

Sarnobat

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

CRIMINAL REVISION APPLICATION NO. 137 OF 2002.

Kantilal Valaji Mali,)
an adult, Indian Inhabitant,)
Occupation : Business,)
residing at 401, Rasta Peth, Pune-11.) ... Applicant/original
accused.

Vs.

1. Mansingrao Nivrutti Torse,)
(As per Court's order abated))
Joint Commissioner, (Pune Division))
Food and Drug Administration,)
791/93, Lucky Building,)
New Guruwar Peth, Pune-42.)

2. State of Maharashtra,)
(Through Government Pleader,)
Criminal Appellate Side, High Court,))
Bombay.)) ... Respondents.

Mr. Kirti M. Parekh, for the Applicant.
Mr. S. S. Hulke, APP for the Respondent/State.

CORAM : SARANG V. KOTWAL, J.

DATE : OCTOBER 24, 2018.

JUDGMENT :

1. By way of this Criminal Revision Application the applicant is challenging the judgment and order dated 26th March, 2002 passed by 4th Additional Sessions Judge, Pune in Criminal Appeal No. 181 of 1997, whereby the judgment and order dated 17th October, 1997

passed by Chief Judicial Magistrate, Pune in RCC No. 94 of 1996 was confirmed and the Appeal was dismissed. The applicant was convicted by the Chief Judicial Magistrate, Pune for contravention of Section 7(i) r/w Section 2(ia) (a), 2(ia) (m) punishable under Section 16 of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the said Act). The Chief Judicial Magistrate had sentenced the applicant to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for one month. The 4th Additional Sessions Judge, Pune by the impugned judgment and order had upheld the judgment and order passed by the Trial Court and had dismissed the Appeal.

2. During the pendency of the present revision application, the original Respondent No. 1 Mansingrao Nivrutti Torse was reported to be dead and therefore, by the order dated 24th June, 2004 passed by this Court, the original Respondent No. 1 Mansingrao Torse was substituted by Joint Commissioner (Pune Division) Food and Drugs Administration.

3. The prosecution was launched by the original Respondent No. 1 against the revision applicant under the aforementioned Sections. The complaint was filed by the original Respondent No. 1 on 17th October, 1996 before the Court of Chief Judicial Magistrate, Pune.

According to the averments in the complaint, the the original Respondent No. 1 was Food Inspector appointed under Section 9 of the said Act. The applicant was owner and proprietor of the firm named and styled as Laxmi Sweet Centre, situated at 501, Rasta Peth, Pune-11. On 11th January, 1996 at about 4.00 pm., the original Respondent No. 1, along with one Madanlal Jain and sampling assistant Mr. S. B. Alhat visited the applicant's premises. The original Respondent disclosed his identity as the Food Inspector. The original Respondent No. 1 demanded and purchased 750 grams Shrikhand for test analysis and paid Rs.39/- for the same. The applicant gave him the food sample in a clean plastic mug. The original Respondent No. 1 gave the applicant notice in form No. VI under Section 14-A under the said Act. The 750 grams of Shrikhand was divided in 3 equal parts and each of the parts was kept separately in 3 clean and dry empty glass bottles. 20 drops of formalin were added as preservative in each of the bottles. The bottles were properly closed and sealed. Labels were pasted on the bottles and those bottles were kept in three different brown paper packets which were sealed with paper slips signed by the applicant, original Respondent No. 1 and the witness. Memo of the events was prepared. On 12th January, 1996. The original Respondent No. 1 sent one sealed sample to Public Analyst, Public Health Laboratory Pune -1. The two remaining samples were sent to Local Health Authority (LHA),

Municipal Corporation, Pune by hand delivery. The original Respondent No. 1 received a letter dated 22nd February, 1996 from the Local Health Authority along with the report dated 9th February, 1996 of the Public Analyst. The report shows that the sample contained milk fats in the quantity of 5.5 % which was less than the prescribed limit of 8.5 % and therefore, the sample was not in conformity with the prescribed norms.

4. The original Respondent No. 1 then sent all the papers to the Joint Commissioner, Senior Division Food and Drugs Administration Maharashtra State, for obtaining consent to lodge the prosecution as required under Section 20 of the said Act. The consent was given vide memo dated 3rd September, 1996. Thereafter, the complaint was filed on 17th October, 1996.

5. After the complaint was filed, as per the prosecution case, the Local Health Authority (LHA) vide letter dated 24th October, 1996 intimated to the applicant that the prosecution was launched against him and he had a right to get the remaining samples tested from Central Food Laboratory.

6. In due course, the cognizance of the offence was taken by the learned Chief Judicial Magistrate, Pune. The prosecution examined PW 1 Torase- the original Respondent No.1 Food Inspector who had launched the prosecution and who had collected the samples. PW 2 Dr. Anil Moreshwar Rawetkar was examined as the Local Authority and

PW 3 Madanlal Anaraj Jain, was the Panch who was present when the samples were drawn. All the three witnesses were cross examined. The Trial court found that there was sufficient evidence for framing of the charge and accordingly the charges were framed on 28th April, 1997 under the aforementioned Sections of the said Act. The applicant denied all the charges against him.

7. P.W. 1-Torase original Respondent No.1 in his deposition stated that he was appointed as Food Inspector under Section 9 of the said act. He produced Government notification showing his appointment for the area. He has further deposed about the drawing of the samples on 11th January, 1996 at about 4.00 pm. from the shop of the applicant. In his deposition he has described as to how he visited the applicant's shop, how he gave him the requisite notice under the said Act and how he drew three samples from 750 grams of Shrikhand and filled them in separate clean bottles and kept them in three different brown papers. He has deposed that 20 drops of formalin were added as preservative in each of the bottles. He has deposed about the drawing of the memorandum panchanama which is produced on record at Exhibit 20. PW 1 has further deposed about the sending of the samples to the Public Analyst. The intimation given to Local Health Authority is at Exhibit 26. One sample was sent to Public Analyst on 12th January, 1996 and remaining two samples were sent to Local

Health Authority. He has further deposed that he received a letter dated 4th March, 1996 from Assistant Commissioner along with letter dated 22nd February, 1996 of Local Health Authority (LHA) and PA report dated 9th February, 1996.

8. PW 1 has further deposed that on 10th March, 1996 he sent letter to the applicant calling for the information about the firm Laxmi Sweet Centre. On 16th April, 1996 he sent a letter to LHA regarding improvement of the firm Laxmi Sweet Centre. Thereafter, he received information from LHA in respect of the firm of the applicant. After collecting all these documents, PW 1 submitted original papers to Joint Commissioner, FDA , Pune. for obtaining consent. Thereafter, he received a letter dated 3rd September, 1996 along with consent order. The consent order dated 30th August, 1996 is produced on record at Exhibit 38. After receiving the consent order, on 17th October, 1996, he launched prosecution by filing the complaint. PW 1 thereafter, requested the LHA to take steps under Section 13(2) of the said act. LHA in turn informed the original Respondent No.1 vide letter dated 24th October, 1996 that the launching of the prosecution was informed to the applicant. In the cross examination, he admitted that he himself did not wash the mug in which the Shrikhand was taken by the applicant. The applicant himself had cleaned that mug. PW 1 has further admitted that the bottles in which the samples were taken were provided by the

store department of their office. PW 1 was unable to say as to when these bottles were washed or cleaned.

9. PW 2 Dr. Anil Rawetkar was examined as the Local Health Authority (LHA) working with Pune Municipal Corporation. He has deposed about his authority and has produced documents showing that he was working in that area. He has deposed that on 12th January, 1996 he received a letter of intimation from PW 1 along with two samples. On 9th February, 1996 he received a report from the Public Analyst. The said report is produced on record at Exhibit 54. On 22nd February, 1996 a letter was sent to the PW 1 along with the report of P.A. On 18th October, 1996 he was informed by PW 1 that the prosecution was launched against the applicant. He has deposed that, on 24th October, 1996 he informed the applicant regarding the prosecution against him. He has further deposed that he sent one copy of P.A. report along with the letter. Office copy of that letter is produced on record at Exhibit 57. He was cross examined mainly on the point of his authority and capacity as local health authority. Apart from that there is not much cross examination of this witness.

10. PW 3 Madanlal Jain was a panch witness who was present in the shop of the applicant on 11th January, 1996 when the samples were drawn by PW 1. He has deposed that the samples were poured in three bottles. The bottles were sealed and panchanama was

prepared which is produced on record at Exhibit 20. He has not deposed that those bottles were kept in brown paper envelopes and those envelopes were tied and sealed. In the cross examination he has deposed that the spoon used for taking sample of Shrikhand was washed and cleaned. He has further deposed that the bottles were washed at the spot. He has further deposed that all the three bottles were filled from the pot of the vendor.

11. The Public Analyst's report dated 09th February, 1996 shows that the total solids were 62.2 %, milk fat was 5.5 %, milk protein was 11.3% , sugar was 57.8 % , titrable acidity was 1.8 %, total ash was 0.7% and the synthetic colour was absent. Section 23 of the said Act empowers the Central Government to make Rules in respect of food articles and consequently the Prevention of Food Adulteration Rules, 1955 are framed. Rule 5 provides for standards of quality of the various articles of food and separate articles are mentioned in Appendices B, C and D. Item A.11 in Appendix B provides specifications for milk and milk products. Item A.11.02.16.01 provides specification and definition of Shrikhand. Shrikhand is defined to mean as follows;

“Shrikhand means the product obtained from Chakka or skimmed milk Chakka to which milk fat is added. It may contain fruit, nuts, sugar, cardamom,

saffron and other spices. It is provided that it should not contain any added colouring and artificial flavouring substances.”

The specifications mentioned are as follows ;

(i) Total solids should not less than 58 per cent, milk fat should not be less than 8.5 per cent, milk protein should not be less than 9 per cent, titrable acidity should not be more than 1.4 per cent, sugar should not be more than 72.5 per cent and total ash should not be more than 0.9 per cent. Considering the Public Analyst's report in the instant case with these specification, it is seen that only one parameter regarding milk fats does not conform with the specifications. The milk fats were 5.5 % whereas as per the requirement they should not be more than 8.5 per cent. Rest of the parameters were within the required specifications.

12. The Chief Judicial Magistrate after narrating the facts has referred to the judgments cited before him on behalf of the applicant. He has observed that the panch witness has deposed that the samples were taken in dry and clean bottles and therefore, there was no lapse on the part of the PW 1 in following the procedure. It is further

observed that the applicant had not moved any application under Section 13(2) of the said Act and therefore, no prejudice was caused to him. Finally relying on the Public Analyst's report, the learned Chief Judicial Magistrate came to the conclusion that the offence was sufficiently proved and therefore, had convicted and sentenced the applicant.

13. The IVth Additional Sessions Judge, Pune in his judgment had accepted the reasoning of the Trial Court. The learned Additional Sessions Judge specifically observed that in the complaint it was mentioned that the accused himself gave the required quantity of sample. Therefore, the prosecution had proved that the samples were homogeneous. He has further observed that it was mentioned in the complaint that the samples were taken in dry and empty glass bottles. He emphasized that PW 1 in his examination has deposed that mug from which Shrikhand was taken was clean. He has further observed that though there was delay of nine months in lodging the complaint, the appellant did not make any application before the Court for sending the samples to the Central Food Laboratory and therefore, prejudice was caused to him. It is further observed that 20 drops each of formalin were added to the three samples as preservative and therefore, it could not be presumed that the samples were not preserved properly. Based on this reasoning, the Appellate Court dismissed the Appeal and

confirmed the order of the Trial Court.

14. I have heard Shri Parekh for the revisional applicant and Shri Hulke, the learned APP for the Respondents. With their assistance I have read the evidence and I have gone through the entire record and proceedings.

15. Shri Parekh submitted that, though there are concurrent judgments and orders against the applicant by both Courts below convicting and sentencing the applicant, procedure followed by PW 1- original Respondent No. 1 was not in conformity with the requirements of the said Act. He further submitted that the pancha's evidence was not consistent with PW 1's evidence. Shri Parekh submitted that there was inordinate delay in launching the prosecution. He further submitted that the said Act confers a valuable right on the accused under Section 13(2) of the said Act which is infringed. He submitted that the samples were not drawn in dry and clean bottles. Shri Parekh lastly submitted that Shrikhand was not stirred and was not homogeneous when samples were drawn and therefore, on the basis of the settled legal principles the accused/applicant deserves to be acquitted.

16. On the other hand, Shri Hulke for the Respondents submitted that, all the procedural requirements were scrupulously followed by the original Respondent No. 1 in drawing and sending the samples. He submitted that though the prosecution was launched after

more than six months, after receiving the PA report, no prejudice is caused to the applicant. He further submitted that since the applicant had not availed of his rights under Section 13(2) of the said Act it cannot be said that any prejudice was caused to him. He therefore, submitted that this is not a case for calling any interference.

17. To appreciate the submissions of the parties, it is necessary to refer to certain provisions of the said Act. The main argument of Shri Parekh is in respect of Section 13 sub Section 2 of the said Act which reads thus ;

13(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the persons from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.”

18. Shri Parekh therefore, submitted that this Section confers a valuable right on the accused and the Local Health Authority is duty bound to comply with it strictly. He has relied on the judgment of the Hon'ble Supreme Court in the case of **Municipal Corporation of Delhi Vs. Ghisa Ram**¹ Paragraph 7 and 8 of the said judgment read thus;-

(7) It appears to us that when a valuable right is conferred by S.13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public analyst, even though that report continues to be evidence in the case of the facts contained therein.

1 AIR 1967 S.C. 970.

(8) We are not to be understood as laying down that, in every case where the right of the vendor to have his sample tested by the Director of the Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the Public Analyst. We consider that the principle must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible."

19. Shri Parekh therefore, submits in the instant case there is clear violation of mandatory provisions of Section 13(2) and therefore, the applicant deserves to be acquitted.

20. Shri Hulke on the other hand, submitted that the right under Section 13(2) of the said Act is not an absolute right. He submitted that if the accused does not choose to make any application before the Court for sending remaining samples to the Central Food Laboratory, it cannot be said that any prejudice is caused to him. For this proposition he has relied on the following judgments of Hon'ble Supreme Court; i) **Babu Lal Hargovindas Vs. The State of Gujarat** ¹ , ii) **Ajit Prasad Ramkishan Singh Vs. The State of Maharashtra** ²

Ajit Prasad Singh (Supra) relies on Babu Lal Hargovindas's

1 1971 (1) S.C. Cases 767.

2 (1972) 2 S.C. Cases 180.

case (Supra). Paragraph 6 of Babu Lal Hargovindas's case reads thus:-

“ 6. There is also in our view no justification for holding that the accused had no opportunity for sending the sample in his custody to the Director Central Food Laboratory under Section 13(2) because he made no application to the Court for sending it. It does not avail him at this stage to say that over four months had elapsed from the time the samples were taken to the time when the complaint was filed and consequently the sample had deteriorated and could not be analysed. The decision of this Court in *Municipal Corporation of Delhi V. Ghisa Ram*, has no application to the facts of this case. In that case the sample of the vendor had in fact been sent to the Director of the Central Food Laboratory on his application but the Director had reported that the sample had become highly decomposed and could not be analysed. It is also evident from that case that the Food Inspector had not taken the precaution of adding the preservative. It appears from page 120 of the report that the elementary precaution of adding preservative to the sample which was given to the Respondent should necessarily have been taken by the Food Inspector, that if such precaution had been taken, the sample with the Respondent would have been available for analysis by the Director of this Central Food Laboratory and since the valuable right given to the vendor by Section 13(2) could not be availed of, the conviction was bad. No such defence is available to the appellant in this case because not only is there evidence that the preservative formalin was added but the appellant had

not even made an application to send the sample to the Director of Central Food Laboratory.”

21. Therefore, the crucial question remains as to what is the impact of Section 13(2) on the present case. The evidence shows that PW 2 has deposed in his deposition that on 24th October, 1996 he informed the applicant regarding the prosecution against him and has further deposed that he sent one copy of PA report. Office copy of that letter is produced at Exhibit 57. It shows the date as 24th October, 1996 and bears the outward number. However, Exhibit 57 is an office copy of the letter. There is no evidence to show how this letter was dispatched. It is not the case of the prosecution that the applicant was intimated personally by PW 2. No acknowledgment regarding receipt of this letter is produced on record. PW 2 has not even deposed that he had received any acknowledgment from the applicant in token of having received the said letter. No evidence is led to show who had dispatched this letter or if anybody had indeed posted this letter. Therefore, there is no cogent evidence on record to conclude that the intimation along with CA report was actually sent to the applicant as per the requirements of the law.

22. In this view of the matter, I am inclined to agree with Shri Parekh that there is violation of the mandatory provision of Section

13(2) of the said Act, though, the applicant had not made any application before the Trial Court to get the samples examined by the Central Food Laboratory. In this context rule 9-(B) also assumes importance which reads thus :-

“ 9-(B) Local (Health) Authority to send report to person concerned – The Local (Health) Authority shall [within a period of 10 days] after the institution of prosecution forward a copy of the report of the result of analysis in Form III delivered to him under sub-rule (3) of rule 7, by registered post or by hand, as may be appropriate, to the person from whom the sample of the article was taken by the Food Inspector, and simultaneously also to the person, if any, whose name, address and other particulars have been disclosed under Section 14-A of the Act.

Provided that where the sample conforms to the provisions of the Act or the rules made thereunder and no prosecution is intended under sub-section (2), or no action is intended under sub-section (2-E) of section 13 of the Act, the Local (Health) Authority shall intimate the result to the vendor from whom the sample has been taken and also to the person, whose name, address and other particulars have been disclosed under section 14-A of the Act, within 10 days from the receipt of the report from the Public Analyst.”

In the instant case PW 2 has not deposed that letter at Exh. 57 was sent by Registered Post or by hand delivery.

23. Shri Parekh further submitted that the Shrikhand was not stirred and was not made homogeneous before the samples were drawn and therefore, the analysis of the samples would not have shown the correct and actual parameters of the Shrikhand which was sold by the applicant. He submitted that on this point also the applicant deserves to be acquitted. In support of his contention he has relied on the judgment of Division Bench of this court in the case of **Nagpur Municipal Corporation Vs. Ram Prasad** ¹. It is observed in the said judgment that in the panchanama of that case it was not mentioned that before taking the samples, the Ghee was stirred and therefore, the sample was not homogeneous or was not of representative character. In that case benefit of doubt was given to the accused and he was acquitted. In the present case though the complaint mentions that Shrikhand was stirred before samples were drawn, in none of the depositions of the witnesses such fact is mentioned. Thus the absence of substantive evidence in that behalf means that the prosecution has failed to prove that the samples were drawn after the Shrikhand was stirred. Therefore, in the instant case it cannot be said that the samples were of homogeneous nature or were of representative character of the

¹ 1998 FAC, 41.

product.

24. Shri Parekh thereafter contended that the bottles in which the samples were kept, were not washed and cleaned. In that behalf though in the cross examination, the panch witness PW 3 has stated that the bottles were washed at the spot itself, PW 1 himself has categorically deposed that the bottles were supplied by store department of his office and he was not aware as to when they were washed. Thus, taking into consideration the evidence of PW 1 the Food Inspector it is clear that the prosecution has failed to prove that the samples were taken in dry and clean containers as required under Rule 14 of the said rules, which reads thus :-

14. Manner of sending samples for analysis -

Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed.”

25. Shri Parekh relied on the judgment of this Court in the case of **State of Maharashtra Vs. Madhukar B. Dharne & another;**¹ The paragraph 4 and 5 of this judgment read thus :-

“4. Perusal of the evidence of P.W. 2 shows

¹ Cri.Appeal No.228/1997
decided on March 3, 2009.

that he has not stated that he himself cleaned the bottles. He has not disclosed as to who cleaned the bottles. The person who cleaned the bottles has not been examined.

5. In the circumstances, this was a case where compliance with the Rule 14 of the said Rules of 1955 was not proved. In view of the law laid down by this Court in the case of State of Maharashtra Vs. Ram Murat Dube in Criminal Appeal No. 98 of 1976 decided on 15th April, 1977, the order of conviction could not have been passed by the learned Magistrate.”

Ratio of this judgment is applicable to the present case.

26. The Food Inspector i.e. PW 1 in his cross examination has deposed that the sample of 750 grams Shrikhand was kept on butter paper and thereafter, three samples were drawn by dividing it 3 equal parts and were and kept in three bottles. The panch has not deposed on the similar lines. He has deposed that samples were directly put in three different bottles. In my opinion even this is a significant discrepancy in the evidence of main prosecution witnesses. The prosecution has to prove that the samples were drawn properly by following all the requirements of law with care and caution. In the instant case there is no consistent evidence led by the prosecution in that behalf.

27. Both the courts below have not taken these crucial aspects

into consideration in their proper perspective. In my opinion their approach and reasoning were not correct. Therefore, the revision deserves to be allowed. Hence, the following order;

ORDER

- i) The Criminal Revision Application is allowed.
- ii) The Rule is made absolute in terms of prayer clause (a).
- iii) The applicant is acquitted of the charges framed
against him.
- iv) The applicant is on bail. His bail bonds shall stand
discharged.

[SARANG V. KOTWAL,J.]