

IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Revision Application No. 17 of 2016

Applicant : Sana-ur-Rehman
through Mr. Mehmood A. Qureshi, Advocate

Respondent : The State & another
through Mr. Talib Ali Memon, A.P.G.

Date of hearing : 7th November, 2022

JUDGMENT

Omar Sial, J.: Sana-ur-Rehman, the applicant, owned and managed a little shop in Gharo, a small town inching towards a rural character with a population of about a million people. The applicant's shop served as an outlet for the products of companies involved in the manufacture of agriculture related products.

2. On 06.04.2011, a gentleman by the name of Shankar Lal, accompanied by a colleague of his named Insaf Ali, walked into the applicant's shop and introduced himself as an inspector from the agriculture department. Mr. Lal zeroed down his attention towards a pesticide manufactured by a company by the name of Jallander Private Limited which was on sale at the applicant's shop. A sample was taken by Mr. Lal from the pesticide container in order for the same to be tested by a laboratory. The container, before Mr. Lal opened it, had the company seal intact. The applicant had an invoice for the lawful purchase he had made from the manufacturer and it was not alleged that the seal on the pesticide had been tampered with by the applicant.

3. The sample was sent to the laboratory for an opinion. The laboratory, seems to have taken the concept of brevity to an absolute extreme, and without giving any basis for its opinion, simply concluded that, the "sample is sub-standard". Indeed section 18(3) of the Agricultural Pesticides Ordinance, 1971 (hereinafter referred to as the "**Ordinance**") says that any report signed by a Government Analyst of an analysis conducted by him shall be conclusive evidence of the particulars stated in the report unless challenged by a person aggrieved. Be that as it may, the spirit of section 18(3) would certainly require that at least some basis of reaching an opinion is stated in the report. A report of such a

nature has the potential to form a link of evidence that may ultimately lead towards the conviction of a person and hence towards curtailing his fundamental rights. In order to do justice to an accused it is not enough to simply write that the sample sent to the laboratory is sub-standard. It is explained in section 3(rr) of the Ordinance that the word "sub-standard" when used with reference to a pesticide, means any pesticide the strength or purity of which falls below the professed standard or quality which is expressed on its label or under which it is sold or a pesticide any valuable ingredient of which has been wholly or partially extracted. Section 21(2)(b) of the Ordinance imposes a criminal liability on a person who imports, manufactures, formulates, sells, offers or exposes for sale, holds in stock for sale or advertises for sale a sub-standard product. The stringent consequence of dealing with a sub-standard product makes it even more necessary that a meaningful examination report is prepared which would at the very least lay down as to what was the benchmark against which the product was compared. The provincial government should look towards reform in the standards for the preparation of such reports. Such reforms will have a positive impact on the criminal justice system.

4. After receiving the laboratory opinion, holding the pesticide to be sub-standard, Mr. Lal lodged a complaint with the local police and consequently F.I.R. No. 61 of 2011 was registered under sections 21(2)(b) and 22 of the Ordinance on 29.09.2011. The applicant was tried and on 19.01.2016, the learned Sessions Judge, Thatta convicted him for an offence under section 21(2)(b) of the Ordinance and sentenced him to a 6 month prison term as well as a fine of Rs. 200,000. If he did not pay the fine he would have to spend another 1 month in prison. This judgment has been challenged through these proceedings.

5. At the core of this case is the question whether a distributor/dealer of pesticide can be criminally liable if, without any input from him, the product being sold at his shop is sub-standard and hence a contravention of the Ordinance? As far as statute is concerned, the Ordinance in itself provides the answer in section 21(1). This section provides that "any person who imports, manufactures, formulates, sells, offers or exposes for sale, holds in stock for sale or advertises for sale an adulterated or sub-standard pesticide shall be guilty of an offence."

6. It is generally agreed that the essential ingredients of any crime are (i) a voluntary act or omission (actus reus), accompanied by (2) a certain state of mind, often referred to as a "guilty mind" (mens rea). Most offences require a coincidence of mens rea and the act that causes the actus reus. Criminal liability would then arise if the person accused has no valid defence. There is however a class of criminal offences for which liability may arise even if the element of mens rea is absent. These are crimes of strict liability. The liability is said to be strict because a person can be convicted even though they were genuinely ignorant of one or more factors that made their acts or omissions criminal. Strict liability offences are usually creation of statute. A brief discourse of the foregoing was essential as it directly impacts the present case.

7. Learned counsel for the applicant has extensively argued that the applicant was a bonafide purchaser of the pesticide, that it is admitted by the prosecution that the seals on the pesticide container put by the manufacturer i.e. Jallander Private Limited were intact when Shankar Lal took samples, there was no allegation that the applicant had tampered with the seal or the product, the purchase of pesticide from Jallander was a lawful purchase against a duly issued invoice and therefore the applicant cannot be held criminally liable even if the pesticide was sub-standard. The liability, if at all, would be that of the manufacturer i.e. Jallander. In other words, according to the learned counsel, the mens rea element of crime was not present. Similarly, he relied on a judgment of a learned Single Bench of this court in an unreported case titled Muhammad Khalid and others vs The State (Criminal Revision Application No. 147 of 2016) where it has been held that "[applicants] have no role for knowingly selling or intentionally allowing sale of sub-standard pesticide and accordingly no actus reus can be attributed to them." With much respect and humility I hold a different view. A bare reading of section 21(1) of the Ordinance shows that the offence is one of strict liability. The section does not require the element of a guilty mind i.e. mens rea. Also, I am of the view that the applicant falls within the ambit of the words "sells, offers or exposes for sale, holds in stock for sale" contained in the said section, and as such when he put up the pesticide for sale, the actus reus of the offence was complete. Having said this, the question that arises is whether it is fair that in all cases of strict liability, courts do not consider the mens rea of the offence. I am inclined to subscribe to the view taken by Lord

Reid in the English case of *Sweet vs Parsley* [1970] AC 132 when he observed that for centuries there has been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a (legislative provision) is silent to mens rea there is a presumption that in order to give effect to the will of Parliament we must read in words appropriate to require mens rea. This presumption is very strong when a court deals with an offence that is truly criminal in character as opposed to being one of a regulatory nature. The overall nature of the statute must be seen to make this distinction. In the circumstances of the current case and as far as the applicant is concerned, I am of the view that the requirement of *mens rea* should be read in section 23(1) of the Ordinance as the containers of pesticide were sealed when test samples were taken and as admittedly, the applicant had no knowledge that the same might be sub-standard. Further prison sentences have been prescribed by statute which makes it more of a “true crime” rather than a regulatory offence. I am of the view that unless the seller knew or should have known or had reasons to believe that the product was sub-standard or if there was evidence that it was he who adulterated the product or if he bought the product from a source which was unreliable and not registered with the relevant authorities or if the product being sold was itself an unregistered product, only then could a criminal liability arise. None of these factors came into play or were alleged in the present case. This may not be the case if it was the manufacturer Jallander, who was the accused. The applicant is entitled to acquittal on this account.

8. In addition to the above, section 15 of the Ordinance provides that the Federal Government may, by notification in the Official Gazette, appoint from amongst the officers of the Federal Government or a Provincial Government employed for work relating to plant protection such number as it deems fit to be Inspectors within such local limits as may be specified in the notification. In the present case, admittedly no evidence was furnished at trial to show that Shankar Lal was a duly notified Inspector. To the contrary, Shankar Lal when asked about this, admitted that he had not provided any evidence to support his assertion but that he had provided such evidence to A.S.I. Natho Khan. PW-3 A.S.I. Natho Khan in his testimony did not mention that he had been provided such an authorization. Most alarmingly, not only this, Natho Khan also admitted that

none of the case property was handed over to him, in fact it was Shankar Lal who had kept the entire case property himself and had then brought it with him to court where it was exhibited. An Inspector, even if Shankar Lal was one, is empowered under section 24 of the Ordinance to enter premises if he has reasons to believe that an offence under the Ordinance has been or is about to be committed, he may enter and search such place and seize any pesticide, article or thing to which the offence relates. The law does not empower him to record witness statements (as Shankar Lal did), entrust himself with the case property and basically carry out the investigation himself. Not an iota of investigation was done by the investigating officer who forgot his duties under the law and acted as a mere rubber stamp for Shankar Lal. No credence can be given to any "evidence" collected through such means. For all purposes, the inspection and subsequent conduct of Shankar Lal shows his *malafide* and appears an unauthorized act on his behalf. The learned trial judge also observed this fact that no evidence of Shankar Lal being an authorized Inspector had been produced during trial, he however, overlooked this lapse by relying on a notification number which was contained in the complaint of Shankar Lal. Once again, Natho Khan did not acknowledge having ever seen the said notification.

9. The samples were taken by Shankar Lal on 06.04.2011. It was not up till 18.04.2011 that they were sent to the Pesticide Quality Control and Testing Laboratory. It appears that during this period the sample remained with Shankar Lal himself. Sample preservation, until the sample testing starts, can be an important factor for correct analytical results. A number of problems may arise when the samples are analyzed a long time after collection (long holding time). The handling (e.g., transportation) and the storage must avoid any contamination or alteration. Alteration of the sample content can occur because of physical and chemical changes in the sample. Prosecution witness Dhani Bux acknowledged at trial that according to his knowledge that pesticide not put in a cool temperature and instead exposed to heat and sunlight reduces its "standard". The accuracy of the samples is further put in doubt when it was acknowledged at trial that the memo of seizure did not contain a date or time on it. The seizure of samples was said to have occurred on 06.04.2011. Dhani Bux however at trial, while stating that the sample was collected on 06.04.2011 acknowledged that the memo was prepared on 07.05.2011. Perhaps realizing that he had not played to the

orchestrated script, Dhani Bux then changed his statement to say that the memo which was prepared on 07.05.2011 was actually not for the seizure of the samples but for receiving the analysis report from the laboratory. In the very next breath he acknowledged that the laboratory report was received on 23.04.2011. The only point of grace was that he admitted that he was illiterate and did not know what was written in the documents he had signed. Some concession may be given to him for his illiteracy, but the whole saga does indicate the *malafide* of Shankar Lal. It is pertinent to mention that all these memos were being made prior to even the registration of the F.I.R. Sample collection, preservation and transport to the laboratory were all done in a crude and negligent manner. Doubt creeps in whether the sample taken by Shankar Lal reached the laboratory in a satisfactory manner and whether the results depict the actual state of the pesticide at the time of its seizure.

10. What I find immensely strange, and pointing further towards the malafide of Shankar Lal is that he did not bother to initiate action against Jallander Private Limited, the company which had manufactured the pesticide. Let alone that, Abdul Sami, the Regional Sales Manager of the company who had sold the pesticide to the applicant was declared innocent by the court. I am at a loss to understand as to how criminal liability could be assigned to the applicant who had been provided sealed bottles by the company but on the other hand the company that manufactured the product was given a clean bill of health without carrying out any investigation.

Opinion of the court

11. When looked at in juxtaposition the defence version that it was non-payment of a bribe to Shankar Lal which led him to file this false case against the applicant sounds more convincing and believable than the prosecution version. Because of the above observations I am of the view that the prosecution was unable to prove its case against the applicant beyond reasonable doubt. The impugned judgment is set aside. The appeal is allowed. The applicant is acquitted of the charge. He is on bail. His bail bonds stand cancelled and surety discharged which may be returned to its depositor upon identification.

JUDGE

