

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION
CRIMINAL APPEAL NO. 1036 OF 2002**

The State of Maharashtra)
At the instance of)
Shri O. S. Sadhwani, Drug Inspector,)
Food & Drugs Administration (M.S.))
Pen – Raigad) ..Appellant
Vs.

1. Laxmichand Nagaji Jain)
R/o, 301, Yash Co-operative Housing)
Society, S. N. Road, Andheri (E))
Mumbai 400 069)

Partner of M/s Esject Products)
W – 185 (D), MIDC Taloja,)
Tal- Panvel, Dist Raigad)

2. Jeetendra Nagaji jain)
R/o, 1, Ji Kalpita Enclare Co-op Hsg)
Society, S. N. Road, Andheri (E))
Mumbai 400 069)

Partner of M/s Esject Products)

3. Chaburao Sampatrao Nagre)
R/o A/p Navada, Tal – Panvel,)
Dist. Raigad)

Approved Manufacturing Chemist)
of M/s Esject Products)

4. Sampatrao Narayan Chavan)
R/o 64, B/6, Sainath Chowk,)
Takhaward, Kurla (W),)
Bombay 400 070)

5. M/s Esject Products)
W-185, (D), MIDC Taloja,)
Tal Panvel, Dist Raigad)

..Respondents
(org. Accused Nos.1 to 5)

Ms Anamika Malhthora APP for Appellant
Ms Triveni Jani appointed as Amicus Curaie

CORAM : K.R.SHRIRAM, J.
DATE : 13th JANUARY, 2020

ORAL JUDGMENT:

1 At the outset, since respondents were not represented, this court appointed Ms Triveni Jani as Amicus Curaie. I have to note Ms Triveni Jani was of immense assistance.

2 The State of Maharashtra is impugning in this Appeal an order and judgment dated 19-6-2002, by which the Learned Judicial Magistrate First Class, Panvel, acquitted four respondents of offence punishable under Section 18(a)(i) read with Section 16(1)(a) of Drugs and Cosmetics Act 1940 (the said Act) punishable under Section 27(d) of the said Act.

3 It is the case of prosecution that on 17-10-1995, Drugs Inspector Pushpahas Mukand Balal (PW.-3), who was the Investigating officer, visited the premises of M/s Agarwal Medical Stores at Post Bapera Tal Tamsar, District Bhandara and drew samples of ESCOL suspension, Batch No.31794, manufacturing date September 1994, expiry dated September 1996, manufactured by Esjeet Products, i.e., respondent no.5, and sent one portion of the sealed sample to the Government Analyst for analysis. The analyst submitted his report on 1-3-1995 to the effect that sample was not of standard quality. On receipt of the report, the Investigating Officer

carried further investigation and finally arrived at the door step of respondent no.5. Respondent nos.1 and 2 are the partners of respondent no.5. Respondent nos.3 and 4 are the employees of respondent no.5. On conclusion of investigation, the Inspector Mr. Sadhwani, who took over the investigation lodged a complaint against respondents. Three witnesses were examined before framing of charge. Thereafter, charge was framed and all respondents pleaded not guilty and claimed to be tried.

4 To drive home their charge, prosecution examined 6 witnesses. Omprakash Shobraj Sadhwani (P.W.-1) is complainant and also the Investigating Officer; Drug Inspector Pushpahas Mukund Balal (P.W.-2) who is also Investigating Officer; (P.W.-3) Prabhakar Daji Pilankar is the Government Analyst who has analysed the drug in question; (P.W.-4) Trimbaklall Murarjibhai Sonchhatra; (P.W.-5) Praveen Amratlal Shah one of the partners of Shah Pharma; (P.W.-6) Nareshkumar Mahadevprasad Agarwal, Proprietor of Agarwal Medical Stores.

5 Section 18 of the said Act prohibits any person from offering, stocking or exhibiting for sale any drug which is not of standard quality or any misbranded drug. In other words, all that the prosecution is required to prove in order to establish contravention of Section 18 is the fact that the accused had sold or exhibited a drug which was not of standard quality or which was a misbranded drug.

6 In this matter, we need not go into details. Prosecution has

entirely relied on a report issued by Dr. Pilankar, the Government Analyst, in which Dr. Pilankar has opined that, (a) the sample is not of standard quality as defined in the said Act and Rules thereunder, (b) the sample does not comply with I. P test for polymorph A, (c) Content of Chloramphenicol has chloramphenicol palmitate in the sample is less than I. P. limits. (66.8% of the labelled amount). The Trial Court after considering the evidence and all documents has concluded, inter alia, that Dr. Pilankar was not appointed as Government Analyst validly and properly as per the provisions of Section 20 of the said Act. Hence, the opinion given by him on the quality of ESCOL is not valid and hence cannot be relied upon for prosecution.

7 Section 20 of the Drugs and Cosmetics Act, 1940 provides that the State Government may, by notification in Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Government Analysts for such areas in the State and in respect of such drugs or classes of drugs or such cosmetics or classes of cosmetics as may be specified in the notification. This provision also makes it clear that the Government Analysts having the prescribed qualifications can be appointed by the State Government by the notification in the Official Gazette. The said notification should also specify the area in which the said Analyst is required to exercise his powers and should also specify the drugs or classes of drugs or the cosmetics or the classes of the cosmetics in respect of which the said Analyst is entitled to analyse.

8 The Trial Court has relied on a judgment of the Learned Single Judge of this Court (S. Radhakrishnan as His Lordship then was) in the matter of State of Maharashtra Vs. R.A.Chandawarkar¹, to arrive at his conclusion that the opinion / certificate issued by Dr. Pilankar was not valid. The facts in the present case are identical, I would say, to the facts in *R.A.Chandawarkar (supra)*. Paragraphs 46 to 56 of the said judgment read as under:

“46. In this behalf the learned A.P.P. Mr. Mhaispurkar had relied upon Exh. P-32 which is the Government Official Gazette Notification dated 15th October, 1971 duly published on the same day by the Urban Development, Public Health and, Housing Department. In the said notification, the persons specified in column 1 of the Schedule, were appointed as Government Analyst for the whole of the State of Maharashtra, and they were empowered in respect of the products specified against them in column 2 of the Schedule. The said notification Exh. P-32 contains five categories of persons which are as under :-

(i) Assistant Director, Drugs Control Laboratory, Maharashtra State, Bombay. (ii) Senior Scientific Officers, Class-I, Drugs Control Laboratory, M. S. Bombay.

(iii) Senior Scientific Officers, Class-II, Drugs Control Laboratory, M. S. Bombay.

(iv) Senior Scientific Officer, Class-I (Pharmacology) Department of Pharmacology, Haffkine Institute, Bombay.

(v) Senior Scientific Officer, Class-II (Biochemistry) Department of Pharmacology, Haffkine Institute, Bombay.

47. Column 2 of the said notification states that all the above mentioned officers were entitled to test and analyse the biological and special products specified in Schedules C and C(1) of the Drugs and Cosmetics Rules, 1945 and in respect of the products other than those specified in Schedules C and C(1) of the said Rules.

48. The learned A.P.P. thereafter had relied upon the Government Resolution dated 26th August, 1975. By this Resolution, the Government of Maharashtra had appointed PW. 2-Mr. A. D. Nadkarni as a Sr. Scientific Officer, Class-I (Microbiology) at the Drugs Control Laboratory under the Food and Drug Administration. The said

1 1999(5) BomC.R.519

Resolution makes it clear in para 2 of the said Resolution that the necessary notification should be published in the Maharashtra Government Gazette. The learned A.P.P. has fairly stated that there is no such Gazette Notification published with regard to the aforesaid appointment of Dr. A. D. Nadkarni as a Senior Scientific Officer Class-I (Microbiology) at the Drug Control Laboratory under the Food and Drug Administration.

49. The learned A.P.P. had also relied upon another Government Resolution dated 6th December, 1978 being Exh. P-32 which states that Dr. Nadkarni has been appointed as a Senior Scientific Officer Class-I (Microbiology) at the Drugs Control Laboratory under the Food and Drugs Administration on probation for a period of two years with effect from the 1st September, 1975, and he has completed his probationary period satisfactorily. In the said Resolution the Government has also directed that his probationary period should be terminated with effect from the 13th November, 1977 and that he should be continued in that post on regular basis.

50. It may be noted that both the aforesaid Government Resolutions dated 26th August, 1975 and 6th December, 1978 are only Government Resolutions and they have not been published in any of the Official Gazette. The learned A.P.P. contended that S. 20 of the Drugs and Cosmetics Act, 1940 does not cast any mandatory obligation on the part of the State of Maharashtra so as to issue an Official Gazette-Notification with regard to the appointment of the Government Analyst. In the alternative, the learned A.P.P. had also argued that even if it is construed that it is mandatory, then, the earlier Government Gazette Notification dated 15th October, 1971 being Exh. P-32 contains various categories of persons who were entitled to act as Government Analyst for the whole of the Maharashtra and virtually for all kinds of products.. The learned A.P.P. further contended that in the light of the above, it should be construed that Dr. A. D. Nadkarni was validly and properly appointed Government Analyst as per the provisions of S. 20 of the Drugs and Cosmetics Act, 1940 and as such, he was entitled to analyse the drug samples and as such, his report ought to be accepted. Mr. Ganatra the learned Counsel for the Respondents contended that the post of Government Analyst is a very important and vital post in the interest of public health and as such, it is mandatory on the part of the Government to publish the said appointment in the Official Gazette. Notification. He further contended that the appointment of the Government Analyst must not only be notified in the Gazette, but, the said Gazette must also indicate the area and also the specific products in respect of which he is empowered to act and operate.

51. Mr. Ganatra, the learned counsel for the respondents states that the General Notification issued and published on 15th October, 1971 cannot be acted upon, in as much as, the said notification does not mention any particular individual to be a Government Analyst, and it also does not mention any particular area or any, specified products.

Mr. Ganatra in this behalf relied upon the judgment of the Apex Court in I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer A.P., reported in (1996) 6 SCC 634. In the said judgment the Supreme Court has considered the necessity of publication of certain appointments in the Official Gazette. Therein it is quoted with approval two observations of earlier Supreme Court judgments viz. in the case of Sammbhu Nath Jha v. Kedar Prasad Sinha reported in (1972) 1 SCC 573 : (1972 Cri LJ 453) and in the case of B. K. Srinivasan v. State of Karnataka reported in (1987) 1 SCC 658 : AIR 1987 SC 1059.

52. The observations in the case of Sammbhu Nath Jha v. Kedar Prasad Sinha reported in (1972) 1 SCC 573 : (1973 Cri LJ 453) at Paragraph No. 17 are as follows :-

"The commission of inquiry is appointed for the purpose of making an inquiry into some matter of public importance. The schedule containing the various allegations in the present case was a part of the notification, dated 12-3-1968 and specified definite matters of public importance which were to be inquired into by the Commission. As such, the publication of the schedule in the Official Gazette should be held to be in compliance with the statutory requirement. The object of publication in an Official Gazette is two fold : to give publicity to the notification and further to provide authenticity to the contents of that notification in case some dispute arises with regard to the contents."

53. Whereas, the observations made by the Apex Court in the case of B. K. Srinivasan v. State of Karnataka reported in (1987) 1 SCC 658 : (AIR 1987 SC 1059) at para 15 are as follows :

"But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner; whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication."

54. After referring to the abovementioned observations in the judgment in the case of I.T.C. Bhadrachalam Paperboards v. Mandal

Revenue Officer, the Supreme Court has held as under :-

"The above decisions of this Court make it clear that where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and that such a requirement is imperative and cannot be dispensed with."

55. In view of the above, the learned counsel for the respondents strongly contended that when the statute very clearly provides a particular mode of appointment, the State cannot deviate from the said mode. Thus, the State can appoint the said Government Analyst only by means of publishing in Official Gazette and mentioning therein the area in which they are entitled to empower and also specifying therein the products with which they can analyse and test.

56. Considering the clear wording of S. 20 of the Drugs and Cosmetics Act, 1940, I have no doubt that the provisions therein are mandatory and thus, the State must publish in an Official Gazette the appointment of the Government Analyst specifying therein the area wherein the Government Analyst can operate and also specifying therein the products with which the Government Analyst can test and analyse. Specially, in view of the aforesaid observations of the Supreme Court, the State can appoint the Government Analysts only by publication of Government Gazette Notification as contemplated under S. 20 of the Drugs and Cosmetics Act, 1940, and not otherwise. The general notification dated 15th October, 1971 being Exh. P-32 referred to and relied upon by the learned A.P.P. would not suffice for the purposes of compliance with S. 20 of the said Act. Since the said notification dated 15th October, 1971 published in the Government Official Gazette is totally ambiguous and uncertain, in as much as, it is difficult to ascertain as to who exactly will be the Government Analyst and for which area and for which products. The said notification is totally vague. In any event, the Government ought to have issued a notification and published the same in an Official Gazette with regard to the appointment of Dr. A. D. Nadkarni, which has not been done at all in the instant case. Hence I hold that Dr. A. D. Nadkarni was not appointed as a Government Analyst validly and properly as per the provisions of S. 20 of the Drugs and Cosmetics Act, 1940. "

9 Even in the case at hand, Government of Maharashtra through Urban Development Public Health and Housing Department, has published a notification dated 6-12-1971 in the official Gazette, notifying the persons specified in column 1 of the schedule as those appointed as Government

Analyst for whole of Maharashtra and they were empowered in respect of the products specified against them in column 2 of the schedule. Notification which is at Exhibit 96 contains three categories of persons:- 1) Assistant Director, Drugs Control Laboratory, Bombay, 2) Senior Scientific Officer, Class-I (Pharmaceutical Chemist), Drugs Control Laboratory, Bombay and (3) Senior Scientific Officer, Class-I, (Biological) Drugs Control Laboratory, Bombay.

10 At Exhibit 94 is the Government Resolution dated 28-8-1980, by which the Government of Maharashtra has appointed by nomination Dr. Prabhakar Pilankar, who was Junior Scientific Officer (Chemist), Class – II, Drugs Control Laboratory, under the Food and Drugs Administration, Bombay, as Senior Scientific Officer (Pharmaceutical Chemist), Class – I, Drugs Control Laboratory, Bombay. There is no gazette notification published as regards to the aforesaid appointment of Dr. Pilankar. The resolution certainly makes it clear in paragraph 6 that the requisite notification should be published in the Maharashtra Government Gazette.

11 It is settled law as relied upon in *R. A. Chandawarkar (supra)* that publishing it in Government Gazette is not just a mere formality. The object of publication in an Official Gazette is two fold: to give publicity to the notification and further to provide authenticity to the contents of that notification in case some dispute arises with regard to the contents. Ms Malhotra fairly conceded that there is Gazette Notification only of Exhibit 96

and not of Exhibit 94. In my view, the facts of the present case squarely falls within the four corners of the facts in *R.A. Chandawarkar (Supra)*.

12 Therefore, the State Government not having published in the Official Gazette, the appointment of Dr. Prabhakar Pilankar, specifying the area wherein he can operate and also specifying therein the products with which Dr. Pilankar can test and analyze, it is difficult to ascertain, as to who exactly will be the Government Analyst and for which area and for which products. Therefore, the only conclusion could be that Dr. Prabhakar Pilankar was not appointed as Government Analyst validly and properly as per the provisions of Section 20 of the said Act.

13 In view thereof, the report or opinion of Dr. Prabhakar Pilankar cannot be relied upon or used by the Government to prosecute respondents.

14 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka* ² in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

2. (2007) 4 SCC 415

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

15 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless they are proved guilty by a competent court of law. Secondly, accused having secured their acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Trial Court rightly observed that the prosecution had failed to prove its case.

16 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

17 Appeal dismissed.

(K.R. SHRIRAM, J.)