1937

Aug. 9.

CRIMINAL REVISION.

Before Biswas J.

GANGA DHAR NATH MAL

v.

CORPORATION OF CALCUTTA.*

Onus—Burden of proving whether an article is human food, if lies on the prosecution—Calcutta Municipal Act (Ben. III of 1923), ss. 412, 418, 488.

In a prosecution for infringement of s. 412 of the Calcutta Municipal Act it must be first proved that what was being sold is an article of human food, and the burden of proving it rests on the prosecuting authority.

The law raises no presumption that the prosecution must be in respect of an article of food referred to in s. 412. Once it is shown that the article is an article of human food, then if the party charged says it was not intended for human consumption, the onus of proving this will be on that party under sub-s. (2) of s. 418.

Merely because tea leaves yield an article of human food, it does not follow that every part of a tea shrub may be put to similar use.

Corporation of Calcutta v. *Pagli* (1) distinguished.

The authority of the Court must be vindicated and its orders carried out, but all things must be done decently and in order so as to inspire confidence in the sense of justice of the Court.

In this case the Magistrate, instead of granting the accused a copy of the order of conviction prayed for, directed the accused to attend personally and then issued a distress warrant for the realisation of the fine imposed on him by attachment and sale of the moveables belonging to the accused.

Magistrate's action adversely commented on.

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Material facts of the case and arguments in the Rule appear sufficiently from the judgment.

Satindra Nath Mukherji for the petitioner.

Pashu Pati Ghosh for the opposite party.

BISWAS J. The prosecution in this case is wholly misconceived. It is a prosecution by the Corporation of Calcutta under s. 488 read with s. 412 (*1*) of the

*Criminal Revision, No. 620 of 1937, against the order of N. N. Gupta, Municipal Magistrate of Calcutta, dated May 8, 1937.

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Calcutta Municipal Act (Ben. III of 1923) for selling tea unfit for human consumption. The accused are a firm of tea-dealers, Ganga Dhar Nath Mal. and they have been found guilty by the Municipal Magistrate and sentenced to pay a fine of Rs. 150. In default one of the partners Nath Mal has been ordered to suffer simple imprisonment for two months. Hence this Rule.

Before dealing with the Rule, it is necessary to refer to a preliminary matter. The conviction order and sentence were passed on May 8, 1937. On the 13th May, the petitioners through their pleader applied for a copy of the order with a view to moving this Court. Instead of granting the copy for which the petitioners had annexed eight folios with their petition, the Magistrate ordered Nath Mal to attend personally, and then issued a distress warrant for realisation of the fine by attachment and sale of the moveables of the firm. It became necessary thereupon for this Court to give a peremptory direction to the Magistrate on the 14th June to issue the certified copy forthwith, and at the same time stay the execution of the distress warrant for three weeks. It was after the copy was thus obtained that the petitioners obtained this Rule.

All is well that ends well, but action such as this on the part of the Magistrate neither lends dignity to the proceedings nor inspires confidence in the sense of justice of the Court. It would be a bad day for the administration of criminal justice if the proceedings of Courts had even the appearance of vindictiveness about them. The authority of the Court must be vindicated and its orders carried out, but let all things be done decently and in order.

Turning now to the Rule, I have no doubt whatever it must be made absolute. The section of the Act said to have been offended against reads thus:—

412. (*1*) No person shall sell, store for sale, expose or hawk about for sale, or keep for sale, any animal intended for human consumption which is diseased, or any food or drug intended for human consumption, or manufacture any such food or drug, which is unsound, unwholesome, or unfit for human food.

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The charge here is that of storing for sale unwholesome tea (about 500 maunds) on August 24, 1936, and the prosecution is based on an inspection held by a Corporation Food Inspector on that date, when he says he found 300 bags of tea stalks and fluff in the petitioners' godown which in his opinion were "absolutely unwholesome and absolutely unfit "for human consumption." He also found 100 more bags and 50 or 60 chests of what he calls "good tea". The prosecution is in respect of the tea stalks and fluff. In cross-examination the witness admits that Nath Mal told him at the time that they did not sell this stuff for human consumption, but only to chemists for chemical purposes.

The learned Magistrate accepted this evidence, and in fact based the conviction on it. As for the defence, referring to what Nath Mal is said to have told the Food Inspector at the time of inspection, the Magistrate observes that this is true, but that the petitioners gave no evidence in support of this statement. The petitioners had actually produced a voucher (Ex. "C") from a well known firm of tea brokers, A. W. Figgis & Co., showing sale of the tea waste on behalf of the petitioners' firm, but as this related to a transaction of November, 1935, the Magistrate refused to accept it. He then referred to s. 418 of the Act, and said that as the petitioners had not discharged the burden which rested on them under this section, he was entitled to find that the tea in question was intended for human consumption, and in that view he convicted the petitioners, holding that the tea was unwholesome.

Section 418, sub-s. (*2*) is in these terms :—

> 418. (*2*) If, as a result of such inspection as is provided for in sub-s. (*1*), a prosecution is instituted under this chapter, then the burden of proving that any such animal, food or drug was not exposed or hawked about or deposited or brought for sale or for preparation for sale, or was not intended for human consumption, shall rest with the party charged.

The prosecution here was "under this chapter", that is to say, under Chapter XXVIII, and it was also instituted as a result of an inspection held under

sub-s. (*1*) of the section: the burden of proving that any food in respect of which the prosecution was instituted was not intended for human consumption would consequently be on the accused. The learned Magistrate was certainly right there, but the important point he overlooked was that, before this section could be invoked, it was necessary for the prosecution to prove that what was charged as unwholesome food was "food". Unless this was established, s. 412 would not in fact be infringed at all. What this section prohibits is the sale of an article of human "food" (leaving out animals and drugs for present purposes), and obviously, in a prosecution for an offence under this section, the burden of proving that what was being sold is "food" intended for human consumption must rest on the prosecuting authority. Once it is shown that the article is an article of human food, it is then, if the party charged says it was not intended for human consumption, that the onus of proving this will be on him. Suppose a person has a bag of curry powder for sale in his shop and has also got a bag of snuff there and the two are indistinguishable in appearance and colour, it would be ridiculous to suggest that because s. 418 could be applied in respect of the curry powder, it would apply in the case of the snuff as well. Merely because the Corporation decide to commence a prosecution under s. 412, the law will not and cannot raise a presumption in their favour that it must necessarily be in respect of an article mentioned in the section.

What is the stuff complained of here? Not tea, or tea dust which, as held in *Corporation of Calcutta* v. *Pagli* (1), is an article of human food, but tea stalks and fluff, which obviously is something very different. The Food Inspector in his evidence no doubt says:—

> From local enquiry I learnt that such tea stalks and fluff are sold as tea by the defendant.

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But it is hardly possible to accept this evidence or to accept it as sufficient. Not a word is said by him as to the nature of the enquiries he is supposed to have made. The case in fact seems to have proceeded on the assumption that the tea stalks and fluff were "food", and yet this was a fact which had to be proved, and could not be assumed. Such evidence as there is on the record indeed goes to support an opposite conclusion. This is what the same Food Inspector himself said :—

> In my opinion and also according to definition of tea, it was not tea but tea stalks. It might have been anything but tea.

"Food" is defined in cl. (*31*) of s. 3 of the Act as including every article used for food or drink by man, other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food; and also as including confectionery, flavouring and colouring matters and spices and condiments. There is no evidence here that tea stalks or fluff are used for food or drink by man. There is no analyst's report in this case showing that these might be used as such. Merely because tea leaves yield an article of human food, it does not follow that every part of a tea shrub may be put to similar use.

The Corporation has, in my opinion, failed to establish the foundation of the prosecution in this case. The conviction and sentence must, therefore, be, and are hereby set aside.

The Rule is accordingly made absolute.

Rule absolute.

A. C. R. C.