
(1984) 04 GUJ CK 0029
In the Gujarat High Court

B.M. Darji

APPELLANT

Vs

Biharilal Karulal and Another

RESPONDENT

Date of Decision : 20-04-1984

Acts Referred:

Constitution of India, 1950 — Article 134A

Evidence Act, 1872 — Section 114

Prevention of Food Adulteration Act, 1954 — Section 10, 11, 13, 16, 7

Citation : (1984) CriLJ 1627 : (1984) GLH 394

Hon'ble Judges : P.S. Poti, C.J.;S.B. Majmudar, J;R.A. Mehta, J

Bench : Full Bench

Judgement

P.S. Poti, C.J.—By an order made on 31.1.1984 our learned brothers Talati and Desai, JJ. have referred the following question to be answered by the Full Bench:

Whether it is necessary for the Food Inspector to lead evidence that the formalin which he added had 40 per cent strength or whether his assertion as regards the strength based on the label pasted on the bottle by a pharmaceutical concern would be sufficient for the purpose?

2. This question arises under the following circumstances. Both these appeals are by the Food Inspector of Ahmedabad Municipal Corporation. The Additional City Sessions Judge, Ahmedabad, acquitted the accused in the two cases, setting aside the conviction of the accused in each of the cases basing his decision in support of such acquittal on certain observations made in a judgment of a Division Bench of this Court delivered on 17.2.1969 in Criminal Appeal No. 752 of 1967. In that case when the Food Inspector deposed as a witness he was cross-examined as to how he asserted that formalin of 40 per cent strength had been added to the food sample taken by him. The case was one of prosecution under the Prevention of Food Adulteration Act, 1954. The Food Inspector had, according to his evidence, merely relied on the label on the bottle of formalin purchased by him. Referring to this situation in the evidence the Division Bench in Criminal Appeal No. 752 of 1967 said:

Therefore, the statement of the Food Inspector, whose assertion that he had added formalin of 40 per cent strength is based on a mere reading of label on the bottle, is purely hearsay evidence and we are not in a position to know what was added to the present sample of milk, except that some aqueous solution was added, which would clearly explain the presence of higher quantity of water.

On this approach the accused in the case was acquitted. The Division Bench which made the order of reference to the Full Bench felt that this approach required reconsideration as the learned Judges felt that the Food Inspector cannot do anything more than purchase formalin from the market, prepared by standard pharmaceutical concerns and in such circumstances there can be a presumption u/s 114 of the Evidence Act. The Judges in the order of reference pointed out further that otherwise even if it is shown that the Food Inspector attempted to establish that the formalin purchased by him did contain 40 per cent strength of formaldehyde the next question would be as to what method was adopted by him to determine this and what material was used for the testing and whether those materials were of the standard quality, thus resulting in endless enquiry.

3. Criminal Appeal No. 599/80 arises out of the judgment in Criminal Appeal No. 142/79 of the Additional City Sessions Judge, Court No. 8, Ahmedabad, allowing the appeal and acquitting the accused, setting aside the conviction and sentence. Such sentence was passed by the Metropolitan Magistrate, Court No. 8, Ahmedabad, in Summary Case No. 72/78 for offences u/s 7(i) read with Section 16(1)(a)(i), Prevention of Food Adulteration Act, 1954, and sentencing the accused to simple imprisonment for six months and fine of Rs. 1,000/- in default of which the accused was to suffer simple imprisonment for one month. On the basis of the analysis of the food sample it was found by the Court that the milk which was the subject matter of the food sample was adulterated and hence the conviction.

4. Criminal Appeal No. 1157/83 is against the judgment in Appeal No. 132/82 before the Additional City Sessions Judge, Ahmedabad, similarly acquitting the accused reversing the conviction and sentence by the Metropolitan Magistrate who found the accused guilty u/s 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954, and convicted the accused to three months' simple imprisonment and a fine of Rs. 500/-. There again the food sample was found to be adulterated on the basis of the report of the Public Analyst superseded later by the report of the Director of Central Food Laboratory, both of which found the sample to be adulterated.

5. In both the Criminal Appeals before the Sessions Court the accused had successfully relied on the decision in Arvindbhai's case. Criminal Appeal No. 752/67 to which we adverted earlier. It was contended by the accused in the appeals that inasmuch as there was no independent evidence adduced by the prosecution as to the contents of the bottle used by the Food Inspector as the bottle of formalin, and from which he took the formalin to be added to the milk

samples it must be found that the prosecution had failed to prove the addition of formalin and therefore acquittal was called for. This plea succeeded in the light of the approach made by the earlier Division Bench in Criminal Appeal No. 752 of 1967. The question before us is whether this approach is correct or whether it calls for any clarification or better statement. That is what we will attempt to do in answering the question now referred to us.

6. Before we deal with the question which we are called upon to answer it would be appropriate to refer in brief to the provisions which have a bearing on the question calling for adjudication in this case, For the purpose of the Prevention of Food Adulteration Act, 1954, appointments of certain authorities such as the Public Analysts u/s 8 of the Act and the Food Inspectors u/s 9 of the Act are contemplated. Section 9 which refers to the appointment of Food Inspectors by notification in the official gazette envisages such appointment only of persons having the prescribed qualifications. Such qualifications have been prescribed by Rule 8, Prevention of Food Adulteration Rules, 1955. Three alternative qualifications are fixed and these are:

8. Qualifications for Food Inspector.- A person shall not be qualified for appointment as Food Inspector unless he-

(a) is a medical officer in charge of health administration of a local area; or

(b) is a graduate in medicine and has received at least one month's training in food inspection and sampling work approved for the purpose by the Central Government or a State Government; or

(c) is a graduate in Science with Chemistry as one of the subjects or is a graduate in Agriculture or Public Health or Pharmacy or in Veterinary Science or a graduate in Food Technology or Dairy Technology or is a diploma holder in Food Technology or Dairy Technology from a University or Institution established in India by law or has equivalent qualifications recognised and notified by the Central Government for the purpose and has received three months' satisfactory training in food inspection and sampling work under a Food (Health) Authority or in an institution approved for the purpose by the Central Government.

Section 10 of the Act empowers the Food Inspector to take samples of any article of food and to send such sample for analysis to the public analyst of the local area within which such sample has been taken. The Prevention of Food Adulteration Rules, 1955, deal, inter alia, with the manner in which the samples of the food to be sent to the Public Analyst are to be taken and how they should be dealt with. Rules 19 and 20 which are relevant for our purpose are extracted hereunder.:

19. Addition of preservatives to samples.? Any person taking a sample of any food for the purpose of analysis under the Act may add a preservative as may be prescribed from time to time to the sample for the purpose of maintaining it in a condition suitable for analysis.

20. Preservative in respect of milk, cream (dahi, khoa) and gur.? The preservative used in the case of samples of any milk (including toned, separated and skimmed milk)(standardised milk chhanna and skimmed milk chhanna), (cream, ice-cream, mixed ice-cream, ice candy), (dahi, khoa and gur) in liquid or semi-liquid form shall be the liquid commonly known as "formalin" that is to say, a liquid containing about 40 per cent of formaldehyde in aqueous solution in the proportion of 0.1 ml. (two drops) for 25 ml. or 25 grams.

Rule 19 makes it clear that the addition of a preservative is for the purpose of maintaining the sample in a condition suitable for the analysis and Rule 20 indicates that in the case of any sample of milk the preservative to be added is the liquid commonly known as "formalin". By way of explanation of the term "formalin" it is further said in the rule that it is "a liquid containing about 40 per cent of formaldehyde in aqueous solution". The very use of the word "about" would indicate that it is not envisaged that it is to be exactly 40 per cent. The probable quantity of formalin to be so added is also indicated as two drops for 25 ml. Rule 53 of the said Rules defines the word "preservative" as meaning "a substance which when added to food is capable of inhibiting, retarding or arresting the process of fermentation, acidification or other decomposition of food". It may also be necessary to refer to Rule 7(3) which deals with one of the duties of the public analyst. Within a period of forty-five days from the date of receipt of any sample for analysis he has to deliver to the Local (Health) Authority a report of the result of such analysis in Form III and para 2 of this Form reads:

The seal fixed on the container and the outer cover of the sample tallied with the specimen impression of the seal separately sent by the food inspector and the sample was in a condition fit for analysis.

Evidently Form III indicates that he is obliged to analyse only a sample which is in a condition fit for analysis. Naturally so. If it is not fit for analysis he cannot be expected to analyse the sample and issue a report.

7. The reference to the above rules has been made mainly with a view to provide the proper perspective for Rule 19 read with Rule 20, Prevention of Food Adulteration Rules, 1955, prescribing the addition of formalin. Such addition is to prevent the decomposition of milk to any material or appreciable degree, so that the sample is retained fit for analysis when the public analyst takes it up for that purpose.

8. It may be useful for the purpose of this case to consider the process of decomposition of milk and the role played by formalin in retarding that process so as to retain the sample in a condition fit for analysis. This may be necessary to understand the degree of importance or the significance of the addition of formalin to the milk sample. Decomposition of milk is evidently on account of the bacteria present therein. Lactic acid organisms which are present in milk absorb food and emit acids as waste into the milk rapidly leading to the decomposition

of the milk. To a considerable extent the speed with which this process would operate depends on the temperature at which the milk is kept. Temperature above 60°F is said to be conducive to easy multiplication of bacteria. This process of bacterial growth would be kept in check by the addition of formalin, the effectiveness of such check depending upon the quantity of the formalin added, of course, with no added effect by reason of addition beyond a particular strength and quantity of such formalin.

9. We take the liberty of quoting a few passages from the judgment of Mudholkar, J. in an early decision, in *Dattappa Mahadappa Vs. Secretary, Municipal Committee*, where the learned Judge has extensively quoted from the book "Milk : Production and Control" by Harvey and Hill. We quote paras 6 to 11 of that judgment as we have not been able to get at the original book to which we would have liked to refer had it been available to us:

(6) At p. 11 of the book the subject "Bacteria found in Milk" is dealt with. Among other things the learned authors have observed:

Despite their minute size, bacteria can accomplish a great deal in various directions. It has been proved that lactic acid organisms, which are present in milk in varying numbers even when produced under clean conditions, can consume their own weight of food each hour. They absorb food over their entire surface and emit waste products, generally acids, into the milk.

Then at p. 13 it is stated:

The acid producing organisms cause an alteration in the character of the milk which ends in putrefaction. The factors which decide the rate of this change are (a) the quantity originally present in the milk, (b) the temperature at which the milk is kept. If milk with a high bacterial content is kept above a temperature of 60°F, conditions are favourable for early and rapid souring.

Then at p. 16 it is stated:

In some milks acid develops to a considerable extent, while in others fermentations take place. Seventy degrees F sees the rapid development of the lactic-acid organisms, principally the *streptococcus lactis*.

Then at Pp. 177-178 they state:

The keeping properties of milk depend upon the number of bacteria contained. Bacteria multiply more rapidly at high temperatures than at low, and the higher the temperature the more rapidly do they increase, this being especially the case with those organisms which cause rapid souring and objectionable flavours in milk.... The bacteria most commonly found in milk grow more rapidly at temperatures above 60°F. At temperature above 70°F, milk speedily sours. If the liquid contains as few as 10,000 bacteria and is held at 60°F, it will become sour in fifty-three hours. If the same milk is held at 50°F, it will not sour for eighty-six hours. Every effort should therefore be made to ensure that the milk is cooled to

a temperature as low as is possible under the prevailing circumstances.

Where milk is kept in its natural condition for a long time, I take it, therefore, that its fat and non-fat content would be reduced. Since milk is so readily liable to change in composition the learned authors enjoin upon various precautions in the matter of collection of samples and their transmission to a laboratory. Thus, at p. 359 they say:

It is essential to the proper standardisation of sampling that all samples should be collected in accordance with principles laid down for Designated Milks in Memo. 139/Foods (January 1937) issued by the Ministry of Health.... This sample should be delivered intact to the bacteriologist.... When the milk has been obtained, it should be packed in ice in a suitable carrying case and should be kept under these conditions until it arrives at the laboratory. This precaution is particularly essential if the samples have to travel some distance. In any case, if milk cannot be delivered to the laboratory within fifteen minutes of sampling, ice should always be used except in the case of pasteurised or other heat-treated milks.

The authors enjoin that the milk should be collected in sterile glass bottles, which should be fitted with accurately-fitting metal or glass stoppers. They also emphasize that the bottles after being filled with liquid from the dipper should be securely stopped and packed in ice in a suitable box and also say that it is important that each bottle should be filled as full as possible in order to exclude the maximum amount of air.

(8) The learned authors also attach great importance to the fact that milk is tested as soon after the sample, is taken as possible. In this connexion their suggestions to the local authorities are:

Whichever method is used, it is advisable that the laboratory should be situated adjacent to the district concerned, in order to prevent any delay in transmitting samples...it would appear highly desirable that every Council should provide its own laboratory and not rely on testing being carried out by outside bodies as so often is the case.

(9) As regards the fat content of milk, the learned authors observed as follows at p. 394:

It is important to remember that the Sale of Milk Regulations, 1939, provides that a sample of milk containing less than 3 per cent, of fat or less than 8.5 per cent, of other solids is to be presumed, for the purpose of the Food and Drugs Act, 1938, not to be genuine until the contrary is proved. This limit for fat is exceedingly low when modern scientific principles of farming are considered as the average fat content of milk from a mixed herd rarely falls below 3.5 per cent. Milk of individual animals, however, frequently fails to reach the standard fixed, this discrepancy being very noticeable amongst pedigree animals from which it might be expected that milk would be of the highest obtainable standard.

Because of these variations and to prevent injustice, provision has been made for "appeal to the cow" samples to be taken when necessary. Should such samples fall below the specified standard, an appeal may be allowed.

Thus, the mere fact that fat and non-fat solids in any given sample of milk are below those prescribed does not lead to the inevitable inference of adulteration. In this case there is evidence to show that there was "an appeal to the she-buffalo" (if I may so put it) and that the sample of milk taken at the instance of the owner of the buffalo gave an analysis which showed fat and non-fat solids to be well below the prescribed percentages. In England, therefore, "the appeal" would have been allowed. Here too that should be done and for identical reasons.

(10) Then at p. 405 the learned authors observe as follows:

Added water may be suspected under the following circumstances: (a) Fat percentage below 3 per cent, (b) Percentage of non-fatty solids below 8.5 per cent, (c) Percentage of total solids below 11.5 per cent, (d) Percentage of ash below 0.65 per cent, (e) Freezing-point nearer to zero than 0.55° C. (f) Specific gravity less than 1.027. (g) Refractive index less than 1.37.

It must be reiterated that the above facts only point to suspicion of added water, it being impossible to differentiate between watered milk and milk which is naturally poor in fatty or non-fatty solids by the practical use of the above data.

* * * * * Although genuine milk usually contains some 87.5 per cent, of water, other samples, though genuine, may contain more or less.

These observations indicate how difficult it is to prove adulteration in a given case.

(11) The learned authors then state:

Because of changes which occur in lactose, even before souring takes place, the percentage of this substance can only be determined when milk is fresh. For this reason it is desirable that milk should reach the analyst at the earliest possible moment after sampling, maintained, if necessary, in a sweet condition by means of ice.

This increases the importance of refrigeration of samples and of avoidance of delay in analysing them.

10. In the milk industry preservatives are sometimes added to retard sourness or decomposition. There are a number of chemical substances used by some unscrupulous dairymen to preserve the milk, the object of adding these preservatives being:

- (1) to prolong the period of sweetness of milk,
- (2) to inhibit and to destroy bacteria, both pathogenic and non-pathogenic, and
- (3) to neutralise acid formed by bacteria and to delay curdling. The practice of

adding preservatives is very objectionable and should be forbidden and made illegal".

A Laboratory Manual of Milk Inspection, by A. C. Aggarwala and R.M. Sharma, page 210.

The authors go on to give the reasons why such addition of preservatives should be forbidden. It is further observed by the author that the substances most commonly used to preserve milk are principally:

(1) Boric Acid and Borax (Sodium borate) and one part of these in one to two thousand parts of milk is sufficient to preserve milk and to delay curdling for several days, and

(2) Formaldehyde. 40 per cent solution of formic aldehyde is known as "Formalin". It is also sold under various trade names, such as "Iceline", "Freezine", "Lactic Fluid", "SteryI etc."

The author observes:

Formalin is a fairly effective and a very popular preservative for milk because it has the advantage of being in a liquid form. Formalin in a concentration of 1 in 20,000 preserves milk for several days and perhaps this much amount is not injurious for the health of consumers.

11. Stedman's Medical Dictionary explains formaldehyde as "a pungent gas. CH₂O, obtained by passing a vapour of methyl alcohol and air over heated platinum and describes its qualities as antiseptic and disinfectant. Formalin is defined as "a 37 per cent aqueous solution of formaldehyde". Rule 20 has referred to the aqueous solution of 40 per cent strength.

12. Unhygienic conditions in the production, handling and distribution of milk results in increase in the bacterial quantity in the milk. When fresh milk is collected from healthy animals under strictly aseptic conditions the bacterial count may be low, In the book "The Chemistry & Manufacture of Indian Dairy Products" by K.S. Rangappa and K.T. Achaya mention is made of the several factors which influence the bacterial quantity of milk. At page 53 of the book the authors deal with the causes for variations in bacterial count. Unhygienic methods of maintaining cattle, conditions of collection and distribution, changes due to season, time lapse between milking and distribution, temperature of storage of milk are all factors of relevance. At page 55 the learned authors observe:

The multiplication of bacteria in milk leads to the progressive development of acidity and reduction of pH, culminating in the curdling of milk. To lengthen the life of the milk, therefore, the bacterial growth should be checked by cooling the milk to below 10°C, or the viable organisms should be destroyed by suitable preliminary heat treatment.

Henry Edward Cox in the book "The Chemical Analysis of Foods" (we are

referring to the 1946 edition which alone is available to us) refers at page 221 to the changes in the milk on being exposed to the air. The author observes:

On keeping, in air, milk gradually becomes more acid by the activity of the micro-organisms present, and when the acidity amounts to about 1 per cent, lactic acid curdling takes place in the cold; at higher temperatures this change takes place with a much lower concentration of acid. Milk which has been collected under "strictly aseptic conditions and kept in a cool place will remain sweet for three weeks or even more without either preservative or pasteurisations.

13. It is not as if the 40 per cent strength mentioned as the strength of formaldehyde in aqueous solution is absolute and any reduction in that percentage would affect the effectiveness of the formalin to any considerable degree. The very fact that reference is made to two drops for 25 ml. would indicate that the quantity is not stated in absolute term. The size of a drop will vary with the size of the dropper used and the pressure exerted. Rule 20 therefore makes only an approximation and variations therefrom which is not of a material degree may not affect the effectiveness of the process of preservation. Of course if the quantity is less or the strength is not of the required quantity the period during which the sample may remain in a state fit to be analysed may be shorter. But, even so, the rule leaves a large margin. That is a matter of relevance in adjudicating the controversy now before us. Whether the rule is mandatory or not has arisen in a number of cases. If what is meant thereby is that any variation in the quantity of formalin added would render the preservative ineffective and therefore the result of the analysis undependable such a plea cannot certainly be countenanced. In some cases contentions have even been raised that if there is deficiency or excess of one or two drops of formalin that would be sufficient to vitiate the result. These pleas have rightly not succeeded. To plead so is to forget the fact that the very concept of "drops" permits approximation and therefore closes the door for any such subtle technical approach. In this background we will go into the various decisions of Courts which have considered the nature of Rule 20 with regard to addition of formalin to a sample of milk.

14. The Courts had occasion to consider the scope of Rule 20 in the context of a plea that failure to strictly comply with the rule would vitiate the result reflected in the report of the public analyst. We first advert to a well-considered decision on this question by M.U. Shah, J. of this Court. He examined in rather elaborate detail the provisions of the Prevention of Food Adulteration Act, 1954 and the Rules made thereunder. We are referring to the decision in *Gela Hira Rabari Vs. S.V. Pandya and Another*, . The following observations of the learned Judge at p. 247 of the report (AIR) : At p. 1487 of Cri LJ may be of relevance:

Again, the use of the qualifying word "about" in relation to the strength and proportion of the liquid appears to me to be meaningful when considered in the context of the purpose of the rule which as aforesaid is to retard or arrest the process of decomposition so that the sample is maintained in a condition suitable

for analysis. The use of the word "about" indicates that the percentage of formaldehyde to be used may be 40% or nearabout. Now, a drop may slightly vary in measure of volume from another depending upon the method used for adding the drop and the human agency employed. Sections 10 and 11 of the Act do not enjoin that any preservative is required to be added to the sample taken by the Food Inspector, a part of which is to be sent to the public analyst for analysis. The addition contemplated by the Rule is only to maintain the sample in a condition suitable for analysis.

The learned Judge also observes that:

The scheme of the Act indicates that a sufficiently high proportion is prescribed so as to ensure as long as immunity as possible from decomposition.

The judgment goes on to quote extensively from the book "Food Inspection and Analysis" by Leach and Winton and the following passage from that book which has been quoted at page 248 may be referred to with advantage:

Formaldehyde, the most commonly used preservative for milk, is sold to the trade under various names, such as "preservaline". "freezine". "ice-line" etc., all being dilute aqueous solutions of formaldehyde, containing from 2 to 6 per cent of the gas being nearly always diluted from the 40% solution known as formalin. These preparations are usually accompanied by directions, which specify the amount to be used, varying from a tablespoonful of the solution in 5 to 10 gallons of the milk. It is commonly used in the strength of 1 part of the gas in 20,000 and rarely less than 1 part in 50,000. The antiseptic power of formaldehyde increases in a marked degree as the strength of the preservative is increased. Milk treated with 1 part in 10,000, for instance, according to the table was found to keep sweet 5? days. In the strength of 1 part to 5,000, the milk did not curdle for 10? days, while 1 part of formaldehyde to 2,500 parts of milk kept the milk from curdling for 55 days, the acidity up to that time, being nearly normal.

We may also quote para 20 of the judgment which quotes from a book "Milk and Milk Products" by Rekles, Combs and Macy:

20. In the book "Milk and Milk Products" by Rekles, Combs and Macy at page 375 occurs the following passage:

Formalin 40 per cent solution of formaldehyde is a very effective antiseptic and preservative. Since formalin comes in a liquid form, it is very convenient to handle. Approximately 1 milli-litre or 28 drops will serve as a preservative for 1 quart of milk for a week or more.

This view is supported by the observations of Edward R. Ling in his book "A text book on Dairy Chemistry", where the learned author has pointed out that formalin should be added at the rate of one milli-litre per quart sample. Now, one quart of milk is equivalent to 946.33 ml. On this calculation, two drops would be sufficient as a preservative for above 67 ml. of milk for a week or more. Again, in

the aforesaid passage, one ml. is stated to be equivalent to 28 drops, whereas in Rule 20, 0.1 ml. is stated to be equivalent to two drops. This also indicates that the requirement as to the addition of two drops for 25 ml. in Rule 20 is approximate and is a sufficiently high proportion."

The learned Judge expressed his agreement with the view taken earlier by Sarela, J. of this Court in an earlier case *Manka Hari Vs. The State of Gujarat*, that Rule 20 is only directory and requires only to be substantially complied with.

15. A Division Bench of the Bombay High Court in *The City of Nagpur Corporation Vs. Sukhanandan Ahir etc.*, had to deal with a plea by the accused who took up the extreme contention that the provision in E. 20 was mandatory and therefore where the addition of formalin by the Food Inspector to the sample was only 16 drops while the rule required addition of a little more than 17 drops the result of analysis was contended to be unreliable. It was contended that irrespective of the fact that the variance was only marginal the accused would be entitled to acquittal. The Court examined the object of adding preservative in this context and noticing Rule 19 found that the purpose of addition of preservative was to maintain the sample in a condition suitable for analysis and therefore the adequacy of the preservative has to be considered in that background. The conclusion was that substantial compliance and not strict compliance was called for. A similar contention was taken before the Allahabad High Court in *Nagar Swastha Adhikari, Nagar Mahapalika Vs. Dalip*, where the accused contended that where 17 drops of formalin alone had been added to each phial instead of 18 drops, there was non-compliance with Rule 20 and therefore the accused was entitled to succeed in his plea for acquittal. Non-compliance with the rules was not found and the Court expressed the view that the public analyst having stated in his report that the sample was in a fit condition for analysis there was no consequence by reason of addition of a lesser quantity of formalin. Following the view expressed by the Bombay High Court in *The City of Nagpur Corporation Vs. Sukhanandan Ahir etc.*, and also relying upon the earlier decision of M. L.J. Shah, J. in *Gela Hira Rabari Vs. S.V. Pandya and Another*, of this Court a Division Bench of the Kerala High Court in *Food Inspector, Municipal Council Vs. Secretary, Ksheeravyavasaya Co-operative Society and Others*, also expressed the view that what was required by Rule 20 was only substantial compliance and not strict compliance.

16. It may be profitable to consider a slightly different line of cases where the quantity of formalin added was not marginally deficient, but was substantially less than that prescribed by the rules. It was contended before the Andhra Pradesh High Court in *Public Prosecutor Vs. Ediga Venkata Swami*, that since only 4 drops of preservative were added to the sample as against the direction of adding one drop to each ounce subsequently amended to two drops the opinion of the public analyst should be considered to have been adversely affected. Dealing with this question the Court observed (At p. 605 of Cri LJ):

Here again, I am inclined to hold that the complaint should have emanated from

the Public Analyst, viz., that as insufficient quantity of the preservative had been added the sample had deteriorated or that decomposition had set in with the result that the analysis could not proceed on a safe footing. There is no such complaint by the Public Analyst nor the respondent has chosen to examine the Public Analyst from this point of view.

The Court further found:

If it was his case that on account of insufficiency of preservative the sample had deteriorated, he could have availed of the provisions u/s 13 of the Act and sent the sample to the Central Food Laboratory for an opinion. Admittedly he has not followed this course. In the absence of it, there is no justifiable reason to arrive at the finding that merely because of the insufficiency of the preservative the sample had undergone a further decomposition.

The same view seems to be reflected in the judgment of the Supreme Court in *Ajit Prasad Ramkishan Singh Vs. The State of Maharashtra*, . In place of 16 drops of formalin to be added to the sample only 8 drops had been added. It was contended in that case that non-addition of sufficient quantity of formalin was fatal and therefore the result based on the report of the public analyst should not be accepted. Mathew, J., speaking for the Bench, rejected this approach. In para 7 of the judgment the learned Judge observed:

There was no evidence before the Magistrate that for the reason that the prescribed quantity of formalin was not added to each part, the part of the sample delivered to vendor was incapable of being analysed by the Director. Nor did the Magistrate rely on that circumstance for his conclusion that the sample could have become decomposed. The appellant could have summoned the Public Analyst and examined him if he was serious in his present contention that since the prescribed quantity of formalin was not added, the part of the sample would have become decomposed by the time the summons was served, and no useful purpose would have been served by sending the sample for analysis by the Director. There was, therefore, no evidence that the part of the sample available with the appellant had so deteriorated at the time the summons was served, as to be incapable of being analysed.

17. The above cases establish the rule that the addition of formalin being for the purpose of preserving the sample nothing turns on the variation in the quantum of formalin added unless variation is of such a degree as to affect the result of analysis. The object of addition of formalin being to preserve the sample for long period, in a case where there has not been passages of long time between taking of sample and its analysis there would be no harm caused by the addition of a lesser quantity of formalin or formalin of lesser strength. In fact if on receipt of the sample the public analyst finds that because of the decomposition of milk it is not in a condition fit for analysis there would be no report of analysis by him. The Punjab and Haryana High Court in the decision in *Municipal Committee Amritsar v. Parkash Chand* (1978) 1 FAC 198 has gone to the extent of holding that the

question of absence or inadequacy of preservative in the sample should be raised by the public analyst himself and not by the person from whom the sample was taken. Though reliance was placed for this proposition on the decision in *Public Prosecutor, Andhra Pradesh Vs. Pasala Rama Rao*, the facts of that case do not appear to support such a proposition as it is not evident from the facts stated therein either that no formalin was added or that the quantity added was substantially inadequate. Of course the decision in *Public Prosecutor Vs. Ediga Venkata Swami*, to which we had adverted earlier takes the same view as that of the Punjab and Haryana High Court. Perhaps, the statement of the law in the form in which it is made by the Punjab and Haryana High Court may be putting the case a little too high. We would like to state the rule in a slightly different form. The fact that the public analyst analysed the sample and submitted a report would be indicative of the fact that the sample was in a condition fit for analysis, that would be further strengthened by the fact that he had signed Form III subscribing to the statement that the sample was in a condition fit to be analysed and therefore the logical assumption would be that what had to be done had been done to preserve the sample, of at any rate there was no harm done to the sample by any failure to substantially comply with Rule 20, even assuming that there was any "such substantial non-compliance.

18. Can the presumption u/s 114, Evidence Act, be called to aid to presume that the Food Inspector had added the requisite quantity of formalin in the absence of a specific statement by him in his evidence? A Food Inspector is normally expected to speak to the main facts of the case including the taking of the sample. If that is spoken to could it be presumed, in the absence of material to indicate otherwise, that he had acted regularly in the performance of his duties. That would mean that he had added the required quantity of preservative. Sarela, J. in *Babubhai Hargovinddas v. State* (1970) 11 Guj LR 530 examined very elaborately the various decisions on this question and since we are in agreement with the conclusion reached by the learned Judge we are quoting his words at para 38:

The ratio of these decisions is that no doubt the Food Inspector and the Public analyst are expected to follow the procedure laid down in the rules but absence of direct evidence in proof of compliance with the requirements of the rule does not justify the conclusion that the requirements were not complied with. If the principal requirement of the provisions of Adulteration Act and the rules as to the taking of the sample, sealing the sample, sending of the sample and analysis of the sample have been clearly made out the procedure (sic) details as to the prescribed manner of doing these acts may be presumed depending on the facts of the case. The presumption is not mandatory but permissible. Whether or not to raise a particular presumption will therefore depend upon facts proved and the nature of the fact to be presumed as proved. If that is so the positive proof of the nature contended for by Mr. Thakore in respect of observance of every part of these rules is not called for.

Dealing with the question of presumption as to whether the public analyst acted in accordance with rules the Supreme Court in *Enayat Ali Nazar Ali Bhori v. State of Maharashtra* (1976) 2 FAC 61 : 1976 Cri LJ 1837 (Bom) upheld the view expressed by the Kerala High Court in *Food Inspector, Municipal Council Vs. Secretary, Ksheeravyavasaya Co-operative Society and Others*, that such a presumption does arise u/s 114 of the Evidence Act. This Court in *Kamleshkumar Babulal Patel Vs. State of Gujarat and Another*, took the same view in regard to compliance with Rule 20. Mankad, J. speaking for the Division Bench, observed:

There is nothing in evidence of the Food Inspector to indicate that addition of formalin is not in the prescribed proportion. It must be presumed that the Food Inspector must have added formalin in the prescribed proportion.

19. A resume of the above discussion could profitably be summarised thus:

(1) Rule 20, Prevention of Food Adulteration Rules, 1955, gives clear indication by reference to the addition being of "drops" and the strength being "about" 40 per cent that there is no scope for a plea of strict compliance with that rule:

(2) The object of Rule 20 is to preserve the sample in a condition fit for analysis and if the public analyst is in a position to analyse the sample and certify in Form 111 it would be evident that the sample was in a form fit to be analysed:

(3) If the accused nevertheless challenges the result of analysis it is for him to adduce evidence that the statement of the public analyst that the sample was in a condition fit for analysis is not correct:

(4) There is a presumption of regularity in regard to the acts of the Food Inspector provided the broad details of the requirements are proved by the Food Inspector:

(5) Unless otherwise challenged the failure to mention the addition of the requisite quantity of formalin may not by itself be fatal to the prosecution.

(5) Rule 20 provides for addition of a quantity of formalin necessary to preserve the sample for a reasonably long period and therefore the consequence of non-addition or substantial deficiency in addition of formalin will depend to a great extent upon many other factors such as the time taken between collection and analysis of the sample, and the conditions under which the sample was kept in the meanwhile.

20. The question before us has necessarily to be determined in the above background. When a Food Inspector speaks of addition of formalin to the sample taken by him it must be taken to be of formalin of the strength contemplated by Rule 20, for the very term "formalin" refers to 40 per cent, aqueous solution of formaldehyde. It was observed by Justice Koshal of the Punjab and Haryana High Court in *Joginder Singh v. State* 11973 Cri LJ 1069 that where a person speaks of "formalin" he must be deemed to refer to a liquid of that specification and it is not further necessary for him to prove by evidence that what was added was

formalin as mentioned in Rule 20. We are in respectful agreement with that view. This would be the situation in the normal run of cases, but where there is a challenge as to what was added we will have to determine that challenge on the material before the Court. It is in this background that the decision of the Division Bench of this Court which caused this reference arises for reconsideration. It is relevant to notice that in that unreported case. Criminal Appeal No. 752 of 1967. the Court observed that the assertion by the Food Inspector that formalin of 40 per cent. strength was added was based on a mere reading of the label on the bottle. When the Court refers to "mere reading of the label" we assume that on the facts of the case that was the only evidence and there was no other material such as acquaintance of the Food Inspector generally with "formalin" which may have qualified him to speak on the addition. No doubt merely because there is a label on a bottle showing that the bottle is of formalin it cannot be taken that it contains formalin. It may be that formalin is not purchased in the usual course by the Food Inspector himself. If the assumption is made that the content of the bottle was formalin merely because of the label that would be unwarranted. The label would be hearsay evidence. An interesting case which came up before the Privy Council in *Joitabhai v. Comptroller of Customs* 1966 AC 356 amply illustrates this point, Section 116. Customs Ordinance, in force in Fiji made it an offence for any person to make any false entry in any declaration, bond, return, receipt or in any document whatever required by or produced to any officer of customs under the Ordinance. The appellant before the Privy Council was charged with making such a false declaration in showing the country of origin of certain goods imported by him from Singapore to Fiji as India. There was nothing to show that the goods were not of Indian origin except that the inner bags showed the marking "Produce of Morocco". The question was whether merely on the basis of the writing on these inner bags "Produce of Morocco" it was open to the customs authorities to assume that the country of origin was not India but Morocco.

Dealing with this Lord Hodson, delivering the judgment of their Lordships of the Privy Council, observed:

Their Lordships are asked by the respondent to say that the inference can be drawn that the goods contained in the bags were produced in Morocco. This they are unable to do. From an evidentiary point of view the words are hearsay and cannot assist the prosecution.

It was further said:

Nothing here is known of when and by whom the markings on the bags were affixed and no evidence was called to prove any fact which tended to show that the goods in question in fact came from Morocco.

It may be noticed that the Privy Council had in that case adverted to an earlier decision of the House of Lords in *Hvers v. Director of Public Prosecutions* 1965 A.C. 1001 . That was a case where in proof of the fact that the appellant had

purchased stolen cars, substituted identity of wrecked cars purchased by him on the stolen cars and sold them, evidence was called in from the records maintained by the manufactures as to numbers in some hidden part of the engine which according to the prosecution would establish identity of the stolen cars. The persons who produced those records were not those who were concerned with making the entries therein and in such circumstances the House was not prepared to accept this situation as an exception to the rule of hearsay evidence and therefore did not rely upon those entries. Reliance has been placed before us by the Public Prosecutor on the decision in AIR 1949 282 (Nagpur) in support of the case that the evidence on the label cannot be said to be hearsay evidence. In the Nagpur case the plaintiff, who had under an agreement let out his business assets to another on certain terms and conditions including the payment of commission to him on the business, cancelled the agreement and sued for return of the business assets. There was a claim of short delivery of two items of business assets valued at Rs. 500/- and Rs. 12/- respectively. As regards the first of these items which was a foreign instrument the plaintiff attempted to prove the value in England by reference to a catalogue received by him from England on request. The question was whether the catalogue was hearsay evidence and hence inadmissible. It was found that the catalogue was issued in the usual course of business by the dealers in England and that amounted to a statement by the dealers in England of the price of the goods concerned made to the plaintiff, that if the plaintiff had gone to the witness box and stated that such a statement was made to him that would have been evidence and since the catalogue was issued in the usual course of business it must be deemed to be not hearsay evidence, but admissible taking all the circumstances into account. In coming to this conclusion the decision in *Cliquot v. United States* (1865) 3 Wall 114, in which case price of Cliquot's champagne based on the current price list in Paris produced by a witness was relied on as evidence and the decision in a similar case in *Fensterstein v. United States* (1865) 3 Wall 145 were relied on. The case before us is not a case parallel to the Nagpur case, and we are not concerned with any question similar to that which arose there. What would have been the situation if the evidence here was that the Food Inspector purchased from a dealer who was dealing with bottled and labelled formalin of a known manufacturer in the regular course of purchasing in bulks or lots from the manufacturers or their distributors, would be a different question, a question which does not fall within the scope of the reference. If the situation is that the label on the formalin bottle alone is said to be evidence of the contents that would not be substantive evidence in the case. But that would not generally be the situation in such cases. That is because the Food Inspector, being a person appointed from among those who have prescribed qualifications, in other words specialist, must be taken to have the expertise of a specialist. A Food Inspector would be dealing with samples every other day, adding formalin or other preservatives to the samples taken by him whenever such a course is called for by the Rules. For such a person it is not necessary that there should be analysis of the formalin to understand whether what he handles is formalin or

not. When he uses the formalin he would necessarily know whether it is formalin or mere water or some other chemical by his acquaintance with the obvious qualities of formalin to which he would have been exposed over the years. Therefore, unless his qualifications are challenged and unless it is shown that he is not acquainted with formalin the fact that he has not proved the chemical contents of the formalin used by him cannot be taken as resulting in a failure of the prosecution. When he speaks of the addition of formalin he must be taken to know that he used is formalin. When a person says that he has taken milk or coffee in the evening he" says so because he, by constant and regular use, knows that what he has taken is milk or coffee, as the case may be, and not because what he has taken is analysed by him before taking it. More so is the case with the Food Inspector dealing with formalin in the regular course of his official duties.

21. We now answer the question referred to us thus. As regards the latter, part of the question the evident answer is that mere assertion on the strength of the label pasted on the bottle may not by itself be sufficient to prove the addition of formalin. But it is not necessary for the Food Inspector to lead an independent evidence that the formalin which he added had 40 per cent, strength. If he speaks to the addition of formalin that would be evidence for reasons we have indicated earlier.

22. In view of the wide scope of arguments al the hearing of the reference it was suggested that it would be more appropriate that the criminal appeals themselves are disposed of by this Bench though only a question had been referred. Since counsel appearing for all parties were agreeable to this course and have no objection to have the appeals themselves heard on the merits the Chief Justice in exercise of the powers under Rule 6 of Chap. II, Bombay High Court Appellant Side Rules, 1960, directed that the appeals themselves be heard and disposed of by the Full Bench and accordingly all parties were heard on the merits of the appeal.

23. In Criminal Appeal No. 599/80 the evidence of the Food Inspector is Ext. 6. He states in his chief examination to the addition of formalin to the sample in the following terms (as translated into English)

I had filled in the milk from the tumbler in three dry. clean and empty glass bottles in equal measure I had dropped thereafter 19 drops of formalin in each bottle.

In cross-examination challenge to this is seen to be made thus:

I do not know as to how the formaldehyde was dissolved. I can state this from the label of the company. It is not true that the disputed sample is not examined in Central Food Laboratory and that it is an incorrect report.

As we have said his qualifications to speak on the addition of formalin has not been challenged. The statement that he knew from the label need not be taken

to mean that it is the only source of his knowledge. In fact the reference there is evidently to the use of formaldehyde into solution and not to any challenge as to addition of formalin at all. Anyhow in the light of what we have discussed earlier in this judgment unless it is brought out that the only source of the Food Inspector's knowledge about the formalin added was the label it need not be assumed so. Hence in that case the prosecution need not fail on account of the fact that there was no addition of formalin. In fact if that was sought to be brought out the cross-examination should have been pursued and it should have been brought out that the Food Inspector was not otherwise qualified to speak or was not otherwise aware that what he added to the sample was formalin. The circumstances also have not been shown to be such as to result in vitiation of the result of analysis by delay on account of addition of formalin being inadequate or of being of inadequate strength.

24. Now we come to Criminal Appeal No. 1157/83. There the Food Inspector, whose evidence is Ext. 4, refers in chief examination categorically to dropping 19 drops of formalin in each bottle. His answers in cross-examination on this point may now be adverted to. He says:

I had not carried out the strength test of formalin. But it was carried out in laboratory. I had formalin dehyde of Glaxo Laboratory of 40% strength.

Here again he asserts that what he added was formalin there is no challenge so as to bring out circumstances which would warrant us not to act on that assertion. In the background of what we have said earlier we do not think that acquittal on that ground would be justified.

25. Coming to the question of the course to be adopted in Criminal Appeal No. 599 of 1980, the judgment of acquittal is seen based on the sole ground of non-compliance with Rules 19 and 20, Prevention of Food Adulteration Rules. In support of the plea for acquittal, the accused had urged other grounds also and evidently it was only because the Court was inclined to allow the appeal on the ground of non-compliance with Rules 19 and 20 that the other grounds were not pressed. This is indicated in the judgment itself. If so, we having found that the judgment cannot be sustained on the ground on which the Court below found a case for acquittal we set aside that judgment and direct reconsideration by the appellate Court of the other matters which were urged before that Court. In other words, the course that we adopt is to set aside the judgment of acquittal by the lower appellate Court and to remit the case back to that Court for deciding the questions other than the one which we have decided here.

26. In Criminal Appeal No. 1157 of 1983 the accused had in the appeal before the Court below raised two grounds : one of them was that Rules 19 and 20 have not been complied with and therefore the prosecution must fail. That question is now answered by the decision here. The other contention was that the Public Analyst's certificate varied substantially from the certificate issued by the Director of the Central Food Laboratory and the prosecution having failed to

explain the substantial variation, the accused is entitled to the benefit of doubt. On that question, we have heard both the sides here. Of course, though urged before the learned Judge of the appellate Court, this was not considered because it was found not necessary in view of the finding on the question of non-compliance with Rules 19 and 20, Food Adulteration Rules. We permitted counsel for the accused to urge that plea before us and v. e have heard him. This Court has considered the same question recently in a Full Bench and has held in that decision (Criminal Revn. Appln. No. 37 of 1979 with Criminal Revn. Applns. Nos. 670 of 1978, 38 of 1979, 671 of 1978, 1144 of 1983 and 321 of 1982 decided on 16th April, 1984) reported in Prahladbhai Ambalal Patel Vs. State of Gujarat and Another, that when once the Director of Central Food Laboratory issues a certificate, automatically the certificate issued by the Public Analyst stands superseded. Thereafter there is no scope for looking at the latter certificate. This Court has also held that the prosecution is under no duty to explain any variation. Therefore, that plea urged before us in support of the acquittal does not succeed. Necessarily, therefore, the appellate judgment acquitting the accused must be set aside, the judgment of the Trial Court restored in so far as conviction is concerned and the question of sentence considered. We find that on the question of sentence, the trial Court has treated the accused leniently and in fact, less than the minimum sentence has been awarded. Anyhow it is not for us to interfere with such sentence as that sentence has become final. In the circumstances, while the respondent-accused is convicted the sentence imposed on him by the Trial Magistrate is restored. Time to surrender, two months.

27. Counsel for respondent 1 in Criminal Appeal No. 1157 of 19K3 makes an oral application under Article 134-A of the Constitution for leave to appeal to the Supreme Court of India. We see no reason to certify the case as a fit one for appeal to the Supreme Court. Leave declined.