
(1976) 10 BOM CK 0001
In the Bombay High Court
Case No : Crminal Appeal No. 21 of 1975

The State	Vs	APPELLANT
Shantilal Chhaganlal Sareiya		RESPONDENT

Date of Decision : 19-10-1976

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 17, 17B, 18, 19, 21

Citation : (1978) 80 BOMLR 1

Hon'ble Judges : Sapre, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sapre, J.—This is an appeal by the State against an order of acquittal recorded in favour of the respondent (original accused) Shantilal Chhaganlal Sareiya by the Metropolitan Magistrate, 28th Court, Esplanade, Bombay, on charges under Sections 18(a)(i) and (ii) and 18(b) read with Section 27 of the Drugs and Cosmetics Act, 1940, hereinafter referred to as "the Drugs Act".

2. There is no dispute that the respondent Shantilal is a proprietor of a concern under the name and style of Messrs. Vallabhji Bhika and Co., situate at Princess Street, Bombay 2, holding a valid licence for dealing in and selling drugs under the Drugs Act. According to the prosecution, at about the time of the commission of the offence, the Drugs Control Administration had received information that spurious Barbour's surgical linen thread was in circulation in Bombay market. The Drugs Inspector Kochar (P.W. 1) visited the shop of the respondent on December 4, 1971, when he came across stock of spurious Barbour's surgical linen thread in the shop. The respondent was present in the shop. Kochar served a prohibitory order on the respondent u/s 22(c) of the Drugs Act, prohibiting him from disposing of the stock of the said drug. On December 18, 1971, he lodged his complaint with the police. The police raided the shop of the respondent in the presence of punched. Kochar was also present. Samples were taken from the stock of Barbour's surgical linen thread kept by the respondent in his shop for

sale. In course of time, a portion of the sample was sent to the Government analyst for analysis. The Government analyst Deshpande (p.w. 3) tested the sample. He found that the sample did not conform with the test for identification for silk and was found to be cotton thread. The respondent was, therefore, prosecuted for stocking for sale sub-standard and misbranded drug. During the course of the investigation, it was found that the thread was purchased by the respondent from Messrs. Nadiad Surgical Co., Gujarat. That concern, however, did not hold any licence for manufacturing the drug. The respondent was, therefore, also prosecuted for stocking for sale a drug which was manufactured without a licence. It may be noted that another drug, viz., Pearsall is plaited and braided silk thread, was also seized from the shop of the respondent and a charge in respect of this drug levelled against the respondent was that he had stocked for sale this drug also which was manufactured without a licence.

3. The respondent denied that Barbour's linen thread and Pearsall is plaited and braided silk thread were found in his shop and contended that they were in a lumber-room behind his shop. He then contended that neither of these articles is a drug within the meaning of the Drugs Act. Thirdly, Barbour's linen thread alleged to have been found in the shop of the respondent had not been proved to be sub-standard. Fourthly, Barbour's linen thread alleged to have been found in the shop of the respondent had not been proved to have been stocked or exhibited for sale. Finally, the Drugs Inspector Kochar had not been validly appointed as it had not been shown that his appointment was made either by the Central or the State Government. All the proceedings taken by him were, therefore, illegal and void ab initio.

4. The learned trial Magistrate overruled the defence that Barbour's linen thread and Pearsall is plaited and braided silk thread were not found in the shop of the respondent and were in the lumber-room behind his shop. He held that the prosecution had proved that these two articles were found in the shop of the respondent. The learned trial Magistrate, however, accepted the defence that neither Barbour's linen thread nor Pearsall is plaited and braided silk thread was a drug under the Drugs Act. He did not, therefore, record a finding whether Barbour's linen thread was sub-standard or misbranded because, according to him, it was not a drug at all. He did not record any definite finding whether the Drugs Inspector Kochar's appointment was illegal. He also did not go into the question whether the respondent could be said to have stocked and exhibited Barbour's linen thread for sale. Mainly on the ground that neither of the two articles seized from the shop of the respondent was a drug under the Drugs Act, the learned trial Magistrate recorded an order of acquittal in favour of the respondent. It is this order that is being challenged in this appeal.

5. It may be stated at the outset that the charge of stocking for sale a misbranded and a sub-standard drug is only in respect of Barbour's linen thread and this charge is not in respect of Pearsall is plaited and braided silk thread. The third charge u/s 18(b) read with Section 27 of the Drugs Act is in respect of

both : Barbour's linen thread and Pearsall is plaited and braided silk thread. But that charge is that the respondent had stocked for sale these drugs which were manufactured without a licence. It was conceded by the learned public prosecutor before me that on this point, namely, that these drugs were manufactured without a licence, there is absolutely no evidence. Therefore, the acquittal of the respondent in respect of the charge u/s 18(b) read with Section 27 of the Drugs Act will have to be upheld as correct and in respect of this charge, the appeal by the State will have to be dismissed.

6. It may also be stated that the finding recorded by the learned trial Magistrate that Barbour's linen thread was found in the shop of the respondent has not been challenged before me by Mr. Vyas. I will have, therefore, to proceed on the basis that this article was found in and seized from the shop of the respondent.

7. The first point that falls for decision in this appeal, therefore, is whether Barbour's linen thread found in and seized from the shop of the respondent is a drug as defined in the Drugs Act. Section 3(b) of the Drugs Act is in these terms:

3. (b) "drug" includes-

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals; and

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;

As pointed out by the Supreme Court in *Chimanlal Jagjivandas Sheth Vs. State of Maharashtra*, the above definition of "drug" is comprehensive enough to take in not only medicines but also substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals. This artificial definition introduces a distinction between medicines and substances which are not medicines strictly so-called. The expression "substances", therefore, must be something other than medicines but which are used for treatment. The Legislature designedly (extended the definition of "drug" so as to take in substances which are necessary aids for treating surgical or other cases.

8. It will be profitable at this stage to notice the markings on the container of Barbour's linen thread seized from the shop of the respondent. The paper wrapper on the 2 oz. reel contains the following marking or label:

Non Sterile Surgical ligature (suture) not to be used upon the Human Body unless efficiently sterilised.

On one end of the flat surface of the reel is the marking "Barbar's Linen Thread"

with the words "Trade Mark". There is also the trade mark of the left human palm with a red cross on it. On the other end of the flat surface of the reel are the words "Cord approx. 2 oz." In the centre again there is a red cross mark.

9. It is in relation to these markings found on the Barbour's linen thread stocked or exhibited for sale in the shop of the respondent that we have to consider whether it is a drug. "Ligature" has been defined in Stedman's Medical Dictionary, twenty-first edn., p. 907, as "A thread, wire, fillet, or the like, tied tightly around a blood vessel, the pedicle of a tumor, or other structure in order to constrict it." In the same dictionary, the word "suture" has been defined at page 1551 as "The surgical uniting of two surfaces by means of stiches, or the material, silk thread, wire, catgut, etc. by means of which the two surfaces are kept in apposition".

10. In Black's Medical Dictionary, twenty-seventh (1967) edn., "ligature" has been defined at page 526 as meaning "a cord or thread used to tie round arteries in order to stop the circulation through them, or to prevent escape of blood from their cut ends. Ligatures are generally made of catgut or silk, and are tied with a reef-knot". In the same dictionary at page 863 is defined "suture" as "the name given either to the close union between two neighbouring bones of the skull, or to the series of stitches by which a wound is closed".

11. If these meanings in medical terminology are given to the two words "ligature" and "suture", by which the substance stocked or exhibited for sale by the respondent is described, there can be little doubt that the substance will answer the description of a drug given in Section 3(b)(i) of the Drugs Act under which, according to the prosecution, it falls. Under the said clause, a substance intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals is a drug. The substance in question was to be used as a ligature or suture. If it was used to tie round arteries in order to stop the circulation through them, the use could be said to be for treatment of a disease. Similarly, if it was to be used to tie tightly around a blood vessel, the pedicle of a tumor, or other structure in order to constrict it, that again could be for the treatment of a disease. If it was to be used to prevent escape of blood from the cut ends of the arteries, it could also be said that the use was in the mitigation of the disease. If the substance was put to use in order to give series of stitches for the purposes of closing a wound, it could be said that the substance was being used for the prevention of disease, inasmuch as if the wound is left open it might be attacked by bacteria and some diseases may be caused.

12. It was urged on behalf of the respondent that a substance to be a drug within the meaning of 3(b)(i) of the Drugs Act has to be one which can be immediately used as such for the treatment, mitigation or prevention of disease in human beings or animals. In the case of Barbour's linen thread, its use comes after the patient is operated upon and the question of stitching his wounds arises. The substance cannot, therefore, be one intended to be used for or in

the treatment, mitigation or prevention of disease in human beings or animals. I find it difficult to accept this construction, as I find nothing in Section 3(b)(i) to restrict the meaning of a substance intended to be used for or in the treatment, mitigation or prevention of disease as meaning a substance which can be put into use at a stage after some other stage in the treatment of the disease has been gone through.

13. It was then urged that, if at all, it is the definition in Sub-clause (ii) and not Sub-clause (i) of Clause (b) of Section 3 which would apply. Sub-clause (i) is general, whereas Sub-clause (ii) is specific. A substance will fall under the definition of "drug" in Sub-clause (ii) of Clause (b) of Section 3, if it is intended, *inter alia*, to affect the structure of human body. The ligature or suture is such a substance. The specific use to which the substance can be put to is mentioned in Sub-clause (ii) and, therefore, it is this sub-clause that will apply. Sub-clause (i) deals generally with all kinds of substances intended to be used for or in the treatment, mitigation or prevention of disease. The rule of construction is that the specific must prevail over the general. Hence, it is Sub-clause (ii) and not Sub-clause (i) of Clause (b) of Section 3 that will apply. But if the substance falls under Sub-clause (ii), it has to satisfy the further requirement that it has been specified by the Central Government by notification in the Official Gazette as being a drug within the meaning of the said sub-clause. Admittedly, there is no notification in respect of Barbour's linen thread and, therefore, it cannot be a drug under the Drugs Act.

14. It may be that a substance satisfies the definition given in Sub-clause (ii). But if it also satisfies the definition given in Sub-clause (i), there is no reason why the latter definition should not be accepted. It cannot be said that a substance which satisfies the definition given in Sub-clause (ii) must necessarily be excluded from the definition given in Sub-clause (i). A suture or ligature may be a substance intended to affect the structure of the human body. But, as already shown, it can also be a substance intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals. Therefore, simply because the prosecution cannot take advantage of the definition in Sub-clause (ii) because the substance has not been specified by the Central Government by notification in the Official Gazette as being a drug for the purposes of that sub-clause, it does not mean that it cannot be considered a drug under Sub-clause (i) if it satisfies the definition in that sub-clause.

15. It may be noted that in Schedule C to the Drugs and Cosmetics Rules, 1945, hereinafter referred to as "The Drugs Rules", some biological and special products have been given and item No. 13 is "Sterilized surgical ligature and sterilized surgical sutuije". It is not disputed on behalf of the respondent that this substance is a drug within the meaning of the Drugs Act. That is also clear if we just notice a few Rules. Rule 61 is in regard to the forms of licences to sell drugs. The Rule refers, *inter alia*, to Schedule C and calls the substances in that Schedule as drugs. Rule 76 is regarding form of licence to manufacture drugs

specified in Schedules C and C(1) and conditions for the grant or renewal of such licence. The Rule thus specifies the substances mentioned in Schedule C as drugs. Sterilized surgical ligature and sterilized surgical suture thus clearly fall under the definition of "drug" in Section 3.

16. It has, however, been urged on behalf of the respondent that a sterilized surgical ligature or suture may be a drug, but a non-sterile surgical ligature or suture cannot be a drug. Barbour's linen thread stated to have been stocked and exhibited for sale by the respondent is non-sterile and, therefore, it cannot fall under the definition of "drug". It is urged that Schedule C contains an exhaustive list of biological and special products which are drugs and non-sterile surgical ligature or suture is not mentioned in the Schedule.

17. I have already noted the markings or label on the container. It describes the substance as non-sterile surgical ligature (suture). The label then contains the words "not to be used upon the human body unless efficiently sterilized". The question is whether the words "not to be used upon the human body unless efficiently sterilized" are a mere direction for use of the substance or they are a qualifying clause or a part of the description of the substance itself. According to the respondent, the whole of the marking "Non-sterile surgical ligature (suture) not to be used upon the human body unless efficiently sterilized" is the description of the article and that description shows that the substance is not a drug. On the other hand, the submission on behalf of the State is that the substance was brought into market to be used as a ligature or suture and the words "not to be used upon the human body unless efficiently sterilized" were no more than a mere direction for use of the substance. It is difficult to hold that if the direction were carried out, the substance would be a drug and if the direction were not carried out, it would not be a drug.

18. I prefer the view urged on behalf of the State. The Pharmacopoeia of the United States of America, seventeenth edn., page 691, describes "Non-absorbable surgical suture." It has been mentioned there that the substance may be non-sterilized or sterile. At page 692 also, in respect of the tensile strength, both non-sterilized and sterile sutures have been considered. The important point to be noted from these is that the basic characteristic of "suture" is not taken away merely because it comes in the hands of a shop-keeper in a non-sterilized form. Basically, a suture or ligature is a suture or ligature. A direction as to the use of the substance does not take away the character of that substance, namely, of that substance being a drug. Hence, the words "not to be used upon the human body unless efficiently sterilized" are only a direction for use of the substance and they are not part of the description of the article or even a qualifying clause along with which alone the description of the substance could be said to be complete.

19. Some provisions in the Rules also fortify the above view of mine. Part IX of the Rules in which Rules 94 to 106 occur deals with "Labeling and Packing of Drugs other than Homoeopathic Medicines". Rule 102 deals with "Non-sterile

Surgical Ligature and Suture". A substance with the above name is thus clearly covered under the definition of "drug" given in Section 3(b) of the Act.

20. It was urged on behalf of the respondent that Barbour's linen thread is used for other purposes as well. Varde (P.W. 2), an employee of Messrs. Forbes and Forbes and Campbell & Co. who are the Distributors of Barbour's linen thread, has admitted that the substance is used in textile and leather industries. It could not, therefore, he said that Barbour's linen thread stocked and exhibited by the respondent for sale in his shop was a drug. Now, the respondent was stocking the substance not merely with the name Barbour's linen thread. The container contained the description "Non-sterile surgical ligature (suture)". The very fact that there is this kind of label on the container shows that it was to be used for medicinal purposes and not for other purposes, namely, cloth or leather stitching. The substance was also kept in a chemists shop and not in a shop selling general merchandise. Even then, if the respondent was stocking or exhibiting for sale Barbour's linen thread for non-medicinal uses, the Rules provided what he ought to do. Rule 123 provides:

123. The drugs specified in Schedule K shall be exempted from the provisions of Chapter IV of the Act and the rules made thereunder to the extent and subject to the conditions specified in that Schedule.

It is in Chapter IV of the Drugs Act that the material Sections 18 and 27 occur. The material portion from Schedule K is as follows:

Class of Drugs Extent and Conditions of Exemption

Drugs falling under Clause (b)(i) All the provisions of Chapter IV of the Act and of Section 3 of the Drugs and Cosmetics the Rules thereunder, subject to the conditions cosmetics Act, not intended for medicinal that the drug is not sold for medicinal use or medicinal use. for use in the manufacture of medicines and that each container is labelled conspicuously with the words "NOT FOR MEDICINAL USE".

Now, a substance described as surgical ligature (suture) would be a drug falling u/s 3(b)(i) of the Drugs Act. Though it was in a non-sterile form and the direction was given that it should not be used upon the human body unless efficiently sterilized, that was not sufficient to hold that it was not stocked or exhibited in the shop of the respondent for sale as a drug. It was only if the container was labelled conspicuously with the words "Not for medicinal use" that it could be said that the respondent had not stocked or exhibited the substance for sale as a drug.

21. For all the above reasons, I hold that Barbour's linen thread found and seized from the shop of the respondent is a drug as defined in the Drugs Act.

22. That brings me to the next question, whether Barbour's linen thread found in

the possession of the respondent was sub-standard and misbranded. u/s 17(f) of the Drugs Act, a drug is deemed to be misbranded if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular. Similarly, u/s 17B(e)(ii) of the Drugs Act, a drug shall be deemed to be adulterated (or sub-standard) if any substance has been substituted wholly or in part therefor. The case for the prosecution is that the substance stocked and exhibited for sale by the respondent was Barbour's linen thread. The claim thus was that it was linen thread. But actually, it was found to be cotton thread. It was, therefore, both a misbranded and a sub-standard drug. It is the case for the prosecution that the Government analyst Deshpande (P.W. 3) had first applied the microscopic test which clearly showed that it was cotton thread and not silk or linen thread and in order to confirm this, he had carried out other tests which led to his final conclusion that the sample did not comply with the test for identification for silk. Deshpande, according to his report, had carried out some tests mentioned in the Text Book of Pharmacognosy by T.E. Wallis. He had also applied the tests for absorbent cotton wool given in British Pharmaceutical Codex 1968.

23. The submission of Mr. Vyas on behalf of the respondent is that analysis of a drug has to be carried out in accordance with the standards laid down in the books recognised and prescribed in the Drugs Rules. The Text Book of Pharmacognosy by T.E. Wallis is not one of the books recognised and prescribed. Moreover, Deshpande had not carried out even the tests mentioned by Wallis in his book. Again, while the substance was linen, the test from British Pharmaceutical Codex applied by Deshpande was for absorbent cotton wool. The result of analysis arrived at by Deshpande could not, therefore, be accepted in evidence and the conviction of the respondent could not be based on such a report.

24. The Second Schedule to the Drugs Act prescribes the standard to be complied with in respect of drugs stocked or exhibited for sale. Items 4 and 5 from this Schedule, which alone are material for our purposes, read thus:

Class of drug. Standard to be complied with

4. Substances (other than food) intended- Such standards as may be prescribed. ed to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals.

5. Other drugs: Standards of identity, purity and strength specified in the edition of the Indian (a) Drugs included in the Indian Pharmacopoeia for the time being and Pharmacopoeia. such other standards as may be prescribed. Standards of identity, purity and strength (b) Drugs not included in the Indian specified for the drugs in the edition of Pharmacopoeia but which are included such

Pharmacopoeia for the time being in any Pharmacopoeia of any other country and such other standards as may be prescribed. -----

----- Part XII of the Drugs Rules deals with standards and Rules 124(1) and (2), which alone are material for our purposes, read thus:

124. (1) The Indian Pharmacopoeia, the Pharmacopoeia of the United States, the National Formulary of the United States, the International Pharmacopoeia and the State Pharmacopoeia of the Union of Soviet Socialist Republics shall be deemed to be prescribed Pharmacopoeias for the purpose of the Schedule to the Act.

(2) For drugs for which no standard of identity, purity and strength are specified in the latest edition of the British Pharmacopoeia but are specified in the British Pharmaceutical Codex, the standards shall be those given in the British Pharmaceutical Codex.

In the Second Schedule, item No. 5 is a residuary item and only if the drug does not fall under any of the preceding classes, that it will fall under item No. 5. According to Mr. Vyas, the drug in question falls under item No. 4. The standards prescribed are mentioned in Rule 124 (1). The Text Book of Pharmacognosy by T.E. Wallis is not one of the books mentioned in this Rule and, therefore, the tests laid down in that book could not be applied.

25. A reading of item No. 4 in the Second Schedule will show that it covers a class of drugs which are defined in Sub-clause (ii) of Clause (b) of Section 3 of the Drugs Act. But I have already held that it is Sub-clause (i) and not Sub-clause (ii) of Clause (b) of Section 3 of the Drugs Act that will apply in the present case. The drug in question cannot, therefore, fall under item No. 4. As it is not shown to fall under any other item, it must fall under the residuary item No. 5. It has not been disputed before me that Barbour's linen thread is not included in the Indian Pharmacopoeia and it is also not included in any Pharmacopoeia of any other country. It is, therefore, the argument of Mr. Vyas that since neither class (a) nor class (b) of item No. 5 applies, the drug in question cannot also fall under item No. 5 and there is no indication what standards can be applied to those drugs which do not fall under any of the classes of drugs mentioned in the Second Schedule.

26. But since item No. 5 is a residuary item, if a substance is a drug, then it must fall under that item. But that does not mean that there is no indication of the standards required to be complied with in respect of such a drug, because it does not fall under class (a) or class (b). The Second Schedule has to be read along with Rule 124(2), which provides that for drugs for which no standards of identity, purity and strength are specified in the latest edition of the British Pharmacopoeia but are specified in the British Pharmaceutical Codex, the standards should be those given in the British Pharmaceutical Codex. In the present case, therefore, since the drug in question is not included in the British

Pharmacopoeia but it is specified in the British Pharmaceutical Codex, the standards given in the British Pharmaceutical Codex are to be applied and this is exactly what has been done by Deshpande. Deshpande started with the microscopic test and this showed that the sample had cotton thread and no silk (linen) thread. At page 41 of the Text Book of Pharmacognosy by T.E. Wallis, fifth edn., (1967), are given the diagrams for cotton and flax and it is clear from these that from a mere microscopic examination it is possible to arrive at a tentative finding whether a certain thread is cotton or linen. After reaching the tentative finding that it was cotton thread and not linen thread, in order to confirm his finding Deshpande carried out further tests for cotton and it is for this reason that he applied the test prescribed for cotton wool. Some of the tests mentioned in the British Pharmaceutical Codex, 1968 for absorbent cotton wool at page 993 are these:

- (1) When examined under a microscope, each trichomes consists of a single cell, about 1 to 3 cms. in length and 15 to 25 microns width, forming the flattened tubular band with slightly thickened rounded edges and showing from about 50 to 120 twists per cm.; the apex is rounded and often solid.
- (2) When soaked in iodine water for a few minutes on a microscope slide, and the excess of reagent removed by filter paper, the trichomes assume a blue colour on adding one or two drops of sulphuric acid (66 per cent v/v).
- (3) It is soluble, at 20°, in sulphuric acid (66 per cent v/v).
- (4) When treated with ammoniacal copper oxide solution, the cells swell uniformly without the formation of globular enlargements, and finally dissolve, with the exception of the contents of the lumen.
- (5) It is insoluble in dilute sodium hydroxide solution.

Now, it will be seen from exh. E-1, which is one of the reports of the Government analyst in respect of one of the samples of Barbour's linen thread seized from the shop of the respondent, that he had carried out the following tests:

- (1) When examined under the microscope, the sample is seen to consist of fibres about 15 to 25 microns wide, forming the flattened ribbon like band with slightly thickened edges and solid round apex and showing twists.
- (2) When soaked in iodine solution, it shows blue colour on the addition of sulphuric acid (66 per cent v/v).
- (3) When mounted in ammoniacal copper oxide solution, it swells uniformly without globular formation and finally dissolves, with the exception of the contents of the lumen.
- (4) It is insoluble in dilute sodium hydroxide solution.
- (5) It is soluble in sulphuric acid (66 per cent v/v).

27. It will thus be seen that the very tests which have been mentioned in the

British Pharmaceutical Codex, 1968 for absorbent cotton wool were applied by Deshpande. As noted, on a broad microscopic test being carried out, he had arrived at a tentative finding that the thread was cotton and not linen or silk. It was in order to confirm this finding that he had carried out the tests for cotton in respect of the substance absorbent cotton wool. It may be noted (page 992) that the synonym for absorbent cotton wool is absorbent cotton and absorbent cotton wool is prepared from cotton. The main ingredient of the substance absorbent cotton wool is thus cotton and if the tests for identification for cotton mentioned in the case of absorbent cotton wool were carried out in respect of the sample, that was apparently a correct mode to find out if the sample contained cotton thread or linen or silk thread. It has not been brought out in the cross-examination of Deshpande that whatever tests he had applied were not sufficient or conclusive to reach a positive finding that the sample did not conform to the tests for identification for silk or linen. There were two modes open to Deshpande to reach his conclusion. The first was to apply the tests for identification for linen and show that those tests for identification were negative and thus come to the conclusion that the sample does not contain silk or linen thread, The other was to apply the tests for identification of cotton and show that the sample conformed to those tests and gave positive results for identification for cotton. Deshpande seems to have adopted the latter tests. That was because immediately on a microscopic examination he found that the sample contained cotton thread and not silk or linen thread. It could not be said that thereafter in applying the tests for identification for cotton and on the basis of positive results obtained, he was wrong in reaching the conclusion that the sample did not conform to the tests for identification for silk or linen.

28. The result of analysis arrived at by Deshpande in respect of the sample, namely, that the sample was cotton thread and not silk or linen thread, has, therefore, to be received in evidence and if the sample showed that it was not linen thread but was in fact cotton thread, then the substance is proved both to be substandard and misbranded. I, therefore, hold that Barbour's linen thread stocked and exhibited for sale by the respondent was a substandard and misbranded drug.

29. The next point for decision is whether the appointment of the Drugs Inspector Kochar was illegal, making all the proceedings taken by him void ab initio. Section 21(1) of the Drugs Act provides that the Central Government or a State Government may, by notification in the Official Gazette, appoint such person as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be. Kochar stated in his evidence that he was appointed u/s 21 of the Drugs Act as an Inspector. In cross-examination, he produced an extract exh. 2 from the Maharashtra Government Gazette dated May 10, 1962 containing an order of the Director of Drugs Control Administration dated April 23, 1962 posting Kochar as Drugs Inspector (Headquarters), Bombay. It is the submission of Mr. Vyas for the respondent that the appointment of

Kochar ought to be made by the State Government and it had not been so made. However, exh. 2 is not the order of initial appointment of Kochar but is only an order of his posting as Drugs Inspector (Headquarters), Bombay. Although Kochar produced this as a copy of the notification of his initial appointment, in fact, it is not so. He was not asked on behalf of the respondent to produce the original notification of his appointment and the respondent seems to have remained satisfied with whatever Kochar had produced as the notification of his appointment. It cannot, therefore, be said that the claim made by Kochar that he had been appointed as a Drugs Inspector u/s 21 of the Drugs Act has been controverted in any way. I, therefore, hold that it has not been proved that the appointment of the Drugs Inspector Kochar is illegal.

30. The last point for decision is whether the respondent could be said to have stocked or exhibited for sale a misbranded and/or sub-standard drug. It is the submission of Mr. Vyas that no bogus customer was sent to purchase Barbour's linen thread from the shop of the respondent. Even Kochar had not himself purchased the article. It could not, therefore, be said that the drug was stocked and exhibited for sale by the respondent.

31. The learned public prosecutor has relied upon the decision of the Allahabad High Court in *Kasim Bhai Vs. State*, where the view taken is that where a particular medicine is kept in the shop, there will be a presumption that it is there for the purpose of sale unless that presumption is rebutted by the accused. With respect, that appears to be the correct view of the law. The respondent owns a chemists shop and holds a licence to sell and deal in drugs under the Drugs Act. His defence was not accepted even by the trial Court that the articles in question were not found in his shop but were lying in a lumber-room behind the shop. There is nothing in the statement of the respondent or in the cross-examination of the prosecution witnesses that the reels of Barbour's linen thread were kept by the respondent in his shop not for the purpose of sale but for any other purpose. Ordinarily, if they are not meant for sale, they should not have been kept in the shop at all.

32. In the result, therefore, the first two charges have been clearly brought home to the respondent and his acquittal on those charges is wrong and must be set aside.

33. The contravention of Sub-clauses (i) and (ii) of Clause (a) of Section 18 of the Drugs Act is punishable u/s 27(a) *ibid*. That section provides for imprisonment for a term which shall not be less than one year but which may extend to ten years and there is also a liability to pay fine. There is a proviso that the Court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year. There is thus a duty on the Court that an accused on his conviction u/s 18(a) (i) or (ii) should be punished with imprisonment for a term not less than one year and also fine. It is only for special reasons that the Court may impose a sentence of imprisonment of less than one year.

34. Mr. Vyas for the respondent has submitted that there are special reasons for giving the benefit of the proviso to the respondent. The respondent himself was not the manufacturer of Barbour's linen thread. He had no means at his disposal to know that the substance was sub-standard or misbranded. This was the first series of cases in which the Drugs Control Administration had prosecuted merchants for stocking and exhibiting for sale surgical suture (ligature). Having regard to all these circumstances, the ends of justice would be met if the respondent is sentenced to one day's imprisonment and a nominal fine is imposed on him.

35. It is difficult to hold that the above can be special reasons which will justify the Court to give the benefit of the proviso to the respondent. Section 19(1) of the Drugs Act provides that it shall be no defence in a prosecution under chapt. IV, which deals, inter alia, with the sale of drugs, to prove merely that the accused was ignorant of the nature, substance or quality of the drug in respect of which the offence has been committed or of the circumstances of its manufacture or import, save as hereinafter provided in the section. Sub-section (3) of Section 19 provides:

(3) A person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall not be liable for a contravention of Section 18 if he proves-

(a) that he acquired the drug or cosmetic from a duly licensed manufacturer, distributor or dealer thereof;

(b) that he did not know and could not, with reasonable diligence, have ascertained that the drug or cosmetic in any way contravened the provisions of that section; and

(c) that the drug or cosmetic, while in his possession, was properly stored and remained in the same state as when he acquired it.

It is clear, therefore, that if the accused wanted to contend that he was not the manufacturer of the drug and he had no means at his disposal to know that this was a sub-standard or misbranded article, he had to prove, in order to prove his innocence, that he had acquired the drug from a duly licensed manufacturer and that he did not know and could not, with reasonable diligence, have ascertained that the drug in any way contravened the provisions of Section 18. In the present case, let alone the proof, the respondent has not even mentioned in his long written-statement that he had purchased the substance in question from a duly licensed manufacturer and that he did not know and could not, with reasonable diligence, have ascertained that the substance in any way contravened the provisions of Section 18. What could not be a valid defence to the charge could also not be a mitigating circumstance in favour of the respondent in awarding the sentence. That this was the first series of cases in which shop-keepers were prosecuted for stocking and exhibiting for sale sub-standard and misbranded surgical suture (ligature) could hardly be a special

reason for which the benefit of the proviso could be given to the respondent. The statutory minimum term of imprisonment for one year ought therefore, to be imposed on the respondent.

36. In the result, the appeal filed by the state is allowed, except with regard to the third charge u/s 18(b) read with Section 27 of the Drugs Act, and the acquittal of the respondent on that charge is upheld. The acquittal of the respondent on the first two charges, namely, for the offences under Sections 18(a)(ii) and 18(a)(i), both read with Section 27, of the Drugs Act is set aside and he is convicted on both these counts. It is not necessary to pass two different sentences in respect of the two offences. It is the finding that what was being given out was cotton thread and not linen thread that had made it both a misbranded and sub-standard drug. Therefore, a single sentence will meet the ends of justice. I, therefore, sentence the respondent to undergo rigorous imprisonment for one year and to pay a fine of Rs. 200; in default, to undergo rigorous imprisonment for a further period of one month. The respondent is given time of four weeks to surrender. The warrant of arrest to issue thereafter.

37. All the stock of Barbour's linen thread seized from the respondent is confiscated. The other property seized from him shall be returned to him.