
(1994) 03 BOM CK 0078

In the Bombay High Court

Case No : Criminal Appeal No. 249 of 1985

State of Maharashtra

APPELLANT

Vs

Jethmal Himatmal Jain and another

RESPONDENT

Date of Decision : 25-03-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 32, 377, 378
Drugs and Cosmetics Act, 1940 — Section 18, 18A, 27
Evidence Act, 1872 — Section 114
Prevention of Food Adulteration Act, 1954 — Section 16

Citation : (1994) 4 BomCR 103 : (1994) CriLJ 2613

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : D.T. Palekar, app, for the Appellant; C.S. Gosaliya and V.B. Ganatra, for the Respondent

Judgement

1. Cases involving racketeering in life saving drugs or trading in spurious medicinal preparation for that matter, require special consideration particularly where it is demonstrated that there has been a compromise in quality or adulteration of the Drugs. Many precious lives have been lost due to the spurious preparations having been administered and it is a matter of little consequence whether the fault can be traced to the manufacturer, to the intermediary or to the dealer. These are crimes against humanity and the law must approach them with a degree of utmost firmness if the rackets are to be contained and snuffed out. Even at the risk of sounding ruthless, it will have to be stated that if a gradation of anti-social offences were to be done, this category would probably top the list.

2. The situation becomes all the more distressful when it is disclosed that the offender is being shown sympatric consideration by the very public authorities in whom the sacred task of safeguarding public safety is entrusted. Instances are not wanting where an unscrupulous trader even after having been booked, approaches the top authorities in the Government and they in turn agree to

condone the lapse for reasons that are not difficult to understand. The conduct of such Government authorities in whitewashing grave crimes requires to be taken serious note of by the Courts because on the one hand it is completely demoralising to a point of total frustration for the Enforcement Officers who see the criminal go scot-free because of the contacts at the higher level and more importantly because it is an assurance and an insurance to that and all other similarly placed criminals that such lucrative rackets are quite safe.

3. In the instant case, the accused had boldly contended that he entered into an understanding with the Government that the cases filed against him by the Drugs Administration authorities for being found in possession and dealing with spurious and substandard drugs would be withdrawn if he agrees to surrender his licence after a particular date. Whether the licence was to be reissued in some other name is not very clear but the fact remains that such horse trading had not only taken place but has been boldly pleaded before the Court and the amazing plea put-forward in law was that since the accused abided by his part of the contract of the understanding, that the Government was estopped from proceeding with the prosecution and on the bar of promissory estoppel, the conviction ought to be set aside. What is even more unfortunate, is that the Appeal Court in this case has upheld the plea though it must be said with some degree of satisfaction that the Department has appealed against that order and brought the entire sordid episode to the notice of this Court.

4. The proceeding is an old one having commenced in the year 1974 but that aspect is of little consequence because the issues involved are of such far-reaching public importance that they require to be dealt with in all seriousness. Firstly, the facts :

5. This appeal is directed against a judgment of the learned Additional Principal Judge (as then he was) of the Court of Session for Greater Bombay, which is dated 7th January, 1985. The present respondents who were the original accused Nos. 1 and 2 in Criminal Case No. 31/S/77 had been convicted by the learned Metropolitan Magistrate, 28th Court, Esplanade, Bombay. Originally five accused had been charged with offences under Sections 65(18) read with 18(C) and 27, 18-A(ii) read with 27, 18-A(i)(ii) read with 27 Rule 65 read with Section 27 of the Drugs and Cosmetics Act. This Court had quashed the proceedings against the original accused Nos. 3 to 5. The trial Court convicted accused Nos. 1 and 2 for the offences punishable u/s 27(a)(i), read with 18(a)(ii) of the Drugs and Cosmetics Act and sentenced them to one year's rigorous imprisonment and to pay a fine of Rs. 2000/- in default to undergo two months rigorous imprisonment. The trial Court further convicted accused Nos. 1 and 2 for the offence punishable u/s 27(b) read with 65(iv) and 27(b) read with Rule 65(18) of the Drugs and Cosmetics Act and Rules and sentenced them to pay a fine of Rs. 500/- in default to undergo two months rigorous imprisonment on each count. The accused were acquitted of the charge u/s 18(a)(ii) read with Section 27 of the Drugs and Cosmetics Act for possessing Garamycin vials alleged to have

been misbranded or adulterated. As indicated earlier, in the Appeal filed before the Court of Session, the learned Judge after hearing the parties allowed the appeal and set aside the convictions. It is against this appellate judgment, that the present appeal has been preferred.

6. The learned A.P.P. Mr. Palekar, has before setting out the facts of this case submitted that this case is one of immense public importance because it concerns two serious heads of mal-practices that are associated with the drugs trade. Firstly he submitted that the accused are alleged to have been parties to stocking and offering for sale adulterated drugs which are supposed to be used as life saving medicines and secondly that the case indicates that the drugs supplied for use in the E.S.I. Hospitals and physicians samples which are banned as not for sale, were found in a Chemist shop as the case were being traded in. He submitted that there has been serious miscarriage of justice, that the grounds on which the accused have been acquitted are not only strange but are shocking and that consequently the same are liable to be set aside. It is essential for the purpose of this appeal to first set out the material facts :

7. On 23rd July, 1974, the Crime Branch (Control) Drugs, C.I.D., Bombay, arrested one Rajnikant Mehta and attached a huge stock of drugs illegally possessed by him. In the course of the investigation it transpired that Rajnikant had purchased most of the drugs from accused No. 1 Jethmal Jain, Proprietor of M/s. Maharashtra Medical Stores at Kalachowki, Bombay. A Police party along with Drugs Inspector R. W. Gudal and other Drugs Inspectors went to the shop M/s. Maharashtra Medical Stores and searched the premises. At that time accused No. 1 Jethmal was not available. Accused No. 2 Mohanlal and the other accused Nos. 3 to 5 who have been discharged were present in the premises. It is alleged that accused No. 2 Mohanlal was the Manager of that shop. In the course of the search some drugs bearing the marking of E.S.I.S. and "Physicians sample not to be sold" were found. The Drugs Inspector Gudal drew the samples of Garamycin U.S.P. Batch No. IN-3-AMK2 19 manufactured by M/s. C. E. Fulford (India) Pvt. Ltd. (ii) Tetracycline Hydrochloride Capsules Batch No. 108 manufactured by M/s. Alkamo Laboratories, Bhandup, Bombay and (iii) Tetracycline Hydrochloride Capsules I.P. Batch No. 506 manufactured by M/s. Ravi Pharmaceuticals, Daman. The necessary information in Form No. 17 was given to accused No. 2 who was present in the shop. The Police party, Panchas and Drugs Inspectors then went to the house of accused No. 1, i.e. the Form No. 19, 86-H, Bawaliwadi, Dr. B.A. Road, Bombay-12, and seized under panchanama different drugs such as Capsules, packed in unlabelled plastic packets and some vials bearing the marking as "Physician's sample not to be sold." Samples were drawn in the presence of the wife of accused No. 1. These seizures formed the subject-matter of a separate prosecution with which we are not immediately concerned.

8. The accused No. 1 later on surrendered to the Police and he gave information about the sources of his purchasing these drugs. Those persons could not be traced. In respect of the Drugs bearing E.S.I.S. marking, the accused stated that

he was an approved Chemist under the E.S.I. Scheme to keep for sale drugs bearing the E.S.I. Marking.

9. The samples in question were sent to the Government Analyst, Bombay, for testing. It was found that the sample part of Garamycin was not of the standard quality, whereas the sample of Garamycin taken from the manufacturer was of the standard quality. The sample parts of Tetracycline Hydrochloride Batch No. 108, manufactured by M/s. Alkamo Laboratories was also found not to be of standard quality and was not containing any Tetracycline Hydrochloride. Moreover, further inquiry revealed that there was no company by name M/s. Alkamo Laboratories, Bombay, and the manufacturing licence No. 417 put on the labels was false. The other Tetracycline Hydrochloride capsules Batch No. 506 manufactured by Ravi Pharmaceuticals were found to be of standard quality. Accused No. 2 who was present in the shop had failed to produce the record of purchase of different drugs kept for sale in that shop.

10. The defence of the accused is basically one of denial. Accused No. 1 contends that he was not present in the shop at the time of the raid, and it is his case that he has not committed any offence whatsoever.

11. Accused No. 2 admits that he was present in the shop at the time of the raid but he maintains that he is a relation of accused No. 1 and that he had visited the shop for the purposes of seeing his relation. He has nothing to do with the conduct of the business or with the shop and he denies that he was the Manager of the shop at the relevant time. He has disputed the prosecution case that the Drugs Inspector had seized the various items from the shop in question. He contends that they had brought the tin containing these drugs from outside and that they had forcibly obtained his signatures on various documents on that day. The learned trial Judge rejected the defence of the accused and convicted them as indicated earlier. Subsequently, however, on appeal these convictions came to be set aside.

12. As indicated earlier, the accused preferred a Criminal Appeal to the Court of Session, being Criminal Appeal No. 137 of 1983, which came to be disposed of by judgment dated 7-1-1985. The Appeal Court, surprisingly enough and very unfortunately, upheld the submissions canvassed on behalf of Accused No. 1, who was the Proprietor of the shop, which was, briefly, to the effect that since he had made an offer to the Government to surrender the licence in return for which he had requested the Government to drop the charges and since he had, in fact, complied with the terms of his offer that the Government was estopped from proceeding with the prosecution. Apart from this startling proposition of law being upheld, what is further distressing in this case is the fact that even as far as Accused No. 2 is concerned, the learned Judge accepted the contention that the evidence was not good enough to sustain the conviction. It is against this order of acquittal that the present appeal has been preferred.

13. At the commencement of the hearing, Shri Ganatra, learned Counsel

representing respondent No. 1, challenged the maintainability of the appeal principally on the ground that this is a proceeding instituted on the complaint of the Drugs Inspector and, consequently, that the leave to file appeal against an order of acquittal can be granted by the Hon"ble High Court u/s 378(4) of the Code of Criminal Procedure, 1973 in such cases only to the complainant. Shri Ganatra relied on a decision of the Kerala High Court in the case of State of Kerala Vs. V. Sunder Raj and Another, , wherein the learned single Judge of that Court upheld the view that an appeal filed by the Public Prosecutor u/s 378(1) of the Code of Criminal Procedure was not maintainable as the Food Inspector had not signed the Vakalatnama. Shri Ganatra further relied on a decision of a learned single Judge of the Nagpur Bench of this High Court in the case of The State of Maharashtra v. Tirathsingh Saudagarsingh, (1986) 1 FAC 55, wherein again the same argument found favour with the Court. I need to record that the learned single Judge had relied on the judgment of the Kerala High Court referred to supra.

14. This argument, in the first instance, cannot be accepted, with due respect to the two earlier decisions. Factually, the title of the complaint filed before the learned Magistrate clearly specifies that the prosecution was "State at the instance" The fact that summons procedure was followed by the learned Magistrate would not make any difference to the matter. It is also fallacious to uphold such a technical plea when the prosecution happens to be at the instance of a public authority, such as the Drugs Inspector, whose source of power flows from the State. The Drugs Inspector is only a subordinate or a designated officer, who is used as a medium for prosecuting the matter. He is not there in his personal capacity as a private complainant and this apparently was the distinction which was overlooked in the aforesaid two decisions. The source of power vests in the State and is only delegated to the Inspector and this can be amply demonstrated by the fact that it is the Inspector who is required to go back to the State for appropriate directions in respect of filing of an appeal. Under these circumstances, in the case of an order of acquittal, the State exercises its powers u/s 378(1) of the Code of Criminal Procedure and not u/s 378(4) of the Code of Criminal Procedure. In the present instance, the learned A.P.P. has produced before me the resolution of the Law and Judiciary Department directing the Public Prosecutor to present the appeal. It has, therefore, been validly and correctly instituted, and entertained by this Court.

15. Appearing in support of the appeal, Shri Palekar, the learned A.P.P., has done an admirable job. I need to commend him for the thoroughness with which he has prepared his case and for the considerable amount of research put in by him and, more importantly, for the manner in which he has dealt with the various legal issues that arise for determination, most of which are within the province of unfamiliar territory. The learned A.P.P. has submitted that the appellate order is erroneous, in the first instance, because none of the findings are supportable from the record, and mainly because the learned Judge followed a strange procedure while deciding the appeal. It was submitted on behalf of accused No. 1

that he had made an offer to the State Government that he would surrender his licence if the Government were to drop the charges against him. Pursuant to this, the State of Maharashtra at the ministerial level took a decision to drop the prosecution on 23-6-1975. Subsequently on a reconsideration of the matter at the instance of the Department, the order withdrawing the prosecution was revoked and the complaint came to be filed before the learned Magistrate. The learned appellate Judge had permitted the defence to summon the Department representative D.W. 1 Desai to produce the file concerning these unsavoury developments, and on a perusal of this material, upheld the defence contention that the Accused who had in fact, surrendered his licence on 4-11-1975 had altered his position to his prejudice and, consequently, that the Government was estopped from thereafter prosecuting him. This is the solitary ground on which the conviction against Accused No. 1 has been set aside.

16. Shri Palekar has seriously assailed the correctness of this order and contended that for whatever reason the Government decided not to prosecute the Accused on the basis of his offer to surrender the licence that one cannot argue that any right of immunity has arisen in favour of the Accused by virtue of this action nor can estoppel be pleaded against the State in such circumstances. He submits that the order to revoke the earlier decision was by way of corrective action and that it passes legal scrutiny. Shri Palekar has proceeded to draw my attention to the fact that the evidence unmistakably discloses two things, the first being that Accused No. 1 is liable for whatever happened in so far as he was the proprietor of the business in question, and secondly, that his physical absence from the premises at the time of the raid cannot, in any way, assist him in so far as the statutory liability is fastened on him. Accused No. 1 does not dispute the fact that apart from being the owner, that he was running the business with the assistance of some employees. Significantly enough sizeable quantities of spurious drugs were seized from his residence. Shri Palekar has dealt with the defence submission, which was to the effect that much of the offending material was seized from a kerosene tin and the contention that this was brought to that place by the members of the raiding party. He submits that there is a background to this case in so far as the Drugs Inspector had raided the residence of one Rajnikant Mehta who, in turn, implicated Accused No. 1 and it was pursuant to this that the authorities had come to check the stock in the shop. There is not even the slightest suggestion to indicate that there was any background of hostility between the Drugs Inspector P.W. 1 Gudal or the Department and Accused No. 2 or that there was any background of hostility or disputes that could be suggestive of their wanting to falsely implicate nor is there a suggestion that any third party was ill-disposed towards Accused No. 1 and wants to bring him in trouble. Shri Palekar submits, and perhaps very rightly, that in the absence of any such material, a mere suggestion that the inspecting party had brought the offending material into the premises would be absurd.

17. With regard to this all important aspect of the matter, I need to record that learned Counsel appearing on behalf of the Accused have strenuously argued

that the Drugs Inspector had come to the shop in the morning and that it was only after a lapse of about four hours that the Police and the Panchas came there. The second aspect that was pointed out to me was that even though it was alleged that sub-standard drugs were found in a kerosene tin which was under lock and key that neither the lock nor the key has been produced. It was, therefore, submitted that the entire action is a frame-up at the instance of the Department. It was also submitted that it is necessary in this particular case to discard the seizure Panchanama in so far as, admittedly, P.W. 1 Gudal had come to the premises four hours before the Police and the Panchas arrived, that consequently apart from the aspect of planting that has been referred to above, that the seizures made by him during this period when he is alleged to have checked the drugs in the shop and sorted out the items in question cannot be said to have been witnessed by the Panchas and, therefore, that the evidence in support of the contention that the seizure were made from the premises will have to be discarded.

18. Dealing with the factual aspect of the matter, on a perusal of the oral and the documentary evidence before me, it is inevitable that the findings of the learned trial Magistrate that the drugs which are alleged to have been attached from the premises of Accused No. 1 must be held to have been so attached. There is nothing on record to justify the allegation that either the Drugs Inspector or the Department were out to falsely implicate the Accused. Frankly, if the intention was to do so or for that matter to plant the material on the premises, it would never have taken the authorities four hours of labour for this purpose. In that event, the operation would have been more swift. The fact that P.W. 1 checked everything in the shop for four hours before sorting out what was required to be seized is itself conclusive evidence that he has acted correctly. I do not see any infirmity with regard to the procedure followed because the Drugs Inspector is a legally authorised authority empowered to check the premises and to ascertain whether any substandard or adulterated or prohibited items had been sorted there. This was precisely what he had come for and there was no need for him to call either the Police or the Panchas unless and until he came across material of that type. On finding such material, the Drugs Inspector very rightly called the Police and the Panchas. It is true that the Panch in this case PW 2 Bharat Sukhia has turned hostile, but that is precisely what one is to expect in cases of this type, I am constrained to observe that the time has now come when Courts will have to ask the very relevant question as to why should a Panch who has signed the Panchanama turn hostile and if he does so, at whose instance is this happening. Undoubtedly, the direct and only beneficiary is none other than the Accused. To my mind, where a Panch has been obviously tampered with, a Court will have to draw an adverse inference against the beneficiary of such a situation. In this case, we have on record sufficient other evidence, namely, the deposition of the Drugs Inspector PW 1 who has proved the Panchanama and through whose evidence, to my mind, this Court can safely and justifiably hold that the seizure in question had, in fact taken place. It is now well-settled law that merely

because Panchas are tampered with that the prosecution will not fail, for that could lead to a total miscarriage of justice in so far as the accused person would indiscriminately resort to such corrupt practices and then go scot-free. Under these circumstances, to my mind, the defence contentions canvassed before me are liable to be rejected and the finding of the learned Magistrate that the seizures were valid and that they had, in fact, taken place is liable to be upheld.

19. In this context, Shri Palekar, the learned A.P.P., has relied on a decision of the Supreme Court in the case of Hari Obula Reddy and Others Vs. The State of Andhra Pradesh, , in support of two propositions, the first of them being that where the calibre of evidence is good enough that even if the witness is an interested party, that the evidence can be relied upon and secondly, in respect of the proposition that the evidence of the complainant can be acted upon regardless of the Pancha's evidence. Though the Supreme Court was not dealing with a case where Panchas were involved, the principle has been upheld in this decision which, in fact, is a well settled proposition of law that the Court is empowered to act on the basis of reliable evidence de hors any support from quarters such as other witnesses. As indicated by me earlier, the complainant is a public authority who was doing his duty, he has withstood the cross-examination admirably and I do not see how a Court of law can discard his evidence merely because the Panchas have been tampered with.

20. On the question of promissory estoppel, Shri Palekar relied on the well-known decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , as also the decision in the case of Mahabir Vs. State, , and has submitted that the learned appellate Court was wrong in having upheld the plea of promissory estoppel. He has submitted, which in fact is the correct position in law, that the learned Judge who heard the appeal has totally misread the applicability of the doctrine of promissory estoppel and has come to the erroneous conclusion that it applies to the facts of this case.

21. Appearing on behalf of Accused No. 1, Shri Ganatra submitted that conversely there is no decision of any Court specifically holding that the doctrine of promissory estoppel does not apply to criminal proceedings. Shri Ganatra submitted that the principle which is to the effect that a party which alters its position to its prejudice cannot, thereafter, be put to detriment by virtue of a subsequent change of stand by the State would apply to the facts of the present case. He contended that Accused No. 1 had offered to surrender his licence after disposing of the stocks within six months if the action against him was withdrawn and that the Government accepted the offer whereby he surrendered the licence. Having done so, Shri Ganatra contended that the State was barred from thereafter proceeding against his client. He alternatively submitted that the order reversing the earlier decision was passed behind the back of Accused No. 1 and without hearing him and that consequently it is a breach of the principles of natural justice and is, therefore, bad. If the prosecution had been instituted pursuant to such an order, according to the Shri Ganatra, the entire exercise is

stillborn. Shri Ganatra, consequently submitted that the Drugs Inspector had no authority to proceed in this case.

22. Learned counsel relied on a decision of the Supreme Court in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , in support of his contention that the principles of natural justice applied and further that the obligation to act fairly is infringed. It is essential at this stage to record that *Maneka Gandhi's* case has no application to the facts of the present case. The Government in this case was wrong having held out any assurance to the Accused that he will not be prosecuted if he surrendered his licence or for that matter on any condition. Once an offence is disclosed, the powers of dealing with that particular offender vest in the Court and it would be a dangerous and impermissible practice to sanction a procedure whereby the accused person could be exonerated of the consequences of such an offence by a Government Authority of whatever level. There is no provision in criminal law which permits the authorities even Ministers who are heads of Departments, to tender pardon in cases where criminal offences have been disclosed and it is, to say the least, a scandalous situation that such horse-trading had, in fact, taken place and that the decision followed not to prosecute the Accused. Dealing in adulterated and substandard drugs, and that too life-saving drugs as also making money out of samples which are not intended for sale, are virtually crimes against humanity and in the face of such charges of black-marketing, the Accused was doing no favour to the Government by offering to surrender his licence. These charges were serious enough for the licence to be forthwith suspended and cancelled, and therefore, if the Accused surrendered his licence he has altered his position to his prejudice, but probably to his advantage. I say this because pursuant to the downright corrupt understanding between him and the Government in exchange for this offer a decision was, in fact, taken not to prosecute him. It is in the public interest that such dishonest practices be deprecated. Unfortunately, the record does not indicate the name of the Minister who had taken this decision, or else this Court would have had no hesitation in ordering action against him personally.

23. In support of his contention that the principles of fairplay must apply, Shri Ganatra has relied upon a decision of the Supreme Court in the case of *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, . That case related to the merger of certain banks and the position of the employees thereafter and is not, even remotely, connected with the present proceedings. The principles of fairplay must govern all administrative actions and it is Shri Ganatra's contention that his client ought to have been given an opportunity of resisting the revocation of the earlier order whereby a decision had been taken not to prosecute him. He has supported this argument by also relying on a judgment of the Supreme Court in the case of *Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc.*, , wherein the Supreme Court was dealing with the principle of "prejudice." Unfortunately, once again a decision has been cited that is in no way relevant. The principles applicable to civil law cannot be invoked in a situation

where an accused person who has committed serious offences and obtains an order that he should be allowed to go scot-free through obviously dishonest and improper means, cannot advance arguments before a Court of law that before the wrong order is corrected that he should be given a hearing. To my mind, once the raid had taken place and the investigation was complete, a prosecution had to follow as a matter of course and the order that was passed stopping that prosecution was unusual and improper. The Accused had no business to approach the Government, in the first instance, and even if he did so, the Government had no power to let him off. Where a downright wrong order has been passed, it was correct on the part of the Government to have revoked that order and restored the status quo ante. It is impossible to argue, therefore, that any principles of fairplay have been violated or that any breach has been caused to the Accused. All that was done was to direct that the Accused should face the prosecution which, in any case, he was liable to do.

24. Shri Ganatra has thereafter relied on a decision of the Supreme Court in the case of Miss. Mohini Jain Vs. State of Karnataka and others, , in support of his contention that the action on the part of the Government was arbitrary. The argument itself is misconceived in so far as I do not see how the case in question, which deals with the right to education and the issue of capitation fees, can even remotely be connected with the present case which dealt with drugs offences. Shri Ganatra seeks to submit that in directing the prosecution of his client, the Government has acted arbitrarily. To my mind, the decision is far from arbitrary. It is valid and correct decision which was very necessary on the facts of the present record.

25. Dealing with the merits of the matter, Shri Ganatra submitted that the Tetracycline Hydrochloride has been proved to be substandard, but that it is wrong to hold that it was misbranded. The evidence of PW 4 in this case very clearly establishes that the drug was misbranded in so far as it has been pointed out that what was found has not been manufactured by that Company. Secondly, Shri Ganatra contended that the non-maintenance of records and the charge that the drug in question had been stocked for sale have not been made out. To my mind, if all the relevant record, such as the procurement, stock register etc., had been maintained, it was upto the defence to establish this fact and to this extent, therefore, there is no reason why the prosecution case or the evidence of the Drugs Inspector should be disclosed in this respect. With regard to the question of stocking of the drugs for sale, Shri Ganatra advanced the contention that the drugs in question were found in a kerosene-tin, that merely possession of such drugs, even if established, was still insufficient for purposes of a conviction in so far as they were at the highest stocked and not kept there for the purpose of sale. In this regard, Shri Ganatra relied upon a decision of the Supreme Court in the case of Mohd. Shabir Vs. State of Maharashtra, . I need to clarify that the Supreme Court was dealing with a case wherein the Accused was caught at a railway station with a certain quantity of tablets and the Supreme Court rightly held that mere possession under these circumstances would not invoke the

provisions of Section 27 of the Drugs and Cosmetics Act since it was not demonstrated that he had a shop or anything of that sort. In my considered view, where the accused is a chemist and where his business is of retailing in drugs and where substandard drugs are found in the shop, regardless of whether they are in a cupboard or in a kerosene-tin, there can be no other inference except that they were stocked for sale. To my mind the judgment is wholly inapplicable.

26. On the question of possession, Shri Ganatra relied on a decision of this Court in the case of Y.R. Parpia Vs. R.M.D. Chamarbagwalla, in support of his contention that where adequate corroboration was available and the prosecution has not led evidence of those witnesses, that an adverse inference must follow. He has pointed out to me that two of the members of the raiding party, namely, Kochar and Patil, as also the second Panch were not examined and that it is, therefore, unsafe to base a conviction on the evidence of PW 1 alone. I need to point out that the aspect of adverse inference u/s 114(g) of the Evidence Act could arise in a case where there is no evidence in so far the evidence that was available was suppressed or not produced. Here, we have a case where evidence is available and the question arises as to whether more or better evidence should have been produced. Shri Ganatra is right to the extent that the prosecution would have been fortified by producing more evidence, but in a situation where the material produced itself is sufficient, I do not see how Section 114(g) of the Evidence Act can come to the assistance of the Accused. On the other hand, the presumption u/s 114(g) of the Evidence Act would come into play in so far as the Drugs Inspector was acting in his official capacity and to this extent, therefore, it is presumed that he was acting correctly. In the absence of any evidence to the contrary, this provision of law would assist the prosecution.

27. In support of his contention that Section 378 of the Code of Criminal Procedure must be strictly construed and that it should be read subject to Section 32 of the Drugs and Cosmetics Act, which prescribes that no prosecution shall be instituted save and except by a Drugs Inspector, Shri Ganatra has relied on a decision of the Patna High Court in the case of Yamuna Sah and Others Vs. The State of Bihar, wherein the Court struck down a prosecution instituted by the Police under the Prevention of Food Adulteration Act. Shri Ganatra submitted that the designated authority being the Drugs Inspector the bar prescribed by Section 32 of the Act must be carried over to the appellate stage. I have already had occasion to deal with this submission and the answer to it is obvious in so far as where the powers vest in the State and the prosecution has been validly and correctly instituted, it is unnecessary for the subordinate authority to prefer an appeal in the higher Court when the State itself is exercising the powers. The Drugs Inspector is an agent of the State and where the principal is exercising the powers, there is no longer any need for the Drugs Inspector to be involved in the picture.

28. Shri Ganatra advanced an argument that covers both the Accused when he

submitted before me that Accused No. 1 is held liable solely on the basis of his having been the proprietor, but that accused No. 2 was the person who was found in the premises. He contends that there is no evidence produced by the prosecution in support of the contention that Accused No. 2 was the Manager, as even the muster roll did not contain his name. Shri Ganatra submits that the Court has convicted him only on the basis of his alleged admission to the complainant that he was the Manager of the concern. Shri Ganatra submitted that under the scheme of the Act, no liability is foisted on an employee because the wording of Section 18 of the Drugs and Cosmetics Act refers only to a person "on his behalf." In this context, Shri Ganatra placed reliance on a decision of the Kerala High Court in the case of State v. Kunchu (1980) 1 FAC 19 in support of this proposition. He has also relied on a decision in the case of Nagar Swasthya Adhikari, Kanpur v. Sunder Lal, (1981) 1 FAC 114, wherein a sample of Dal was collected in the absence of the master and the Court held on the facts of that case, that neither the master nor the servant could be held liable. Shri Ganatra placed reliance on a decision of the Orissa High Court in the case of Tulsidas v. State of Orissa 1987 Cri LJ 664, under the Essential Commodities Act, 1955, wherein the Court quashed a proceeding against the employee holding that the servant cannot, under any circumstances, be held liable. In sum and substance, Shri Ganatra contends that there is no material on record to establish that Accused No. 2 was either an employee or was acting on behalf of Accused No. 1. He further submits that the mere presence of Accused No. 2 can neither result in criminal liability to him nor can it for that matter provide any nexus vis-a-vis Accused No. 1 in relation to the commission of this offence.

29. This view propounded by Shri Ganatra is not only an oversimplification of the situation but would result in absurd consequences. The record undisputedly indicates that Accused No. 2 was present. It further establishes that he was connected with the business because otherwise he could not have pointed out and produced the material that was ultimately seized. The fact that his name is not mentioned in the muster is understandable because he was not an employee of the level of a clerk or a salesman. In these circumstances, it can never be argued that he was a casual visitor and had nothing to do with the business. On the other hand, the material on record establishes the fact that he was obviously a confidant of Accused No. 1 and that he was left incharge of the place because Accused No. 1 could rely on him to manage the affairs. A family relationship is also established with Accused No. 1 and the only inference on a totality of the material on record that is lawfully permissible would be that Accused No. 2 was looking after the business on behalf of Accused No. 1. Undisputedly, Accused No. 1 is the Proprietor of the business and the liability as far as he is concerned is absolute. He has not brought any material on record to indicate that the drugs that were seized from the premises had come there without his knowledge or despite his instructions. Under these circumstances, his mere physical absence from the premises will not assist him at all and, to my mind, the liability of both the Accused is fully established.

30. Shri Ganatra thereafter proceeded to go into several minute details of the evidence and sought to submit that the Drugs Inspector in the present case has not complied with the various procedural requirements. There has been detailed cross-examination of the Drugs Inspector and it is Shri Ganatra's contention that there has been breach of the procedure prescribed under the rules. I do not propose to deal with this aspect of the matter in any detail because, to my mind, these are hyper-technicalities, they are not of any significant consequence and the basic evidence being reliable and trustworthy and, more important, since there has been substantial compliance with the requirements of law the insignificant lapses, if any would in no way vitiate the present prosecution. Consequently, to my mind, this aspect of the matter does not require any serious attention.

31. Lastly, Shri Ganatra advanced the submission that a long period of time has elapsed since the incident has taken place and that in these circumstances the Court should not disturb the of acquittal. Apart from this, Shri Ganatra also drew my attention to the decision of the Supreme Court in the case of Dhan Kumar Vs. Municipal Corporation of Delhi, , "Supreme Court on Prevention of Food Adulteration Cases" 1951-1979 Pages 523, and contended that if two views were possible that the one in favour of the Accused must be accepted. There is no quarrel with any of these well-settled propositions of law, but the important aspect that is predominant in this proceeding is that Accused No. 1, who is a retail chemist and who supplies medicines to members of the public and possibly even to medical institutions, was found in possession of life-saving drugs that were downright spurious. One does not know how many persons have lost their lives after consuming such bogus preparations and that too having paid their hard-earned money to the persons like the Accused. The fact that a long time has elapsed will not, to my mind, reduce the gravity of the offence. As far as the other aspects of the matter are concerned, namely, the question as to whether any other view is possible, I need to record that one does not require a string of authorities to support the principle that if there is any doubt on the evidence or if more than one view were to be possible that the benefit has to be given to the Accused. This, however, does not mean that where the evidence is conclusive that one has to still stretch the facts in favour of the Accused.

32. Appearing on behalf of Accused No. 2, Shri Gosalia reiterated the submission that the appeal is not maintainable since it is not presented by the original complainant, namely, the Drugs Inspector. Shri Gosalia contended that the provisions of Section 378(1) whereunder the State may authorise a Public Prosecutor to present an appeal is subject to clause (6) which, in turn, refers to an appeal to be preferred only by the original complainant and no one else. I have already dealt with this aspect which, to my mind, is devoid of any legal substance whatsoever. In the present instance where the State is the prosecuting authority and where it has designated a particular officer to act as a complainant, the power to prosecute and to present the appeal only stands delegated to that officer for purposes of the trial and it is wrong to contend that none other than

that officer can present the appeal. It is the complainant who is acting under the authority of the State and it is for the State to take the decision in the matter of filing an appeal against acquittal and to issue instructions for that purpose. This having been validly done, to my mind, the present appeal is perfectly tenable.

33. Next, Shri Gosalia canvassed the plea of promissory estoppel and sought to contend that Accused No. 1 who could no longer put up with the harassment from the Department had, in fact, surrendered his licence in return for the assurance that the prosecution would be dropped and he contends that the principle of promissory estoppel would thereby apply. To my mind, on the facts of this case, there can be no bar of promissory estoppel and learned Counsel has thoroughly misunderstood the concept. It would be a dangerous situation and one wholly impermissible, if Courts were to uphold a situation whereby Government officials would be permitted to condone serious breaches of criminal law in return for so-called repentance shown by the accused. Not only is such a corrupt practice against public policy and repugnant to public interest and downright antisocial but the consequences would be disastrous. On the facts of the present case, I fail to see what amends Accused No. 1 was making any surrendering his drug licence which, in any event, was liable to be cancelled having regard to the fact he was found in possession of spurious life-saving drugs and blackmarketing other medicines that were meant for free distribution to doctors and marked as "not being for sale." On the contrary, the licence of Accused No. 1 ought to have been suspended and cancelled and by offering to surrender the licence he was not doing a favour to anybody, but, on the contrary, a service to humanity.

34. On the aspect of search and seizure, Shri Gosalia submitted that the same is in breach of the provisions of the requirements of law. He reiterated the defence plea that the Drugs Inspector had planted the material in the premises and sought to contend that there is nothing on record to establish that the raiding party had offered themselves for a search. Having regard to the fact that the material on record establishes the offence conclusively, to my mind, such nit-picking will not avail the Accused.

35. Shri Gosalia, thereafter advanced certain contentions which are essentially in the nature of technicalities, principally, concerning the criminal liability of Accused No. 1. Taking advantage of the fact that he was not physically present at the time when the raid took place, he contended that it would be improper to foist the criminal liability on him unless it were demonstrated from the evidence that he was in-charge of the day-to-day business and that he had knowledge of the fact that the offensive material was, in fact, stocked in the shop. He relied on a decision reported in the case of *State of Maharashtra v. Damodhar*, (1979) 1 FAC 226, in support of this contention. He thereafter cited an earlier decision of this Court in the case of *the State of Maharashtra v. Abba Musha Yusuf* (1979) 1 FAC 340, in support of his submission that unless knowledge and participation are established that a conviction against Accused No. 1 would be bad-in-law. As

a corollary to this argument, Shri Gosalia submitted that the decision in the case of Bawa Singh v. The State of Punjab, (1982) 2 FAC 240 : 1983 Cri LJ 60, clearly takes the view that the stock must be for purposes of sale as this is one of the ingredients of law. In this context, he contended that learned single Judge of this Court (I. G. Shah, J.), while deciding Criminal Revision Application No. 181 of 1989 The State of Maharashtra v. Navinchandra Keshavlal Shah has upheld the position that evidence regarding sale or stocking for sale is a necessary requirement. The principle enunciated in the foresaid judgments flows squarely from the facts of those cases and does not necessarily hold good in all situations. To my mind, it is unnecessary for the Department to send a bogus customer or, for that matter, to produce counterfoils of bills, etc. indicating that the Accused had, in fact, offered or attempted to sell or, in fact, sold the type of offensive drugs as are involved in the present offence. That, to my mind, would be carrying the burden of proof too far and it is not a legal requirement. A Court of law is entitled to take cognizance of the facts of a particular case and draw the only legitimate inference that could arise therefrom which must be regarded as the irresistible conclusion. If, as has happened in the present case, sub-standard or misbranded life-saving drugs are found in the premises of a Chemist's shop and that too a shop that is doing normal retail business of selling such medicines to the members of public, it would be absurd and impossible for a Court to accept the defence that those items were merely kept there and were not intended for sale. If such material were found in residential premises or in a godown or in a place where the normal business of retail sale of such medicines or drugs is not taking place from day to day, it could, perhaps, be arguable that even if the possession is established, the fact that it was kept there for sale may or may not be a legitimate inference depending on the facts of the case. In the present instance, we have a situation where admittedly the Chemist's shop was working and was doing retail business and it must, therefore, be presumed, both in fact and in law, that everyone of the items found within the premises has been brought there for purposes of sale alone and nothing else. The business that was being carried on in those premises was retail sale of medicines and drugs and nothing else and the offending items happened to fall within that category. I, therefore, reject completely and totally the contention that the misbranded/substandard drugs that are the subject matter of the present prosecution were kept in the premises for any innocuous purpose. As I have said earlier, this is an atrocity against society and against humanity and one shudders to think of the consequences that would have and must have resulted to patients who have paid good money for substandard life-saving drugs and taken them in the hope that the drugs would have the effect which they ordinarily should have had. Serious complications and re-actions apart, we do not know as to how many valuable lives have been lost, thanks to racketeers of this type. Courts, should, therefore, refuse to accept meaningless defences such as the present one and must come down very heavily in case of this type.

36. As regards the contention that the prosecution has failed to adduce positive

proof that Accused No. 1 who was not physically present there at the time of the raid, can be said to have either the knowledge or participation in the commission of the offence, I need to record that in the present case, the firm in question is a proprietary concern. Accused No. 1 has nowhere contended that he was not incharge of the conduct of the business or for that matter that it had been handed over to some third party who was managing it. It is admitted by him that the licence stood in his name and that he in fact, was the owner of the business in question and was conducting the same. Under these circumstances, the prosecution needs to prove nothing more than what it has done and if the defence chooses to contend that the material was either planted there or that it was brought there by some other person without the knowledge of accused, No. 1, then the burden of establishing that defence shifts to the Accused. No defence evidence has been led nor has anything been brought out to establish the latter. I, therefore, do not accept that the principle laid down in the cases cited by Shri Gosalia would in any way assist Accused No. 1 on the facts of the present case.

37. Lastly Shri Gosalia advanced the submission that the Drugs Inspector is hostile to the accused and, therefore, that his evidence should be discarded. He also raised the plea that the raid had gone on for five hours that several infirmities have taken place in the course of the conduct of the raid and that consequently, the prosecution evidence does not establish the charge. As regards the first submission canvassed by Shri Gosalia, I have carefully scrutinized the material on record and there is not even a suggestion, leave alone anything being established, that can be upheld by the Court in support of the so-called hostility that is pleaded between the Department and the accused. I need to observe here that in a majority of cases, it is a sad reflection on the working of the Department that all sorts of atrocities take place only because of absolute collusion between the Department's Officers and Inspectors and the law-breakers. On the other hand, the officers in this case require to be commended for having very fairly and correctly done their duty, and in these circumstances, to my mind, the charge of bias against the Department's Officers is wholly unfounded and requires to be rejected in toto.

38. Shri Palekar, the learned A.P.P., who has represented the State, has done an admirable job in having shifted out from the material on record all the necessary ingredients that have been established by the prosecution, both on fact and in law, for purpose of establishing the charges. I am in complete agreement with the learned A.P.P. when he contended that interference by the Appellate Court on the basis of this record was totally and completely unjustified. Shri Palekar has effectively countered the basic arguments advanced by learned Counsel for the Accused who submitted that because the Accused had made an offer to somebody in the Government Department that the licence would be surrendered that as a quit pro quo the prosecution should have been withdrawn. The records indicates that the decision had, in fact, been taken and was subsequently reversed. It was for this reason that at the appellate stage the learned Judge following the unusual procedure of asking for the records to be produced and

took the same in evidence. That has not improved, but worsened the position. It is unfortunate that the name of either the Minister or the Officer who was responsible for the corrupt practice does not emerge from the record. The fact remains that in return for the offer made by accused No. 1 we are not aware of what else transpired, but a decision was conveyed to the Department to withdraw the prosecution. It must be said to the credit of the Department that the matter was pursued and that the State Government subsequently accepted the position that this decision was not only wrong, against public policy but was downright corrupt and reversed the earlier decision and proceeded with the prosecution. On this state of facts, I was amazed when learned Counsel for the accused boldly put forward the contention in law that the doctrine of promissory estoppel applies. According to them ever since the Accused agreed to surrender the licence the accused has altered his position to his detriment and, therefore, the Government was bound to withdraw the prosecution. I cannot conceive of a more wrong and misreading view of the doctrine of promissory estoppel which, in the first instance cannot be applied to cases of this type and that too criminal cases.

39. Shri Palekar has contended, and very rightly, that viewed at from the purely academic angle, the principle of promissory estoppel may be an enforceable doctrine as far as certain other branches of law are concerned, but that it is unthinkable that it should either be invoked or sought to be enforced within the ambit of criminal law. He has demonstrated to me the dangerous consequences of a situation whereby an accused person who is guilty of serious criminal offence will be able to indulge in horse-trading with the prosecuting authorities and get the prosecution withdrawn. Such a course of action would virtually subvert the rule of law in this country. The learned A.P.P. has vehemently submitted that this Court must very forcefully and firmly deal with any such effort because the consequences of allowing such a situation are unthinkable. It could lead to a situation whereby persons would be able to buy their freedom at the Executive level and the Courts would be helpless because the prosecutions are withdrawn. Ultimately, the State is the prosecuting authority and no reasons are required to be adduced before the Court for withdrawal of a prosecution in cases where neither the sanction nor the permission of the Court is involved.

40. Shri Palekar has relied strongly on a decision of the Supreme Court, though under the Income Tax Act, where a situation, though not very similar, had come up for consideration. The decision in question is in the case of Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, . In that case the Commissioner had agreed to withdraw his appeals before the Income Tax Appellate Tribunal on the basis of a request from the assessee. Subsequently, the Department found that it was essential from the point of view of the revenue as also from the angle of public interest that the Department must prosecute the appeals in question. The doctrine of promissory estoppel was invoked and it was contended that there is a legal bar to the continuance of the appeals. The Supreme Court negated this contention and laid down very conclusively that

estoppel is a rule of equity which forbids truth being pleaded or representation, on which faith another has acted to his detriment, being retracted. The soul of estoppel is equity and where public duties cast by statute are involved, private parties cannot prevent performance by invoking estoppel.

41. This principle has also been enunciated by the Court of Appeal in England in the case of *Maritime Electric Co. Ltd. v. General Diaries Ltd.*, 1937 AC 610, and Halsbury's Laws of England para 1515. The principle that emerges is that where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot be estoppel or be prevented from exercising his statutory powers.

42. It is in these circumstances that the learned A.P.P. is contended that the solitary ground on which the Appeal Court has virtually allowed the present appeal is liable to be set aside. He also pointed out to me that having advanced this particular contention that the Appeal Court has virtually disregarded all the rest of the evidence, but Shri Palekar pointed out that if one were to view the record of this case carefully, it will be seen that in spite of the offence having been conclusively established and the learned Magistrate having convicted the accused that the learned appellate Judge has interfered with the conviction order solely on the basis that the doctrine of promissory estoppel would apply. Since, as indicated by me, there can be no application of that principle, the learned A.P.P. is right when he submits that the appellate order requires interference with.

43. Having regard to the aforesaid position, the appeal is liable to succeed and the appellate order must consequently be set aside, and the order of conviction recorded by the learned Magistrate is restored. Unfortunately there is no application for enhancement of sentence in the present case. This, to my mind, would have been a fit case in which the punishment awarded by the learned trial Magistrate ought to have been substantially stepped up. On the other hand, one needs to take cognizance of the fact that an abnormally long period of time has passed since the date of commission of the offence, the date of conviction by the trial Court and the date on which this appeal is being decided. It is only for this reason that it was necessary for me to hear learned Counsel appearing on behalf of the accused on the question of sentence.

44. As indicated by me earlier, this case is an old one and due to the misplacement of the record, the judgment could not be completed earlier. After the same was dictated in open Court, the matter was adjourned in order to hear the learned Counsel appearing on behalf of the accused on more than one date of hearing. Finally, the learned Advocate Shri Gosalia, appeared before me and he made certain submissions on the question of sentence. He reiterated the position that Accused No. 1 was not present when the incident took place and that it would be extremely harsh to him if he were to be visited with the consequences of what happened in his absence merely because he was owner of the business. Similarly, it is contended that accused No. 2 was only a relation or a caretaker and under these circumstances it would be even more unjust to hold

him liable and award a severe punishment to him. Mr. Gosaliya essentially submitted that accused No. 1 realised the hazards of the trade and in particular of the fact that there are large scale rackets in passing of spurious and substandard drugs and that he was really a victim to such a situation and not a participation in the racket which was why he himself went to the authorities and requested them to withdraw the prosecution on his surrendering the licence. He further submitted that undoubtedly the section prescribed a minimum of one year rigorous imprisonment but that the legislature was aware of exceptional situations which could arise and would justify a lesser sentence. Mr. Gosaliya points out to me that virtually 20 years have passed since the incident and that neither of the accused are carrying on that business and in these circumstances, that the Court should not impose a further jail sentence at this point of time. Mr. Gosaliya states that both the accused had been arrested and kept in custody for some time but apart from this he submits that even if some punishment is to be awarded, it should be by way of a fine and not of a jail sentence at this point of time.

45. It is unfortunate that since our legal system is heavily overloaded and the procedures are extremely slow and cumbersome, that the disposal of cases takes abnormally long; one cannot on the present record hold that the accused have been responsible for the delay. In a given situation, where it is demonstrated that during the pendency of the proceedings the accused has undergone a lot of suffering such as where the accused was in custody or for that matter, in situations where the accused is suspended and on a subsistence allowance or where as a result of the prosecution the consequences have been so disastrous that the accused has suffered virtual ruination, those aspects alone, to my mind would be valid justification on which a plea for leniency could be based having regard to the efflux of time. In the present case, the two accused are young persons and nothing has been shown to me with regard to their position having deteriorated or for that matter that they have suffered during the interim period. On the other hand, one needs to bear in mind that the consequences of criminal acts must catch up with the accused particularly when the crimes are against society as in the present case. The ethical concept of forgive and forget merely because the incident took place in the distant past will not hold good in a Court of law.

46. The learned A.P.P. has submitted that these offences are motivated by extreme greed; that cheap, spurious and substandard drugs are illegally manufactured and that the only channel through which they can be sold to the public is through the chemists shops and that, therefore, a deterrent punishment is necessarily called for wherever such offences are detected. He relied on the J.J. Hospital case wherein the judicial inquiry held by this Court had demonstrated how, with the active connivance of corrupt officials and with the patronage of equally unclean politicians, poisonous and substandard drugs were being used in large quantities in public hospitals and had resulted in several deaths. That was one of the few instances where these crimes were projected

before the public, but the scale on which such atrocities were taking place makes one shudder to think of how many innocent men, women and children have suffered and died in silence without anybody taking special note. It is the laxity of the law and the laxity of application of the law that are both responsible for a certain class of traders emboldening themselves to carry on such nefarious activities.

47. It is true that many years have passed since the incident took place but that as I have said earlier, does not diminish the gravity or complexion of the offence. I do not, however, share the view that the jails which are already overcrowded should be further burdened by incarceration of these two accused for a period of one year which was the sentence awarded by the learned Magistrate. The sentence of one year rigorous imprisonment was principally the ground on which a fine of only Rs. 2500/- was awarded. This to my mind is a total misreading of the concept of doing justice. Where a deterrent sentence is called for, a Court will have to ensure that the accused and others similarly inclined are genuinely dissuaded and frightened from proceeding with that course of action because of the consequences. From this point of view, where it is demonstrated that the trading in spurious drugs has been indulged in only from the aspect of avarice, greed and the burning desire to make easy money, the law must award a punishment which would spell out loud and clear that such crime is not economical, by taking away much more than the spoils. From this point of view, the sentence awarded by the learned Magistrate requires certain modifications.

48. The appeal accordingly succeeds. The appellate order is set aside. The conviction recorded by the trial Court is confirmed. The sentence of one year rigorous imprisonment and fine of Rs. 2500/- awarded to each of the accused on each count is modified to that of imprisonment for the period already undergone by each of them and it is further directed that accused Nos. 1 and 2 shall pay a fine of Rs. 1 lakh on the first count and a fine of Rs. 50,000/- on each of the other counts, in default rigorous imprisonment for one year and six months respectively on each of the counts. The accused are granted 12 weeks" time to deposit the fine in the lower Court. On the expiry of 12 weeks, if the fine has not been paid, the bail bonds to stand cancelled and the substantive sentences to take effect.

Friday 25th March, 1994.

49. After the parties were heard on the question of sentence on the last date of hearing, I had dictated the operative part of the judgment and after finalising the same, I had completed and signed the judgment. The office had placed the matter on Board for formal pronouncement of the judgment today at 2.45 p.m. At this stage, Mr. Ganatra, submitted that he was unable to remain present on the last few dates of hearing and that he desires to make certain additional submissions. Mr. Sabnis, learned Counsel appearing on behalf of the accused No. 1 also requested the Court that he should be heard in the matter. I pointed out to both the learned Counsel that the matter was notified on three dates of

hearing for this purpose and that I have in fact heard the Asst. Public Prosecutor and Mr. Gosaliya, on the question of sentence, that the judgment has been finalised and signed and consequently that no alterations are permissible at this stage. However, out of the courtesy to the learned Counsel, I have heard them. It is essential for me to record the contention advanced by Mr. Ganatra and to answer the contention in question; even though it is raised virtually at a post hearing stage and that too after the judgment has been completed. He relies on the decision of the Supreme Court reported in Pandurang and Others Vs. State of Maharashtra, , in the case of Pandurang v. State of Maharashtra. In that case, a single Judge of this Court had disposed of an appeal whereunder the charge was punishable u/s 16 of the Prevention of Food Adulteration Act, 1954. That Section inter alia, provided for imprisonment which may extend to three years. Mr. Ganatra contended that under the Appellate Side Rules of this Court, it was not permissible for the matter to be heard by a single Judge as the offence was one under a section punishable with imprisonment for a period extending to over 2 years R.I. He drew my attention to Section 27 of the Drugs and Cosmetics Act, whereby the imprisonment can extend to 10 years and he therefore, submitted that this is a Division Bench matter which has wrongly been heard by a Single Judge. Relying on the ratio laid down by the Supreme Court in Pandurang's case, (supra), Mr. Ganatra submitted that the judgment of this Court is rendered a nullity as the single Judge has no jurisdiction to decide the Appeal. According to Mr. Ganatra, even at this stage, it is open to the Court to point these facts out to the Hon'ble the Chief Justice and transfer the matter to the Division Bench for a de novo hearing. To my mind, that procedure would not be permissible having regard to the fact that the judgment has been finalised and signed.

50. Quite apart from this aspect of the matter, to my mind, the principle laid down in Pandurang and Others Vs. State of Maharashtra, , would not apply to the present appeal. The relevant rule on which Mr. Ganatra relies is reproduced below :

"II. "Appeals against convictions in which only a sentence of fine has been awarded or in which the sentence of imprisonment awarded does not exceed five years with or without fine, appeals against acquittals wherein the offence with which the accused was charged is one punishable on conviction with a sentence of fine only or with a sentence of imprisonment not exceeding two years or with such imprisonment and fine, and appeals u/s 377 of the Code of Criminal Procedure, revision applications and Court notices for enhancement of sentence for offences punishable on conviction with sentence of imprisonment not exceeding two years or with such imprisonment and fine. (e) Applications for leave to appeal u/s 378(4) of the Code of Criminal Procedure against acquittals wherein the offence with which the accused was charged is one punishable on conviction with a sentence of fine only or with a sentence of imprisonment not exceeding two years or with such imprisonment and fine."

Normally, the interpretation sought to be put forward by Mr. Ganatra would hold

good but seems to have over-looked another crucial aspect of the present case. In the present instance, we have a proceeding wherein the accused were awarded sentence of one year's rigorous imprisonment and fine of Rs. 500/- each on each of the counts. They preferred an appeal to the Court of Session where they were acquitted. The State of Maharashtra has assailed that order through the present appeal and I have dealt with the very crucial aspect in the judgment namely that even though the complexion of these offences are very serious that this Court cannot enhance the sentence of one year rigorous imprisonment that was awarded by the trial Court, as there was no application for enhancement filed by the State of Maharashtra. Consequently, the order was right in placing the matter before a single Judge because even if the appeal were to be allowed in the absence of the enhancement notice, no sentence exceeding one year rigorous imprisonment could be awarded to the accused. It is these facts which distinguish the present appeal from the facts in Pandurang's case. To my mind, therefore, there is no infirmity as far as the jurisdiction of this Court to hear and decide the appeal is concerned.

51. Both Mr. Ganatra and Mr. Sabnis have canvassed a strong plea on various grounds in support of their submission that at this late point of time, the accused should not be sent to jail once again. It is unnecessary for me to reproduce these grounds because I have already considered that position. On the point of fine, both the learned Counsel have submitted that nothing serious has been pointed out. No prior offences have been alleged nor has anything been alleged against the accused at a subsequent point of time. They also contended that there is no evidence on record to support the plea that either of the accused had benefited in any manner through the acts that are the subject matter of the present prosecution. They, therefore, submit that a reasonable light fine should be imposed on the accused.

52. I am unable to accept the submissions with regard to this last plea because, I have already pointed out that the complexion, gravity and above all the heinous character of the offence is such that would mitigate strongly against any leniency being shown. It is only long delay in disposal of the appeal that has come to the assistance of the accused in the matter of not awarding a further jail sentence to them at this point of time. To my mind, a correct application of the current principle relating to the theories of sentencing would require that the fine must be meaningful and that it must be sufficiently heavy. It is for this reason that the accused have been awarded a fine of Rs. 1,00,000/- each on each count.

Appeal allowed accordingly.

53. Order accordingly.