

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.968 OF 2002

The State of Maharashtra
(Through Shri. S.A.Chougule,
Food Inspector, Pune.)

.. Appellant
(Orig. Complainant)

Vs.

- 1) Avinash Vamanrao Oturkar
- 2) Sudhir Chintaman Tembere
- 3) M/s. C.T. Distributors
- 4) Chandrakant Hirachand Shah
- 5) Girish Chandrakant Shah
- 6) M/s. Shah & Associates
- 7) V. Shreeniwas Reddy

.. Respondent
(Orig. Accused Nos.1 to 7)

..

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Mr. Arfan Sait, Additional Public Prosecutor for the Appellant.
None for the Respondents.

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CORAM : PRAKASH D. NAIK, J.

DATED : MAY 30, 2017.

ORAL JUDGMENT :

This Criminal Appeal is preferred by the State challenging the judgment and order of acquittal dated 16th April, 2002 passed by the Chief Judicial Magistrate, Pune. The respondents were acquitted of the offences under Section 7(i) read with Section 2(ia) (a) and Section 7(v) read with Rule 37 of

the Prevention of Food Adulteration Rules, 1955 punishable under Sections 16 and 17 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as “the PFA Act”, for short).

2 The brief facts of the prosecution case are as follows:

- (a) The accused nos.1 and 2 were partners of firm, (accused no.3) M/s. C.T. Distributors situated at Sadashiv Peth, Pune. The accused nos.4 and 5 are the partners of accused no.6, M/s. Shah & Associates situated at Shahupuri, Kolhapur. The accused no.7 is the proprietor of manufacturing firm known as British Biologicals, situated at Bangalore. This firm manufactures the food article “B-protein”.
- (b) On 30th August, 1999 at about 7.30 p.m. the complainant visited the accused no.3 M/s. C.T. Distributors at Sadashiv Peth, Pune along with witness where the accused no.1 was found present. The complainant disclosed his identity, so also the identity of the witness to accused no.1. He also disclosed his intention of drawing food sample to accused no.1. The complainant demanded and purchased 3 jars each weighing 200 grams of B-Protein chocolate flavour

(Protein Food Beverages) from accused no.1 alongwith other food articles.

- (c) The present case is related to the sample of food drawn by the complainant with regard to "B-Protein Chocolate Flavour". The complainant divided 3 jars of above food articles into 3 parts equally i.e. each part was consisting one jar. The said 3 jars/parts were kept separately into the dry, clean and empty polythene bags, those were closed by candle heat, tied by thread horizontally and vertically and sealed. Paper slips were also affixed thereon. The panchanama was recorded and it was signed by the complainant, accused no.1 and the witness.
- (d) One of the sample part along with relevant documents was sent to Public Analyst, Pune (hereinafter referred to as "the P.A.", for short) for test and analysis and the remaining two parts and relevant documents were sent to the Local (Health) Authority, Pune (hereinafter referred to as "the LHA", for short).
- (e) On 1st November, 1999, the complainant received the report

of P.A. showing that sample contains protein and iron contents less than that declared on the label hence, it contravenes Rule 27 of PFA Rules, 1955.

- (f) After necessary investigation, all the relevant documents were sent to Joint Commissioner, FDA, Pune, who issued consent to prosecute the accused. Thereafter, the present complaint was filed in the Court.
- (g) The charge was framed against the accused on 19th March, 2002 for the offences punishable under Section 7(i) read with Section 2(ia) (a) and Section 7(v) read with Rule 37 of the Prevention of Food Adulteration Rules, 1955 punishable under Sections 16 and 17 of the Prevention of Food Adulteration Act, 1954.

3 The prosecution examined three witnesses. P.W.1 Sukumar Annu Choughule who is the Food Inspector, who lodged the complaint, P.W.2 Dr. Rawetkar is working as MOH, PMC and LHA under the PFA Act and P.W.3 Mahesh Chavan acted as pancha.

4 P.W.1 has deposed that he has been notified as Food Inspector. On 30th August, 1999, he visited the premises of accused no.1 named and styled as M/s. C.T. Distributors situated at Sadashiv Peth, Pune along with panch witnesses. Accused no.1 was present in the said shop and looking after the business of selling of B-Protein food articles. The witness disclosed his intention of inspection and taking samples of food articles for test and analysis. Accused no.1 disclosed that he is partner of the said firm. He inspected the premises. It was found that different B-Protein food beverages having different flavours were stored for sale in the said premises. The accused no.1 was running the business without valid licence under the PFA Act. He further deposed that he purchased 3 sealed and bearing identical labels jars of B-Protein chocolate flavour each weighing 200 grams along with other three samples. The accused no.1 sold the said food article for analysis. The witness then took three sealed and bearing identical label jars of said food articles each weighing 200 grams and divided it into 3 equal parts by count i.e. each part consists of one jar of 200 grams. He then put these 3 jars into 3 clean, dry and empty polythene bags and sealed them on candle heat. Then tied by thread horizontally and vertically and sealed by means of sealing wax. Then he pasted sample labels bearing

details of parts by means of gum. Each part was then wrapped in separate brown paper and its open ends were folded in neatly inside and pasted by means of gum. Then a paper slip issued and signed by LHA & MOH, PMC, Pune were pasted around each part from bottom to top by means of gum. Accused no.1 and panch witness signed all parts. Each part was then tied by thread horizontally and vertically and sealed by sealing wax at 4 places. He recorded panchanama which was signed by him, accused no.1 and panchas. On 31st August, 1999 the sealed part of the said sample alongwith original copy of form vii and covering letter under Rule 17 in a sealed packet to P.A. Pune for analysis. He also sent copy of form vii and specimen impression of seal used to seal the said sample in a sealed packet alongwith covering letter to P.A. Pune and MOH, PMC, Pune and copy of specimen impression of seal in a sealed packet to LHA, Pune. He also forwarded intimation letter under Section 11(1)(c)(i) to LHA by hand delivery intimating about sending one part of sample to P.A. Pune. On 31st August, 1999 he forwarded a letter along with form no.6 dated 30th August, 1999 to accused no.6. It was revealed that accused nos.4 and 5 are partners of accused no.6. Accused no.4 disclosed that he purchased the said food article from accused no.7. On 1st November, 1999, he received report from P.A.

through LHA, Pune. In the said report, it was opined that the food articles contents protein and iron contains less than that declared on label. The witness collected the information of witness nos.1 to 3 from PMC, Pune. As per the information, accused nos.1 and 2 were partners of accused no.3. On 2nd December, 1999 he sent letter to licencing authority FDA Kolhapur to collect information of accused no.6. He visited the firm M/s. Shah & Associates Kolhapur to collect information. It was revealed that accused nos.4 to 6 sold the said food article to accused no.3. Accused no.6 purchased the said food articles from accused no.7, who is the manufacturer of the said food articles. It was revealed that accused no.7 sold the said food article to accused no.6 and the accused no.7 is holding licence under PFA Act for manufacturing of the said food articles. On 31st December, 1999, the witness submitted all documents along with covering letter proforma "A" to Joint Commissioner, FDA, Pune through Assistant Commissioner (Food) FDA, Pune vide letter dated 30th April, 2000. the consent order bears signature of Joint Commissioner, FDA, Pune. The witness filed a complaint on 20th June, 2000. He sent a letter to LHA, PMC, Pune intimating them about the prosecution and taking action under Section 13(2) of PFA Act read with Rule 9-B and requesting him to send a copy of

P.A. report to all the accused.

5 P.W.2 deposed that he is working as MOH, PMC and LHA under the PFA Act for the jurisdiction of PMC area. On 31st August, 1999 he received a letter of intimation along with two counter parts of the food sample. He received a separate letter along with two specimen impression of seal on two separate papers. He received P.A. report. On 30th October, 1999 they forwarded the P.A. report to Mr. Chougule. On 20th June, 2000 Mr. Chougule intimated him that he has filed prosecution against seven parties. On 26th June, 2000, the witness intimated all the seven parties by separate letter regarding prosecution against them. P.W.3 was examined as a panch witness. However, he did not support the prosecution case and declared hostile. However, he admitted his signature on panchanam Exhibit-34.

6 The trial Court after recording the evidence and hearing both the parties delivered the impugned judgment of acquittal. The trial Court has primarily held non-compliance of procedural safeguard by the authorities with regard to the seizure of article. The trial Court also observed that taking into consideration the facts/reasons and the evidence put forth on

record by the complainant, the prosecution has failed to prove the charge levelled against the accused and, hence, they were acquitted.

7 The learned APP Mr. Sait has submitted that the trial Court has committed an error of acquitting the accused. He submitted that the evidence on record was sufficient to prove the charge against the accused and, therefore, the trial Court ought not to have acquitted them. He submitted that the defence was silent while cross-examining the witness qua the compliance of procedural safeguards and has not been able to demolish the prosecution case. He further submitted that the trial Court had erred in coming to the conclusion that prosecution has failed to prove the charges levelled against the respondent – accused. He submitted that the finding of the trial Court about non-compliance of Rules 14 and 15 of PFA Rules is contrary to the record. The trial Court has committed an error in coming to the conclusion that there is breach on the part of the complainant about the mandatory provisions under Rule 16(d) of PFA Rules, 1955. He submitted that all the requisite procedural safeguards were complied with. The report of the public analysis supports the prosecution case and hence, the prosecution has established

the charges levelled against the accused. He, therefore, submitted that the decision of the trial Court is contrary to law. This Court should interfere and set aside the impugned judgment and order.

8 The defence had contended before the trial Court that the complainant did not follow the legal procedure while the complainant purchased three jars each weighing 200 grams of B-Protein chocolate flavour (Protein food Beverages). The complainant has deposed that he put these three jars into three parts and each part consisting one jar and the said three jars were kept separately into the dry, clean and empty polythene bags, those were closed by candle heat. The trial Court has observed that the said statement of the complainant indicates that he used plastic bag as a container while making sample part. The accused had contended that the plastic container i.e. plastic bag is not at all suitable container as defined under Rule 14 of the PFA Rules, 1955 and there is likelihood of tampering with the same. It was also contended that the the container being plastic bag it is open secret that lak seal cannot be put on it. The complainant has closed the mouth of alleged container/plastic bag by heat of candle and no lak seals were put as required under

Rule 14 of the PFA Rules. The defence had relied upon the decision of this Court delivered in the case of ***State of Maharashtra Vs. Prabhudas Atalmal Baktani***¹. In the said decision it was observed that contravention of taking the sample in plastic paper in violation of Rule 14 and that by itself is fatal to the prosecution. As sample should be required to sent to P.A. in dry and clean container and it is not contemplated that the sample should be sent in a plastic bag which can easily be tamper with. The accused also relied upon Ruling in the case of ***Bhojuml Dhanuml Kundal & Anr. Vs. Shirpur Warwad Municipal Council, Shirpur and Anr***². In the said decision, it was observed that compliance of Rule 14 is mandatory and non-compliance will vitiate the prosecution. In the light of the aforesaid vital aspects and the judicial pronouncement referred to above, the trial Court observed that the complainant did not follow the mandatory provisions under Rule 14 of the PFA Rule, 1955. I do not find any infirmity in the approach of the trial Court since it is apparent that there was violation of Rule 14 as stated hereinabove.

9 The trial Court further observed that in the evidence, the complainant has deposed that *"Then I pasted sample labels*

1 1986(3) PFA Cases Page 221

2 1986 Cri.L.J.931

bearing details of said sample and LHA Slip No.PMC(ii) Sr.No.000115 on all 3 sample parts by means of gum". In the light of the said deposition, the trial Court observed that the complainant pasted label on the container i.e. plastic bag and not on each part of so purchased jar. In fact, the complainant was duty bound to paste the alleged label on so purchased jar itself. The evidence does not disclosed that all the particulars/details alleged to be shown on the said label. The accused in support of the said contention relied upon the ruling reported in 1986(I) PFA Cases Page 55. In the said decision this Court has observed that *"All bottles or jars or other containers containing samples for analysis shall be properly labelled and the parcels shall be properly addressed"*. Such procedure was not accepted which mean the breach of Rule 17 inasmuch as the sample memo, in form VII were not sent to the Public Analyst in a sealed cover. The trial Court further observed that Exhibit 40 is a letter of complainant addressed to LHA & MOH, but this is only designation and no specific place i.e. city of the said officer or place of local area of the said officer where the said officer is placed is mentioned. P.W. Dr. Rawetkar and P.W.1 have not identified the signature on Exhibit 40 to 42 made on behalf of LHA Office, Pune. With regard to receipt of articles shown in

letter under reference. The trial Court therefore observed that the complainant has not at all properly followed Rule 15 of PFA Rules, 1955.

10 The trial Court observed that Exhibit - 42 is a letter of complainant addressed to LHA under Section 11(1)(c)(i) of PFA Act, 1954 i.e. intimation to LHA. It shows compliance under Section 11(1)(C)(i) of PFA Act about the alleged sample drawn on 31st August, 1999. The trial Court noted that the sample in question was taken by the complainant on 30th August, 1999 and not on 31st August, 1999. Hence, the alleged compliance under Section 11(1)(c)(i) of PFA Act is not at all of sample drawn on 30th August, 1999. With regard to the said infirmity, the accused had relied upon the judgment of this Court in the case of ***State of Maharashtra Vs. Raghunath Hindurao Gajbar***³. In the said decision, it was observed that compliance of the provision regarding information to local Health Authority is mandatory. The Court held that once the legislature prescribes such manner, the same has got to be observed strictly by the person who has been entrusted with the duty of implementation of the law by paying attention to each of the mandatory requirements prescribed by

3 1984(I) PFA Cases Page 226.

the law. The legislature has not made the provisions for intimation to Local Authority of certain facts an empty formality. The trial Court, therefore, observed that there is non-compliance of the provisions laid down under Section 11(1)(c)(i) of the PFA Act.

11 The trial Court further observed that the copy of purchase bill Exhibit-64 shows that the food articles shown therein were purchased by respondent no.3 from accused no.6 on 31st August, 1999. According to the complainant the sample was taken on 30th August, 1999. Therefore the fact that the food article shown in Exhibit-64 is dated 31st August, 1999. It is implicit that it does not relate to the seizure dated 30th August, 1999. Thus, the accused have no concern with the alleged food article. The complainant's case that the accused no.7 supplied food article to the accused no.6. Accused nos. 4 to 6 have no concern with the article in question, and, therefore, the trial Court inferred that the accused no.7 has also no any concerned with the alleged food article of which sample was drawn.

12 The trial Court further held that the panchanama Exhibit-34 shows that the sample parts were tied by thread

horizontally - vertically. Panchanama does not disclose that sample part was tied above and across within the meaning of Rule 16(d) of PFA Rules 1995. For the said purpose the learned advocate for the accused relied upon the ruling in the case of ***The State of Assam Vs. Sri Nath Mal Goenka & Anr.***⁴ In the said decision, it was observed by Gauhati High Court that compliance of Rule 16 is mandatory. A very strict liability has been created by the Act. It is imperative that the sample taken from the vendor reaches intact and elaborate procedure and manner of packing and selling is complied with.

13 If a container is secured by means of strong twin or thread not “above and across” but “above or across”, it might be possible even while keeping the knot of the twine or thread intact, to remove the same, replace the contents, and put back the the thread in its original position which may not be possible because in a case that where a container is secured by means of twine or thread. It was further observed that this is a important safeguard given to the citizens against any possibility of mischief against them and the same cannot be allowed to be tressed lightly or whittled down by treating the same as directory. The

4 1990(2) PFA Case Page 174

requirements of Rule 16, more particularly clause (d) thereof, have to be held to be mandatory. The trial Court, therefore, held that there is a breach of Rule 16(d) of the PFA Rule.

14 The trial Court further observed that in the P.A. report the protein percentage by weight is shown as 14.06. It does not show the actual weight of the protein found in the sample. The report does not make it clear which process of analysis had been used. Therefore, the facts mentioned in the P.A. report cannot be relied upon. The reference was made to the decision of ***State of M.P. Vs. Ganeshram***⁵. In the said decision, it was observed that in the absence of factual data or reasons for arriving at the conclusion, the P.A. report has been held vague. It was not the responsibility of the respondent accused to summons the P.A. and obtain the factual data. The burden lies upon the appellant State which they have failed to discharge. The report of the P.A. can be admitted in evidence without examining the P.A. himself but the opinion contained in the report is neither conclusive nor binding unless the conclusion is based on sufficient data so that the Court can itself consider the correctness thereof. It was further observed that in the said case,

5 1984(I) PFA Cases Page 307

the Sessions Court has held that though the percentage of serious components had been stated, the weight on the basis of which the percentage is arrived at is not stated. The leaned advocate for the accused also relied upon the decision of this Court in the case of ***State of Maharashtra Vs. Baburao Daga Suryavanshi***⁶ in support of the aforesaid issue. In the said decision, it is observed that the process employed for analysis was not clarified which has resulted in acquittal which has to be sustained.

15 The trial Court also made reference to the fact tht from the P.A. report Exhibit-54, it is apparent that there are different sources of protein. The defence has placed reliance upon the Book of Nutrition and Food Processing by H.G. Muller and G. Tobin. The relevant extract from, book was quoted. The trial Court, therefore, observed that there are different source of protein and hence, the different factors have to be applied for arriving at proper conclusion about quantity of protein in a food article. In the present case, the P.A. has not shown which factors had been used for coming to alleged conclusion. The P.A. has not quoted in his report the multiplying factor used for estimation of protein contents. The trial Court further recorded in paragraph

13 of the judgment that the complainant has not followed the mandatory provisions of Rules 17 and 18 of PFA Rules, 1955. It was observed that P.W.2 has admitted that P.A. report had been received after the period of 40 days. P.A. was not examined by the prosecution to explain the discrepancies and, therefore, P.A. report is not trustworthy. In paragraph 14 of the judgment, it was observed that Exhibit - 115 is intimation of filing complaint to the accused given by LHA. The said intimation undertakes that the sample was collected on 31st August, 1999. It is the case of the complainant that the sample in question was taken on 30th August, 1999. Therefore, there is no intimation given to the accused with regard to the sample dated 30th August, 1999 mentioned in Exhibit-1 i.e. complaint. The consent letter to prosecute the accused at Exhibit - 91 also indicates that on 31st August, 1999 vide Article in question was supplied by accused nos. 6 to accused no.3 although it is the case of the complainant that the sample was taken on 30th August, 1999. In the light of all these infirmities, the trial Court has observed that the prosecution has failed to prove the charge levelled against the accused and, therefore, acquitted the said accused.

documentary evidence adduced by the prosecution. The infirmities as observed by the trial Court vitiates the prosecution. I am of the view that the trial Court has taken a possible view which does not require any interference. Apparently, there is non-compliance of the Rules 14, 15 and 16 as stated hereinabove. The prosecution has, therefore, failed to establish the charge against the accused. The reasoning of the trial Court is supported by various decisions of this Court as well as the other Courts which are referred to in the judgment by the trial Court and hence, I am of the view that the trial Court has rightly acquitted the accused.

17 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Appeal No.968 of 2002 is dismissed;
- (ii) No order as to costs.

(PRAKASH D. NAIK, J.)