

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application for Special Leave to Appeal from the Judgement pronounced on 08.05.2013 by the High Court of the North Central Province holden in Anuradhapura in High Court Appeal No. 44/201 under Section 9(a) of the High Court of Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 154P of the Constitution and the Supreme Court Rules of 1990.

SC Appeal No. 74/2014

HC MCA 44/2011

MC Kebithigollawa Case No. 67675

W.G.S.L. Wasala,

Public Health Officer,

Mahasenpura.

**Complainant**

Vs.

Coca-Cola Beverages Sri Lanka Ltd.

Tekkawatta,

Biyagama.

**Accused**

**And then between**

Coca-Cola Beverages Sri Lanka Ltd.

Tekkawatta,

Biyagama.

**Accused-Appellant**

**Vs.**

1. W.G.S.L. Wasala,  
Public Health Officer,  
Mahasenpura

**Complainant-Respondent**

2. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondent**

**And now between**

Coca-Cola Beverages Sri Lanka Ltd.  
Tekkawatta,  
Biyagama.

**Accused-Appellant-Appellant**

1. W.G.S.L. Wasala,  
Public Health Officer,  
Mahasenpura

**Complainant-Respondent-Respondent**

2. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondent-Respondent**

**BEFORE:** Buwaneka Aluwihare P.C, J  
Kumudini Wickramasinghe, J  
Janak De Silva, J

**COUNSEL:** Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremasinghe for the Accused-Appellant-Appellant.  
Madhawa Tennakoon, DSG with Ganga Wakishta Arachchi, SSC for the Respondent-Respondent.

**ARGUED ON:** 12.07.2021.

**WRITTEN SUBMISSIONS:** Accused-Appellant-Appellant on 08.07.2014.  
Respondent-Respondent on 18.01.2021.

**DECIDED ON:** 09.11.2023

### Judgement

**Aluwihare, PC, J,**

1. The Public Health officer, Mahasenpura (Complainant-Respondent-Respondent) on 23<sup>rd</sup> October 2010, took into custody a bottle of Ginger Beer of ‘Lion’ brand which was offered for sale at “Aluthkade Welandasela” in Nikawewa. As the bottle of Ginger Beer concerned did not contain a label declaring the batch number, the date of expiry and the date of manufacture, the Public Health Officer (hereinafter referred to as the

'Respondent') instituted criminal proceedings before the Magistrate's court (Kebithigollawa) against the Manufacturer of the bottle, Coca Cola Beverages Sri Lanka Ltd. (the Accused-Appellant-Appellant) for having manufactured or distributed the bottle in violation of Section 18(1)(c) read with section 2(1) of the Food Act, No. 26 of 1980 as amended and Regulation 04(2) (e), (f) and (d) of the Food (Labelling and Advertising) Regulations published in the Gazette Extraordinary No. 1376/9 of 19<sup>th</sup> January 2005. The said paragraphs of the Regulation require the label to carry; (e) the date of expiry, (f) date of manufacture and (d) batch number respectively. At the conclusion of the trial, the learned Magistrate convicted Coca Cola Beverages Sri Lanka Ltd. (hereinafter referred to as the Appellant) on all charges.

2. Aggrieved by the said judgement, the Appellant appealed against the conviction to the Provincial High Court of the North Central Province and the learned High Court Judge by his judgement dated 08/05/2013 affirmed the findings of the learned Magistrate of Kebithigollawa and upheld the conviction. The present appeal is from the said judgement of the High Court.
3. This Court granted Special Leave to Appeal on the questions of law referred to in subparagraphs in (viii) and (x) of the petition of the Petitioner dated 19.06.2013. The said questions are reproduced below:
  - 1) Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19<sup>th</sup> January 2005?
  - 2) In any event were the charges levelled against the Accused ambiguous & defective as a result of including two distinct and separate acts i.e. 'manufacturing or 'distribution' in one and the same charges in violation of provisions under Chapter XVI of the Code of Criminal Procedure Act, No.15 of 1979 read with those of Food Act, No.26 of 1980 as amended & Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No.1376/9 of 19<sup>th</sup> January 2005?

4. The facts of the case presented before the Magistrate's Court were that the Complainant officer detected a bottle of 'Ginger Beer' on which the date of manufacture, the date of expiry and the batch number were not clear, [“පැහැදිලිව නොමැති නිසා එය අත්අඩංගුවට ගැනීම සිදුකලා” *vide* pg.19 of the MC proceedings]. The second witness who testified on behalf of the prosecution, one Buddhika Lakmal, stated that those details were vaguely visible on the bottle [“ඡේන නොපෙනෙන ගතට තිබුනේ”, *vide* pg. 24 of the MC proceedings]. The fact that only one such bottle was detected is relevant. I will now address the first question of Law.

**Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005?**

5. The Respondent's position, as contended by the learned DSG was that the Appellant committed an offence by manufacturing the Ginger Beer bottle without having a batch number, the date of manufacture and the date of expiry printed on the label of the bottle. The main contention of the learned President's Counsel for the Appellant on the other hand was that the Appellant cannot be held liable for a violation of Regulation 02 of the Regulations made under the Food Act, promulgated in the Gazette bearing number 1376/9 of 19<sup>th</sup> January 2005, as the said Regulation 02 does not contemplate the manufacturer's liability in respect of what may happen to a product at the hands of a retailer or a third party.
6. While Regulation 02 defines the parameters and purview of the Food (Labelling and Advertising) Regulations 2005, the rest of the Regulations describe details and specific obligations relating to labelling and advertising. It was the contention of the learned President's Counsel that the liability under Regulation 02 of the said Regulations rests on any person who “sells, offers for sale, exposes, or keeps for sale, transports or advertises for sale any food contained in a package” and the said Regulation has no application to distributors and manufacturers and therefore, the

appellant, who was the manufacturer of the bottle of 'Lion' Ginger Beer cannot be held liable.

7. The learned DSG for the Respondents submitted, however, that as per the evidence adduced before Court, labelling is done at the time of manufacture itself by the Appellant, and labelling is therefore an integral part of the manufacturing process. He submitted further that it is the same person who manufactures the product who is responsible for the proper labelling of the product, in terms of Section 2 of the Food Act, therefore, the manufacturer is also liable for any contravention of the Food (Labelling and Advertising) Regulations 2005. Accordingly, it was the position of the learned DSG that the Appellant, being the manufacturer of [bottle of] Ginger Beer becomes liable for non-compliance with Regulation 02 of the aforementioned Regulations and as such, the findings, both of the learned Magistrate and the learned High Court Judge are correct and must be upheld.
8. When considering the arguments placed before the Court, both by the Appellants and the Respondents, it would be necessary to consider both the statutory provisions of the Food Act and the liability imposed upon parties by the Regulations made thereunder.
9. Section 02 of the Food Act spells out the liability in general of various stakeholders who are involved in distinct/different processes, commencing from the point of manufacture to the retailer. It is to be noted, however, that Section 02 is not a penal provision but stipulates a series of conducts that are prohibited. The Regulations, however, not only refer to specific violations, but also spell out penal sanctions that would follow in the event of any breach of the same. In this context, it would be relevant to consider the intention of the legislature in enacting the statutory provisions referred to above and the regulations made thereunder.
10. Section 2(1) of the Food Act, No. 26 of 1980 as amended states:

*“No person shall manufacture, import, sell, expose for sale, store or distribute any food –*

*(a) that has upon it any natural or added deleterious substance which renders it injurious to health;*

*(b) that is unfit for human consumption;*

*(c) that consists in whole or in part of any unclean, putrid, repugnant, decayed, decomposed or diseased animal substance or decayed vegetable substance or is insect infected;*

*(d) that is adulterated;*

*(e) that has in or upon it any added substance in contravention of the provisions of this Act or any regulation made thereunder; or*

*(f) in contravention of the provisions of this Act or any regulation made thereunder.”*

11. As referred to earlier, Section 02(1) lays down certain prohibitions and broadly spells out the mischief the legislature intended to prevent. The legislature, taking cognizance of the fact that various stakeholders are involved across the food chain, that is, production, trade and handling of food, has legislated statutory provisions as well as subordinate legislation to ensure ‘food safety’ and ‘food quality’ from the perspective of the public, within the sphere of the industry.
12. Upon further observation, I note that the provisions of the Act and the Regulations identify specific violations in relation to various sectors in the food industry i.e production, trade and handling of food, and therefore, when deciding on whom the liability lies in the present instance, in the context of the compliance imposed, one must necessarily refer to the provisions of the Act and/or the Regulations as the case may be, and identify on whom the liability is imposed and whether it has not been complied with.

13. In the course of the argument, the learned DSG contended that the Appellant is liable under Section 2(1)(f) of the Act, as in terms of the said provision, manufacturing, exposition for sale, storing or distribution of any food in contravention of the provisions of the Act, or any regulation made thereunder is prohibited. When one analyses Section 2 of the food Act [referred to in paragraph 10 above] it is clear from the words used; “No person shall manufacture, import, sell, expose for sale. Store or distribute any food.....in contravention of the provisions of this Act or any regulation made thereunder”, that the offences do not impose strict liability, but the liability is pinned on the ‘person’ who is responsible for the violation alleged. The reason is a rational one. In the ‘food chain’, different stakeholders in the industry handle ‘food’ at various points [in the chain] and once a particular stakeholder [in the chain] loses control of that ‘food’, there is no justification to hold that stakeholder liable for every non-compliance that takes place after that particular stakeholder had lost control of the ‘food’, unless it can be established that the violation had taken place in the hands of that particular stakeholder.
14. Scrutiny of the legal regime relating to regulation of the food industry makes it clear that the legislature had been alive to this fact and had made clear provisions to ensure that the liability is imposed based on whose responsibility it is to comply with law at a given point. Thus, it is *sine qua non* to consider the statutory provisions and regulations from this perspective to identify who is responsible for compliance.
15. Case to the point is Regulation (4) of the very Regulations under which the Appellant had been charged, which reads, thus; “*no person shall sell, offer for sale, expose or keep for sale any food, transport for sale after the date of expiry thereof*”. The compliance in relation to this Regulation is required from the ‘seller’. What the regulation prohibits are the ‘acts in connection with sale of food’ beyond its shelf life. It would be beyond any stretch of imagination to argue that by virtue of Section



2 of the Food Act, the manufacturer is also liable if the retailer sells an item of food after its expiry date.

16. Regulation 2 of the said Regulations under which the Appellant is charged carry the identical words; *“no person shall sell, offer for sale, expose or keep for sale any food, transport or advertise for sale, any food contained in a package or container, unless such package or container is labelled in accordance with the regulations.*
17. The learned President’s Counsel for the Appellant argued that it is clear from the above Regulation that the actors who are responsible for the obligations regarding labelling are persons who “sell, offer for sale, expose or keep for sale, transport or advertise for sale, any food contained in a package or container”, that this does not include manufacturers within its scope and therefore, there is no liability on the manufacturer in relation to any of the obligations that are laid down in the said Regulation.
18. The essential element for any prosecution in respect of non-compliance is the availability of evidence establishing liability. When the Food Act and its regulations are examined, it becomes apparent that the drafters of this legislation were conscious of the fact that the industry which was sought to be regulated involved multiple processes, multiple actors, and multiple concerns. The legislation has been meticulously drafted to reflect industrial realities. This is evident in the scheme of the Act. For example, Section 02(1) states that “No person shall manufacture, import, sell, expose for sale, store or distribute any food...” followed by subsection (f) which states “in contravention of the provisions of this Act or any regulation made thereunder” so as to indicate that the manufacture, importation, sale, exposure for sale, storage or distribution of any product in violation of the Regulations promulgated under the Act would constitute an offence.
19. It was also brought to the attention of the Court by the learned President’s Counsel for the Appellant that the Act empowers the Minister in charge of the subject to

make Regulations in respect of matters governed by the Act [vide Section 32(1)] and such Regulations have been enacted from time to time. Of those Regulations, ‘manufacturing and distribution’ have been specifically addressed by other Regulations such as Regulation No. FR 1405/3 published in the Gazette Extraordinary 1405/3 dated 31.12.2005, Regulation No. FR 1420/4 published in the Gazette Extraordinary 1420/4 dated 21.05.2006. This observation is in my view, crucial to this appeal for if the legislature intended liability to be imposed on the manufacturer for matters which may affect the product beyond the scope of control of the manufacturer too, the legislature would have expressed such intention in the Regulations which seem to spare no detail. Charging the manufacturer in relation to a matter which could have occurred at the hands of the retailer or other actor would therefore be futile as it does not serve to enforce the Act or the Regulations. I am reminded of the astute observations of Justice Sharvananda (as he was then) in *Nandasena v. Senanayake and Another* [1981] 1 SLR 238 at p. 245.

*“Statutes should be construed, as far as possible, to avoid absurdity or futility. A statute should be construed in a manner to give it validity rather than invalidity - ut res magis valeat quam pereat [so that the matter may flourish rather than perish]”.*  
(parenthesis and emphasis added)

20. No doubt, food labelling is an effective tool to protect consumer health in terms of food safety and nutrition. Food labels convey information about the product's identity and contents, and on how to handle, prepare and consume it safely. This is a universally accepted thesis. For example, the Food and Agriculture Organisation of the UN, states that “the *empowerment* of consumers is necessary through improved and evidence-based health and nutrition information and education to make informed choices regarding consumption of food products for healthy dietary practices”. This can be achieved by ensuring the ‘information’ is made available to the consumer at the time the consumer makes the decision with regard to the purchase, thus the responsibility cast on the seller to ensure that the information is made available at the point of sale.

21. Other than the rationale referred to above, there can be numerous reasons as to why it would be practically possible to make the manufacturer liable in relation to the Regulation in issue. The main reason I see is that, once the product leaves the manufacturer, it loses control of the product and if the product gets deformed due to mishandling of the same by third parties, one cannot hold the manufacture liable. Another would be in instances where the packaging is done by a totally an independent actor over which the manufacture may not have control. This may be true in instances where food is imported in bulk and packaging is done locally. It is for that reason I referred to the fact that the words in section 2 of the Food Act are of vital importance, the liability is on the person who contravenes the Act or the regulation. Whether a person had contravened the provisions can only be decided on evidence and not on surmise.
22. Prior dicta do not offer any discernable guidance regarding the charging of parties within the scheme of the Act. Therefore, I find it prudent to examine the practices of jurisdictions beyond our seas in this respect. In the United States of America, the Federal Food, Drug and Cosmetic Act governs the safety of food products exposed to consumers. The said Act includes a laudable scheme whereby the Secretary of Health and Human Services (Secretary) has the option of giving the alleged violator notice of intention to prosecute and the opportunity to respond orally or in writing before reporting a violation of the Act to a United States attorney for prosecution. This proceeding is commonly known as a "Section 305 hearing" and the opportunity for such hearings is normally made available to targets of prosecution. While our legislation does not imbue a scheme for prior hearing, one aspect that may offer guidance is the criterion adopted to evaluate whether the FDA (the authority) is possessed with the facts and circumstances which warrant the institution of criminal proceedings. These factors were stated by one by Eugene Pfeifer, then Associate Chief Counsel for Enforcement at the FDA, in his article, "Section 305 Hearings and Criminal Prosecutions", 31 CCH Food Drug Cosmetic Law Journal (1976) 376 at pg. 371-381. In India, I have observed that in addition General Guidelines issued to Food Safety Inspection Officers by the Food Safety and Standards

Authority of India, direction is also given in the form of 'Inspection Matrices' and Checklists which help the Inspection Officers to ascertain whether the elements listed below were evident in the product. Many of the same elements also exist in the 'Compliance and Enforcement Policy' of the Canadian Food Inspection Agency, which is responsible for the enforcement of the Food and Drugs Act of Canada. In my view, these elements must also be considered by Public Health officers prior to the initiation of criminal proceedings under our Food Act:

- a) Whether there has been a deliberate or intentional violation of the law.
  - b) Whether there has been a failure to exercise due diligence. For example, if any product contains any foreign substance, even if it is an isolated incident, then that fact would be relevant and persuasive in the institution of prosecution.
  - c) Whether alleged violations have exposed the public to some danger.
  - d) Whether the violation was obvious to a person knowledgeable about the industry.
  - e) Whether the violation has been a recurrent problem that the alleged suspect has failed to deal with over a period of time.
  - f) Whether the violation results from the commission or omission of an act which could have been prevented, detected, or corrected. The absence of a quality control system which could have prevented the problem would be relevant and persuasive in the institution of prosecution.
  - g) Any violation which resulted or may have resulted in significant economic damage to the public.
23. I must stress that these factors are not exhaustive. I also do not suggest that these factors should inhibit or restrain the Public Health officers from initiating prosecution against an accused when the available evidence establishes a nexus between the offence and the members of the body-corporate committing such offence. However, one must employ a general understanding of Corporate Liability when understanding the objectives of the Act. We are not entitled to treat the law as being an entity immune from sense. Particularly, we must bear in mind that when examining the regularization of an industry such as the Food Industry, the Manufacturer, once he has created the product loses control over the product

created in degrees as the product is distributed, offered to retailers and then exposed for sale by shop owners.

24. For the reasoning referred to above, I hold that the Regulation under which the Appellant was charged is not applicable to the manufacture and therefore no liability can be imposed on the Appellant.
25. Accordingly, I set aside the conviction and sentence imposed on the Appellant and Appellant is acquitted. In view of the finding made above, I do not think it would be necessary to address the second question of law on which special leave was granted.
26. I now advert to a matter relating to this appeal which, in my opinion, warrants the attention of the Court. The Court is mindful that the subject of Food Legislation concerns consumer protection and public health. It is a serious issue which affects the public at large and as I pen this judgment, I am much concerned by the fact thought that if the system were to weaken or be undermined by lack of resources, the entire citizenry would suffer. While I commend the efforts and yeoman services provided by the Public Health Officers, I also think that it is important to note that effective enforcement and prosecution of offences under the Food Act and its Regulations is dependent on Public Health Officers possessing the requisite knowledge of the legal landscape for the purpose attributing liability and regulating the industry within the confines of the law.
27. In the circumstances, it is my view that the relevant authorities and agencies, must endeavour to provide such assistance, and should consider the possibility of engaging in capacity-building, aimed towards providing legal training for Public Health Officers, for the effective implementation of the Act and its Regulations.

## Conclusion

In view of the observations made above, I answer the question of law of this appeal in the following manner.

1. Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005?

Yes, manufacturing and distribution are not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005.

*The conviction set aside and the Appeal allowed.*

JUDGE OF THE SUPREME COURT

Kumudini Wickramasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT