## CRIMINAL REVISION.

*Before Henderson and R. C. Mitter JJ.*

1936

*Sep.* 28 ; *Oct.* 5.

MANEENDRA NATH BANERJI

*v.*

JYOTISH CHANDRA DATTA.*

*Food Adulteration—Sanitary Inspector purchasing sample without special authority, Effect of—Seller's knowledge of object of taking samples—Bengal Food Adulteration Act (Ben. VI of 1919), ss. 6, 9, 10, 11, 12, 14, 20, 21.*

The purchase of samples of articles of food by a Sanitary or Food inspector of a municipality (in compliance with the safeguards under the Bengal Food Adulteration Act of 1919) for analysis by the public analyst may be treated as a purchase by any private individual under s. 9 of the Act, and, as such, is not vitiated for such purchaser's want of special authority from the municipality empowering him to perform the duties under ss. 10 and 12 of the Act.

*Sewal Ram Agarwala* v. *Emperor* (1) followed.

If, at the time of purchasing samples of articles of food by a buyer, the seller knows that the same are taken for the purpose of analysis by the public analyst, a declaration (under the Act) to the seller of the buyer's intention to have the samples analysed is unnecessary.

*Wheeker* v. *Webb* (2) followed.

*Barnes* v. *Chipp* (3) distinguished.

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The material facts of the case and the arguments in the Rule appear sufficiently in the judgment.

*Sudhangshu Shekhar Mukherji* for the petitioner.

*Jitendra Mohan Banerji, Nirmal Kumar Sen* and *Jagan Nath Gangopadhyaya* for the opposite party.

*The Officiating Deputy Legal Remembrancer, Debendra Narayan Bhattacharjya* for the Crown.

*Cur. adv. vult.*

*Criminal Revision, No. 744 of 1936, against the order of M. H. B. Lethbridge, Sessions Judge of Burdwan, dated July 6, 1936, affirming the order of F. Huque, Magistrate, First Class, of Katwa, dated May 29, 1936.

(1) (1934) I. L. R. 62 Cal. 374. (2) (1887) 51 J. P. 661.
(3) (1878) 3 Ex. D. 176.

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MITTER J. This Rule has been obtained by the two petitioners before us who have been convicted of an offence punishable under s. 6, sub-s. (*1*), cl. (*c*) of the Bengal Food Adulteration Act and each of them sentenced under s. 21 of the said Act to pay a fine of Rs. 150, in default to suffer simple imprisonment for one month. The charge against the petitioners is that they stored for sale adulterated *ghee* in a shop situate in Katwa *bâzâr* within the municipal limits of Katwa. The finding is that petitioner No. 2, Dina Nath Bhakat, is the owner of the said shop and petitioner No. 1 Maneendra Nath Banerji, is his shop assistant.

The facts which have been established are that on September 14, 1935, Jyotish Chandra Datta, the complainant, who is the Sanitary Inspector of the Katwa Municipality, accompanied by some members of the Food Adulteration Committee of the said municipality, took samples of *ghee* and mustard oil from five shops of the Katwa *bâzâr*. No sample was taken from the shop of petitioner No. 2 on that day. After these samples had been taken, a sample of *ghee* (we are not concerned with the sample of mustard oil) was sent by the manager of the shop of petitioner No. 2 to the municipal office for analysis by the public analyst. This fact was made one of the grounds for defence, but, as we will indicate hereafter, it has got a material bearing on one of the points raised by the petitioners before us, and furnishes an answer to the prosecution. On the next day, that is, on September 15, 1935, the said Sanitary Inspector of the municipality accompanied by three members of the Food Adulteration Committee went to the shop in question and the Sanitary Inspector asked the petitioner No. 1 to supply him with *ghee* and mustard oil. After some hesitation petitioner No. 1 supplied him with *ghee* and mustard oil. He divided the *ghee* in three parts as also the oil and sealed them. He then tendered the price which was refused. He then gave to the said petitioner a sealed packet of each of the said articles and

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sent one of each to the public analyst. The public analyst in the form given in the schedule to the Act gave a certificate stating that the *ghee* sent to him was grossly adulterated. On the receipt of his report with the sanction of the municipal commissioners the prosecution was started. The public analyst was not examined as a witness. There is no direct evidence that the Sanitary Inspector forthwith, after obtaining the articles, in express terms notified to petitioner No. 1 his intention to have the articles analysed by the public analyst.

From the written statement that was filed by petitioner No. 1, from the trend of cross-examination of the prosecution witnesses and the evidence on the record, it appears that the specific defence was of a twofold character, namely (*i*) that petitioner No. 2 had no concern with the shop, and (*ii*) that the *ghee* from which sample was taken by the complainant had not then been stocked for sale in the shop.

The first defence is concluded by findings of fact; the second defence is as follows:—The shop belonged to the Bhakat Babus. It is an *ârhatdâri* shop. The *bepâris* sent goods which they themselves sell, the Bhakats taking commission only. A Marwari sent to the said shop fifty-two tins of *ghee*. The manager of the shop allowed him to store them there on condition that samples would be taken and sent for analysis by the public analyst and if his report was favourable, the goods would be sold from the shop on *ârhatdâri* system. If his report was unfavourable or if the result of the analysis be not known within five weeks, the *ghee* is to be returned to the Marwari, but in the meantime it was to remain only in deposit in the *ârhat*. It is said that in pursuance of this arrangement a sample of *ghee* was sent by the manager of the shop for analysis to the municipal office on September 14, 1935. The defence in substance was that the *ghee* in question had not been stocked for sale. This defence has been rightly overruled on the finding that the sample sent by the

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manager of the shop to the municipality on September 14 was sent after samples had been taken by the Sanitary Officer from other shops on September 14, and was sent for the purposes of creating evidence in anticipation that samples from the shop in question would be taken later on for being sent for analysis by the public analyst for starting prosecution, an anticipation which has proved to be correct.

Before us two substantial points have been taken by the petitioners' advocate, namely:—

(*i*) the Sanitary Inspector of the Katwa Municipality was not a person authorised under s. 10 of the Act and had accordingly no authority to take the samples;

(*ii*) that the said officer did not comply with s. 11, inasmuch as he did not state forthwith after his purchase his intention to have the samples examined by the public analyst.

It is said by the learned advocate that this omission does not make the certificate of the public analyst evidence of the facts stated therein under s. 14 (*2*) and his report cannot go in as he was not examined as a witness.

Under s. 20, cl. (*e*), the Local Government issued a notification, dated July 14, 1930. The said notification was published in the Calcutta Gazette on August 7, 1930 (p. 1205). It runs as follows:—

> The Health Officer, or where specially authorised by the local authority, which is hereby empowered in this behalf, the Sanitary Inspector or the Food Inspector in the employ of a municipality or District Board, shall exercise the powers and perform the duties mentioned in ss. 10 and 12 of the Act. In any municipality which has no Sanitary Officer, such function shall be performed by the sanitary officers of the District Board of the district concerned with the consent of the District Board.

There is no evidence that the commissioners of the Katwa Municipality specially authorised their Sanitary Inspector to exercise the powers or perform the duties mentioned in ss. 10 and 12. We do not agree with the learned Sessions Judge in the view that the presumption in favour of official acts being

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regularly done would enable the Court to presume that the Sanitary Officer had been authorised under ss. 10 and 12. The said Inspector must accordingly be taken for this case to be a private person who purchased samples and sent them for analysis by the public analyst. Such a private person can do so under s. 9 of the Act. We, accordingly, do not accept the first contention as sound and follow the judgment of a Division Bench on this point, *Sewal Ram Agarwala* v. *Emperor* (1).

The second point, however, requires careful consideration. On this point there is no decided case here, so far as we are aware. But there are cases decided in England on the Sale of Food and Drugs Act of 1875 (38 & 39 Vic. c. 63), now replaced by the Food and Drugs (Adulteration) Act of 1928 (18 & 19 Geo. 5 c. 31). The former Act is the prototype of the Indian Act. It is unnecessary to examine both the said English Acts in detail. Sections 14 and 21 of the former Act correspond to ss. 18 and 28 (2) of the latter Act. We propose to examine the Act of 1875 and to examine the decisions passed thereon which have a material bearing upon this question before us. Section 10 provides for the appointment of public analysts. Section 13 authorises certain persons to procure samples and submit the same for analysis by the public analyst. Section 18 provides that the certificate of the public analyst shall be in the form set out in the schedule to the Act or to the like effect. Section 21 provides that the said certificate shall be sufficient evidence of the fact stated therein without the public analyst being called as a witness, option, however, being given to defendant to call him as a witness. Section 14 of the Act as amended by s. 13 of 62 & 63 Vic. c. 51 is as follows:—

> The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have

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the same analysed by the public analyst, and shall divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit and shall, if required to do so, deliver one of the parts to the seller or his agent.

Three years after this Act was passed a case was decided by the Exchequer Division [*Barnes* v. *Chipp* (1)]. A person mentioned in s. 13, namely, a police constable under the direction of an Inspector of Weights and Measures went into an inn and purchased gin from a barmaid. He paid the price and then told her that he purchased the gin for the purpose of analysis. He omitted to add the words "by the public analyst." He then said that he would divide the article but omitted to say "into three parts" and give her a portion which the barmaid said she did not want. The Act as it stood then only made division into three parts compulsory if the seller required such division. The amendment of 1899 changed this part of s. 14, but that is not material for this case. The article was sent to the public analyst who analysed it and gave a certificate stating that it was adulterated. The public analyst was not examined as a witness. Kelly C. B. held that to sustain the case the complainant must prove that the purchaser of the article satisfied the conditions of s. 14, that he after his purchase had forthwith notified to the seller or his agent selling the article his intention to have the same analysed by the public analyst. He stated thus:—

> Mr. Jelf in effect asks us to strike those words out. When we look at s. 21 we see that the production of the certificate of the analyst is to be sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called. In order to see how the certificate is to be obtained we must look at the preceding sections. This is a penal Act, and would lead to great injustice if this provision in s. 14, which is intended for the benefit of the seller, might be disregarded where the person selling is, as in the present case, an ignorant barmaid. On the ground of convenience, as well as by the very terms of the statute, I think the notification required by s. 14 is a condition precedent to a prosecution under the Act.

In England the position has all along been maintained that the notification of the intention by the buyer of the article to have the same examined by a

(1) (1878) 3 Ex. D. 176, 181.

public analyst is essential for sustaining a prosecution. There are many cases on the point, one of the recent ones in which that principle was accepted is the case of *Monro* v. *Central Creamery Company, Limited* (1). The principle underlying the said requirement of the statute is to give an opportunity to the seller to see that the sample is fairly taken, to apprise the seller that the sample left with him may have to be preserved by him for future comparison and to give an opportunity of having it analysed at his instance.

Section 11 of the Indian Act and s. 14 of the English Act of 1875 and s. 18 of the English Act of 1928, however, use the words "shall forthwith "notify to the seller or his agent selling the article "his intention to have the same analysed". It does not speak of any declaration to be made at the time by the buyer and the principle underlying the said section being what we have stated above we think that a declaration is not necessary. All that is required is that the seller must know at the time of the purchase that the article purchased would be sent by the buyer to be analysed by the public analyst. Section 12, cl. (4), brought to our notice by Mr. Bhattacharjya, does not incline us to hold that the notification of intention mentioned in s. 11 is not essential to the prosecution. That section, namely, s. 12, deals with inspection by authorised persons of goods at the manufactory, in the course of transit or hawked about and with seizure. The section follows the principle of the English decisions that no notification of intention is necessary when food is seized in the course of the transit, *etc.* The question we are considering arose in 1887 on a reference being made to the High Court of Judicature in England by the Justices of the Peace of the Upper Division of Lathe of Sutton-Hone. There an Inspector of Drugs appointed under the Sale of Food and Drugs

(1) [1912] 1 K. B. 578, 585.

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Act of 1875 purchased brandy, rum, whisky and gin from the appellant. He divided them into three parts, sent them for analysis by the public analyst who granted a certificate that they were adulterated. Just after the purchase the Inspector stated that he intended to have the articles analysed by the "country "analyst" instead of by the "public analyst".

MATHEW J. Stated thus in the course of the argument—

> You say the words "public analyst" must be used either in speech or in writing. Surely this is a superstitious adherence to a form. The statute says the constable is to notify to the seller his intention to have the article analysed by the public analyst. He need not say anything if the seller knew all about what was intended.

Cave J. in this judgment distinguished *Barnes* v. *Chipp* (1). He said thus:—

> The person buying the article is bound by the statute to notify to the seller his intention to have the article analysed. But no particular form of words is required, *nor even any words at all.* What is necessary is, that the seller *must know* that the samples are to be taken for the purpose of analysis, so that he may see that the samples are to be fairly taken.

*Wheeker* v. *Webb* (2).

This enunciation of the law has been followed in England since then (see 15 Halsbury, s. 235, pp. 147-148, Hailsham Ed.).

In the case before us we have no doubt that petitioner No. 1 knew when the *ghee* was taken by the Sanitary Inspector from his shop that it would be analysed by the public analyst. The occurrences of September 14 and the application to the municipality made by the manager of the shop in question on September 14 to have a sample of *ghee* sent to the municipal office on that date with a request that it may be analysed by a public analyst, with the fees of the said analyst paid, put the matter beyond doubt and from these facts the necessary inference

(1) (1878) 3 Ex. D. 176. (2) (1887) 51 J. P. 661, 662.

follows that the petitioner No. 1 who gave the *ghee* to the complainant on the next day knew at the time that the samples were being taken from him for the purpose of analysis by the public analyst.

We accordingly discharge this Rule.

HENDERSON J. I agree.

*Rule discharged.*

A. K. D.