APPELLATE CRIMINAL

Before Mehar Singh and S. B. Capoor, JJ.

MUNICIPAL CORPORATION OF DELHI,—*Appellant.*

versus

GHISA RAM,—*Respondent.*

Criminal Appeal No. 30-D of 1964.

Prevention of Food Adulteration Act.

Prevention of Food Adulteration Act (XXXVII of 1954)—S. 13—Accused denied the right to have the sample analysed by the Director of Central Food Laboratory—Whether entitled to acquittal—Sample of curd —How to be taken.

1964

November 11th

Held, that an accused person cannot directly send his part of the sample to the Central Food Laboratory, Calcutta, for analysis. The only manner in which he can have approach to that laboratory is through the Court in terms of sub-section (2) of section 13 of the Prevention of Food Adulteration Act, 1954, and that situation arises after the institution of the prosecution under the Act. So the use of

the word 'may' in sub-section (2) of this section, though seeming to give a discretion to the Court, has to be read as mandatory because it gives a statutory right both to an accused person and the prosecution to have a check of the analysis of the Public Analyst through analysis of one or both of the remaining parts of the sample. A duty is thus cast on the Court when an application for this purpose is made to send the part of the sample to which it refers for analysis by the Director of the Central Food Laboratory so that there may be a check of the analysis of the Public Analyst. Where, for any reason, the accused person is denied this statutory right of having a check analysis, he will be materially prejudiced in his defence and is, therefore, entitled to acquittal, especially because the certificate of analysis by the Director of the Central Food Laboratory, Calcutta, if done in proper time, is to supersede the analysis and opinion of the Public Analyst.

Held, that the proper manner and method of taking a sample of curd is that the set curd should be divided vertically and the entire one compartment should be taken, churned and then divided into three parts, one to be sent to the Public Analyst, one to be retained by the Food Inspector and the third to be given to the seller.

Petition for appeal under Section 417 of the Code of Criminal Procedure against the order of Shri B. K. Malhotra, Magistrate, 1st Class, Delhi, dated the 21st January, 1964, acquitting the respondent.

Charge: Under Section 7/16 of the Prevention of Food Adul*teration Act, 1954.*

BISHAMBER DAYAL, ADVOCATE, for the Appellant.

GHANSHYAM DASS, ADVOCATE, for the Respondent.

JUDGMENT

Mehar Singh, J.

MEHAR SINGH, J.—This is an appeal by the Municipal Corporation of Delhi from the order, dated January 21, 1964, of a Magistrate of the First Class at Delhi, acquitting Ghisa Ram respodent of an offence under section 16 for contravention of section 7 of the Prevention of Food Adulteration Act, 1954 (Act 37 of 1954). hereinafter to be referred as 'the Act'.

The respondent has a licence for running a Halwai's or sweetmeat-seller's shop in Defence Colony in New Delhi. On September 20, 1961, Food Inspector Parkash Chopra, with Food Inspector Ram Gopal and peon Ram Bharose

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visited the respodent's shop. A sample of curd (Dahi) of cow's milk was taken by Food Inspector Parkash Chopra from the shop of the respondent. It was churned and made into three equal parts, of which one was given to the respodent, another was made over by the Food Inspector on the same day to the Public Analyst, Dr. A. Kannan and the third was retained by the Food Inspector in terms of section 11(1) of the Act. The Public Analyst carried out the analysis of the sample given to him on October 3, 1961, that is to say 13 days after the sample had been taken. The three parts had been duly marked and after fastening up the bottle sealed, but no preservative was added to any of the parts. The Public Analyst gave his certificate of analysis on October 23, 1961, in which he found the fat content 11.6 per cent and the non-fatty solids 7.3 per cent. The standard prescribed by the rules for curd of cow's milk is 3.5 per cent fat and 8.5 per cent non-fatty solids. Thus the analysis showed that the sample of curd analysed was far in excess of the standard in regard to fat and 1.2 per cent below in regard to non-fatty solids. The Public Analyst on this opined that the sample was adulterated with 14.1 per cent added water. He noted in his opinion that the sample had been kept in a refrigerator before analysis.

The complaint against the respondent was filed in Court on May 23, 1962, some 8 months and 3 days after the sample had been taken by the Food Inspector. On October 4, 1963, some 17 months after the complaint had been preferred in the Court, the respondent in terms of sub-section (2) of section 13 of the Act made an application for analysis of part of the sample, retained by the Food Inspector, by the Director of the Central Food Laboratory at Calcutta, and the report of the Director of the Central Food Laboratory was that the part was in a highly decompsed condition and thus obviously did not admit of analysis or was not in an analysable condition.

At the trial the respondent admitted all the facts as above in regard to the taking of the sample of curd of cow's milk by the Food Inspector from his shop and the dealing with the same as stated. But he said that he had prepared the curd from pure cow's milk. This was his

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only defence. Of curse the counsel on his behalf questioned the correctness of the analysis of the part of the sample made by the Public Analyst.

The learned trial Magistrate acquitted the respondent following *R. C. Shaida* v. *The Municipal Corporation of Delhi* (1), in which Sharma, J., had held that as changes take place by action of bacteria in milk within a short time and bacteria affects percentage of fat and non-fatty solids in milk when turned into curd, so it could not be said that as soon as milk is converted into curd, the changes which started stopped and for good. The learned Judge observed that the curd should not be allowed to remain for a long period and without adding the required preservative since the percentage of fat and non-fatty solids present in the milk from which it is prepared is likely to dwindle. In that case a sample of curd had been analysed six days after the same had been taken by the Food Inspector. The Analyst's report had stated that the sample was kept in a refrigerator, but the learned Judge observed that the form prescribed by the rules for a report of the Public Analyst of the result of the analysis by him does not provide for the making of such a note by him so that such a note could be used as evidence in the case like other entries made in consonance with the prescribed form and that it was for the prosecution to prove by evidence—possibly by examining the Public Analyst—that the delay in analysis of the sample of curd by the Public Analyst did not result in the deterioration of fat and non-fatty solids in it. The learned Magistrate obviously, in the face of these observations of the learned Judge, proceeded to acquit the respondent in this case.

In *Municipal Corporation of Delhi* v. *Jai Dayal* (2), a Division Bench of this Court, consisting of Dua and Mahajan, JJ., has not accepted the observations of Sharma, J., in *Shaida's case*. It has been observed—"That the sample was kept in a refrigerator before the analysis, so contends the counsel, does not relate to the result of the analysis. Our attention has, in this connection, been drawn to Form III which lays down that the Analyst has to certify that the sample received by him was found to be properly

(1) 1964 P.L.R. 537.
(2) I.L.R. (1964) 2 Punjab 482=1964 P.L.R. 1016.

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sealed and fastened and that he had found the seal intact and unbroken. Then he is to declare the result of the analysis and his opinion thereon. In my view, the opinion of the Public Analyst must, from the very nature of things, include the reasons which may be relevant for forming his final opinion on the declaration of the analysis. Now, if the declaration of the Analyst discloses adulteration of the food-stuff, he would clearly be justified in noting the fact that the sample had not been kept in a refrigerator or had no preservative in it and, therefore, it would not be safe for him to give the opinion in favour of adulteration on the basis of the result of the analysis. Considered from this point of view, I am of the opinion that the fact of the sample having been kept by the Analyst in a refrigerator may equally legitimately and properly form part of his report and, therefore, admissible in evidence." We are bound by this decision of the Division Bench. It may, however, be pointed out that unlike the form of certificate of the Public Analyst under the English Food and Drugs Act, 1938, which form is reproduced at page 546 of Bell's Sale of Food and Drugs, 13th Edition (1956), Form III under rule 7 (3) of the Rules made under the Act does not provide a note under it that "in the case of a certificate regarding milk, or any other article liable to decomposition, the Analyst should specially report whether in his opinion any change had taken place in the constitution of the sample that would interfere with the analysis". In the form of certificate of Public Analyst under the English statute there are useful notes and what I have reproduced above is stated at the end of note 6. There are no similar notes with Form III under rule 7 (3) of the Rules under the Act. It would be better if such a note was added to that form to avoid any possible argument in this respect. In the presence of such a note the Public Analyst will then have to state that no change had taken place in the constitution of the sample that interfered with the analysis and in stating so he may give the reason why the delay did not result in any change and one of the reasons may be that the sample was retained in a refrigerator. But a note to the form may also say that the Public Analyst will state whether during the delay in the analysis of a sample of a perishable article it was or was not kept in a refrigerator to obviate any change that may interfere with the analysis.

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When this case first came for hearing before Pandit, J., and myself, we were not quite sure for what length of time a sample of curd, even though kept in a refrigerator, may be available for proper and adequate analysis in regard to its fat or non-fatty solids contents so as to enable an Analyst to give an opinion whether or not it is adulterated. We needed clarification on this but the counsel for the parties were not able to refer us to any text book or authority that was helpful in this respect. We, therefore, ordered that experts be examined in this Court under section 428 of the Criminal Procedure Code in this case to clarify this matter. Accordingly two experts have been examined. The first expert is Dr. Sat Parkash who is Dairy Chemist in the Delhi Milk Scheme and is a notified Public Analyst of the Delhi Administration, and the second expert is Dr. A. Kannan, Public Analyst of the Delhi Municipal Corporation. The last witness has now deposed that in the present case in fact the sample of curd given over to him by the Food Inspector was kept in a refrigerator till the analysis was carried out.

The opinion of Dr. Sat Parkash on the various questions on the subject is—

(a) that early changes in fat and non-fatty solids during the conversion of milk into curd, after its setting, almost stop;

(b) that further changes may occur, at room temperature, only say after a week, when no preservative is used, provided the sample is kept in a sealed bottle, but those changes will be different from the changes that started with milk turning into curd;

(c) that a sample of curd, properly sealed, even without a preservative, and kept anything upto seven days at room temperature—temperature varying from 27° centigrade and normally to 32° centigrade but in rare cases to 35° centigrade—will still maintain the percentage of fat and non-fatty solids for the purposes of analysis, and though it may not be edible after 24 hours, it will still remain unchanged for the purposes of

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analysis in regard to its percentage of total fat and non-fatty solids;

(d) that by the end of that time, that is to say by the end of a week, bacterial development will start taking place which will break the fat contents thus causing reduction in the same and as the time passes such reduction will increase, and that if such a sample is then kept, at that temperature, for more than a week, say 10 days, it will then start decomposing and consequently become unfit for analysis;

(e) that if such a sample is then kept, after having been kept for six or seven days at room temperature in a refrigerator, it will preserve its fat and non-fatty solids contents for the purposes of analysis for another three weeks and, though when kept at room temperature for those six or seven days, there may be bacterial development in it, but such development will not affect the fat contents or break the non-fatty solids to reduce the same during the period, and, if within that period the sample is placed in a refrigerator, it will keep fit for the purposes of analysis for a period as given, which means that, in this way, the sample will be available for proper and effective analysis for a total period of four weeks;

(f) that if to such a sample a preserving agent is added, it may maintain its total percentage of fat and non-fatty solids contents for the purposes of analysis for say four months and if then the sample of this type is placed in a refrigerator, it will keep such qualities for some more months, say another two months, which gives a total of about six months, during which period the sample will be available for the purposes of analysis without deterioration or decomposition affecting the same; and

(g) that if a properly sealed sample of curd is kept at room temperature for a week and then in a

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refrigerator for three weeks, and it is, thereafter sent to Calcutta for analysis, it will still be fit for analysis by the end of the fifth week, but it will start decomposing thereafter.

In his opinion Dr. A. Kannan adds another factor for consideration—

(h) that increase in lactic acid by the lapse of time does not affect non-fatty solids so as to decrease them, does not affect fat at all, and with the increase of lactic acid by efflux of time there will be corresponding decrease in lactose so that the total percentage of solids in curd will continue to be the same.

Otherwise Dr. A. Kannan broadly agrees with the opinion of Dr. Sat Parkash differing only in this—(i) that he takes the room temperature to be anything from 30 to 40 degrees centigrade, and (ii) that he considers the initial period for which a sample of curd, without preservative, can maintain its analysable qualities at room temperature is fifteen days.

The difference of opinion on the first matter is not substantial and on the second matter we prefer to accept the opinion of Dr. Sat Parkash which appears to us to be rather more unconcerned and unconnected with the questions under consideration in this case. This does not mean that there cannot be such a genuine difference of opinion, but on the whole we have accepted in this respect the opinion of Dr. Sat Parkash.

The analysis of the part of the sample given to the Public Analyst was in this case done thirteen days after the sample was taken, but as that part was delivered to the Public Analyst on the very day the sample was taken and it was kept in a refrigerator, on the basis of the testimony of the two expert witnesses, it is now evidence that there was no occasion for any change taking place in that part that interfered with the analysis. On this account, therefore, the analysis of that part by the Public Analyst is not open to exception. The complaint against the respondent was made some eight months and three days after the sample was taken. Section 13 of the Act reads—

"13. REPORT OF PUBLIC ANALYST.—(1) The public analyst shall deliver, in such form as may

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be prescribed, a report to the food inspector of the result of the analysis of any article of food submitted to him for analysis.

(2) After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the court for sending the part of the sample mentioned in sub-clause (i) of sub-clause (iii) of clause (c) of sub-section (1) of section 11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of the receipt of the sample, specifying the result of this analysis.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2) shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory under sub-section (2) is produced in any proceeding under this Act, or under sections 272 to 276 of the Indian Penal Code (Act XLV of 1860), it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3) or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code (Act XLV of 1860):

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

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In sub-section (2) of this section the words used are that the Court 'may then despatch the part of the sample', and though in this the word used is 'may', but sub-section (3) of this section provides that the certificate by the Director of Central Food Laboratory, Calcutta, shall supersede the report of the Public Analyst, and (ii) the proviso to sub-section (5) of this section makes facts stated in that certificate as conclusive evidence, which apparently means that a statutory opportunity is provided, according to sub-section (2) of this section, both to an accused person and the prosecution to have part of the sample with the accused or part of the sample left with the Food Inspector analysed by the Director of the Central Food Laboratory as a check of the analysis done by the Public Analyst, thus providing protection to either against a wrong or suspicious analysis by the Public Analyst. This statutory right, so far as an accused person is concerned, might well provide conclusive evidence of his defence that the sample is not adulterated. If the circumstances so develop that an accused person is deprived of this opportunity to have a check of the analysis by the Director of the Central Food Laboratory, it may mean deprivation of a substantial defence to such a person. Of course an accused person can have his own sample analysed by a private analyst, but that will not supersede the report of the Public Analyst as does the certificate of the Director of the Central Food Laboratory. Rule 3(a) of the Prevention of Food Adulteration Rules, 1955, provides for analysis of sample of food sent by any officer or authority authorised by the Central Government for the purpose and submission of the certificate of analysis to the authorities concerned by the Central Food Laboratory and there is nothing in rule 3 which entitles an accused person to send a part of the sample given to him by the Food Inspector direct for analysis to the Central Food Laboratory. Some conclusion is available from rule 4. So an accused person cannot directly send his part of the sample to the Central Food Laboratory for analysis. The only manner in which he can have approach to that laboratory is through the Court in terms of sub-section (2)

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of section 13 of the Act and that situation arises after the institution of the prosecution under the Act. So the use of the word 'may' in sub-section (2) of this section in the context to which reference has already been made though seeming to give a discretion to the Court has in that context to be read as mandatory because it gives a statutory right both to an accused person and the prosecution to have a check of the analysis of the Public Analyst through analysis of one or both of the remaining parts of the sample. A duty is thus cast on the Court when an application for this purpose is made to send the part of the sample to which it refers for analysis by the Director of the Central Food Laboratory. In *State of Uttar Pradesh* v. *Jogendra Singh* (3), their Lordships have held that "the word 'may' generally does not mean 'must' or 'shall'. But it is well-settled that the word 'may' is capable of meaning 'must' or 'shall' in the light of the context. Where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command". Read in this light the use of the word 'may' in the context in regard to which it is now under consideration has to be taken to be mandatory so that when an application either by an accused person or the prosecution is made for sending the part of the sample, either with the accused person or with the prosecution, for analysis by the Director of the Central Food Laboratory, the Court has to send it to him for that purpose so that there may be a check of the analysis of the Public Analyst. In the present case the complaint having been made in Court some eight months and three days after the taking of the sample, according to the opinion of the experts, it had, assuming that the sample with the Food Inspector was also retained in a refrigerator, become unfit for analysis at the expiry of five weeks after the date of its taking and, if it was not kept in a refrigerator, at the most after ten days. It was only when the complaint was instituted in Court that the respondent became entitled to have the sample with the Food Inspector sent for analysis by the Director of the Central Food Laboratory, but by that time part of the sample was so decomposed that it did not admit of analysis. In fact when it was sent to the Director of the Central Food Laboratory, his certificate is to that effect.

(3) A.I.R. 1963 S.C. 1618.

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The learned counsel for the Delhi Municipal Corporation has contended that the respondent did not make any application in this respect until some sixteen or seventeen months after the institution of the complaint, but in the facts of this case that is of no consequence because long before the complaint was actually instituted the part of the sample with the Food Inspector had become unfit for analysis because of the supervening decomposition in it. Similar obviously was the case with the part of the sample that the respondent had with him. So the respondent was denied this statutory right and thus the learned trial Magistrate could not possibly have convicted him of the offence of which he was charged. In *Chintaman* v. *State* (4), the part of the sample with the Food Inspector was not produced in Court when required, on the application of the accused person, for being sent to the Director of the Central Food Laboratory for analysis, and Satish Chandra, J., observed that "the report of the Public Analyst may not suffer from any infirmity by not having been superseded by a certificate of the Director. But since the applicant has been denied the right to get it (sample) tested by the Director, it will not be safe to hold the accused guilty of the offence." The learned counsel for the Delhi Municipal Corporation has pressed that, in any case, no prejudice has resulted to the respondent because of the delay in the institution of the complaint and because of the resulting deprivation of the statutory right to the respondent to have part of the sample with the Food Inspector analysed by the Director of the Central Food Laboratory, but, I should have thought it apparent that when there is a denial of such a statutory right to an accused person, which may materially affect his defence, prejudice to such a person in his defence inheres in the situation.

In this respect reference may be made to the parallel provisions of English statutes and three cases under the same. In the Sale of Food and Drugs Act, 1875, section 22 provides—

> "The Justices before whom any complaint may be made........... under this Act may, upon the request of either party, in their discretion cause any article of food...to be sent to the Commissioners of ~~Indian~~ Revenue, who shall thereupon

(4) 1964 A.L.J. 893.

direct the chemical officers of their department at Somerset House to make the analysis, and give a certificate to such Justices of the result of the analysis."

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This is reproduced as a note at page 288 of *Hewitt* v. *Taylor* (5). This was subsequently amended by the Sale of Food and Drugs Act, 1899, and, as amended, section 22 provided that the Justices before whom the complaint is made shall at the request of either party, or without such request if they think fit, cause the articles, retained for future comparison, to be sent for analysis to the Commissioners of Inland Revenue. So what was previously within the express discretion of the Justices became an imperative duty by the amendment. This is now provided in section 112 of the Food and Drugs Act, 1955, of which sub-sections (1) and (3), which are relevant, say—

"(1) The court before which any proceedings are taken under this Act may, if it thinks fit, and upon the request of either party shall, cause the part of any sample produced before the Court under sub-section (4) of section one hundred and eight of this Act to be sent to the Government Chemist, who shall make an analysis and transmit to the court a certificate of the result thereof, and the costs of the analysis shall be paid by the prosecutor or the defendant as the court may order.

(2) * * * * *

(3) Any certificate of the results of an analysis transmitted by the Government Chemist under this section shall be signed by or on behalf of the Government Chemist, but the analysis may be made by any person acting under the direction of the person by whom the certificate is signed; and any certificate so transmitted by the Government Chemist shall be evidence of the facts stated therein unless any party to the proceedings requires that the person by whom it is signed shall be called as a witness."

One thing is clear and that is that under the English statutes the report of the chemical officers of the Commissioners of

(5) (1895) 1 Q.B. 287.

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Inland Revenue, or a certificate of the Government Chemist under those statutes does not supersede the analysis and opinion of the Public Analyst as is provided in section 13 of the Act. In the case of English Statutes the report of the chemical officers of the Commissioners of Inland Revenue, or a certificate of the Government Chemist is evidence in the case with the report of the Public Analyst which is also evidence in the case. The Justices have then to weigh between the two to decide to accept which, should there be an occasion for that. Another thing that is clear from the English Statutes is that the part of the sample left with an accused person can be had examined by him by an analyst of his own choice and he can produce evidence in this respect to contradict or discredit the analysis and opinion of the Public Analyst or even a certificate of the Government Chemist. The first case in this connection is *Lowery* v. *Hallard* (6), in which half a pint of brandy had been purchased by the Inspector. It was divided into three parts, one containing five ounces, one containing three ounces, and one containing about two but less than two and a half ounces. The Public Analyst, to whom the the part containing five ounces was sent gave his certificate from which it appeared that the brandy was adulterated. It appeared from the uncontroverted evidence of the Public Analyst, and of an analyist called on behalf of the accused person, that it was not possible to get a complete or satisfactory analysis of a sample of brandy containing only two and a half or three ounces. The Inspector had given the part containing less than two and a half ounces to the accused and had retained the part containing about three ounces for future comparison. One of the arguments was that in view of section 22 of the Sale of Food and Drugs Act, 1875, as amended by section 21 of the Sale of Food and Drugs Act, 1899, the part given to the accused was not sufficient for analysis by the chemical officers of the Commissioners of Inland Revenue and this justified the acquittal of the accused, who was the appellant. Lord Alverstone, C.J., with Lawrence and Ridley, JJ., concurring, made these observations on that part of the argument—

> "......the section (13) says that the purchaser shall divide the article into three parts, each part to

(6) (1906) 1 K.B. 398.

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be marked and sealed or fastened up, and shall, if required to do so, deliver one part to the seller, and shall retain one part for future comparison, and shall submit the third part, if he deems it right to have it analysed, to the public analyst. It is contended for the respondent that it is not a condition precedent that the other two parts shall be of equal value for the purpose of analysis as the part which is submitted to the public analyst. In my opinion, the provisions of section 14 are conclusive against that contention, and I think that even a superficial consideration of those provisions is sufficient to show that each of the three parts must, at least, afford substantially the same facilities for analysis. I do not, of course, mean that they must all be mathematically equal but, in my judgment, there is no good ground for the argument that the section is satisfied if the part which is submitted to the public analyst for the purpose of founding a prosecution alone affords sufficient facilities for analysis. The subsequent provisions of the Act confirm me in this view. Section 20 provides that when the public analyst has analysed the portion which has been sent to him and has given his certificate from which it may appear that an offence has been committed, the person causing the analysis to be made may take proceedings. Then section 21 says that at the hearing the part retained by the purchaser shall be produced; and section 22, as amended by section 21 of the Act of 1899, provides that the Justices before whom the complaint is made shall, at the request of either party, or without such request, if they think fit, cause the article—that is, the portion retained by the purchaser and produced in Court—to be sent for analysis to the Commissioners of Inland Revenue. Either party, therefore, has an absolute right to have that analysis. Then we must consider the third portion which, if required, is to be delivered to the seller. It would be little less than a farce if that part were not sufficient for the purpose of analysis on behalf of the seller. The

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whole scheme of the Act, therefore, seems to show that the sufficiency for the purposes of analysis of these two portions which are retained is a condition precedent to the prosecution of the proceedings. One good reason why this should be so is that, under section 21, the Justices may act upon the production of the certificate of the public analyst without any further evidence. It is, therefore, most important that there should be a proper opportunity of checking or correcting any analysis made by the public analyst. I have, therefore, come to the conclusion. not that the three parts into which the article is divided must be mathematically equal or identical in every respect, but that each part must at least be sufficient for the subsequent purpose contemplated by the statute, that is, for analysis by a Government analyst or by an analyst on behalf of the seller."

No doubt in this case the two parts of the sample, other than the one part sent to the Public Analyst, were in the beginning sufficient for the purposes of subsequent analysis to check the correctness of the Public Analyst's analysis and opinion, but in principle it ought to make no difference should those two parts have become by subsequent lapse of time not sufficient and in a proper condition for the purposes of a subsequent check analysis. In *Suckling* v. *Parker* (7), a sample of milk was taken and one part of it retained by the purchaser for subsequent analysis, but when the accused person within the scope of section 22 of the Sale of Food and Drugs Act, 1875, as amended, had that part sent to the chemical officers of the Commissioners of Inland Revenue, the letter from the Commissioners said that an examination of the bottle shewed that the cord was loose and portions of fat and dried milk were adhering to the outside of the bottle and the paper wrapper, and that under those circumstances a satisfactory examination of the milk was not possible, and that the analysis could not, therefore, be carried out by the department. An argument having been urged on the side of the accused, who was the appellant, that in those circumstances the conviction could not be maintained because such an

(7) (1906) 1 K.B. 527.

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analysis of the part of the sample left with the purchaser was a condition precedent that must be fulfilled before the magistrate could convict. Ridley, J., with Darling, J., being of the same opinion, observed—

> "Section 21 of the Act of 1899 does say that Justices shall on the request of either party cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis. I agree that that section which renders obligatory on the Justices what had previously under section 22 of the Act of 1875 been merely discretionary, is intended to afford additional protection for the accused person, and it is argued for the appellant that, having regard to the provisions of section 14 of the Act of 1875, the words 'article of food' in section 21 of the later Act can only refer to the third sample, which under section 14 had to be retained by the purchaser. I do not agree with that; but, even if it were so, it does not follow that if when the third sample is produced it is in a condition which renders analysis impossible, that fact necessarily renders the whole proceeding nugatory. It would be a very strong thing to say that an accused person who has not challenged the accuracy of the analysis of the public analyst is to be acquitted merely because an inherent defect has rendered impossible the analysis of the third sample.
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> Counsel for the appellant also referred us to *Lowery* v. *Hallard* (6), but that case does not, in my opinion, touch the point with which we are dealing here. In that case the Court was dealing with the question as to the taking of samples, and all that was decided was that although the three samples need not be mathematically equal in size, yet each sample must be of a size sufficient to permit of analysis."

The learned Judge then remarked that it did not appear quite satisfactorily how it came about that the third sample deteriorated in the manner described, and the case was remitted to the magistrate for a finding of fact whether it

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had been properly sealed and fastened up in such manner as its nature permitted. It seems to me that, as under the English statutes, an accused person can have the part of the sample given to him analysed on his own account from an analyst and then challenge the correctness of the analysis and opinion of the Public Analyst, and as the analysis made by the chemical officers of the Commissioners of Inland Revenue does not supersede the analysis and opinion of the Public Analyst but is merely a piece of evidence which may be considered with the analysis and opinion of the Public Analyst, it is in this approach that the case was remitted to the magistrate and it is, I consider, in this approach that the observation of the learned Judge is to be appreciated when it is said that the accuracy of the analysis of the Public Analyst was not challenged by the accused. However, in this case, the case of *Lowery* v. *Hallard* (6). was not followed and an attempt was made to show that that was a different type of a case, although Ridley, J., was one of the Judges concurring with the judgment of Lord Alverstone, C.J., in that case. The last case is *Winterbottom* v. *Allwood* (8), in which sample of tinned sardines in olive oil was in the statutory manner divided into three parts, one was given to the accused person, the second was sent to the Public Analyst for analysis, and the third was retained by the Inspector making the purchase for subsequent analysis within the meaning of section 22 of the Sale of Food and Drugs Act, 1875, as amended by section 21 of the Sale of Food and Drugs Act, 1899. On the first part of the sample given to the accused, which had been sent at his instance for analysis to the chemical officers of the Commissioners of Inland Revenue, the certificate given was that by the time the part of the sample came to be analysed certain chemical and other changes had taken place in it so that the chemical officers were unable to say whether cottonseed oil was or was not present in it, the accused having sold the tins of sardines with a label that the sardines were packed in pure olive oil. The question raised was that the conviction could not be maintained because of alterations in the first part of the sample, by way of decomposition or otherwise, which had taken place between the time when it was purchased and the time when that part was submitted for analysis.

(8) (1915) 2 K. B. 608.

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Ridely, J., confined himself to the question whether the three parts of the sample were sealed and fastened up in such manner as the nature of the sample permitted and was of the opinion that the magistrate having found so, the appeal of the accused must be dismissed. Avory, J., agreed with the dismissal of the appeal but this observation of the learned Judge has bearing on the consideration of the present question—

> "From the case of *Lowery* v. *Hallard* (6), it appears that the object of the section is that the vendor shall have an opportunity of having an effective analysis made. It is true that in that case the decision only proceeded upon the question of quantity, and the Court said that a sufficient quantity ought to be left with the vendor to enable him to have an effective analysis made in order to check the analysis made by the public analyst. The Court there did not deal with the question whether the article should be so sealed or fastened up that it would not deteriorate. But by analogy the object of the section being to give the vendor the opportunity of having the sample effectively analysed, if in this case I thought that upon the facts found it was not clear that the appellant had such an opportunity, I should be of opinion that the case ought to go back to the magistrate in order that he might determine whether a reasonable opportunity had been afforded to the appellant of having an analysis made. Having however, come to the conclusion that there was evidence which satisfied the magistrate that the appellant had that opportunity, there is no reason for sending the case back, and I think that the second point also fails."

Leaving aside the question of fact to which the learned Judge refers, as I read the observation of the learned Judge, it applies the dictum in *Lowery* v. *Hallard* (6) to a case where a sample has so deteriorated that an accused person had not the opportunity of having the sample effectively analysed. Lush, J., in the same case, observed—

> "The object of the performance of the duty is to enable the seller to have the article analysed and

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to enable the Court, if it thinks fit, to have the article analysed. That is shown by section 21. Having regard to the object of the requirement and to the fact that section 14 does not in clear terms state the method to be adopted, I think that the proper view is that the purchaser is to take reasonable care to have the portions so sealed or fastened up as to be capable of analysis at the proper time. That is, in effect, what the Court decided in *Lowery* v. *Hallard* (6), as regards quantity, and in that case Lord Alverstone, C.J., said: 'It is . . . most important that there should be a proper opportunity of checking or correcting any analysis made by the public analyst. Just as it is necessary to see that a sufficient quantity is retained and is sealed or fastened up, so it is necessary to see that the way in which the sealing or fastening takes place shall be reasonably sufficient to allow of subsequent analysis by an analyst employed on behalf of the seller and by the public analyst."

Now, as I appreciate the dicta of Avory and Lush, JJ., in this case in regard to *Lowery* v. *Hallard* (6). the same is to accept the dictum of Lord Alverstone, C.J., in that case and the same does not conform with the view of that case in *Sukling* v. *Parker* (7). In any case, the opinion of Lord Alverstone, C.J., has been accepted by Avory and Lush, JJ., in *Winterbottom* v. *Allwood* (8) that the part of the sample left either with the accused person or with the prosecutor must not only be quantitatively sufficient for subsequent check analysis but it must also remain in such a state that it is analysable subsequently for a check analysis in so far as its composition is concerned. If I read these cases rightly, they lend support to the view that has been taken above of sub-section (2) of section 13 of the Act and other sub-sections of the same section.

So the learned trial Magistrate could not possibly have convicted the respondent because of the denial of statutory right to the latter to have the part of the sample with the Food Inspector checked by the Director of the Central Food Laboratory at Calcutta, whose certificate of analysis, if done in proper time, would have superseded the analysis

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and opinion of the Public Analyst in this case. This situation was created beyond the control of the respondent for he could not apply to the Court for sending the part of the sample given to him or the part of the sample retained by the Food Inspector to the Director of the Central Food Laboratory for a check analysis until after the proceedings had been instituted against him. That was done some eight months and three days after the sample was obtained and by that time, according to the evidence of the experts, the two parts of the sample, one with the respondent and the other with the Food Inspector, even if retained in a refrigerator, became unfit for analysis because of chemical changes taking place after the maximum period of five weeks, for which period, according to the experts, the parts of the sample could have retained composition for a proper analysis. This argument on the side of the respondent thus supports his acquital by the learned trial Magistrate.

The learned counsel for the respondent has further urged that in this case the sample of curd was not taken in a proper manner. Both the expert witnesses are agreed that the proper manner and method of taking a sample of curd is that the set curd should be divided vertically and the entire one compartment should be taken, churned, and then divided into three parts. There is no evidence that this was done in the present case. The learned counsel for the Delhi Municipal Corporation contends that no question on this aspect was put to the witnesses, but obviously it is for the prosecution to prove that the sample was taken in a proper manner so as to admit of proper and effective analysis. The learned counsel for the respondent then points out that the effect of the sample not having been taken in a proper manner and by a proper method has been that it seems probable that the sample was taken only of the upper layer of the curd where fat had increased and non-fatty solids decreased. Both the experts are agreed that if a sample is taken in this manner the result would be as contended by the learned counsel for the respondent, and Dr. Sat Parkash is clear that in this case either the sample of curd of cow's milk taken from the respondent was not taken in a proper manner and by a proper method or there has been defective analysis. It seems that both the positions are correct. There could not have been such a high degree of fat, as found in the sample in

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this case, if a proper sample had been taken, so there is every indication that the sample was not taken by the method now given by the two experts but it was probably taken from the top layer of the curd. Dr. A. Kannan, the Public Analyst, who analysed the sample given to him by the Food Inspector, admits that he considered it as a sample of buffalo's milk and it is in this manner that the high degree of fat in the sample is explained by him. But his own report P. 3 shows that what was examined by him was curd of cow's milk and not curd of buffalo's milk. It is obvious, in the circumstances, that the sample was probably not taken in a proper manner and by a proper method and at the same time the analysis is not satisfactory upon which reliance can be placed.

The consequence then is that for the two reasons as detailed above this appeal of the Municipal Corporation of Delhi fails and is dismissed.