APPELLATE CRIMINAL.

Before Henderson and Khundkar JJ.

LEGAL REMEMBRANCER, BENGAL

v.

KSHITISH CHANDRA BANERJI.*

1939

July 4.

Adulteration—*Presumption as to an article being adulterated, when should be raised and how should be rebutted—Certificate of analyst, Value of—Bengal Food Adulteration Act (Ben. VI of 1919), ss. 4, 6, 14, 20.*

An accused person cannot be tied down to any particular method by which he must rebut the presumption raised by s. 4 read with Rules under s. 20(2) of the Bengal Food Adulteration Act. It is incorrect to say that, in the case of mustard oil, a presumption that it is not genuine raised under s. 4 on a certificate by the analyst can only be rebutted by following the oil throughout the entire process of manufacture or by proving that no adulterant, common or rare, of any sort had entered into the oil.

The presumption, if raised, is not rebutted by the accused by merely proving that none of the common adulterants was present in the oil. On the other-hand, it is not necessary to prove that no adulterant of any sort is present. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds as required by s. 6.

The certficate of the public analyst is made evidence without formal proof under s. 14 (2) of the Act, but there is no presumption that it is accurate. It depends on the circumstances of the case whether or not the Court should raise a presumption at all.

Hunt v. Richardson (1) and *Jenkins v. Williams* (2) referred to.

CRIMINAL APPEAL.

This was an appeal by the Local Government against an appellate order of acquittal in a case under s. 6 read with s. 21 of the Bengal Food Adulteration Act. The accused was a shop-keeper in a *bâzâr* in Jalpaiguri. On July 28, 1938, the Assistant Health Officer purchased a quantity of mustard oil from the shop of the accused and as required by s. 11 of the Act divided it into three parts, one of which

*Government Appeal, No. 5 of 1939, against the order of T. B. Jameson, Sessions Judge of Jalpaiguri, dated Feb. 27, 1939, setting aside the order of D. N. Haque, Magistrate, First Class, of Jalpaiguri, dated Dec. 7, 1938.

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he left with the accused. One phial was sent to the local public analyst, who reported that the saponification and iodine values of the samples were 182·7 and 103·7 respectively. In his opinion, the oil was adulterated. The accused was, therefore, put upon his trial under s. 6 read with s. 21 of the Act. On November 11, 1938, the accused made an application to the trial Court to get one of the samples analysed from the Government Test House at Alipore, which was refused. The accused, thereupon, arranged for the analysis of the sample left with him by a chemist of the Government Test House, who was called as a witness by the defence. According to him, the saponification and iodine values were 175·6 and 104·7 respectively. His evidence further was that none of the common adulterants was found in the oil. Under a Rule framed by the Local Government, if the saponification values be less than 169 or more than 175, or the iodine value be less than 96 or more than 104, the oil would be presumed not to have been derived exclusively from mustard seeds. The accused was convicted by the trial Court, but was acquitted on appeal. The Local Government thereupon preferred the present appeal against that order of acquittal.

The Advocate-General of India, S. M. Bose, Santosh Kumar Basu and *Ajoy Kumar Basu* for the Crown.

Probodh Chandra Chatterjee for the accused.

HENDERSON J. This is an appeal by the Local Government under s. 417 of the Code of Criminal Procedure against an order of acquittal passed by the learned Sessions Judge of Jalpaiguri. The accused was convicted by a Magistrate of an offence punishable under s. 6 read with s. 21 of the Bengal Food Adulteration Act.

The appellant has a shop in a *bâzâr* named Barnes in the district of Jalpaiguri. On July 28, 1938, the Assistant Health Officer purchased 12 ounces of

mustard oil for the purpose of chemical analysis. In accordance with the procedure laid down under the Rules the oil was placed in three bottles, which were sealed, one of the bottles being made over to the accused. One bottle was sent to the analyst employed by the district board. The accused's bottle was sent at his request to the Government Test House at Alipur to be analysed. As a result of the analysis made by the analyst of the district board, which showed that the oil was adulterated, the accused was put on his trial and convicted.

The point of law urged on behalf of the Crown in the appeal is concerned with the interpretation of ss. 4 and 20 of the Act. Section 4 lays down that in certain circumstances a presumption is to be drawn that the article in question is not genuine. There can be no doubt that, if the certificate given by the District Board analyst is accepted, in view of the Rules framed by the Local Government under s. 20(2)(*a*), the mustard oil was not genuine. It is plain from his judgment that the learned Sessions Judge appreciated this. But, according to the submission of the Crown, he has stultified this provision of the law by the way in which he dealt with the question whether the presumption had been rebutted.

The learned Advocate-General put forward two points. His first contention was that the presumption could only be rebutted by following the oil from the mustard seeds throughout the process of manufacture right up to its arrival in the shop of the accused and demonstrating that no deleterious substance had been introduced. In the second place he argued as an alternative that the only other way in which the presumption could be rebutted is by the accused proving that there was no adulterant, common or rare, of any sort in the oil.

In support of the first proposition he relied on a series of English cases which were concerned with the

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interpretation of s. 6 of the Sale of Food and Drugs Act of 1875. Under the provisions of that section no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance and quality of the article demanded by the purchaser under a penalty. Section 4 makes provision for the raising of a presumption in circumstances similar to those in the Bengal Act.

The first of these decisions is that of *Hunt* v. *Richardson* (1), which was heard by a Court of five Judges in the Kings Bench Division. They differed by 3 to 2. They were largely concerned with the meaning to be attached to the provisions of s. 6, which have no application to the Bengal Act. The only decision which goes so far as the contention of the learned Advocate-General is that in *Jenkins* v. *Williams* (2), decided last April, in which the accused was not represented. In my opinion the weight of the decisions is not in favour of this contention.

Then again all these cases were concerned with milk, which is quite a different commodity from mustard oil. It is produced by an animal and sold within a few hours of its production. There can be no difficulty in tracing its history in any particular consignment from the animal to the distributor. If such a Rule were to be applied to mustard oil, the burden cast upon the accused would be one which it would be quite impossible for him to discharge.

The question really depends upon the terms of ss. 4 and 6. The presumption raised under s. 4 is that the article is not genuine. Section 6 lays down that mustard oil must be derived exclusively from mustard seeds. We cannot find any warrant for the proposition that the accused person can be tied down to any particular method for establishing his defence.

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On the second point, the judgment of the learned Judge was criticised with regard to this passage:—

> The only conclusion I can come to on the evidence and the two reports before me is that the report submitted by the defence comes nearer to showing that the oil is pure mustard oil than the report of the prosecution to showing that it is adulterated. In my opinion when the common adulterants are proved to be absent, the prosecution should show what the actual adulterant is, because the presumption arising under the Rules is for all practical purposes rebutted.

The contention of the learned Advocate-General was that this is to render the provisions of s. 4 nugatory. He contended that the true position is exactly the opposite and that the presumption is not rebutted unless the accused himself proves that no adulterant of any sort is present.

In our judgment, neither of these views is correct. If the learned Judge meant that when the accused shows that none of the common adulterants was present, the Court must hold that the presumption has been rebutted, then in our opinion he went too far. In the present case unless he was prepared to hold himself on the evidence that the presumption was fully rebutted, he should have upheld the conviction. On the other hand, the contention of the learned Advocate-General goes too far in the other direction, as it ignores the precise point which the accused has to prove. I will repeat the relevant provisions of that Act. Under s. 4 there is a presumption that the article is not genuine. Under s. 6 genuine mustard oil must be derived from mustard seeds. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds.

Turning to the facts of the present case the first point for determination is whether the presumption is to be raised at all. Under s. 14(*2*) of the Act the certificate of the analyst is made evidence without formal proof: but there is no presumption that it is accurate. In the present case we have conflicting reports by two experts whose integrity has not been

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and cannot be called in question. It is thus abundantly plain that errors are possible and a slight variation from the standard might justify the Court in refusing to raise a presumption at all. In the present case the District Board analyst found nothing wrong with the iodine value. Both the analysts found that the saponification value was excessive. In these circumstances we are of opinion that the presumption should be raised.

It remains to be considered whether it has been rebutted. It has been proved that none of the common adulterants were present. This has obviously taken the accused a very long way towards his goal. The chemical assistant in the Government Test House who made the analysis is throughly competent. He formed the opinion that the mustard oil was genuine. He further explained that the different mustard seeds give different saponification value owing to the peculiar properties of the seeds. This is quite enough to account for what was found in the present case. We accept that opinion and in view of that opinion it must be held that the presumption has been rebutted.

The appeal is dismissed.

KHUNDKAR J. I agree.

Appeal dismissed.

A. C. R. C.