

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 353 of 1992****With****CRIMINAL APPEAL No. 1125 of 1991****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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RAJESHKUMR CHANDULAL SHAH - Appellant(s)**Versus****BABUBHAI JOITARAM PATEL & 1 - Opponent(s)**

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Appearance in Criminal Appeal No.353 of 1992:

MR DK MODI for Appellant(s) : 1,
 MR MD MODI for Appellant(s) : 1,
 NOTICE SERVED for Opponent(s) : 1,
 MR IM PANDYA, APP for Opponent(s) : 2,

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Appearance in Criminal Appeal No.1125 of 1991:

MR IM PANDYA, APP for Appellant(s) : 1,
 MR HM PARIKH for Opponent(s) : 1,
 MR DK MODI for Opponent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 31/03/2006

ORAL JUDGMENT

1. These Criminal Appeals arise out of common judgment dated 24th September 1991 passed by the Judicial Magistrate, First Class, Prantij in Criminal Case No.142 of 1998.
2. Criminal Appeal No.353 of 1992 has been filed by the original accused No.3, who was held guilty of the charges levelled against him of offences punishable under Sections 7(1) and 7(5) of the Prevention of Food Adulteration Act (hereinafter to be referred as the "said act"). Criminal Appeal No.1125 of 1991 has been filed by the State challenging the very same judgment by which original accused Nos.1 and 2 came to be acquitted.
3. The case pertains to alleged adulteration in Chilly Powder being sold by original accused No.1-Mohanlal Devshankar Joshi, who was a retailer. The Food Inspector under the said Act visited the shop of accused No.1 and from certain bags containing Chilly Powder collected the samples weighing 600 gms. and

sealed the same in three different bottles and sent the samples for laboratory testing.

4.The Food Inspector had collected the said samples on 29th August 1988. The report suggested that there was adulteration in the Chilly Powder and impermissible colours have been used therein. The report was sent to the Local Health Authority (L.H.A. for short). Necessary sanction for prosecution was granted. As per sub-section (2) of section 13 of the said Act L.H.A. had to forward a copy of the report of result of the analyst to the person against whom prosecution is instituted informing such person that if he so desires, he may make an application to the Court within a period of 10 days from the date of receipt of copy of the report to get sample of the article of food analyzed by the Central Food Laboratory. Rule-9(A) of the Prevention of Food Adulteration Rules specifies the time limit for the L.H.A. to send report under sub-section (2) section 13 of the said Act.

5.Before the Trial Court, the prosecution tried to establish that all the three accused persons were guilty of offences punishable under Sections 7(1) and

7(5) of the said Act. Broadly stated it was the case of the prosecution before the Trial Court that the food item seized from the shop of accused No.1 contained impermissible colours and the same was adulterated. The same was manufactured by accused No.2 and accused No.3 was the person nominated for the purpose of the said Act. It was, therefore, the case of prosecution that all three persons were guilty of above-mentioned offences.

6.The learned Judge after recording the evidence for the prosecution and after hearing the detailed submissions made by the learned advocates appearing for the prosecution as well as for the defence, came to conclusion that accused No.1 was covered by the warranty and in view of the provisions contained in the said Act, he could not be held guilty of having breached any of the provisions of the said Act.

With respect to the accused No.2 also, the learned Judge was pleased to record the finding of acquittal.

With respect to accused No.3, however, it was

found that he had committed breach of the provisions contained in Section 7 of the said Act. The learned Judge came to the conclusion that, as per report of the analyst, adulteration in the samples was established. He found that the report and the notice under Section 13(2) of the said Act were duly served on all the accused persons. He also found that there was a valid nomination in favour of accused No.3 by a proper resolution passed by accused No.2 and that accused No.3 had in fact accepted such nomination for the purpose of the said Act. On the basis of these conclusions, the Trial Court formed that accused No.3 is responsible for breach of the provisions contained in Section 7 of the said Act. Finding that adulteration is a serious offence, upon conviction accused No.3 was ordered to undergo imprisonment for a period of two years and pay fine of Rs.1,000/- and in default thereof to suffer further imprisonment for a period of three months.

7.Learned advocate, Shri D.K.Modi appearing for the original accused No.3-the appellant in Criminal Appeal No.353 of 1992 took me through the entire evidence on record and the judgment delivered by the learned Judge. On the basis of the materials on record and the

decision rendered by the learned Judge, it was contended before me that under no circumstances conclusion of guilt of accused No.3 could have been reached. It was contended that there were major procedural defects committed by the prosecution at all stages beginning with the collection of samples and even during the conduct of the prosecution. He submitted that the sealing of the bottles was itself defective. That the process of analysis was incomplete. That it was not clear whether the analyst found impermissible colours in the Chilly Powder through chemical analysis or through microscope. The analyst himself was never examined before the Trial Court. His report could not have been relied upon without supporting notes. He further submitted that when accused No.2 had been found not guilty, there was no scope thereafter to fasten the liability on the nominee.

Quite apart from these contentions, the learned advocate Shri Modi submitted that entire case must fall through on the ground that necessary intimation/notice was never served on the accused Nos.2 and 3 as required under sub-section (2) of section 13 of the said Act.

8. Section 13 of the said Act reads as follows :-

"13. Report of public analyst.- (1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis.

(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 14A, 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.

(2A) When an application is made to the court under sub-section (2), the court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section(1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the court and only one part of the samples has been sent by the court to the Director of the Central Food Laboratory under sub-section (2B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court:

Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of sub-sections (2) to (2D) shall, so far as may be, apply.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2B) shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory [under sub-section (2B)] is produced in any proceeding under this Act, or under sections 272 to 276 of the Indian Penal Code (45 of 1860), it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code (45 of 1860):

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory (not being a certificate with respect to the analysis of the part of

the sample of any article of food referred to in the proviso to sub-section (1A) of section 16) shall be final and conclusive evidence of the facts stated therein.

Explanation.- In this section, and in clause(f) of sub-section (1) of section 16, "Director of the Central Food Laboratory" shall include the officer for the time being in charge of any Food Laboratory (by whatever designation he is known) recognised by the Central Government for the purposes of this section.

Time limit for sending notice required under sub-section (2) section 13 of the said Act is specified in Rule-9(A) of the Prevention of Food Adulteration Act. Rule-9(A) reads as follows :-

"9. A. Sending of sample by Local (Health) Authority:

(a) Local (Health) Authority shall within a period of seven days or receipt of requisition for second part of the sample from public analyst under the proviso of Rule 7(1), send such sample to the public analyst.

(b) Local (Health) Authority, while sending second part of the sample under the provision of sub-section (2-E) of section 13 of the Act, shall do so within a period of 20 days from the date of receipt of the report from the first public analyst."

9. On the basis of above statutory provisions, it was contended before this Court by learned advocate Shri Modi that sending report of the analyst along with the notice as prescribed under sub-section(2) of section 13 of the said Act is a mandatory requirement of law. The same gives a valuable right to the accused to question the report by requiring that a part of the sample collected by the authority be sent to the Central Food Laboratory. He submitted that if there is a variance between two reports, the Central Food Laboratory report would supersede the report given by the local analyst. He, therefore, submitted that it is absolutely essential for the prosecution to establish before the Court that the report along with notice as specified in sub-section (2) of section 13 of the said Act was duly served on the accused.

In this regard, he further submitted that all throughout the trial, it was the case of the said accused persons that the report along with the notice was never sent by the authority to them. He further submitted that it was the case of the prosecution that such report was forwarded to the accused through Registered Post A.D. The postman was never examined as witness before the

Court to prove the service thereof. Registered Post A.D. slips were exhibited before the Court which did not contain the signature of accused No.3 or any authorized person on behalf of accused No.2. From the original acknowledgment slip produced at Exhs.33 and 34, he pointed out that the said acknowledgments were signed by one Shri Nigam Shah. It was not established that he had any authority to receive notice on behalf of accused No.2 or accused No.3. In that view of the matter, it was contended that learned Judge gravely erred in observing that the notices were duly served on the accused.

In support of his contentions, learned advocate Shri Modi placed reliance on various decisions of this Court and other High Courts. Reference to only some of them would serve the purpose.

In the decision of Rameshwar Dayal V. State of U.P. reported in 1996 SCC (Cri.) 75, the Hon'ble Supreme Court observed that to have the sample examined by the Central Laboratory is a very valuable right given to the accused. Rules provide that such a report should be supplied within a certain period. It was, therefore, observed that non-supply of such a report would cause

serious prejudice to the accused. The Hon'ble Supreme Court found that the High Court ought not have rejected plea of the accused merely on the ground that such an objection was not raised before the Trial Court.

In the case of Biyadhar Jena V. State of Orissa reported in 1990(2) FAC Page-69, learned single Judge of Orissa High Court held that under sub-section(2) of Section 13 of the said Act, it is not dispatch of the report, but service thereof which would be compliance of the requirements under the said section. Relying on the decision of the Hon'ble Supreme Court in case of Municipal Corporation of Delhi V. Ghisa Ram 1975(1) FAC 186, it was held that to satisfy the rigid requirements of Section 13(2) of the said Act which confers a valuable right on the accused to prove his evidence, mere communication would not be sufficient but the receipt thereof has to be established. It was further observed :-

"The absence of intimation to the petitioner that the sample collected from him under rule 9-A of the Rules was adulterated, renders it an illusory remedy. Mere despatch of the document without proof of service is not sufficient compliance of the requirements of law. A combined reading of section 13(2) and rule 9-A makes it clear that the legislative intent was to

intimate the accused the result of analysis of the sample collected from him, and to give him the option of exercising his right to get the sample tested by the Central Food Laboratory. As held by this Court in the case of **Bijay Kumar Ram V. State (1989) 1-O.L.R.340**, the prosecution has to show that the copy of the report in question was in reality served on the intended person. Similar view was also expressed by this Court in the case of *Rama Chandra Sahu V. State of Orissa 1988(1) FAC 3: 1985(1) O.L.R. (NOC)29.*"

In the Criminal Appeal No.204 of 1979 decided by the learned single Judge of this Court on 08th December 1980. Learned single Judge of this Court made following observations :-

"This case here, is however, little different. The envelope and the A.D. Slip bare the name of the respondent as also his correct address. The A.D.Slip produced at Ex.9, however, does not bear the signature of the respondent but of one Ganpata Atabhai. Now, no such presumption can be raised that Ganpatbhai Atabhai is the brother of the respondent-accused or that he was an authorised agent of the respondent-accused to receive the said envelope. In cases where the addresses refused to accept the envelope tendered to him a presumption can be raised that he had received the letter. But in case where from the evidence produced by the prosecution itself, it becomes clear that the respondent was neither tendered that envelope nor had he signed the A.D. Slip in lieu of receiving the same nor

had he refused the same, but somebody else had received the same, no such presumption as Shri Trivedi wants the court to raise, can be raised. On the contrary if there was any such presumption which could have been raised under Sec.114 of the Indian Evidence Act that presumption stands amply rebutted by the documentary evidence produced by the prosecution itself. In that view of the matter the order of acquittal passed by the learned Metropolitan Magistrate cannot be considered to be in any way erroneous."

This decision has been followed in number of decisions of our High Court as was pointed out by learned advocate Shri Modi for the appellant. Reference to all these decisions would not be necessary. Suffice it to say there is consistent view of this Court that to meet with the requirement of the provision of sub-section (2) of section 13 of the said Act, the prosecution must establish before the Court that the report was duly served upon the accused as, upon service of such a report, the accused enjoys a valuable right to question such a report and to have the part of samples retested through central Laboratory.

10. In the present case, as noted earlier, it was the consistent case of the accused before the Trial Court that such report was not served on them. Through the

cross-examination of the prosecution witnesses, the defence had clearly set up the theory that the report as required under sub-section (2) of section 13 was never served on them. The prosecution took no steps to examine any witnesses to establish that the same was duly served on the accused Nos.2 and 3. On the record, though registered acknowledgment slips were produced, the same do not carry the signature of accused No.3 or any authorized officer of accused No.2. Shri Nigam Shah, who is supposed to have received the letters, is not shown to have been carrying authority to receive communication on behalf of accused Nos.2 and 3. In that view of the matter, I find that the prosecution completely failed to establish before the Trial Court that the report was duly served as required under sub-section(2) of section 13 of the said Act. In my view, the Trial Court committed an error in observing that the acknowledgment slips demonstrate that the report was duly served. Having perused the acknowledgment slips, I find that the same do not carry the signatures of either accused No.3 or any other authorized person on behalf of accused No.2.

In view of this crucial lapse on part of

prosecution as has been held in series of decisions, some of which have been noted hereinabove, accused Nos.2 and 3 were deprived of their valuable right to have the laboratory report tested through Central Laboratory. The same caused prejudice to the said accused in their defence. The entire prosecution and the conclusion of the learned Trial Judge pertaining to guilt of accused No.3, therefore, must fail.

11.In the result, I find that the Trial Court erred in arrived at the conclusion of guilt of accused No.3.

12.With respect to the appeal against acquittal, it can be seen that there was no possibility of recording conviction against accused No.1 in any case. Accused No.1 was only a Vendor and was retailing goods received by him in sealed bags. The learned Trial Judge, therefore, rightly concluded that even if there was any adulteration in the food item, accused No.1 was sufficiently covered under the warranty. With respect to accused No.2, as noted above, I find that there was glaring defect of non-service of report of sub-section (2) of section 13 of the said Act. The acquittal against accused No.2 also, therefore, cannot be

reversed.

13.In the result, I find that Criminal Appeal No.353 of 1992 is required to be allowed. Criminal Appeal No.1125 of 1991 filed by the State is required to be rejected.

14.In the result, Criminal Appeal No.353 of 1992 is allowed. Conviction recorded against accused No.3 by the learned Trial Judge in the main judgment is set aside. Criminal Appeal No.353 of 1992 is accordingly allowed and disposed of. Criminal Appeal No.1125 of 1991 is dismissed.

(AKIL KURESHI, J.)

mrpandya*