CRIMINAL REVISION.

Before Biswas J.

1937

July 20, 22.

RAM CHARIT RAM BHAKAT

v.

CHAIRMAN, RAJSHAHI DISTRICT BOARD.*

Presumption—Presumption of storage for sale, when arises—Attempt, if punishable—Bengal Food Adulteration Act (Ben. VI of 1919), ss. 4, 6—Indian Penal Code (XLV of 1860), s. 511.

In a prosecution for an offence under s. 6 of the Bengal Food Adulteration Act, the presumption referred to in sub-s. (4) reverses the ordinary rule of evidence which rests the onus of proof in a criminal trial on the prosecution. It should, therefore, be strictly construed. The fact that the article of food was in transit in a cart and not deposited in any place for the purpose of sale does not necessarily militate against the presumption of storing for sale. But the word "possession" in sub-s. (4) must be given a strict interpretation. It means actual physical possession, and cannot be extended to include constructive possession. In a case, therefore, where the article of food meant for the accused was in actual possession of another person during transit, the presumption under that sub-section does not arise.

Webb v. *Baker* (1); *Daly* v. *Webb* (2) and *Williams* v. *Allen* (3) referred to.

Section 511 of the Indian Penal Code has no application to an attempt to commit an offence under the Bengal Food Adulteration Act.

Delay in instituting the prosecution and lack of care in framing the complaint, adversely commented on.

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

Suresh Chandra Talukdar and *Jyotirindra Nath Das* for the petitioner.

Sudhangshu Shekhar Mukherji and *Amaresh Chandra Ray* for the opposite party.

*Criminal Revision, No. 536 of 1937, against the order of S. K. Gupta, Sessions Judge of Rajshahi, dated April 23, 1937, confirming the order of A. R. Khalifa, Magistrate, First Class, at Rajshahi, dated Feb. 13, 1936.

(1) [1916] 2 K. B. 753. (2) (1869) Ir. R. 4 C. L. 309.
(3) [1916] 1 K. B. 425.

BISWAS J. The petitioner is said to be a dealer in *ghee* at Nitpur in the district of Dinajpur. On October 25, 1935, a consignment of twenty-five tins of buffalo *ghee* admittedly meant for him was landed at Godagari steamer-*ghât* and put into two carts for being conveyed to the Godagari railway station from where it was to be booked to Rohanpur station, where the petitioner was to take delivery. Godagari is within the district of Rajshahi and Rohanpur in Dinajpur. On the way the carts were stopped by the Sanitary Inspector of the Rajshahi District Board on suspicion, and some samples of the *ghee* taken by him from one of the tins which were all sealed up. The samples were sent to the Public Analyst for examination, and upon his report that the *ghee* was "highly adulterated", the present prosecution was started before a Magistrate of the First Class at Rajshahi.

The complaint was filed by the Sanitary Inspector, and stated that the petitioner had on October 25, 1935, infringed s. 6 of the Bengal Food Adulteration Act (Ben. VI of 1919) by "exposing for sale or sell-"ing" adulterated buffalo *ghee*. The petitioner was found guilty and sentenced by the Magistrate to pay a fine of Rs. 100, and on appeal to the Sessions Judge, the sentence was maintained, but the conviction was altered to one under the said section read with s. 511 of the Indian Penal Code. Hence the present Rule.

There is one preliminary remark I feel bound to make in this case, and that is with reference to the delay in starting the prosecution. As stated above, the offence was alleged to have been committed on October 25, 1935, and yet the complaint was not filed before July 8, 1936. It appears that the samples were submitted to the Public Analyst on October 30, 1935, but his report was not received until May 11, 1936, and it was not till about two months after that the case was commenced. There is no explanation whatever on the record for this inordinate delay. It

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seems to me to be amazing that it took over six months for the analyst to make his report and then about two months for the District Board to make up its mind, if it can be said to have had any mind at all. Whether it was gross negligence or hopeless inefficiency, I will not pause to inquire, but I am not at all surprised that the petitioner should have made it a grievance that the analyst's report which was the basis of the prosecution had been delayed so long. The learned Sessions Judge says that "there is no "reason to think that the adulteration took place in "transit or in process of time", but in the absence of any evidence from the analyst or from some other person competent to speak on the subject, it seems to me to be impossible to tell how far the report might or might not have been affected by the delay. The least the prosecution could do in the case was to have examined some one to speak to the effect of this long lapse of time.

One other matter I cannot help referring to, and it is that the District Board took no action to see that the suspected *ghee* might not be used. It would be hard to beat the *naivete* of the Sanitary Inspector, who said this :—

> I suspected that the tins might contain adulterated food. I did not take any action that the *ghee* might not be used. *I did not think it necessary to seize all the* ghee.

The sooner Public Health authorities shed such conceptions of their duty, the better.

There is yet another comment, bearing on the Rule, which the case invites, and it is as to the lack of care in framing the complaint. As already pointed out, the complaint was that the petitioner had infringed s. 6 "by exposing for sale or selling" adulterated *ghee*. And yet it is clear on the prosecution case itself that there was no question of selling or of exposing for sale any *ghee*. The *ghee* was seized in transit, and it is not said that any of the tins of *ghee*, which were on the carts at the time, was

sold or exposed for sale. The learned advocate for the District Board was unable to deny this: so he was obliged to fall back upon a plea that whatever the complaint, the Court could convict for any other offence that the petitioner may be shown to have committed.

The other offence which from the facts proved the petitioner is said to have committed is also under s. 6, not by selling or exposing for sale as alleged in the complaint, but by "storing for sale". Section 6, it will be seen, prohibits not merely selling or exposing for sale, but also manufacture or storing for sale. This being a summons case, it is true that s. 246 of the Code of Criminal Procedure would not limit the finding or conviction to the offence stated in the complaint, but I have no sympathy with a public body, which, knowing the facts it relies on and can prove, still omits or neglects to shape the complaint in terms which will accord with the facts. There was absolutely no justification here for not specifying the particular form of breach of s. 6 which the petitioner was supposed to be guilty of. Such laxity the law may condone, but certainly merits no approval or encouragement.

The question next arises whether there was "storing for sale" in breach of s. 6. The learned advocate for the District Board relies strongly on sub-s. (*4*) of this section. This sub-section provides that in any prosecution under this section, the Court shall, unless and until the contrary is proved, presume that any of the articles mentioned therein found in the possession of a person who is in the habit of manufacturing or storing such articles for sale, has been manufactured or stored for sale by such person.

It will be seen that the trying Magistrate relied on this sub-section, and holding that, at the time the *ghee* was seized, the petitioner was in constructive possession through his servant Noor Muhammad and

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that the petitioner was a person in the habit of storing *ghee* for sale, drew the presumption under this sub-section and found that the *ghee* was stored for sale by the petitioner. The learned Sessions Judge, however, was of opinion that sub-s. (*4*) refers to actual, and not constructive, possession, and in that view, altered the conviction to one for an attempt to sell or store for sale adulterated *ghee*, reading s. 6 with s. 511 of the Indian Penal Code. It may be stated at once that the learned Judge was wholly wrong in having recourse to s. 511, as this section deals only with attempts to commit offences punishable under the Indian Penal Code. It can have no application to an attempt to commit an offence under the Bengal Food Adulteration Act. This was conceded by the learned advocate for the prosecution, and he, accordingly, renewed the argument which had found favour with the trying Magistrate.

Now, as to sub-s. (*4*), it is clear that this reverses the ordinary rule of evidence which rests the onus of proof in a criminal trial on the prosecution : it will, therefore, have to be strictly construed. Admittedly, in this case there is no positive evidence of storing of *ghee* for sale, and that is why the presumption is invoked. But are the necessary conditions as laid down in the sub-section satisfied?

The person in whose possession the *ghee* is said to have been found here is Noor Muhammad, not the petitioner. The evidence of the steamship company sub-agent (P. W. 4) is that Noor Muhammad took delivery of the tins on behalf of the petitioner : the question is, whether this can make the possession of Noor Muhammad the possession of the petitioner for the purposes of sub-s. (*4*). The Magistrate seems to think that because s. 6, sub-s. (*1*) says that "no person "shall, directly or indirectly, himself or by any other "person on his behalf", do the offending act, the possession in sub-s. (*4*) may be equally the possession of the person accused and of any other person on his

behalf. I do not think I can accept this argument. This will be reading into the sub-section words which are not there: if that was the intention, the legislature might easily have added after the words "a person who is in the habit of manufacturing or "storing like articles for sale" some such words as "or of any other person on his behalf", like we find in sub-s. (*1*). Possession in sub-s. (*4*) must mean actual physical possession. It is to be observed that mere possession of any of the articles referred to therein is not an offence under the Act, but from the fact of possession a presumption is to be drawn which will establish an offence. That being so, the word "possession" must be given a strict interpretation, and cannot be extended to include "constructive "possession". Compare the decision in *Webb* v. *Baker* (1). The fact that the *ghee* was in a cart for the purpose of being carried and was not deposited in any place for the purpose of sale, in other words, that it was in transit, need not militate against the presumption of storing for sale. See *Daly* v. *Webb* (2) and *Williams* v. *Allen* (3). But, as I have said, it is only the person who is found in possession of the offending article against whom the presumption may be drawn. I agree, therefore, with the Sessions Judge that on the facts found, it cannot be said that the petitioner stored *ghee* for sale, and as I have held that s. 511 of the Indian Penal Code cannot apply, it follows the prosecution must fail.

The second condition required by sub-s. (*4*) is also not satisfied in this case. The condition is that the person against whom the presumption is to be drawn must be shown to be a person who is in the habit of storing *ghee* for sale. The only evidence on the point is this. P. W. 5 says that the petitioner has a shop at Nitpur: "it is a very big shop. It deals in "*ghee*, sugar, cloth, *etc.*". P. W. 4, the steamship company sub-agent, says that the petitioner on an

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average takes delivery of about twenty-five tins of *ghee* per month, and P. W. 6, the station-master at Godagari, deposes that on two dates subsequent to the date of the alleged offence, he saw two consignments of *ghee* arriving for the petitioner. There is not a word in the evidence what the consignments were intended for, nor as to what was to be done at the petitioner's shop at Nitpur, and yet it should not have been difficult for the prosecution to give evidence on these points. I am wholly unable to agree with the trying Magistrate that the only inference that can be drawn from the evidence is that the accused was in the habit of storing *ghee* for sale.

The result is that in spite of the fact that here was a man who was indenting "highly adulterated" *ghee*, he is able successfully to dodge the law, not through any particular astuteness on his part, but solely and simply through the ineptitude of the prosecuting authorities.

The conviction and sentence passed on the petitioner are, therefore, set aside, and the fine, if paid, must be refunded.

A copy of this judgment may be transmitted to the District Board of Rajshahi.

Rule absolute.

A. C. R. C.