
(1973) 12 BOM CK 0008

Bombay High Court

Case No: Criminal Appeal No. 801 of 1972

The State of
Maharashtra

APPELLANT

Vs

R.S. Thakkar

RESPONDENT

Date of Decision: Dec. 13, 1973

Acts Referred:

- Penal Code, 1860 (IPC) - Section 272, 273, 274, 275, 276
- Prevention of Food Adulteration Act, 1954 - Section 11, 13, 16, 7

Citation: (1974) 76 BOMLR 413

Hon'ble Judges: Masodkar, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Masodkar, J.

This appeal has been filed by the State against the acquittal of the non-applicants accused under the provisions of Section 16(1) read with Section 7(1) of the Prevention of Food Adulteration Act, 1954. The allegations against the accused were that accused No. 1 was a licensee and a partner of an eating house named Cafe Thakkar located in Port area, Bombay. Accused No. 2 was the servant in the shop. On September 18, 1970 at about 11.30 a.m Food Inspector, Ramchandra Rajaram Kumar purchased for analysis 600 grams of curd and sent one part thereof following the procedure by adding formalin, for analysis. The prosecution alleged that the report of the public analyst found that the sample contained 16.7 per cent, of fat deficiency. On receipt of this report the steps to prosecute the present accused were taken.

2. The defence of the accused had been of denial including that such curd was not sold by him. The learned Magistrate has accepted the evidence of the Food Inspector and also considered the evidence of the panch. It is further found that public analyst noticed formalin and after analysis he made a report exh. E. From that report the learned

Magistrate concluded that it was satisfactorily established that the curd was sold and that it was below the standards prescribed under the Prevention of Food Adulteration Rules. However, the learned Magistrate took the view that the provisions of Rules 17 and 18 of the Prevention of Food Adulteration Rules have been infringed and that the accused were entitled to acquittal.

3. This acquittal is challenged by the State in the present appeal. However, at the hearing of this appeal an important question is raised as to the true construction of Section 13, Sub-section (2) and its effect on the proceedings. It does appear that the sample that was collected by Ramchandra, Food Inspector, on September 18, 1970, was sent for analysis and the report received as can be seen from exh. E on October 20, 1970. Exhibit E itself is dated. October 20, 1970. Prosecution witness No. 2, Ramchandra, states that he obtained sanction on November 19, 1970 which is as per exh. F, that is about a month thereafter. The complaint appears was filed on December 8, 1970 and the first date appears to be fixed presumably, for the appearance of the accused on January 4, 1971. There-after the case was adjourned from time to time till the complainant applied for issue of summons to the witnesses on June 21, 1971. Evidence was recorded in July 1971 having framed the charge on July 12, 1971.

4. The accused filed an application u/s 13(2) on September 27, 1971 for sending his sample to the Director of the Central Food Laboratory. The learned Magistrate after satisfying himself about the condition of seal etc., despatched the same and received a report or a communication from that authority to say that the sample was highly decomposed, and was not fit for analysis. The Director of the Central Food Laboratory stated that the parcel of curd was actually received by his office on October 19, 1971, but could not be analysed being highly decomposed. All these dates have some relevance because of the controversy raised in this appeal.

5. The learned Counsel appearing for the accused contends that under the facts and circumstances, the accused had exercised the right u/s 13(2) of the Act and the same was frustrated because of the conduct of the prosecution. He submits that after the accused was called upon to enter his defence, he had filed an application and the sample of curd alleged to have been given to him was sent to the Central Food Laboratory and discovered to be completely decomposed. He relies on the evidence of P.W. 4 Pandharinath, the Public Analyst, who stated that such a sample with the addition of formalin could remain without deterioration for a period of 3 or 4 months only if kept at the normal temperature. From this evidence it is submitted that the prosecution was duty bound to act so as to preserve the right of the accused conferred u/s 13(2) of the Act and the conduct of the prosecution in filing the complaint itself after a lapse of three months and further not making an application u/s 13(2) by itself is indicative that the accused was seriously prejudiced in his defence and, as such, the trial is vitiated and the acquittal recorded by the learned Judge has to be affirmed.

6. As against this, the learned Counsel appearing for the State Mr. Garud, argues that there are laches on the part of the accused in applying almost after an year u/s 13(2) and that it does not lie with him to complain about the frustration of his own right. The learned Counsel submits that Sub-section (2) of Section 13 which confers the right on the accused first indicates that the accused must exercise that right after the summons has been issued to him and any further delay on his part to exercise that right does not avail to his benefit.

7. Both the sides have relied on some of the authorities of the Supreme Court and some of this Court which will be noticed hereafter. One thing is pretty clear that the sample was collected on September 18, 1970 and the report of analysis had been received by October 1970. The prosecution was launched after about one month or so. The accused was asked to appear in January 1971, that is about three months after the actual collection of the sample. The proceedings indicate that till about June 1971, the prosecution was trying to get the witnesses served and only the evidence before the charge was recorded in the month of July 1971, It is after that in September the accused applied.

8. Even on the own showing of the prosecution witness No. 4, Pandharinath, such a sample could be preserved without deterioration only for a period of three to four months. With this evidence on record and further application by the accused in exercise of his right u/s 13(2) of the Act it is to be found that the prosecution had not been diligent enough to put the papers before the trial Judge in the present prosecution. In fact, as the dates referred to above indicate, the prosecution itself has been launched after the period of three months which means that the deterioration of the sample had already been started. This is clearly enough to sustain the acquittal of the accused for they are seriously prejudiced in such matters in getting the sample analysed from the Director of Central Food Laboratory under Sub-section (2) of Section 13 of the Act.

9. However, the controversy as to the point of time when the accused must of necessity exercise his right has been raised in the present appeal and it may now be noticed. Section 11 prescribes the procedure to be followed by the food inspectors. Clause (c) of Sub-section (1) of Section 11 requires him to deliver one part to the person from whom the sample has been taken, to send another part for analysis and retain the third part for production in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under Sub-section (2) of Section 13, as the case may be. In this case, it is not disputed that the third part was with the food inspector Ramchandra and was produced during the trial on July 12, 1971 when P.W. 2 Ramchandra was examined. It is after this that the accused exercised his right in the month of September.

10. Section 13(1) deals with the report of the public analyst and Section 13(2) which is the bone of rival contentions reads as follows:-

After the institution, of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the court for sending the part of the Sample mentioned in Sub-clause (i) or Sub-clause (iii) of Clause (c) of subsection (1) of Section 11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application 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 may then despatch the part 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 sample, specifying the result of his analysis.

Sub-section (5) of Section 13 may also be usefully extracted which reads as follows:-

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:

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein.

The plain reading of Sub-section (2) shows that the accused or the complainant are enabled on payment of prescribed fees to seek analysis from the Director of the Central Food Laboratory and the report made by the Director of the Central Food Laboratory supersedes the report given by the Public Analyst and under the proviso to Sub-section (5) it is made final and conclusive evidence of the facts contained in that report. On closer scrutiny it appears that the samples -which are mentioned in Sub-clause (i) or Sub-clause (iii) of Clause (c) of Sub-section (1) of Section 11 are all subject matters upon which provisions of Sub-section (2) of Section 13 would operate. The accused may in a given case tender the sample given, to him under Sub-clause (i) of Clause (c) of Sub-section (1) of Section 11 and apply for analysis of that sample or he may cause the analysis to be made from the authority mentioned of the sample or the part retained under Sub-clause (iii) of Clause (c) of Sub-section (1) of Section 11 of the Act. The right of the accused therefore reaches to both the parts, that is, one part delivered to him and another retained by the Food Inspector or the complainant, as the case may be. He may exercise that right once the prosecution is instituted under the Act and obtain the report from the Director of the Central Food Laboratory which is treated as final evidence of facts. The question arises whether the prosecution has a similar right which is conferred upon the accused to seek analysis from the Director of the Central Food Laboratory for sending the part of the sample mentioned in Sub-clause (i) or Sub-clause (iii). The learned Assistant Government Pleader wishes to restrict the right of the prosecution only to the part under Sub-clause (iii) of Clause (c), while the learned Counsel for the accused submits that on the plain reading of the section prosecution can apply even to get the sample delivered

under Sub-clause (i) of Clause (c) of Sub-section (1) of Section 11.

11. It is to be noted that the section is worded in the manner conferring the right both on the accused as well as on the complainant. It does not indicate the outer limit of the time when this right has to be exercised. The complainant may in a given case therefore be within its right to take advantage of Sub-section (2) and apply to the Court for sending either of the samples that is one under Sub-clause (i) or Sub-clause (iii) of Clause (c) Sub-section (1) of Section 11 to the Director of the Central Food Laboratories for certificate. There are no words of limitation as to the right of the party in a trial nor there are any words prescribing any time limit for exercise of that right. It is, therefore, not possible to accept that right of the complainant is restricted only to the sample retained under Sub-clause (iii). This analysis has become necessary in this case for both the sides are contending that it is the conduct of the rival party that should be put in issue while considering the effectiveness or otherwise of the right exercised by the particular party. It is not merely the conduct of the accused according to the learned Counsel for the accused that is in issue, but it is also the conduct of the complainant who is also similarly clothed with the right that must be taken into account.

12. The provisions of Section 13(2) have been the subject-matter of judicial consideration by this Court as well as by the Supreme Court under the particular facts and circumstances of the given cases. These decisions may briefly be reviewed so as to understand the effect thereof on the present controversy. In [Municipal Corporation of Delhi Vs. Ghisa Ram](#), the Supreme Court was dealing with an acquittal of the accused who had filed an application on October 4, 1963 in a prosecution instituted upon a complaint on May 23, 1962. The Director had reported that the sample of curd sent to him had become highly decomposed and no analysis of it was possible and the case was tried in the absence of the report of the Director of the Central Food Laboratory. Before the Supreme Court the main contention raised on behalf of the complainant was that though, under the Act, a certificate of the Director of the Central Food Laboratory has the effect of superseding the report of the Public Analyst, the absence of such a certificate for any reason whatsoever will not affect the value and efficacy of the certificate given by the Public Analyst. While considering the submission the Court referred to the provisions of Section 13(2) and Sub-section (5) of that section and observed that Sub-section (5) will be attracted when in fact the Director of the Central Food Laboratory issues a certificate after analysis. If no certificate is issued, the report given by the Public Analyst does not cease to be the evidence of the facts contained therein, nor does it become ineffective merely because it could have been superseded by the certificate issued by the Director of the Central Food Laboratory. Though this was the position found so as to enable the prosecution to rely on the report of the Public Analyst given u/s 13(1), the Court further considered the provisions of Section 13(2) as far as the right of the accused was concerned in such a trial. If the accused exercised the right conferred u/s 13(2) and the certificate is issued that certificate from the Director of the Central Food Laboratory would supersede the report given by the Public Analyst. If, on the other hand, the accused did

not choose to exercise that right, the case against him can be decided on the basis of the report of Public Analyst. The Court then proceeded to consider the cases where the accused purported to exercise the right and Director is unable to issue a certificate for some reason or the other including that the sample of food had so deteriorated and become decomposed that no analysis of it was possible. With respect to the facts in that case where the opinion was given by the expert witness, the Court came to the conclusion that right of the accused u/s 13(2) was frustrated as no preservative was added and that there was delay even in launching the prosecution. The Court observed (p. 972) :

It appears to us that when, a valuable right is conferred by Section 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.

(Italics are ours).

Now, this paragraph extracted from the judgment of the Supreme Court would indicate, firstly, as far as the accused was concerned, he had a statutory right for the purpose of proper defence to get the sample analysed by the Director of the Central Food Laboratory. Secondly, the prosecution is obliged therefore to proceed in such a manner that this valuable right of defence will always be preserved and not denied to the accused.

13. The judgment of the Supreme Court hastens to lay down that whether there had been denial or not in exercise of this right is always to be found under the facts and circumstances of the particular case. As stated earlier, on the facts of that case where the accused, in fact, had filed an application though at a very late stage of the trial, the Court came to the conclusion that the right u/s 13(2) was put in jeopardy and therefore the acquittal of the accused was justified.

14. The instant case therefore is an authority that Section 13(2) gives a valuable right to the accused to seek analysis so as to substantiate his defence. As I have indicated earlier a similar such right is given to the prosecution too. The effect of non-exercise of that right by the prosecution has not been considered in this case. It is perfectly possible to

conceive of a case that after launching the prosecution the complainant itself moves an application u/s 13(2) immediately and tries to seek either the sample in the hand of the accused or the third sample being examined by the Director of the Central Food Laboratory. In case the accused were for any reason to refuse to hand over the sample for such analysis or take steps suo motu to get such a sample inspite of the application by the complainant, then surely it would be a case where the accused has failed to exercise his right. Under the scheme of the Prevention of Food Adulteration Act, there is no indication that culpability of the accused can be inferred only because he does not take any step for the purpose of analysing the sample in his custody. It is one thing to say that he had a right and has not exercised the same and it is another thing to say that he has exercised the right and that right was frustrated because of the facts and circumstances available in a particular given case. If the complainant has a similar right as that of the accused, the fact that the prosecution has not tiled an application u/s 13(2) is also a relevant factor which can be taken into account. Such non-tiling of application by the complainant can be viewed along with the other circumstances available on record where the accused has filed an application at a late stage of the trial.

15. In this respect the provisions of Section 11(2) are of some interest where the person from whom the sample has been taken declines to accept one of the parts, the food inspector is required to send intimation to the public analyst of such refusal and thereupon the public analyst receiving a sample for analysis has to divide it into two parts and seal or fasten up one of those parts and cause it, either upon receipt of the sample or when he delivers his report, to be delivered to the food inspector who has to retain it for production in case legal proceedings are taken. These provisions read with Section 13(2) would show that even this part which is received u/s 11(2) is still the one which is referred to in Section 11(1)(c)(i) and is kept for analysis and can be reached on application being sent for further analysis by the Director of the Central Food Laboratory for a certificate. I have referred to these provisions to point out that the part mentioned in Sub-section (2) of Section 11 is not in the possession of the accused. It is to be tendered at the trial by the prosecution and there the prosecution can exercise the right mentioned in Sub-section (2) by seeking a further analysis from the Director of the Central Food Laboratory. Therefore, always in a given case it is the conduct of the prosecution that is of primary importance and effort must be to find out whether ultimately that what was made available by the Legislature to the accused was preserved to him with all expedition and efficacy that can be expected in such trials by the complainant who sets the law in motion. The usual grievance of the accused that the sample gets deteriorated when the application is made can easily be forestalled if after launching the prosecution, the complainant comes out with an application for analysis u/s 13(2) of the Act. It is only where the complainant seeks to rely only on the report of the Public Analyst and then the accused taking advantage of the inaction of the complainant comes out with an application which is made at late stage such an omission would come up for consideration. After all the provisions of Section 13(2) and 13(5) are merely provisions relating to the steps to be taken during the trial of an offence. These are enabling ones and the accused can legitimately contend in

a given case that he need not file an application so as to fasten the liability under the Act on his own head till he hears all the evidence of the prosecution. This would surely include a step to be taken by the prosecution u/s 13(2) of the Act. The matter can be viewed yet from another angle too. The accused is called upon to enter his defence only after he is put to charge as his trial is held under Chapter XXI of the Code of Criminal Procedure and his plea is recorded at the stage indicated by Section 255 of that Code. If, therefore, the prosecution or the complainant wants to avoid the likely result of the frustration of the right conferred on the accused, it must show that it was acting in a manner consistently to preserve that right of the accused. As stated earlier, that can be done by filing a simple application u/s 13(2) as soon as the prosecution is instituted and then the grievance of the accused can never be conceived nor can be heard.

16. This is more so for as in the present case the complainant is possessed of the knowledge as to the addition of preservative and its effectiveness. That knowledge need not be attributed to the accused. What type of preservative is added and for what period the sample would be fit for analysis are matters known to the prosecution and its experts. That being the position, the conduct of the prosecution or the complainant must be such that with all the data in its possession on these relevant matters, it has acted in a manner which can be found to be fair. Law, as it stands, does not make the report of Public Analyst conclusive of the guilt of the accused and prosecution cannot stop at that. Provisions of Section 13(2) clearly enable it to have conclusive analysis of the part in the hand of the accused. That step can be taken and has not been taken is all relevant in a given case. The accused who, under our tenets of criminal law, is entitled to take advantage of the omissions on the part of the prosecution can urge that his¹ guilt cannot be found for no steps were taken to preserve unto him the valuable statutory right. His application, which must, of necessity, come in such a trial, has to be viewed along with the conduct of the prosecution itself. Merely because the accused chooses to make that application at a later stage of the trial, it cannot be said that his right was preserved or that prosecution conducted itself in a manner so that such a right was not denied to him. As indicated in Ghisa Ram's case, it is after all for the defence that the accused has been given that right and his right and its frustration must be tested upon the backdrop of the conduct of the prosecution in a given case. Different considerations would obviously arise when the accused does not exercise his right at all by filing the application at any stage of the trial before the Magistrate u/s 13(2). Those are the cases where the accused cannot complain that his right has not been preserved. (See [Babu Lal Hargovindas Vs. The State of Gujarat](#), and [Ajit Prasad Ramkishan Singh Vs. The State of Maharashtra](#). In both these cases the Supreme Court was considering the submissions on behalf of the accused that his right was frustrated in a trial where the accused did not at all file an application u/s 13(2) of the Act. Upon the facts, the Court found against the accused for it, is implicit that the prosecution is entitled to rely on the report of the Public Analyst and if independent of the prosecution the accused wanted to exercise his right, he must take steps as is permitted by Section 13(2) of the Act. Observations in the latter decision viz. Ajitprasad's case clearly indicate that once he exercises that right during the trial, different

considerations will attain the result of the prosecution. Their Lordships have observed (p. 1633) :

...It is clear from the sub-section that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, the Magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps, have contended that he was deprived of his right to have the sample analysed by the Director on account of the laches of the complainant and that he should be acquitted.

These observations therefore indicate that once the accused exercises his right u/s 13(2) and the Director of the Central Food Laboratory intimates that his sample is so decomposed that it is not possible to make a report, the whole matter has to be reviewed so as to find out whether the prosecution has conducted itself in a manner so as to preserve this right to the accused in all fairness. One of the decisions cited at the Bar and reported in *State v. Bhagvandas Gopaldas* (1969) 72 BomLR 25 cannot be treated as good law in view of the decision of the Supreme Court referred to above. In *Ajitprasad's* case the acquittal was on the very same ground that was the basis of acquittal in the case in *Bhagvandas Gopaldas* decided by this Court. The facts of *Ajitprasad's* case which ultimately considered the effect of non-filing of the application by the accused and merely making a submission on the sole ground of referring to the period of decomposition of the sample did not find favour also with this Court in *State v. Ajitprasad Bambisatv Sing* (1960) Criminal Appeal No. 1459 of 1968, decided by Deshmukh J., on November 18, 1969 (Unrep.).

17. Another decision of this Court may also be referred to being *Rambharoselal Bankelal v. The State of Maharashtra* (1973) Criminal Appeal No. 568 of 1972, decided by S.K. Desai J., on September 24, 1973 (Unrep.). After considering the three (Supreme Court decisions, the learned Judge pointed out that:

In *Ghisa Ram's* case the Supreme Court has not laid down that it is only in cases where there is default on part of the prosecution, that it would not be proper to convict the accused person on the report of the Public Analyst, I have gone carefully through these three judgments and it appears to be established that such defence could be raised by the accused only where he has applied to the Court that one of the two Samples be sent to the Director of the Central Food Laboratory and the Director of the Central Food Laboratory had reported that on account of the state of the sample no analysis by him was possible. Now, this result may occur: (a) on account of any default on the part of the prosecution, (b) on account of laches or similar defaults on "the part of the accused and (c) on account of other reasons and circumstances in respect of which it cannot be said that there is any default either on the part of the prosecution or the accused.

It is further observed by the learned Judge that in his view, if the report of the Director of the Central Food Laboratory cannot be obtained on account of any fault on the part of the accused person, then surely he cannot be heard to complain that his valuable right has been lost and in such a case the Court will consider and may act on the opinion of the Public Analyst. In the case that was before the Court, the learned Judge found that when it cannot be decisively said who was at fault, the matter was entirely within the discretion of the Court and that the appellant was entitled to benefit of doubt. By taking that view the Court allowed the appeal of the accused though the application obviously was made quite late during the trial.

18. All these passage of judicial decisions indicate two classes of considerations, one being where the accused has not purported to exercise his right by filing an application u/s 13(2) and the other, he during the trial has exercised that right, but by the time he exercised the same, the sample had gone beyond the stage of analysis. In the first class of cases, it appears to be well-settled by the Supreme Court decision that the accused cannot be heard to complain that his right is frustrated for in fact he has not chosen to exercise the same. In the latter class of cases however, he is entitled to make that complaint and grievance; and if a grievance is made, the Court is bound to take into account all the facts and circumstances under which the prosecution was conducted, and as indicated earlier, all the factors must enter judicial decision of that issue so as to find out whether the statutory right u/s 13(2) was at all available when the application was made by the accused.

19. As stated earlier, the conduct of the prosecution is really a decisive factor when an application is made by the accused at any stage of the trial. Legislature itself has not enacted when the accused or the complainant should come out with an application u/s 13(2). It is, therefore, not possible to control the right of the accused so as to compel him to apply under that provision by laying down a particular period, of time. If I were to do so, I would be legislating into the body of Section 13(2) itself a requirement of period. In its own wisdom the Legislature has created a right and it is left to the complainant who seeks the conviction of the accused to take all the steps necessary for bringing home the guilt by the machinery provided by the Act. Section 13(2) is merely an enabling method of seeking better and conclusive evidence. Sub-section (5) is a rule of evidence and not the end of the trial. There may be still defences open to the accused inspite of the certificate obtained under Sub-section (5) which may ultimately defeat the case against him. It is therefore not possible to relieve the prosecution of the burden which it must always bear under our system and principles of Criminal Jurisprudence. In that the prosecution has to establish that the accused had not only the right but he was offered a proper and adequate opportunity and further that it was his conduct alone that has frustrated the same. That can be done by filing a simple application u/s 13(2) by the complainant. There is no reason or any principle which dictates that this omission cannot be treated as a relevant factor for there is no bar of making such application by the complainant so as to reach the sample in the hand of the accused for analysis. Handing over a sample u/s

11(2) of the Act is not an empty formality. It can be subjected to test and conclusive evidence can be had during trial u/s 13(5). Not taking a step to have such evidence by the prosecution with full knowledge that time is running out to have it, are all matters of relevance when accused comes out with a plea that his right is frustrated.

20. Now, applying all these principles to the present case, there is definite evidence that the complainant was knowing that the sample handed over to the accused u/s 11(2) of the Act would deteriorate even with the addition of formalin within a period of three to four months. The prosecution itself was launched after three months. The accused was expected to appear on January 4, 1971 and as indicated above till July 1971 charge was not framed. It is only in the month of July 1971, the stage indicated by Section 255 of the Code of Criminal Procedure was reached. After that the accused exercised his right in the month of September 1971. Before that the prosecution which was fully aware of the right of the accused did not take any steps whatsoever which it could have taken u/s 13(2) and in fact allowed the trial to linger on which ultimately resulted in the frustration of the right of the accused to get a final and conclusive report from the Director of the Central Food Laboratory. It is clear that the sample was collected in September 1970 and Public Analyst's Report was received in the month of October and there was no reason for the prosecution to further wait for launching the prosecution. Similarly, it is clear that the prosecution could not produce all its evidence, even prior to the stage of the charge till July 1971. By that time on its own showing the right of the accused to get the sample analysed by filing proper application had in fact become nugatory. Under such circumstances when the prosecution was aware that the sample would get decomposed within a given time, the fact it omitted to have the analysis u/s 13(2) has to be viewed as in fact rendering the right of the accused ineffective. Therefore, when an application was made in the month of September 1971 and Magistrate forwarded the same, the accused not only exercised his right but established that it was prosecution who has to be blamed for not preserving his rights under law.

21. That being the position, the acquittal of the accused cannot be interfered with though for different reasons. On facts of the present case, there cannot be any dispute as to the collection of the samples and the report of the Public Analyst which by themselves were sufficient otherwise to lead to the conviction of the accused. However, as the right u/s 13(2) of the Act of the accused stood frustrated, no conviction can ensue and accused would be entitled to acquittal.

22. In the result, the present appeal would stand dismissed.