EKNATH SHANKARRAO MUKKAWAR

v.

STATE OF MAHARASHTRA

April 12, 1977

[Y. V. CHANDRACHUD, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.]

Revisional jurisdiction—Suo motu *powers of the High Court to enhance sentence—Power not taken away by provision for appeal against inadequacy of sentence by the State Government or the Central Government—Criminal Procedure Code (Act II of 1974),* 1973, *section* 397 *read with s.* 401 *(Section 435/439, Criminal Procedure Code,* 1898).

Criminal Procedure Code (Act II of 1974), 1973, *Section* 377(1), (2)—*Meaning of the words "by any other agency empowered to make investigation into any offence under any Central Act"—Investigation under Prevention of Food Adulteration Act by Food Inspectors—Section* 377(1) *and not s.* 377(2) *of the Cr. P. C. applies—Appeal at the instance of State Government is maintainable.*

Prevention of Food Adulteration Act, 1954, *Section* 16(1), *Proviso I—Power to impose sentence less than minimum—Interference by appellate court.*

Appeal against inadequacy of sentence—Power of court to alter conviction to an aggravated category—Criminal Procedure Code (Act II of 1974), 1973, *Section* 377— *Scope of.*

Practice and precedents—Binding effect of decisions of coordinate court.

The appellant and his father were charged u/s. 2(1) (c) of the Prevention of Food Adulteration Act, 1954 for adulteration of chilly powder. The sample of chilli powder which was seized by the Food Inspector on April 13, 1974 contained 37.25% of the total ash against the permissible percentage of 8%. It was stated in the Analyst's report that the percentage of extraneous matter which was common salt mixed with the chilli power was 32.4%. The judicial magistrate, Udgir, found that the chilli powder was adulterated within the meaning of s. 2(i) of the Act and convicted the appellant under s. 16(1) (a) (i), proviso 1 of the Prevention of Food Adulteration Act, 1954 r/w s. 2(i)(1) and s. 7(1) of the said Act and sentenced him to simple imprisonment till the rising of the court and to pay a fine of Rs. 500/- and in default rigorous imprisonment for two months. The appellant's father was, however, acquitted. The State of Maharashtra preferred an appeal against the order of acquittal of the father and against the inadequacy of the sentence awarded to the appellant. The High Court dismissed the appeal against acquittal of the appellant's father but allowed the appeal of the State with regard to the inadequacy of the sentence. Affirming the conviction of the appellant under s. 16(1) (a) (i) r/w sections 2(1)(i) and 7(1) of the Act, the High Court enhanced the sentence to six months' simple imprisonment and a fine of Rs. 1000/-, in default simple imprisonment for two months.

Allowing the appeal by special leave, the Court,

HELD : (1) The new Code of Criminal Procedure, 1973 has not abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction *suo motu*. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Courts power of enhancement of sentence in an appropriate case by exercising *suo motu* power of revision is still extent u/s. 397 read with s. 401 Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself" call for the record of proceedings of any inferior criminal court under its Jurisdiction. The provision of s. 401 (4) is a bar to a party who does not appeal when appeal lies, but applies to revision. Such a legal bar under s. 401(4) does not stand in the way of the High Court's exercise of power of revision *suo motu*, which continues as before in the new Code. [545H, 546A-C]

A (2) Under sub-section (1) of s. 377, the State Government has a right to appeal against the inadequacy of sentence in all cases other than those referred to in sub-section (2) of that section. The true test under s. 377(2) Criminal Procedure Code is whether the offence is investigated by the Delhi Special Police Establishment or is investigated by any other agency empowered to make investigation under any Central Act other than the Code of Criminal Procedure. In other words, just like s. 3 of the Delhi Special Police Establishment Act, there should be an express provision in an Act empowering the making of investigation under the Act. No such express provision is found in the Prevention of Food Adulteration Act. Mere provision of an in-built mechanism of some kind of investigation in that Act is not decisive of the matter. There should be an express provision in that Act empowering the Food Inspectors to make investigation of offences under the Act. In the absence of any express provision in the Act in that behalf, it cannot be held that the Food Inspectors are empowered to make investigation under the Act. Section 377(2) Criminal Procedure Code, therefore, is not attracted and the appeal under s. 377(1), Criminal Procedure Code at the instance of the State Government is maintainable. [517 A, H, 518A, B, C, F]

(3) The Prevention of Food Adulteration Act provides that when conviction is under s. 16(1) (a) (i) for selling an adulterated article coming within the definition of section 2(i)(1), the Magistrate by recording adequate and special reasons has jurisdiction to award a sentence less than the minimum. [519-H-520 A-C]

(4) Courts have to give due recognition to the intent of the Legislature in awarding proper sentence including the minimum sentence in appropriate cases described under the Act. When the Legislature itself intends not to visit an offence under the Act with an equal degree of severity under specified circumstances, it is permissible for the courts to give the benefit in suitable cases. [519 F-G]

(5) In an appeal under s. 377, Criminal Procedure Code, the High Court may interfere with the sentence, if no reasons for awarding a lesser sentence are recorded by the Magistrate. Again if the reasons recorded by the Magistrate are irrelevant, extraneous, without materials and grossly inadequate, the High Court will be justified in enhancing the sentence. In the instant case the reasons given by the Magistrate were not so grossly inadequate that the High Court could interfere with the sentence in a petty case. [520 A-B, C]

(6) In an appeal against inadequacy of sentence it is not permissible to alter a conviction to an aggravated category of offence for which the accused was not convicted. While the accused in such an appeal under s. 377 can show that he is innocent of the offence, the prosecution is not entitled to show that he is guilty of graver offence and that on that basis the sentence should be enhanced. The prosecution will only be able to urge that the sentence is inadequate on the charge as found or even on an altered less graver charge. [519 D-E]

(7) When there is a decision of a co-ordinate court, it is open to the Judge to differ from it, but in that case, the only judicial alternative is to refer to a larger Bench and not to dispose of the appeal by taking a contrary view. Judicial discipline as well as decorum should suggest that as the only course. [520 F]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 577/76.

(Appeal by Special Leave from the Judgment and Order dated the 4th Nov. 1976 of the Bombay High Court in Criminal Appeal No. 448 of 1973).

H *V. M. Tarkunde, S. V. Tambwekar and Miss M. Tarkunde,* for the appellant.

H. R. Khanna and *M. N. Shroff,* for the respondent.

A

The Judgment of the Court was delivered by

GOSWAMI, J.—The appellant was convicted by the Judicial Magistrate, Udgir, under section 16(1)(a)(i) proviso (i) of the Prevention of Food Adulteration Act, 1954, read with section 2(i)(1) and section 7(i) of the said Act and sentenced to simple imprisonment till rising of the court and to pay a fine of Rs. 500/-, in default rigorous imprisonment for two months. The appellant's father who was also charged for the same offence was, however, acquitted.

B

The charge against the appellant was that he sold chilli powder which was adulterated inasmuch as the percentage of the total ash was more than the permissible limit. The sample of chilli powder which was seized by the Food Inspector on April 13, 1974, contained 37.25% of the total ash against the permissible percentage of 8%. It was stated in the Analyst's report that the percentage of extraneous matter which was common salt mixed with the chilli powder was 32.4%. The learned Magistrate found that the chilli powder was adulterated within the meaning of section 2(i)(l) although the prosecution was on the basis of the article being adulterated within the meaning of section 2(i)(c) of the Prevention of Food Adulteration Act, 1954 (briefly the Act).

C

D

The State of Maharashtra preferred an appeal against the order of acquittal of the father of the appellant and against the inadequacy of the sentence awarded to the appellant. The High Court dismissed the appeal against acquittal of the appellant's father but allowed the appeal of the State with regard to the inadequacy of the sentence. The High Court while affirming the conviction of the appellant under section 16(l)(a)(i) read with sections 2(i)(l) and 7(i) of the Act enhanced the sentence to six months' simple imprisonment and a fine of Rs. 1000/-, in default simple imprisonment for two months. Hence this appeal by special leave.

E

Mr. Tarkunde, appearing on behalf of the appellant, submits that the appeal by the State of Maharashtra under section 377(1), Criminal Procedure Code, 1973, was incompetent in view of the provisions of sub-section (2) of that section. He further submits that the High Court was not at all justified in a case of this nature to interfere with the sentence when the trial court had given adequate reasons for imposing the lesser sentence.

F

It is also pointed out, more or less as an alternative submission, that the power of the High Court to enhance sentence which was available under section 435/439 Cr.P.C. of the old Code is replaced by the provision of appeal under section 377 Cr.P.C. of the new Code. It is also stated that the High Court's power of revision, *suo motu*, long exercised under the old Code is now taken away under the new Code by providing for apppeal against inadequacy of sentence. The above submission is put forward *ex abundanti cautela* lest we may not interfere with the sentence imposed by the High Court having regard to the possibility of exercise of powers, *suo motu*, by the High Court for enhancement of sentence assuming the appeal is incompetent on the ground urged by the appellant.

G

H

A We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, *suo motu*. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising *suo motu* power of revision B is still extent under section 397 read with section 401 Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself" call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under section 401(4) does not stand in the way of the High Court's exercise of power of revision, *suo motu*, which continues C as before in the new Code.

Before we proceed further we may set out section 377(1) and (2) Cr. P. C. with which we are concerned :

> 377. (1) "Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction D on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.
>
> (2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police E Establishment, constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inade- F quacy".

Mr. Tarkunde emphasised upon the difference of language in section 377(2) and section 378(2) Cr. P.C. In the latter section the word "also" appears making provision for both the State Government and the Central Government to appeal against acquittal.

G On the other hand it is urged on behalf of the State that the word "also" may be read in section 377(2) Cr.P.C. in the context of the scheme of the two provisions in section 377 and section 378 Cr.P.C.

It is true that section 378(2) follows the pattern of section 417(2) of the old Code and the right to appeal is conferred upon both the State Government and the Central Government in express terms in H section 378(2). It is clear that the legislature has maintained a watertight dichotomy while dealing the matter of appeal against inadequacy of sentence. We agree that in the absence of a similar word "also" in section 377(2) it is not possible for the court

to suppply a *casus omissus.* The two sections, section 377 and section 378 Cr. P. C. being situated in such close proximity, it is not possible to hold that omission of the word "also" in section 377(2) is due to oversight or *per incuriam.*

Section 377 Cr. P. C. introduces a new right of appeal which was not earlier available under the old Code. Under sub-section (1) of section 377 Cr. P. C. the State Government has a right to appeal against inadequacy of sentence in all cases other than those referred to in sub-section (2) of that section. This is made clear under section 377(1) by its opening clause "save as otherwise provided in sub-section (2)". Sub-section (2) of section 377, on the other hand, confers a right of appeal on the Central Government against a sentence on the ground of its inadequacy in two types of cases :

(1) Those cases where investigation is conducted by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946.

(2) Those other cases which are investigated by any other agency empowered to make investigation under any Central Act not being the Code of Criminal Procedure.

There is no difficulty about the first type of cases which are investigated by the Delhi Special Police Establishment where, certainly, the Central Government is the competent authority to appeal against inadequacy of sentence.

The controversy centres round the second type of cases *viz.,* those which are investigated by any other agency empowered to make investigation under any Central Act not being the Code of Criminal Procedure.

The Criminal Procedure Code *inter alia,* provides for investigation of all categories of criminal offences. The First Schedule of the Code classifies offences under the Indian Penal Code as well as offences against other laws. Between the above two classifications the entire denotation of criminal offences is exhausted. It is clear that the Delhi Special Police Establishment also has to comply with the provisions of the Code of Criminal Procedure in investigation of offences just as the State Police has to do.

By section 3 of the Delhi Special Police Establishment Act, the Central Government may by notification in the official gazette specify the offences or class of offences which are to be investigated by the Delhi Special Police Establishment. It is only when such a notification is made by the Central Government that the Delhi Special Police Establishment is empowered to investigate the specified offences. Similarly if in any other Central Act, not being the Code of Criminal Procedure, a provision is made for empowering a particular agency to make investigation of offences under that Act, then also the Central Government alone will be the competent authority to prefer appeal under section 377(2) Cr. P. C. The true test, therefore, under section 377(2) Cr. P. C. is whether the offence is investigated by the

A Delhi Special Police Establishment or is investigated by any other agency empowered to make investigation under any Central Act other than the Code of Criminal Procedure. In other words, just like section 3 of the Delhi Special Police Establishment Act, there should be an express provision in the Prevention of Food Adulteration Act empowering the making of investigation under the Act. But no such express provision is found in the Prevention of Food B Adulteration Act.

Mr. Tarkunde took us through all the relevant provisions of the Prevention of Food Adulteration Act and in particular rule 9 of the Central Rules to point out that it is a self-contained code detailing the requisite manner of investigation for the purpose of efficient prosecution of offenders under that Act. Mere provision of an C in-built mechanism of some kind of investigation in that Act is not decisive of the matter. There should be an express provision in that Act empowering the Food Inspectors to make investigation of offences under the Act.

It is true that investigation under section 2(h) Cr. P. C. is an D inclusive definition and is of wide import. It may also be true that some of the powers exercised by the Food Inspectors under section 10 of the Act are included in the investigatory process of the police although the Food Inspectors have no powers of arrest of the offenders unless they refuse to give name and residence or give suspicious name or residence. This procedure in the Act follows from the fact that on the date of taking a sample of an article, the Food Inspector is E not in a position to come to a conclusion whether the article is adulterated within the meaning of the Act. It is only on receipt of the Analyst's report certifying the article to be adulterated that the Food Inspector will be able to submit a report to the Magistrate for taking cognizance of the offence and his report will have to be accompanied also by a written consent of the appropriate authority under section 20 of the Act. The scheme of the Act is such that the case is instituted F on his report and dealt with under the Criminal Procedure Code as a case of which cognizance is taken under section 190(1)(a) of the Criminal Procedure Code. In the absence of any express provision in the Act in that behalf it is not possible to hold that the Food Inspectors are empowered to make investigation under the Act. Section 377(2) Cr.P.C., therefore, is not attracted and the appeal under section 377(1) Cr.P.C. at the instance of the State Government is G maintainable. The first submission of the appellant has no force.

With regard to the second and last submission on sentence Mr. Khanna on behalf of the State submits that this was a case under section 16 for violation of section 2(i)(c) of the Act in which case the Magistrate had no jurisdiction to award a sentence less than six months. According to counsel, the High Court was right in enhancing the H sentence of the appellant.

We are concerned in this case with the Prevention of Food Adulteration Act prior to the amendment by Act 34 of 1976, which

inter alia, amended section 2(i)(l) and added a sub-clause (m) to section 2(i). A

It is true that under section 16(1)(a)(i) if any person sells any article of food which is adulterated he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to six years and a fine which shall not be less than one thousand rupees. The proviso to that section, however, relieves an offence under sub-clause (i) of clause (a) when *inter alia,* it is with respect to an article of food which is adulterated under sub-clause (l) of clause (i) of section 2, from the rigour of the above penal provision and the court may, for any adequate and special reason, impose a sentence of imprisonment for a term of less than six months or a fine of less than one thousand rupees etc. It is by invoking the above proviso that the trial court sentenced the appellant as set out above. B C

Mr. Khanna submits that we should alter the finding of conviction to one for violation of section 2(i)(c) from section 2(i)(l), since, according to him, that will be the proper conviction on the facts of the case. We are unable to entertain this plea for altering the conviction in such a manner for the purpose of enhancing the sentence under section 377 Cr.P.C. The State did not appeal against the acquittal of the appellant under section 16(1)(a)(i) read with section 2(i)(c) and proceeded on the basis that the article was adulterated within the meaning of section 2(i)(l) as held by the trial court. This is clear also from the judgment of the High Court. In an appeal against inadequacy of sentence it is not permissible to alter the conviction to an aggravated category of offence for which the accused was not convicted. While the accused in such an appeal under section 377 Cr.P.C. can show that he is innocent of the offence, the prosecution is not entitled to show that he is guilty of a graver offence and on that basis the sentence should be enhanced. The prosecution will only be able to urge that the sentence is inadequate on the charge as found or even on an altered less graver charge. The submission of Mr. Khanna is clearly untenable. D E

Mr. Khanna next submits that this Court should not interfere with the sentence in a case under the Prevention of Food Adulteration Act as the offence is against society at large affecting the health and well-being of the people in general. We are alive to the seriousness of offences under the Prevention of Food Adulteration Act. Courts have to give due recognition to the intent of the legislature in awarding proper sentence including the minimum sentence in appropriate cases described under the Act. Such offences cannot be treated in a light-hearted manner. Even so justice has to be done in accordance with law. The Prevention of Food Adulteration Act, itself, permits for some leniency in an excepted category of cases as pointed out earlier. When the legislature itself intends not to visit an offence under the Act with an equal degree of severity under specified circumstances, it is permissible for the courts to give the benefit in suitable cases. F G

H

As seen earlier, the Prevention of Food Adulteration Act provides that when conviction is under section 16(1)(a)(i) for selling an adulterated article coming within the definition of section 2(i)(l), the

A Magistrate, by recording adequate and special reasons, has jurisdiction to award a sentence less than the minimum. In an appeal under section 377 Cr.P.C. the High Court may interfere with the sentence if no reasons for awarding a lesser sentence are recorded by the Magistrate. Again, if the reasons recorded by the Magistrate are irrelevant, extraneous, without materials and grossly inadequate, the High Court will be justified in enhancing the sentence.

B

While dealing with the question of sentence the Magistrate noted that the appellant was a small retail shopkeeper who had only 3 kgs. of chilli powder in his shop for sale out of which 450 gms. were purchased by the Food Inspector. He also considered the nature of the offence as disclosed in the report of the Public Analyst. There is nothing in the evidence to show that any injurious ingredient to health

C was mixed with the article. We find that the Magistrate had the jurisdiction under the first proviso to section 16(1) to award less than the minimum sentence in this case by recording adequate and special reasons. We are unable to hold that the reasons given by the Magistrate are so grossly inadequate that the High Court was right in interfering with the sentence in this petty case. We must hasten to add that the matter would have been absolutely different if the article sold

D contained ingredients injurious to health.

Our attention is drawn to a disquieting feature in the procedure adopted by the learned single Judge (G. N. Vaidya, J.) in disposing of the appeal. The learned Judge ignored the decision of another single Judge of the same court (J. M. Gandhi, J.) who had earlier held in a similar case that the appeal by the State was not competent under

E section 377(1) Cr.P.C. It is true that the decision is pending before this Court in appeal by special leave. That, however, cannot be sufficient reason for the learned Judge to ignore it and observe that it is "unnecessary to keep back this matter till the Supreme Court decides matter". When there was a decision of a coordinate court, it was open to the learned Judge to differ from it but in that case the only judicial alternative was to refer it to a larger bench and not to dispose of the

F appeal by taking a contrary view. Judicial discipline as well as decorum should suggest that as the only course.

In the result the appeal is allowed and the judgment and order of the High Court are set aside. The appellant shall be discharged from his bail bond.

S.R. *Appeal allowed.*