UNITED STATES v. WILMINGTON CHEMICAL CORP.

254 F. Supp. 92 (1966) | Cited 0 times | N.D. Illinois | May 6, 1966

MEMORANDUM OPINION

Motion of Defendant Klehman to Dismiss.

This is a ten-count information charging violations of theFederal Hazardous Substances Labeling Act, Sec. 1263(a), Title15, U.S.C. In essence, it is charged that the nameddefendants, Wilmington Chemical Corporation, and itspresident, Joseph S. Klehman, caused to be introduced intointerstate commerce a number of cans containing X-33 waterrepellant, a substance defined as "hazardous" under Section1261(f)(1)(A)(v), and "extremely flammable" within the meaningof Section 1261(1), which cans were misbranded in violation ofthe requirements set forth in Sections 1261(p)(1)(B), (C),(E), (F), and (1), and in Regulation 21 C.F.R. § 191.7(b)(3),promulgated pursuant to Section 1262(b).

On January 28, 1963, this Court overruled defendants' motionto dismiss, and, at the same time, granted leave to theindividual defendant, Klehman, to file an additional motion todismiss based on the immunity provisions of Section 32, Title15, U.S.C. That section reads in pertinent part:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title."

Relying on his subpoenaed testimony before the Federal TradeCommission in connection with a complaint entitled, In theMatter of Wilmington Chemical Corp. and Joseph S. Klehman, anindividual and as an officer of said corporation, Docket No.8548, defendant asserts that he is immune from prosecutionherein.

This court must conclude that defendant has failed to meetthe burden imposed upon him. In Heike v. United States,227 U.S. 131, 33 S.Ct. 226, 57 L.Ed. 450 (1931), the Supreme Courtof the United States refused to immunize a defendant againsta revenue fraud indictment relating to illegal importation ofraw sugar after he testified before a federal grand juryinvestigating antitrust violations as to the amount of sugarmelted annually by each of several refineries. In applying thestatute which preceded Section 32 now before us, the Courtreasoned that the compelled testimony given in the priorhearing must relate in a "substantial" way to the subjectmatter of the indictment. That is, even though "sugar" wasinvolved in both proceedings, the subject matter of the twoinquiries, monopoly and tax fraud, were not sufficientlyrelated so as to activate the immunity statute.

From the papers submitted by the parties herein we must holdthat such "substantial relationship" is absent here, as well.That is, while X-33 water repelant provides a common subject,the F.T.C. hearing dealt with defendants' sales practices andunfair competition as they related to Section 5 of the FederalTrade Commission Act, such as representations that defendantwas connected with E.I. DuPont de Nemours & Co., and theinstant indictment concerns violations of the FederalHazardous Substances Labeling Act. The failure to includecertain mandatory warnings on a label cannot be said tosubstantially relate to the "unfair trade practices" recitedin the F.T.C. complaint. See Himmelfarb v. United States (9thCir., 1945) 175 F.2d 924, cert. den. 338 U.S. 860, 70 S.Ct.103, 94 L.Ed. 527 (1949); United States v. Greater Kansas CityRetail Coal Merchants Assn. (D.C.Mo., 1949) 85 F. Supp. 503,513.

While defendant has gone to great lengths to criticize the"small minded bureaucratic practices" of the F.T.C. and theprosecutive arm of the United States Government, he has verysketchily outlined the similarities between the twoproceedings. We are satisfied that the government hassufficiently countered these assertions. That is, whiledefendant baldly contends that he testified before the F.T.C.with regard to labeling, the government points out that saidtestimony dealt with defendant's use of the DuPont name onlabels alone. Similarly, while defendant points to testimony"relating to X-33," the prosecution asserts that Klehman merelydiscussed waterproofing qualities of X-33, and not itshazardous nature with which we are concerned.

Finally, Defendant refers to testimony relating to seizureof X-33 by the F.D.A. This the government asserts, wasvoluntarily introduced by defendant over strenuous andrepeated objections by the F.T.C. attorney. Surely suchvoluntary evidence cannot be considered "compelled testimony"giving rise to immunity. Just as a defendant may waive hisFifth Amendment privilege against self-incrimination, Raffelv. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054(1926); Smith v. United States, 337 U.S. 137, 150, 69 S.Ct.1000, 93 L.Ed. 1264 (1949), so a defendant cannot cry"compulsion" and seek immunity when he voluntarily offersinformation. The "immunity is as broad as the compulsion andno broader." May v. United States (1949) 84 U.S.App.D.C. 233,175 F.2d 994, 1001. To hold otherwise would be to permit awitness who was called to testify about a minor offense toread off a list of his unrelated transgressions, and thusacquire absolution for his sins. The immunity statute was notintended to serve the function of a confessional, and cannotbe construed in that manner.

In the face of the government's detailed rebuttal,defendants' unsupported assertionscan not satisfy the burden the law has dictated he must carryon a motion to dismiss. Nor do his assertions that thegovernment be required to produce the F.T.C. transcript lendsupport to his cause. Defendant was, and is, free to securethat record and to itemize the "substantial relationship"which he claims to be present. The government cannot in asituation as this be required to subject itself to discoverywhen the items sought were not obtained from the defendant asrequired by Rule 16 of the Federal Rules of CriminalProcedure.

On the record before us, it is the opinion of this Courtthat defendant has failed to demonstrate applicability ofSection 32, Title 15, U.S.C. to the instant indictment. Themotion of defendant to

dismiss is denied.