ALLAHABAD HIGH COURT

Dharam Deo Gupta

Vs.

State (Allahabad)

Criminal Revn. No. 143 of 1956. , against order of Civil and S. J. Lucknow,

(A.N. Mulla, J.)

12.03.1956. 27.03.1958

ORDER

A.N. Mulla, J.

1. Sri Dharam Deo Gupta, the applicant in this case, has been convicted on two charges under the Drugs Act 1940 (Act No. XXIII of 1940). He was held to have contravened the provisions of Section 18(a) (i) as well as Section 18 (a) (ii) of the said Act. He was, therefore, convicted under Section 27 of the said Act to nine months' rigorous imprisonment and a fine of Rs. 500 on both the counts by the trial court. The appellate court upheld his conviction under both the counts, but set aside the sentence of imprisonment under these two counts. The applicant has now come up in revision before this Court.

2. The applicant was the Managing Director of a company known as 'The New International Chemicals Ltd., which had its Depots at Lucknow as well as Barabanki. This company did not manufacture any drug, but it dealt with drugs. In a part of the premises of the said firm at Lucknow there was another firm which was known as 'Asha Medical Stores, Lucknow'. The proprietor of this firm was Sri P. N. Varma. Sri P. N. Varma had previous dealings with a drug manufacturing firm at Calcutta known as 'Andrew's Chemicals (India) Ltd.

3. The Government of India invited tenders for the supply of one lac fifty thousand ampoules of 10 c.c. equa pro injections. The necessary conditions and specifications were mentioned when these tenders were invited. One of the essential conditions was that the goods supplied should be 'own make' of the firm who submitted the tender. The applicant's firm, although it did not manufacture the required drug, submitted a tender and it was accepted by the Government on the 10th of December, 1954. The condition of a supply was that the entire quantity was to be supplied in two instalments of 75 thousand ampoules each, one by the 28th of February, 1955 and the other by the 30th of April, 1955. When this tender was accepted, a schedule was attached

to the letter of acceptance. According to Clause 13 of this schedule the particulars governing the supply were the following :-

> "(a) Specification :- B. P. (British Pharmacopeia)
> (b) Makers name and brand :- 'Own make'.
> (c) Country of origin :- India."

Under Clause 15 of the said schedule the Dy. A.D.G. (M.S.), M.S.D. Karnal was appointed the inspecting officer and the place at which the goods were to be tendered for inspection was mentioned as the premises of the firm.

4. As the applicant's firm could not manufacture this drug, they placed an order for its supply at Andrew's Chemicals (India) Ltd., Calcutta, The applicant's firm did not do so directly, but placed this order through Asha Medical Stores. I will comment upon this conduct of the applicant at a later stage. Andrew's Chemicals (India) Ltd., accepted the order and supplied the 75 thousand ampoules which were included in the first instalment, Sri P. N. Varma, proprietor of Asha Medical Stores, was present in Calcutta when these ampoules were packed by Andrew's Chemicals (India) Ltd. and handed over to another Calcutta firm Mansukhlal Tirbhovandas and Co. This firm according to the directions given by Sri P. N. Varma despatched these ampoules to the New International Chemicals Ltd. at Lucknow and the railway receipt in respect of this consignment was sent to them also. These ampoules were booked on the 21st of January, 1955 by Mansukhlal Tirbhovandas and Co. and they arrived at Lucknow on the 27th of January. 1955, and its delivery was taken the same date by the New International Chemicals Ltd. Lucknow.

5. One of the conditions of the contract was that a sample was to be inspected by the Inspecting Officer mentioned in the schedule. This condition was mentioned in paragraph 6 of the letter of acceptance and it runs as follows :

> "Advance Sample : If required, Advance Sample must be despatched to the Inspecting Officer mentioned in the schedule so as to reach him by the dates specified therein. The actual date of despatch must be reported promptly to this office. The sample must be of an acceptable quality and fully representative of the bulk supply. If the sample is not approved, this contract is liable to immediate cancellation in which case the stores will be repurchased elsewhere at your risk and expense under the conditions of contract. This is an essential condition of the contract and the Government shall under no circumstances be liable for any stores manufactured by you before the advance sample has been approved." In pursuance of the conditions quoted above, a letter was sent by Sri P. R. Haryal, Assistant Depot Manager, Government M. S. D. Karnal, to the New International Chemicals Ltd. Lucknow on 6/7-1-1955 informing them that Sri R. K. Chugh, Assistant Chemist, will inspect the first instalment of Acqua pro injection ampoules on 27-1-1955. It was thus a coincidence that Sri Chugh and the ampoules arrived on the same date at

Lucknow. Sri Chugh visited the premises of the firm on the same date and took two sets of samples out of the consignments received. One of these sets was left with the firm of the applicant and the other was sent to the Director Central Drugs Laboratory, Calcutta, for his report. It may be mentioned that when Sri Chugh took these specimens these ampoules bore the following labels :

"10 c. c. ACQUA
PRO- INJECTION
B. P.
P. V. 01086 Batch No.
Date of Mfg. 20-12-54.

THE NEW INTERNATIONAL CHEMICALS LTD.

Lucknow- Barabanki.

Sri Chugh was not shown any other labels nor was any statement made to him at that stage that these labels were incorrect. A mere reading of these labels shows that the ampoules purported to have been manufactured by the New International Chemicals Ltd., LucknowBarabanki.

6. The Director, Central Drugs Laboratory, Calcutta, after testing the sample sent to him, sent his report Ex. P-10 on 22-2-1955, which was received at Karnal on 25-2-1955. In this report it was mentioned that oxidisable matter was above B. P. (British Pharmacopeia) limit and that the sample did not pass the pyrogen tests and, therefore, it was not of acceptable quality. On receipt of this report the Government cancelled the supply of the first instalment. They sent a letter dated 4/5-3-1955 to the New International Chemicals Ltd. Lucknow in which they mentioned that the sample has not passed the pyrogen tests and was, therefore, rejected. They, however, requested the applicant's firm to tender the second instalment at an early date as the supply was urgently required in the Depot.

7. It seems that almost at the same time when the Government wrote this letter to the applicant's firm, a confidential letter was sent by Sri P. S. Ramchandran to B. D. Wadhwa, Assistant Drugs Controller, Uttar Pradesh, Lucknow informing him that the sample was found defective and asking him to arrange for the inspection of the firm in order to make sure that the firm is taking proper steps to test the injections in question. This letter was sent on 7-3-1955. In due course this letter came into the hands of Sri D. V. Kakkar, Drugs Inspector, Lucknow, who came to the premises of the firm on 22-3-1955 and took into his possession the entire stock of the ampoules that was lying there and sealed it. He had obtained the previous sanction of the District Magistrate, Lucknow, for this action and after seizing these packages, he placed them in the custody of the applicant. He took a receipt from the New International Chemicals Ltd. and this

receipt was signed by the applicant. When Sri Kakkar took the permission of the District Magistrate to seize the stock, he mentioned in his official and confidential note to the District Magistrate that it was necessary that the entire stock of this medicine should be taken in possession because the firm was likely to remove its defects. At the time when these ampoules were taken in possession, their number was 74,600.

8. After making this seizure and after the report from the Director, Central Drugs Laboratory, Calcutta, was received Sri Kakkar issued a notice to the applicant in which he mentioned that the sample had failed to pass the two tests and it was further mentioned that the applicant did not possess a licence to manufacture the said preparation under the Drugs Act. The applicant was called upon to explain within a week why legal action should not be taken against hint under Section 27 of the Drugs Act for the breach of Section 18 (a) (i) and Section 18 (c) of the said Act.

9. In reply to this notice the applicant's firm submitted an explanation which was signed by Sri R. D. Chaudhri, the technical Director of the firm. This explanation was offered on 19-4-1955 and it is Ex. P-6. As this explanation was found unsatisfactory, Sri Kakkar filed a complaint against the applicant on 29-6-1955. He prayed that the applicant be prosecuted under Section 27 read with Section 18 (a) (i) and 18 (a) (ii) of the Drugs Act, 1940. It may be mentioned that when notice was received by the applicant, he took up the plea that he was not the manufacturer of these ampoules and that he had acquired this drug under a written warranty signed by the manufacturer to the effect that the ampoules did not in any way contravene the provisions of Section 18 and that the drug while in his possession remained in the same state as when he acquired it. He also sent a copy of the warranty to the Drugs Inspector along with a written notice that he intended to rely upon this warranty and he had mentioned the name and address of the warrantor M/s. Andrew's Chemicals (India) Ltd., Calcutta, and that he had also sent a notice to the said warrantor intimating that the applicant would rely on their warranty. It also appears that the sample left with the applicant by Sri Chugh was sent by him to Haffkine Institute, Bombay, for their report. This sample was sent on 19-5-1955, and the report of the Haffkine Institute was received on 8-6-1955. According to this report, the sample passed the pyrogenic tests.

10. The trial Court framed two charges against the applicant. The first charge was that on 22-3-1955 he stocked and exhibited for sale 74,600 ampoules of Acqua pro injections B. B. Batch No. 397 at his premises at Lucknow which were not of standard quality and secondly that the said ampoules which were found in the possession of the applicant were mis-branded. After taking the evidence in the case the trial Court found that both the charges were made out against the applicant and convicted him, as mentioned above.

11. In revision before me the counsel for the applicant raised three contentions so far as the fixed charge was concerned. Firstly, he contended that the ampoules recovered from the premises of the applicant's firm were not stocked and exhibited for sale. Secondly, his contention was that if a

presumption is to be drawn against him that; these ampoules were stocked and exhibited for sale, merely from the fact thai they were recovered from the premises of his firm, even then the prosecution has failed to establish that they were below standard quality. Thirdly, it was contended by him that even if these ampoules are held to be of a sub-standard quality, the applicant cannot be convicted because he was not the manufacturer of this drug and he did not know nor could he have with reasonable diligence ascertained that the said ampoules in any way contravened the provisions of Section 18 and the said ampoules while in his possession remained in the same state as when he acquired them.

12. I have heard the learned Counsel for the applicant as well as the counsel for the State at length in this case. I have come to the conclusion that so far as the first charge is concerned, it must fail, because every one of the three contentions advanced before me on behalf of the applicant is maintainable and fully borne out by the evidence and the circumstances of the case.

13. I will first take up the question whether these ampoules were stocked and exhibited for sale or not. I would at this stage quote the relevant words of Section 18 of the Drugs Act, 1940. Section 18 runs as follows :

> "From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf :
> (a) manufacture for sale, or sell, or stock or exhibit for sale, or distribute
> (i) any Drug which is not of standard quality;
> (ii) any misbranded drug..,.." It would be seen from the words of sub-clause (a) that a person can be convicted under the provisions of this section only if the stocking or exhibiting of goods is for the purpose of sale. The commas placed in this sub-clause leave no room for doubt that the intention of the Legislature was to penalise the stocking or exhibiting of goods below standard quality only if they were meant for sale. In other words the mere stocking of goods or exhibiting of goods of sub-standard quality is not an offence under Section 18 of the Drugs Act. I am fortified in this view by a decision of a Single Judge of our High Court in *Kasim Bhai v. State*[1], The learned Judge was dealing with sub-rules (2) and (9) of Rule 65 of the Drugs Rules, but his observations are applicable to the stocking under Section 18 of the Drugs Act also. The learned Judge after discussing the said sub-rules observed :
> "It will appear from the above provisions that what is prohibited by them is the supply or sale of particular kinds of medicines except under the direction and personal supervision of a qualified person. There is nothing in these sub-rules which lays down that such medicines will not be stocked unless a qualified person is engaged in the shop. The charge against the applicant is not for the supply or sale of the medicines specified in Schedule H, but for stocking such medicines."

I am in agreement with the view expressed above end mere stocking unless it is for the purpose

of sale does not amount to an offence within the meaning of Section 18 of the Drugs Act, 1940.

14. It is true that this circumstance that the ampoules were stocked in a side room near the shop would lend itself to the inference that they were meant for sale, if there bad not been clear indications that this inference cannot be drawn in this case. In the case cited above the learned Judge held that if a particular medicine is kept in the shop, there will be a presumption that ft is there for the purpose of sale unless that presumption is rebutted. In my opinion the undisputed facts and circumstances of this case not only rebut the presumption, but make it impossible for this presumption to be raised at all.

15. I would first take up the question whether these ampoules were stocked for sale or not. There is nothing on the record to indicate that they were exhibited for sale. The

[1] AIR 1956 All 703

long history of the case given by me in the beginning leaves no room for doubt that these ampoules were stocked because the agreement to sell these ampoules existed. They were the first instalment to fulfil the terms of the contract and the applicant's firm was awaiting the directions of the Government of India. They were seized on 22-3-1955 and upto that time the applicant was not even aware that these ampoules would be rejected by the Government of India. Under the terms of the contract itself, the applicant's firm had to stock these ampoules and if he did so in order to fulfil the contract into which he had entered, it cannot be inferred that he had stocked these ampoules for the purposes of sale. There is a clear distinction between a sale and an agreement to sell. Sub-sections (3) and (4) of Section 4 of the Indian Sale of Goods Act (Act 3 of 1930) clearly brings out this distinction. These sub-sections run as follows :

> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

It is, therefore, clear that these ampoules were stocked because the applicant's firm had contracted to provide these ampoules and they were not stocked for the purpose of sale.

16. The next question to be determined is whether the stocking of these ampoules for the purpose of meeting the contract by itself would amount to stocking for sale or not. In my opinion it cannot be described as a stocking for sale. The terms of the contract were quite clear. I have mentioned the important and relevant condition earlier by which the ampoules were to be tested and if they were found sub-standard, the Government was entitled to cancel the contract. On 22-3-1955 the Government had not cancelled the contract and the applicant could do nothing else except to keep the ampoules and stock them in his premises. Again where there is a condition

precedent that a sample would be tested, the stocking of, goods of sub-standard quality cannot come within the purview of Section 18 of the Drugs Act. The very basis of this provision is to protect unwary customers from buying inferior goods which are passed as goods of standard quality. A customer cannot test the quality of the goods supplied to him and he goes by the description given to the goods by the dealer. But where a sample is to be tested first, the dealer cannot cheat the customer. If he supplies sub-standard goods, he takes the risk of losing the contract and suffering loss on that account. Even in this contract the penalty which the applicant had to pay was that the contract would be cancelled. I am therefore of the opinion that in these circumstances even if the applicant had been the manufacturer of these ampoules, he could not have been prosecuted under Section 18 of the Drugs Act, for he had not stocked them for sale but to meet a provisional contract.

17. Where goods are to be produced according to certain specifications, there is a likelihood that occasionally they may not be of that standard. The penalty the contractors pay for such a mistake is that they suffer a loss, put if they fail to produce the goods of a standard quality, this failure by itself does not constitute any offence. It is only when there is a possibility of some wrongful gain accruing to a person from such a failure, that a doubt can arise that it was not a genuine failure, but was due to something else. Where a sample was to be tested before the 'agreement to sale' became a 'sale' there was no possibility of securing any wrongful gain. That the failure of the applicant was not considered an offence by the Medical Stores Depot, Karnal, is proved from the fact that they wrote to the firm of the applicant requesting him to tender the second instalment at an early date. If a consignment is not of an acceptable quality, the contract cannot be enforced, but on this ground alone it cannot be held that an offence under Section 18 (a) (i) has been committed. To prove an offence under Section 18 of the Drugs Act the prosecution must prove that the goods were stocked or exhibited for sale and not merely that they were stocked. This can be proved by direct evidence or by circumstantial evidence. It is true that in some cases the act of stocking alone might be sufficient to prove that they were stocked for sale, but there can be other cases where a reasonable explanation can be offered for stocking. On the facts of this case the evidence leads only to one conclusion namely that the stocking was done to meet the contract and not for the purposes of sale.

18. I will now take up the second question namely whether the prosecution has satisfactorily proved that the recovered ampoules were of substandard quality. The prosecution relies upon Ex. P-10, the report of the Government Analyst and contends that according to the provisions of Section 25 (4) of the Drugs Act, it is conclusive evidence on the point that the ampoules were of substandard quality and this opinion must be accepted by the Court. The counsel for the applicant on the other hand contends that unless the certificate contains the factual data it cannot be treated as conclusive evidence. It is further contended by him that unless the procedure laid down in the Drugs Act under Section 23 is followed no finality can be attached to the report of the Government Analyst. Lastly he contends that it is for the Court to decide the question whether the ampoules were of sub-standard quality or not and a correct interpretation of Section

25 (4) of the Drugs Act does not make the Government Analyst the final arbiter on this point.

19. Before dealing with these contentions, I would like to make some observations as to how the relevant sections of the Drugs Act should he interpreted. It is obvious that in some recent enactments including the Drugs Act, 1940, a departure is made from the normal rule of evidence. The normal rule of evidence is that a witness, before his testimony can be considered should be examined on oath and an opportunity should be given to the other party to cross-examine him. It is only after he has faced these tests that his statement can be treated as evidence. Even in the Criminal Procedure Code, this normal rule has been modified to a certain extent by Section 510. Section 510, Criminal Procedure Code runs as follows :

> "Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government..... upon any matter or tiling duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code."

It would be seen that the report of the Chemical Examiner could be used as evidence and under the general law it is being frequently used as evidence. No doubt the Court has the discretion to summon the Chemical Examiner as a witness, if it is not satisfied by the report alone. In the Drugs Act as well as some other Acts including the U. P. Pure Food Act No. 32 of 1950, the legislature has enacted that in certain cases a report submitted under the provisions of these enactments would be conclusive evidence of the facts contained therein. This in a way abridges the rights of a person to cross-examine such witnesses and by its terminology seems to indicate that the Court must accept the conclusions reached by these experts. The question, therefore, arises whether this abridgment amounts to an infringement of any basic right given to the citizens under the Constitution of India. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure established by law. It cannot be denied that one of the basic natural rights possessed by an accused person is that he should have an opportunity to defend himself against the charge levelled against him. If any enactment contains any such procedure which takes away this basic right of an accused, it must be held to be ultra vires of the Constitution. According to Article 13 of the Constitution of India, all laws which are inconsistent with the rights given to the citizens are void to the extent or such inconsistency. It is, therefore, to be determined whether Section 25 (4), Drugs Act is inconsistent with Article 21 or not. Is it against an established procedure of law, when it makes the opinion of the Government Analyst final and gives no opportunity to an accused person to challenge that opinion by cross-examining the Government Analyst? That this provision has been made for the sake of convenience and saving of expenditure can well be understood, but these reasons cannot take away the right of an accused person to defend himself. The Court has to see whether any alternative procedure of defence is open to an accused person or not. It is, therefore, necessary to closely analyse the provisions of Section 25 of the Drugs Act. Section 25 of the Drugs Act runs as follows :

1. The Government Analyst to whom a sample of any drug has been submitted for test or analysis under sub-section (4) of Section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.
2. The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken and another copy to the warrantor, if any, named under the proviso to sub-section (3) of Section 19, and shall retain the third copy for use in any prosecution in respect of the sample.
3. Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the said warrantor has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.
4. Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (S) notified his intention of adducing evidence in controversion of a Government Analyst's report the Court may, of its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drug produced before the Magistrate under sub-section (4) of Section 23 to be sent for test or analysis to the said laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

20. A reading of this section makes it clear that the report of the Government Analyst is to be held to be conclusive only if it is not challenged according to the procedure given in the section. This by itself proves that it is not conclusive evidence in the sense that it must be accepted. It is open to an accused person to rebut the report and it is open to a Court to reject the report, if the rebuttal is satisfactory. In other words the legislature, although it has denied the right of cross-examination to an accused and has also made this report admissible in evidence without the Government Analyst deposing on oath, has provided an alternative procedure by which an accused can defend himself. The basic right of an accused to defend himself is protected and the provisions of Section 25 of the Drugs Act, therefore, are intra vires of the Constitution.

21. But at the same time the procedure mentioned above should be strictly followed and if reliance is to be placed upon the conclusive nature of the evidence of the Government Analyst, it should be procured only in the manner mentioned in Section 25 of the Drugs Act. The basic rights can be abridged only in the manner prescribed and in no other manner. In this respect I find that this report was not obtained according to the prescribed procedure. The repeated reference to Section 23: in Section 25 makes it quite clear to me that it is only when a sample is taken under the provisions of S 23 (3) of the Drugs Act that the report submitted by the Government Analyst can be given this finality. Section 23 (3) of the Drugs Act runs as follows :

> "Where an Inspector takes a sample of a drug for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the persons from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked....."

Obviously the sample in this case was not taken under the provisions of Section 23 (3) of the Drugs Act, but was taken for quite a different purpose. No intimation of the purpose was given in writing in the prescribed form as required by Section 23 (3). Neither was the applicant asked to put his own seal on the samples that were taken. The sample was taken with the object of finding out whether the required specifications of the contract were fulfilled by the applicant or not. There was no idea of any criminal prosecution in the mind of Mr. Chugh when he took these samples.

It was on 22-3-1956, that Sri D. V. Kakkar Drugs Inspector Lucknow, came to the premises of the applicant's firm and seized the entire stock. Perhaps the idea of a criminal prosecution came into the mind of Sri D. V. Kakkar sometime in April, 1955 and the applicant came to know about it when a notice was issued to him by Sri Kakkar on 14-4-1955. If Sri Kakkar wanted to prosecute the applicant on the ground that the samples were of sub-standard quality, in my opinion it was necessary to take fresh samples under the provisions of Section 23 (3) of the Drugs Act. The report given by the Central Drugs Laboratory Calcutta was given for another purpose and not for the purpose of providing that factual data which would have been necessary if it was meant to be utilised as conclusive evidence according to Section 25 (4) of the Drugs Act. For the purpose of declaring the sample to be of an unacceptable quality it was not necessary to give this factual data. On the basis of this report the Government was entitled to cancel the contract, but the prosecution is not entitled to depend upon this report as conclusive evidence in this trial. In my opinion Section 25 of the Drugs Act cannot be separated from Section 23 of the said Act and if the prosecution wants to prove the report of the Government Analyst and contend that it should be treated as conclusive evidence, it is necessary to observe the procedure mentioned in Section 23. The report of the Government Analyst under Section 25 is governed by the procedure mentioned in Section 23., As this procedure was not followed in this case, Ex. P-10 the report of the Central Drugs Laboratory, Calcutta, in this case cannot be treated as conclusive evidence. Only that report of the Central Drugs Laboratory Calcutta can be treated as conclusive evidence which is obtained under Section 25 (4) Drugs Act and not any other advisory report given by them for some other purpose.

22. The Drugs Act contains prescribed forms and Form 2 framed under Rule 6 of the Drugs Rules, 1945, clearly mentions the requirements which a certificate of test or analysis by the Central Drugs Laboratory should contain. It is mentioned in this form which is Form 2 in Schedule A that details of results of test or analysis with protocols of tests applied should be

given. Ex. P-10 contains no such details. As a matter of fact it contains no factual data at all. The reason is not far to seek. This report was not giver, for the purpose for which the prosecution is utilizing it. If the Central Drugs Laboratory had known that they were to give a report for the purposes of prosecuting the accused person under the Drugs Act, they would have given this data. A report which does not contain any factual data cannot be treated as conclusive evidence of the opinion given in the report. The relevant entries in Ex. P-10 are as follows :

> "Oxidisable matter :- Above B. P. (British Pharmacopeia) limit.
> Pyrogen test:- The sample does not pass the test.
> Conclusion :- The sample is not of acceptable quality."

23. It would be seen from the extract cited above that no factual data is given in this report and only the opinion of the Government Analyst is mentioned. It has been repeatedly held by this Court that such a report is not sufficient to prove that the sample examined by it was of a sub-standard quality. No doubt these decisions are under Section 10 (2) of the U P. Pure Food Act, but that section is almost analogous to Section 25 (4) of the Drugs Act and the rule of law laid down in those decisions fully applies to this case. Those decisions are *Din Dayal v. State*[1], *State v. Nathi Lai*[2]. and *State v. Sahati Ram*[3], I will quote only one extract from these decisions, which is from *State v. Sahati Ram, at page*[4]:

> "It has been repeatedly pointed out by this Court, and in this connection we may refer to two recent decisions of this Court, the one in *Din Dayal v. State*,

[1]1956 All LJ 276: (AIR 1956 All 520)
[2]1956 All LJ 340
[3]1957 All LJ 647: (AIR 1958 All 34)
[4]648 (of All LJ) : (at pp. 34-35 of AIR)

> in which one of us was a party, and the other in *State v. Nathi Lal*, that the certificate of the Chemical Analyst should contain the factual data which the analysis should reveal and not merely the opinion of the Public Analyst as to what that data indicates about the nature of the article of food, and that if the certificate merely gives the final opinion of the Public Analyst and if such an opinion be held to be conclusive evidence about the nature of the article of food, the merit of the case against the accused is really decided by the Public Analyst and not by the Court and the Court just gives its authority to the conclusion of the Public Analyst and that this cannot be the position in law. The report of the Public Analyst in the present case does not, in our opinion, specify what Section 10 of the Act required him to specify and what could have been evidence for the consideration of the Court."

24. I am in entire agreement with the view expressed above and in my opinion the legislature did not contemplate that cases should not be decided by Courts of law, but by Government Analysts, who do not even give the reasons for their opinion. If this was really the intention of the legislature, it would make Section 25 (4) of the Drugs Act ultra vires of the Constitution, for it would amount to denying the basic right to an accused person to defend himself and it would be against the established procedure of law. That a person has a basic right to defend himself against

an accusation has been held again and again by the Supreme Court. However strong and believable the evidence might be the accused must be given an opportunity of rebutting that evidence. If such an opportunity is not given it violates the fundamental conceptions of natural justice and it infringes Article 21 of the Constitution of India.

25. It may also be kept in mind that the reasonable possibility of an error being committed by the Government Analyst when he is analysing or testing a sample cannot be eliminated. The Court has a right to satisfy itself that the chance of a mistake has been eliminated. It can do so if sufficient factual data is given in the report. This factual data by itself will show that the opinion given is fully borne out.
But where the opinion is not supported by any factual data, the Court cannot test the opinion of the Government Analyst and can only accept it in a blind manner. The liberty of the people cannot be taken away from them on such evidence which cannot be tested. It is, therefore, necessary that the procedure laid down in the Drugs Act should be strictly followed and where this procedure has not been followed the report of the Government Analyst cannot be treated as conclusive evidence.

26. In this case if the normal procedure had been followed the sample would have been sent to Haffkine Institute, Bombay but because the sample was examined for quite a different purpose, this procedure could not be followed. The applicant, however, sent the sample left with him to the Haffkine Institute and they reported that the sample passed the pyrogen tests. The Central Drugs Laboratory on the other hand, had reported that the sample did not pass the pyrogen tests. There was thus a conflict of opinion between the Haffkine Institute and the Central Drugs Laboratory, Calcutta.
Under Section 25 (4) of the Drugs Act, the Central Drugs Laboratory, Calcutta, is supposed to be a higher authority than the Haffkine Institute, Bombay. If a conflict of opinion about the quality of the sample had arisen during the normal course the trial Court could have sent a sample to the Central Drugs Laboratory, Calcutta, to decide the question and then the opinion of the Central Drugs Laboratory would have been treated as conclusive evidence of the facts stated in its report In this case the first report was given by the Central Drugs Laboratory. It is, therefore, obvious that if the report of the Central Drags Laboratory is to be held to be the final word regarding the quality of the sample, the accused was highly prejudiced, because he got no chance of rebutting the opinion which would have come against him according to the normal procedure. In the special circumstances of this case the opinion of the Central Drugs Laboratory, therefore, cannot be treated as the final authority and it can be treated only as the report of a Government Analyst. The applicant rebutted this opinion by submitting the report of the Haffkine Institute.

27. According to Ex. P-10, two defects were noted in the sample; one was that it failed to pass the pyrogen tests and the other was that the oxidisable matter was above B. P. (British Pharmacopoeia) limit. The Haffkine Institute did not test the sample for oxidisable matter, but it reported that the sample passed the pyrogen tests. It was, therefore, necessary for the trial Court

to send the report of the Haffkine Institute to the Central Drugs Laboratory again and get their opinion whether the sample was of sub-standard quality on the basis of the oxidisable matter being above B. P. limit alone. This was not done by the trial Court. Actually Ex. P-10 does not say that the sample was of sub-standard quality. It only says that it is not of acceptable quality. The Central Drugs Laboratory is all the time giving its advice in terms of the contract and not in terms of the prosecution of a person. On the evidence as it stands, it cannot be decided whether the sample was or was not defective on the basis of pyrogen tests. As regards oxidisable matter, there is no clear opinion that if it was above B. P. limit, this defect alone would make the sample of sub-standard quality. At any rate, there is no opinion on the record of the case to indicate that this defect alone was sufficient to reject the sample.

28. I am, therefore, of the opinion that from whatsoever angle the evidence is approached the inevitable conclusion is that the prosecution has failed to establish that the sample was of substandard quality.

29. The third contention advanced by the applicant was that he could not be prosecuted under Section 18 of the Drugs Act as he was protected by Section 19 (3) (a) and (b) of the Drugs Act. This plea is also well founded. The evidence clearly shows that the applicant had acquired these ampoules from Andrews Chemicals, Calcutta and they had also given two warranties for the two consignments which were sent. The applicant brought it to the notice of the Drugs Inspector within the limited time and he also intimated his intention to use these warranties to the warrantor. It can also safely be accepted that the applicant did not know and could not with reasonable diligence ascertain that ampoules were of a substandard quality and there can be no doubt that these ampoules remained in the same state during his possession.

30. The counsel for the State has contended that this plea is not made out because a representative of the Andrews Chemicals, Calcutta, was not examined in defence and also because the warranties were addressed to Asha Medical Stores and not to the firm of the applicant. There is no force in any of these two contentions. Sri P. N. Varma proprietor Asha Medical Stores, was examined in defence and his statement to the effect that the two warranties were given by Andrews Chemicals to him personally can safely be accepted. The warranties were given in respect of the ampoules which were supplied by them and it is quite irrelevant whether these warranties were given to Asha Medical Stores or to the firm of the applicant. I am therefore of the opinion that the prosecution has failed to prove the first charge against the applicant.

31-32. Coming to the second charge of misbranding these ampoules, I am of the opinion that this is satisfactorily established against the applicant. (After discussing the evidence the judgment proceeded :) The applicant was, therefore, not only privy to the misbranding, but there can be no doubt that this misbranding was 3one at his instance.

33. Misbranding has been defined under Section 17 of the Drugs Act. Sub-sections (b), (f) and (g) of Section 17 run as follows :

> "(b) if it purports to be the product of a place or country of which it is not truly a product,
> (f) 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;
> (g) if the label or container bears the name of an individual or company purporting to be the manufacturer or producer of the drug, which individual or company is fictitious or does not exist."

34. In my opinion the label found on the ampoules made it a misbranded drug within the meaning of all the three sub-sections of Section 17 which I have cited above. These ampoules with the labels which were found on them purported to be the product of the New International Chemicals, who had their branches at Lucknow and Barabanki, while actually they were the manufacture of Andrews Chemicals, Calcutta. They thus purported to be the product of a place other than the place where they were really produced.

35. The counsel for the applicant contended that the same word 'place' is also used in Section 9 (b) of the Drugs Act and, therefore, the fact that a Calcutta product is being described as a Lucknow or Barabanki product will not amount to a misbranding within the meaning of sub-section (b) of Section 17 of the Drugs Act. I have not been able to follow this contention. The word 'place' is not a synonym for country and it is one of the rules of interpretation that surplusages are not used in enactments. The word 'place' definitely connotes a different meaning from the word 'country'. It means that where the product of one town is being described as the product of another town it amounts to a misbranding within the meaning of this sub-section. I am, therefore, of the opinion that these ampoules were misbranded under sub-section (b) of Section 17 of the Drugs Act.

36. Similarly they were misbranded within the meaning of sub-sections (f) and (g) of Section 17 of the Drugs Act. The lable used on these ampoules was false and misleading as regards the name of the manufacturer and also as regards the place of its manufacture. It is, therefore, covered by the latter part of sub-section (f). It was also mis-branded because it gave the name of a fictitious company as the manufacture of the ampoules. The counsel for the applicant contended that the New International Chemicals was not a company which can be called fictitious or which did not exist and, therefore, sub-section (g) does not apply. In my opinion this is not the meaning of the word 'fictitious' in the context of this sub-section. Fictitious, as defined in the Chambers Twentieth Century Dictionary means 'imaginary - not real -forged'. It is the third meaning which is applicable in this case. Forgery is defined in Sections 463 and 464 of the Indian Penal Code. Whenever any document is made and the intention is to commit fraud, that document becomes a forged document. It is true that the New International Chemicals Ltd. was a

firm, but it was not a firm of manufacturers. The label used wanted to fraudulently declare that this firm was a firm of manufacturers. It also claimed to be manufacturers of these ampoules when the real manufacturers were Andrews Chemicals, Calcutta. It, therefore, took up a fictitious role and, therefore, the name of the manufacturer given in the label was fictitious. It was not real. I am therefore satisfied that these ampoules were misbranded.

37. Under Section 18 (a) (ii) of the Drugs Act, the law prohibits that a person shall himself or by any person on his behalf manufacture for sale ..... any misbranded drug. On the findings reached by me, it was the applicant who through the agency of Andrews Chemicals manufactured for sale these ampoules which were misbranded drugs. The case against the applicant under this charge is, therefore clearly made out.

38. As a result I set aside the conviction of the applicant on the first charge, namely that he stocked and exhibited for sale these ampoules. I, however, maintain and uphold his conviction on the second charge, namely that the ampoules which were found in his possession were misbranded and they were manufactured for sale at his instance. I set aside the sentence of fine imposed upon the applicant under the first charge, but maintain the sentence of fine imposed under the second charge. If the applicant has fully deposited the fine on the two counts Rs. 500/- should be returned to him. If the applicant has not deposited any fine so far he should deposit Rs. 500/- within a period of one month. In default of payment of fine he shall undergo three months' rigorous imprisonment. With the modification mentioned above, this application of revision is dismissed.
Order accordingly.