food Inspector he must ensure that the milk has been made homogenous, otherwise the report of the Analyst is bound to be misleading regarding the contents of fat and solids not fat. If the Court comes to the conclusion that the milk was not stirred and made homogenous it is not bound to rely upon the report of the Public Analyst to record a conviction against the vendor. To come to a conclusion that the milk was made homogenous when the sample was taken, the contents of the complaint have necessarily to be looked into. In case the factum of stirring of the milk is missing in the complaint it is open to the trial Court to entertain a doubt on the statements of the Food Inspector and the prosecution witnesses and the trial Court cannot be faulted in giving benefit of doubt to the accused if on taking an overall view of the evidence it arrives at the conclusion that due to the omission in the complaint it would be hazardous to rely upon the evidence to hold the milk vendor guilty of adulterating the milk. The trial Court would, therefore, be justified in acquitting the accused for the charge under Section 7 read with Section 16(1)(a)(i) of the Act.

(Paras 4, 5 and 6).

Appeal from the order of Sh. O. P. Dhaiwal, Additional Sessions Judge, Bhatinda, dated 15th March, 1984 reversing that of Sh. Iqbal Singh Baiwa, P.C.S., Judicial Magistrate, 1st Class, Bhatinda, dated 19th May, 1983 acquitting the accused.

Order : Acquittal.

H. S. Bhullar, Advocate, for A.G. Punjab.

Anupam Gupta, Advocate, for the Respondents.

JUDGMENT

Pritpal Singh, J.

(1) These are ten State appeals against acquittal, (Criminal Appeals Nos. 502-DBA and 672-DBA of 1984, 286-DBA, 353-DBA, 414-DBA, 417-DBA, 418-DBA, 422-DBA, 431-DBA, and 473-DBA of

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1985). The common point for determination in these appeals is whether a milk vendor, whose sample of milk was found adulterated on analysis, can be acquitted of the charge under section 7, read with section 16 (1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act), on the ground that in the complaint filed by the Food Inspector it was not mentioned that the milk was made homogenous, by stirring, before the sample was taken. In all the cases from which these appeals have arisen this is the main ground, if not the sole ground, for acquittal of the concerned milk vendor.

(2) At the very threshold an objection has been taken by the learned counsel for the respondents that the complaints, having been filed by the Food Inspector, the State of Punjab is not competent to file the appeals against acquittal. This objection has no merit because the point has been set at rest by the apex Court of this country in *Khem Raj v. State of Madhya Pradesh*, (1). An appeal against acquittal is filed under section 378 of the Code of Criminal Procedure (hereinafter referred to as the Code). The provisions of this section are *pari materia* with the provisions of section 417 of the 1898 Code, before it was amended in 1973 on all essential features. The Supreme Court while considering the scope of section 417, held, that sub-section (1), (which is similar to sub-section (1) of section 378 of the amended Code), is in general terms and would take in its purview all types of cases since the expression used in the sub-section is "in any case". The Hon'ble Judges observed:—

"We do not see any limitation on the power of the State Government to direct institution of appeal with regard to any particular type of cases. Sub-section (1) of section 417 being in general term is as such of wider amplitude. Sub-section (2) advisedly uses the word 'also' when power is given to the Central Government in addition to direct the public prosecutor to appeal."

The Supreme Court in an earlier judgment in *Akalu Ahir and others v. Ramdeo Ram* (2) had taken a similar view and it was observed as follows:—

"The Code of Criminal Procedure 1872 by section 272 permitted the Government to file an appeal from acquittal and

(1) A.I.R. 1976 S.C. 173.

(2) A.I.R. 1973 S.C. 2145.

this was repeated in section 417 of the Code of Criminal Procedure 1882 and again in 1898. The object of limiting the right of appeal against the orders of acquittal to the State Government was to ensure that such appeals are filed only when there has been miscarriage of justice and not when inspired by vindictiveness. A private party had, therefore, no right of appeal. The aggrieved party could, however, move the authorities concerned to consider the question of presenting an appeal against acquittal. This indicates that punishment for offences is normally the responsibility of the State as the guardian of law and order. Thus, section 417, Cr. P.C. before its amendment by Act 26 of 1955 empowered only the State Government to direct the Public Prosecutor to present an appeal from an order of acquittal. In 1955, however, this section was amended and it was provided, *inter alia*, that where an order of acquittal is passed in a case instituted upon complaint the complainant may present an appeal provided that the High Court on his application grants him special leave to do so. Even in case when the complainant has a right to present an appeal against acquittal his failure in securing special leave would under section 417(5) bar the State Government also from appealing. This reflects the Parliament's anxiety not to expose the orders of acquittal to plurality of appeal by preserving to the State as guardian of law and order, a distinct right of appeal wholly unaffected by the result of the complainant's right to appeal."

In view of these judgments of the Supreme Court, it is now beyond controversy that the State Government is competent to file appeals against acquittal in all cases. We have, therefore, no hesitation in upholding the *locus standi* of the State of Punjab to file these appeals.

(3) Reverting to the question posed for determination in these cases, it may be mentioned that this question has already been answered in the affirmative by two Division Bench judgments of this Court. In *State of Haryana v. Ram Dhan* (3), the Food Inspector did state in the trial Court that the milk was stirred before

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the sample was purchased but in the complaint this fact was nowhere mentioned. In these circumstances the judgement of acquittal passed by the trial Court was affirmed. In *State of Punjab v. Inder Singh*, (4) the Division Bench observed:

“The learned counsel also submitted that the plea that the milk had been stirred before the sample was obtained does not find any mention in the complaint. The Food Inspector at the stage of the trial did state that the milk was stirred but in view of the submission made by the learned defence counsel we deem fit and proper to give benefit of doubt to the respondent on this point.”

With these observation, the judgment of acquittal rendered by the trial Court was affirmed.

(4) On a careful consideration of the matter we find no reason to differ with this view. We may, however, make it clear that this view is not based on the violation of any statutory requirement, but rests on the rule of prudence in the context of the appraisal of evidence. In the Act, the definition of the term “complaint” has not been given nor any pro forma of the complaint has been provided. We have, therefore, to fall back upon the definition of this term in section 2(d) of the Code, which reads as under:—

“2(d). ‘Complaint’ means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report;

* * * * *

Help may also be obtained from the provisions of section 190(1)(a) of the Code, which is reproduced below:—

“190. *Cognizance of offences by Magistrate.*—

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second

class specially empowered in this behalf under subsection (2), may take cognizance of any offence—

- (a) upon receiving a complaint of facts which constitute such offence;

* * * * *

A combined-reading of these provisions indicates that a criminal complaint is required to contain only those facts which constitute the alleged offence. In the light of this definition we have to consider as to what are the facts which constitute the offence of adulteration of milk envisaged by the provisions of the Act. According to section 7 of the Act, no person can sell any adulteration food. The adulteration of milk falls under section 2(ia)(m) of the Act which reads as follows:—

*2(ia) 'adulterated'—an article of food shall be deemed to be adulterated—(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health;

* * * * *

According to this provisions, the milk meant for sale must adhere to the standard prescribed in rule A.11.01.11 for Appendix B to the Prevention of Food Adulteration Rules, 1955. This rule provides that buffalo's milk must contain atleast 6 per cent of milk fat and 9 per cent of milk solids not fat in the State of Punjab. Similarly, the minimum requirement of milk fat and milk solids not fat in cow's milk is 4 per cent and 8.5 per cent. A Food Inspector is empowered under section 10 of the Act to take sample of any article of food from any person selling such article. He is authorised to get the same analysed from the Public Analyst under section 11 of the Act. The Public Analyst is thereafter required under section 13 of the Act to analyse the sample and then to deliver his report to the Local Health Authority. If the sample has been found adulterated on analysis, the Food Inspector is authorised to file a complaint against the vendor under section 7 read with section 16 of the Act. Thus, the essential ingredients of a complaint in the case of adulterated milk are that the milk was for sale that its sample was taken

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by the Food Inspector which was got analysed and that the sample was found adulterated. There is not provision in the Act or the Rules prescribing method of taking sample nor there is any statutory requirement of making the milk homogenous. In these circumstances, the omission of the factum of making the milk homogenous in the complaint is not fatal to the admissibility of the complaint. When a complaint is filed by the Food Inspector omitting fact the Magistrate evidently cannot refuse taking cognizance of the offence. Quite clearly, such omission does not affect the maintainability of the complaint.

(5) The omission, however, plays an important role in the appraisal of evidence. It is no longer open to controversy that the milk must be made homogenous before its sample is taken. The Supreme Court has said so and it is also the consistent view of this Court. This view has been expressed by the Supreme Court in *Food Inspector, Municipal Corporation, Baroda, v. Madanlal Ramlal Sharma and another*, (5) as follows:—

“We are conscious of the fact that in milk and milk preparations including curd, it is distinctly possible that the fat settles on the top and in order to find out whether the milk or its preparation such as curd has prescribed content, the sample must be homogenous and representative so that the analysis can furnish reliable proof of nature and content of the article of food under analysis.”

In this context, the observations of this Court in *Ram Dhan's case* (supra) are to the effect that it is a matter of common knowledge that cream accumulates on the top of the milk and if the milk is not properly stirred when the sample is taken it is bound to be deficient in essential ingredients. This view was followed in numerous Single Bench judgments of this Court. Apart from these a reference in this connection may be made to the observations in a book “A Laboratory Manual of Milk Inspector” by A. C. Aggarwal and R. N. Sharma, Fourth Edition, 1961, in which guidelines have been laid down for careful and accurate sampling of milk. These guidelines are reproduced below:—

“*General Sampling* : The careful and accurate sampling of milk is of utmost importance in all analysis of milk. Probably more errors are ensued through careless preparation of samples than in the actual performance of

the tests. The most important thing to bear in mind in this connection is that the whole body of milk from which a sample is to be drawn should be uniform throughout in its composition, and any sample of milk drawn out of it for analysis must necessarily be a true representative of the whole body of milk. The factors disturbing the uniformity of composition of milk are mainly the separation and partial churning of fat. Thorough mixing of milk must first be ensured either by stirring with a long handled dipper if the container is big, or by pouring from one vessel to another or by shaking gently."

There is, therefore, no gainsaying that before a sample of milk is taken by the Food Inspector he must ensure that the milk has been made homogenous. Otherwise the report of the analyst is bound to be misleading regarding the contents of fat and solids not fat. While assessing the value of the report it becomes the duty of the Court to ascertain if the sample of milk had been properly taken by the Food Inspector. The proper sample would only be of the milk made homogenous by stirring. If the Court comes to the conclusion that the milk was not properly stirred and made homogenous it is not bound to rely upon the report of the Public Analyst to base conviction of the milk vendor. To come to a conclusion that the milk was made homogenous when the sample was taken the contents of the complaint have necessarily to be looked into. In case the factum of stirring of the milk is missing in the complaint, it is open to the trial Court to entertain doubt on the statements of the Food Inspector and his witnesses in Court in respect thereof.

(6) An analogy can be drawn from a private complaint before a Magistrate, as also one made before the police in a cognizable case in the shape of a first information report. If any occurrence takes place, the complainant in such private complaint or in the first information report, as the case may be, may give a narration of the same withholding the names of the eye-witnesses or some other salient facts. As long as the allegations constitute an offence the cognizance of the case cannot be refused by the Court. But, at trial these omissions would assume importance and the proof adduced before the Court regarding the facts so omitted in the first information report would be looked with suspicion and the benefit of doubt will become available to the accused. Such a situation will arise not because the mention of those facts was a necessary requirement of the complaint to constitute the offence but because the

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omission would make the evidence, which is produced to prove those facts, suspect as an after-thought. The omission is not inherently fatal to the prosecution case but the Court while assessing the evidence would certainly be entitled to take the view that evidence of the facts not mentioned in the complaint or the first information report cannot be safely relied upon. By the same reasoning, although it may not be necessary to mention the factum of making the milk homogenous for maintainability of the complaint, yet it would be open to the Court not to place implicit reliance on the evidence produced in respect thereof in the Court on the ground that in the light of the omission in the complaint this evidence could possibly be an afterthought. We must hasten to make it clear that the Court is not bound to reject the evidence of stirring of the milk simply because this facts is omitted in the complaint. But the view taken by us is that the trial Court cannot be faulted in giving benefit of doubt to the accused if on taking overall view of the evidence it arrives at the conclusion that due to the omission in the complaint it would be hazardous to rely upon the evidence to hold the milk vendor guilty of adulterating the milk.

(7) On the analysis made above, we find no reason to interfere with the view taken by the Subordinate Courts in these cases that owing to the non-mentioning of the making of the milk homogenous in the complaint the evidence of the Food Inspector became doubtful in respect thereof which entitled the milk vendors to invoke the doctrine of the benefit of doubt in their favour. These State appeals are, therefore, dismissed.

K. S. Tiwana, J—I agree.

H.S.B.

Before : D. S. Tewatia and Surinder Singh, JJ.

AJIT SINGH TOOFAN AND OTHERS,—Petitioners

versus

STATE OF HARYANA AND OTHERS,—Respondents.

Civil Writ Petition No. 2939 of 1985.

May 30, 1986.

Constitution of India, 1950—Article 16—Persons appointed on ad hoc basis to government posts—Letters of appointment stipulating that tenure of service would terminate on availability of candidates for regular appointment—Ad hoc appointees