Supreme Court of India
Pandit Ukha Kolhe vs The State Of Maharashtra on 11 February, 1963
Equivalent citations: 1963 AIR 1531, 1964 SCR (1) 926
Author: S C.
Bench: Sinha, Bhuvneshwar P.(Cj), Gajendragadkar, P.B., Wanchoo, K.N., Gupta, K.C. Das, Shah, J.C.

PETITIONER:
PANDIT UKHA KOLHE

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT:
11/02/1963

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SINHA, BHUVNESHWAR P.(CJ)
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS

CITATION:
1963 AIR 1531 1964 SCR (1) 926
CITATOR INFO :
D 1965 SC1887 (3,5,7 ETC.,)
D 1966 SC 356 (6)
RF 1972 SC1738 (31)

ACT:
Criminal Trial-Offence under Prohibition Act-Blood taken before start of investigation-Report of Chemical Examiner-Procedure prescribed not followed-Admissibility of report-Re-trial, when can be ordered-Bombay Prohibition Act, 1949 (Bom. 25 of 1949) ss. 66, 129A, 129B-Code of Criminal Procedure, 1898 (Act 5 of 1898), ss. 428, 510.

HEADNOTE:
On account of injuries received in a motor accident the appellant was taken to the hospital at 6 A. M. on April 3, 1961. As he was found smelling of alcohol, a specimen of his blood was taken and collected in a phial. Subsequently, when investigation started this phial was taken by the In-vestigation Officer on April 13 and sent to the Chemical Examiner on April 18. On examination, it was found to have

a concentration of alcohol in excess of that mentioned in s. 66 (2) of Bombay Prohibition Act. The trial Court convicted the appellant relying upon the presumption arising on the report -of the Chemical Examiner. On appeal, the Sessions judge found that no evidence had been produced regarding the safe custody of the phial from April 3 to April 18, regarding its storage at a place where it was not liable to deteriorate and regarding its delivery to the Chemical Examiner, and ordered a retrial. This order was upheld by the High Court. The appellant contended (i) that the report of the Chemical Examiner was not admissible in evidence at the trial of the appellant for an offence under the Bombay Prohibition Act as the blood had not been collected in the manner prescribed by s. 129 A, and (ii) that the order for a fresh trial was illegal.

Held, (per Sinha, C. J., Gajendragadkar, Wanchoo and Shah jj., Das Gupta, J. contra) that the report of the Chemical Examiner was admissible in evidence. Section 129A was intended primarily for compelling a person to submit himself for medical examination and for collection of blood; this power could be exercised only in the course of investigation of an offence under the Act and only when a

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Prohibition Officer or a Police Officer had reasonable ground for believing that a person bad consumed liquor. If the examination of blood is made otherwise than in accordance with s. 129 A the result may still be proved by virtue of subs. (8) to s. 129 A and there is nothing in s. 129A or s. 129B which precludes proof of that fact if it tends to establish that the person had consumed illicit liquor. By enacting ss. 129 A and 129B the law provided one method of collection of evidence in respect of an offence under s. 66 (2) but it did not thereby exclude other methods. Bombay Act No. 12 of 1959 which introduced ss. 129 A and 129 B and which had been reserved for the consideration of the President and had received his assent prevailed, in the State of Bombay, over s. 510 of the Code of Criminal Procedure to the extent of inconsistency between the two. Accordingly, the report of a Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Act otherwise than in the manner set out in s. 129A cannot be used in evidence, but a report in respect of blood collected at a time when no investigation was pending or at the instance of a Police Officer or a Prohibition Officer, is admissible under s. 510 of the Code. Nazir Ahmad v. The King Emperor, (1936) L. R. 63 I.A. 372, Taylor v. Taylor, (1875) 1 Ch. D. 426, Deep Chand v. State of Uttar Pradesh, [1959] Supp. 2 S.C. R. 8 and Ch. Tikaramji v. State of Uttar Pradesh, [1956] S. C. R. 393, referred to.

Held, further, that the order for retrial was bad and that the Sessions judge should himself take additional evidence in respect of the safe custody etc. of the phial of blood.

An order for retrial of a criminal case is made only in exceptional cases as it "pose.-, the accused to another trial affording the prosecution an opportunity to rectify infirmities disclosed at the earlier trial. An order for retrial is not made unless the appellate court is satisfied that the trial court had no jurisdiction to try the case, or that the trial was vitiated by serious illegalities or irregularities or on account of the misconception of the nature of the proceedings there has been no real trial or that any of the parties had, for reasons over which it had,, no control, been prevented from producing material evidence. Since the Sessions judge was of the view that "additional evidence was necessary" he should have proceeded under s.428 (1) of the Code.

Ramanlal Rathi v. State , A.I.R. (1931) Cal... 305, referred to.

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Per Das Gupta, J.-The report of the Chemical Examiner in respect of blood taken not in accordance with the provisions of s. 129A was not admissible. In view of sub-s. (8) of s. 129A the fact that a person has consumed an intoxicant may be proved by evidence other than that made available under s. 129A; but for the determination of the percentage of alcohol in the blood no other procedure except that provided by s. 129 A was permisible. Section 66 (2), which provided for the drawing of a presumption in favour of the prosecution if the percentage of alcohol found in the blood of an accused exceeded that mentioned in the section, was introduced in the Act by the very Amending Act which introduced s. 129 A. It was reasonable to infer that the legislature intended the presumption under s. 66 (2) to be drawn only in cases where tile procedure prescribed by S. 129A had been followed.

Nazir Ahmad v. The King Emperor, (1936) L. R. 63 I. A. 372 relied on.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION:Criminal Appeal No. 131 of 1962.

Appeal by special leave from the judgment and order dated June 13, 1962, of the Bombay High Court in Criminal Revision Application No. 402 of 1962.

R.K. Garg, S. C. Agarwala and M. K. Ramamurthi, for the appellant.

C. K. Daphtary,Solicitor-General of India, N. S. Bindra and R. H. Dhebar, for the respondent.

1963. February 11. The following judgments were delivered by SHAH,.J.-On April 3, 1961 at about 2-30 A.M., a motor vehicle fell into a ditch by the side of a highway near Edlabad, District Jalgaon,

and all the occupants of the vehicle were injured. One Mohmad Yusuf who was in that vehicle died of the injuries. The appellant was tried before the judicial Magistrate, First Class, Bhusawal, for offences of rash and negligent driving when he was under the influence of liquor and thereby causing the death of Mohmad Yusuf and injuries to four other occupants of the motor vehicle and also for offences under the motor Vehicles Act. The Trial Magistrate held that the evidence was not sufficient to prove that the appellant was driving the motor vehicle at the time of the mishap, and acquitted the appellant of the offences under the Motor Vehicles Act and also under the Indian Penal Code. But he held that the evidence established that the appellant had at the material time consumed illicit liquor and had thereby committed an offence punishable under s. 66 (b) of the Bombay Prohibition Act. He accordingly convicted theappellant, and sentenced him to suffer rigorous imprisonment for three months and to pay a fine of Rs. 500/- and in default of payment of fine, to suffer rigorous imprisonment for two months. On appeal to the Court of Session, the order of conviction was set aside, and a retrial was directed, because in the view of the Court there had not been a "fair and full" trial. A revision application filed against the order in the High Court of Bombay was summarily dismissed. The appellant has appealed to this Court with special leave against the order of the High Court.

The case for the prosecution, in so far as it relates to the charge for the offence under the Bombay Prohibition Act, is briefly this: Early in the morning of April 3, 1961 as a result of motor vehicle Temp. No. .170 B. M. B. falling in a ditch near Edlabad several persons including the appellant were injured. At about 6 a. m., the appellant reached the Civil Hospital, jalgaon. On Dr. Kulkarni, Resident Medical Officer of the Hospital informing him about the death of Mohmad Yusuf, the appellant fainted and he was admitted as an indoor patient in the Hospital. On examination, the appellant was found "smelling of alcohol". Dr. Kulkarni thereupon directed one Dr. Rote to collect a specimen of blood from the body of the appellant, and accordingly some venus blood was collected in a phial. The phial was closed in the presence of Dr. Rote and sealed. But before treatment could be given to the appellant, he was discharged from the Hospital at the request of some persons who accompanied him. The blood specimen remained in the Hospital. Information about the mishap to the motor vehicle was received by the police at Jalgaon at about 8 a. m., on that day and a case was registered against the appellant and four other persons for certain offences under the Indian Penal Code and the Motor Vehicles Act, and on receiving information that all the incumbents of the motor vehicle were at the time of the mishap in a state of intoxication, also under s. 66 (b) of the Bombay Prohibition Act XXV of 1949. The Officer in charge of the investigation sent the appellant to the Civil Hospital for medical examination. The condition of the appellant was found by Dr. Kulkarni to be normal. A specimen of the appellant's blood was again collected at about 11 a. m., and was sent to the Chemical Analyser, for examination and report. On April 12, 1961, the Sub-Inspector in charge of the investigation came to learn that a specimen of blood of the appellant had been taken by the Hospital authorities early in the morning of April 3,1961. On demand by the police officer the Medical Officer delivered the phial containing the blood specimen together with a certificate from Dr. Rote that a blood specimen of the appellant was collected by him at 6 a.m., on April 3, 1961. The investigating officer affixed an additional seal on the package and forwarded the same with a special messenger to the Chemical Examiner on April 18, 1961. On examination of the contents of the phial it was found that there was concentration of alcohol to the extent of 0.069 per cent w/v ethyl alcohol. This concentration being in excess of the concentration mentioned in s. 66 (2) of the

Bombay Prohibition Act, a complaint for the offence under the Bombay Prohibition Act was also lodged against the appellant.

At the trial, on behalf of the prosecution among others were examined Dr. Kulkarni, Dr. Rote and the investigating officer. The report of the Chemical Examiner was also tendered in evidence. But the special messenger who carried the sample was not examined; nor was any evidence given about the place where and the condition in which the phial containing the blood specimen was kept in the Hospital. The appellant in his statement to the Court denied that concentration of alcohol detected by the Chemical Examiner from the specimen taken by Dr. Rote exceeded 0.069 per cent w/v. He admitted that on April 3, 1961 he was in the Civil Hospital in the early morning, that when he was told by Dr. Kulkarni about the death of Mohamad Yusuf he "suffered a shock"., that thereafter he went home immediately, and during that time his"mental condition was not good". He further stated :

> "I fell unconscious. I was semi-conscious. During that time my relations and friends gave me certain liquid as a sort of medicine. I
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> -felt like that. Then I was carried to the hospital in the same condition. As I regained my consciousness I told doctor that I want to leave the hospital because my friend was dead in hospital and as I did not feel it proper to live in hospital under such circumstances, so I left the hospital. I do not know who gave me medicine when I fell down on the road, after I had left the hospital. This was, when I left the hospital for my home."

The defence of the appellant therefore was that when he was informed about the death of Mohamad Yusuf he fainted and some medicinal preparation was administered to him by his friends to revive him and thereafter he was carried to the Civil Hospital. He has not admitted that any specimen of blood from his body was collected, but it appears to be his defence that if excessive concentration of alcohol was traced in the blood it was the result of some medicinal preparation administered to him by his friends. Section 66(1) of the Bombay Prohibition Act, in so far as it is material, provides :

> "(1) Whoever in contravention of the provisions of this Act, or any rule, regulation, or order made, or of any licence, permit, pass or authorization issued, thereunder-
>
> (a) x x x
>
> (b) consumes, uses, possesses or transports any intoxicant..... shall, on conviction, be punished - "(i) for a first offence, with imprisonment for a term which may extend to six months and with fine which may extend to one thousand rupees :"

'Intoxicant' is defined in s. 2(22) as meaning "any liquor, intoxicating drug, opium or any other substance, which the State Government may, by notification in the Official Gazette, declare to be an intoxicant; and by s. 2(24) liquor includes "(a) spirits, denatured spirits, wine, beer, toddy and all liquids consisting of or containing alcohol ; and

(b) any other intoxicating substance which the State Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act." The contravention referred to in s. 66(b) is the contravention of acts prescribed by s.13. That section prohibits, amongst other acts, consumption and use of liquor. The provisions of s. 13 which occur in Chap. III are subject to a general exception contained in s. 11, which provides, in so far as it is material, that :

> "Notwithstanding anything contained in the following provisions of this Chapter, it shall be lawful to import, export, transport, manu- facture, bottle, sell, buy, possess, use or consume any intoxicant..... in the manner and to the extent provided by the provisions of this Act or any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder."

The validity of the provisions of the Act as originally enacted was considered by the Court in The State of Bombay v. F. N. Balsara (1), and it was held inter alia that cl.

(b) of s. 13, in so far as it affected the consumption or use of medicinal and toilet preparations containing alcohol was invalid. The Legislature of the Bombay State thereafter amended the Act by enacting s. 24A which provided a general exception in respect of toilet, medicinal and antiseptic preparations and flavouring extract', essence or syrup. As a consequence of the amendment made by s. 24A the operation of the prohibition contained in s. 13 and the other sections was limited in two respects : (1) by s. II where the contravention was in pursuance of and in the manner and to the extent provided by the provisions of the Act or any rules or regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorisation granted; and (2) in respect of preparations and materials exempted under s. 24A. When, therefore, a person was charged with consuming any intoxicant in contravention of the provisions of the Act or of the rules, regulations or orders made or of (1)[1951] S.C.R. 682.

any licence, pass, permit or authorisation under s. 66(i)(b), it had to be established that the contravention was not protected either by s. 11 or s. 24A. It is clear that direct evidence about the consumption of liquor in contravention of the provisions of the Act, when such consumption is prohibited, would not ordinarily be forthcoming. Mere evidence that the person charged with consuming or using an intoxicant was in a state of intoxica- tion would not be sufficient to bring home the charge under s. 66(1)(b). That is illustrated by the decision of this Court in Behram Khurshed Pesikaka v. The State of Bombay (1). It was held in that case that the effect of the declaration in The state of Bombay v. F. N. Balsara (2), that cl. (b) of s. 13 of the Bombay Prohibition Act is void under Art. 13(1) of the Constitution in so far as it effects the consumption or use of liquid medicinal or toilet preparations containing alcohol is to render a part of s. 13(b) of the Bombay Prohibition Act inoperative and ineffec- tual and thus unenforceable, and that the bare circumstance that a citizen accused of an offence under s. 66(b) of the Bombay Prohibition Act is smelling of alcohol is compatible with his innocence as well as his guilt: the smell of alcohol may be due to the fact that the accused had contravened the enforceable part of s. 13(b) of the Bombay Prohibition Act, or it may well be due to the fact that he had taken alcohol which fell under the unenforceable and inoperative part of the section. The onus therefore lies on the prosecution to prove that the alcohol

of which he was found smelling came under the category of prohibited alcohol and therefore within the enforceable part of s. 13(b). The Legislature of the State of Bombay being faced with this interpretation imposing a serious burden which the prosecution had to undertake in trials for offences of consumption or use of liquor contrary to the provisions of the Act, for due (1) [1955] 1 S.C.R. 613, (2) [1951] S.C.R. 682.

enforcement of the law and to prevent evasion, enacted certain additional provisions by Bombay Act 12 of 1959. By that Act, s. 66 was renumbered s. 66(1) and sub-s. (2) was added thereto in the following form "Subject to the provisions of sub-section (3), where in any trial of an offence under clause

(b) of sub-section (1) for the consumption of an intoxicant, it is alleged that the accused person consumed liquor, and it is provided that the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent, weight in volume then the burden of proving that the liquor consumed was a medicinal or toilet preparation, or an antiseptic preparation or solution, or a flavouring extract, essence or syrup, containing alcohol, the consumption of which is not in contravention of the Act or any rules, regulations or orders made thereunder, shall be upon the accused person and the Court shall in the absence of such proof presume the contrary."

By sub-s. (3) the provisions of sub-s. (2) are not to apply to consumption of liquor by indoor patients during the period they are being treated in a" hospital, convalescent home, nursinog home, or duspensary, maintained or supported by Government or a local authority, or by charity, or by such other persons in such other institutions, or in such circumstances as may be prescribed. The result of this amendment was to make, except in the cases expressly provided in cl. (3) concentration of alcohol in excess of 0.05 per cent, weight in volume in blood presumptive evidence of' consumption of liquor in contravention of the provisions of the Act and the burden of proving that the liquor consumed was a medicinal or toilet preparation or an antiseptic preparation or solution, or a flavouring extract, essence or syrup, lay upon the person charged with the offence.

The case of the prosecution in this case rested primarily upon the report of the Chemical Examiner certifying that alcohol concentration in the blood of the appellant which was extracted at 6 a. m. on April 3, 1961, was in excess of the percentage prescribed by s. 66 (2). The prosecution had, therefore, to establish that the specimen examined by the Chemical Examiner was the specimen of blood collected from the body of the appellant and that the specimen disclosed concentration of alcohol in excess of the permissible limits. It is somewhat unfortunate that the trial Magistrate did not appreciate that the only important piece of evidence on which the prosecution case against the appellant rested was contained in the report of the Chemical Examiner. There is no dispute that the appellant went to the Civil Hospital early in the morning of April 3, 1961. He has admitted that fact in his statement before the Court. Dr. Kulkarni has deposed that on being told about the death of Mohamad Yusuf the appellant fainted and was admitted to the Hospital, and that he found that the appellant was smelling of alcohol. Dr. Kulkarni has stated that no treatment was given to the appellant and there is no suggestion by the appellant that he was given any treatment in the Hospital. Dr. Rote was asked by Dr. Kulkarni to collect a specimen of blood from the body of the appellant, and a blood specimen was accordingly taken and the phial was sealed in his presence by a

laboratory servant. Dr. Rote stated in cross-examination that no methyl spirit was applied before extracting blood. The certificate of Dr. Rote dated April 13, 1961, that he had collected blood from the body of tile appellant on the morning of April 3, 1961, and that the bottle containing the blood was sealed in his presence corroborates the statement.

But there is no evidence on the record about the person in whose custody this phial remained till it was handed over to the Sub-Inspector of police on April 13, 1961, when demanded. There is also no evidence about the precautions taken to ensure against tampering with the contents of the phial when it was in the Civil Hospital and later in the custody of the police between April 13, 1961, and April 18, 1961. Even the special messenger with whom the phial was sent to the Chemical Examiner was not examined : and Ext. 43 which was the acknowledgment signed by some person purporting to belong to the establishment of the Chemical Examiner does not bear the official designation of that person, The report of the Chemical Examiner mentions that a sealed phial was received from the police officer by letter No. C/010 of 1961 dated April 18, 1961, but there is no evidence that the seat was the one which was affixed by Dr. Rote on the phial. These undoubtedly were defects in the prosecution evidence which appear to have occurred on account of insufficient appredation of the character of the burden which the prosecution undertakes in proving a case of an offence tinder s. 66 (1) (b) relying upon the presumption tinder s. 66 (2).

It was assumed by the Trial Magistrate that the phial containing blood collected by Dr. Rote was kept in a safe place and could not be tampered with that it was kept in such a place that it was not liable to deteriorate, that thereafter this phial also remained with the police at a place where it could not be tampered with, and that the phial sealed by Dr. Rote was delivered by the special messenger to the establishment of the Chemical Examiner and that the same phial was examined by the Chemical Examiner, and that between April 3, 1961, and April 19, '1961, when the contents of the phial were Subjected to chemical examination, they had not deteriorated. Both the Prosecutor and counsel for the appellant appear to have contributed to the somewhat slipshod trial of the case. Dr. Kulkarni and Dr. Rote were examined as witnesses for the prosecution, but no examination or cross-examination of either was directed in respect of these important matters, and even to the investigating officer, no questions seeking to elicit information on these matters were asked. The report of the chemical examination of the blood specimen collected at 11 a. m. on April 3, 1961, was also not tendered in evidence by the prosecution though the same was demanded.

The Sessions judge pointed out some of these infirmities. He arrived at the conclusion that as the examination of the blood specimen taken at 6 a. m. on April 3, 1961, was not obtained in the course of investigation at the direction of the investigating officer, who had reasonable grounds for believing that the appellant had consumed an intoxicant, the "presumption under s. 129B" could not come to the aid of the prosecution. The learned judge observed-and it was conceded at the Bar before him

-that the prosecution could still establish that the appellant had consumed liquor otherwise than by a certificate obtained in respect of examination of the blood concentration procured ill the manner provided under cls. (1) and (2) of s. 129A, but as the trial Magistrate had relied merely upon the presumption under s. 66 (2) and had not analysed the evidence in that light, nor had he directed his

attention to the question whether the other evidence on the record, a part from the presumption, established such case, the order of the conviction could not be sustained. Observing that there had not been a "fair and full trial" in respect of the offence under the Bombay Prohibition Act, the Sessions judge set aside the order of the trial Magistrate and directed that the case be sent back to the Migistrate and be retried in the light of the observations made by him in the course of the judgment.

An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C. J.,in Ramanlal Rathi v. The State (1), observed :

> "If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a. verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that, the prosecution did not (1) A.I.R. (1951) Cal. 305.
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> produce the proper evidence and did not know how to prove their case."

In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions judge thought that in the interests of justice and for a just and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceedings resorted to the procedure prescribed by s. 428 (i) or the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellate Court should exercise its power under the said section. The observations made by the Sessions judge do clearly suggest that in this case he was of the view that "additional evidence was necessary,". The examination or both Dr. Rote and Dr. Kulkarni was perfunctory. What steps were taken by Dr. Rote after he collected the blood specimen and sealed the phial, to whom he entrusted the phial, where it was stored and what steps were taken for preventing interference, deterioration or tampering with the same, are matters which were never investigated. Neither the prosecutor nor counsel for the

defence asked any Question in that behalf, and even the trial Magistrate did not take any steps to obtain information in that behalf. The method of storage of the phial when it was in the custody of the police officers and its dealing therewith when it was in the custody of the special messenger have been left in obscurity. But the evidence does disclose that the phial wassealed in the presence of Dr. Rote, and the report ofthe Chemical Examiner also disclosed that he had opened a phial which was sealed and that the sea) was intact, with the device "Medico-Legal Bombay". Evidence regarding the_ dealing With the phial since it was scaled and it was submitted for examination of the Chemical Examiner may appear to be formal; but it has still to be led in a criminal case to discharge the burden which lap upon the prosecution. Such evidence would appear to be "necessary" with in the meaning of s. 428 (1) of the Code of Criminal Procedure, and may, having regard to the circumstances, be permitted to be led in appeal. The attention of the Magistrate does not appear to have been directed to the question whether the time which elapsed between the collection of blood and its examination had any material bearing on the result of the examination. The Court would normally require some evidence that the concentration of alcohol is not due to deterioration or delay in the examination of the contents of the phial or to exposure to weather conditions, before raising the presumption under s. 66 (2). An opportunity to lead this evidence may be given under s. 428, not with a view to fill up lacunae in the evidence but to regularise the trial of the accused and to ensure that the case is established against him beyond reasonable doubt, more so when for the purpose of' convicting the accused reliance is sought -to be placed upon a presumption arising from the report of a Chemical Examiner, who is not examined before the Court, and which substantially raises a presumption of guilt. In this connection, the circumstance that the regularity of the process for- extraction of blood and the subsequent dealing of the blood phial was not challenged by the appellant in the trial court is material.

But counsel for the appellant contends that the report of the Chemical Examiner on which alone substantially the case of the prosecution rests is inadmissible in evidence. He submits that in order to raise a presumption under s. 66(2) of the Act, in a trial of a person charged with committing an offence under s. 66 (1) (b), it must be proved that concentration of alcohol in the blood of the accused person is not less than 0.05 per cent weight in volume, and that can only be proved by the report of the Chemical Examiner or the Medical Officer in the manner provided by s. 129B in respect of examination of blood collected in the circumstances and under conditions prescribed by s. 129 A. Counsel says that the Legislature having enacted a special provision relating to the procedure by which evidence about concentration of alcohol in blood is to be collected, examined and placed before the Court, no other method of establishing concentration of alcoholic content in the blood of a person charged with an offence under s. 66 (1) (b) is permissible, and that even though a concession was made before the Court of Session by counsel appearing for the appellant, evidence aliunde the report under s. 129B was inadmissible. Starting on this hypothesis, counsel submits that the report of the Chemical Examiner in respect of blood collected not in the manner and in the conditions set out in s. 129 A, cls. (1) and (2), cannot be used as evidence for raising a presumption against the appellant, and beyond the bare circumstance that Dr. Kulkarni noticed that the appellant was "smelling of liquor at 6 a. m. on April 3, 1961, there is no evidence on which the appellant could be convicted.

it is necessary in considering the validity of this argument to examine the scheme of ss. 66 (2), 129A and 129 B, which were added by Act. 12 of 1959. In a trial of an accused person for an offence of consuming liquor under s. 66 (1)

(b) of the Act, s. 66(2) makes proof of concentration of alcohol in the blood of the accused in excess of the prescribed quantity presumptive evidence that he has consumed, in contravention of the provisions of the Act or the rules, regulations or orders made thereunder, liquor which is not excepted from the prohibitions in Ch. III, and the burden lies upon the accused to prove that liquor consumed by him was a medicinal, toilet or antiseptic preparation or a solution or flavouring extract, essence or syrup containing alcohol. Subsection (2) of s. 66 provides for raising a presumption upon proof of concentration of alcohol in blood: it does not prescribe the manner or method of proving concentration of alcohol in blood of the person charged with the offence under- s. 66 (1) (b) exceeding the percentage mentioned in sub-s. (2).

The material part of s. 129A is :

"(1) Where in the investigation of any offence under this Act, any Prohibition Officer duly empowered in this behalf by the State Government or any Police Officer, has reasonable ground for believing that a person has consumed an intoxicant and that for the purpose of establishing that he has consumed an intoxicant or for the procuring of evidence thereof it is necessary that his body be medi- cally examined, or that his blood be collected for being tested for determiningthe percentage of alcohol therein,such Prohibition Officer or Police Officer may produce such person before a registered medical practitioner (authorised by general or special order by the State Government in this behalf) for the purpose of such medical examination or collection of blood, and request such registered medical practitioner or furnish a certificate on his finding whether such person has consumed any intoxicant and to forward the blood collected by him for test to the Chemical Examiner or Assistant Chemical Examiner to Government, or to such other Officer as the State Government may appointing this behalf.

(2) The registered medical' practitioner before whom such person has been produced shall examine such person and collect and forward in the manner prescribed the blood of such person, and furnish to the officer by whom such person has been produced, a certificate in the prescribed form containing the result of his examination. The Chemical Examiner or Assistant Chemical Examiner to Government, or other Officer appointed under sub-section (1) shall certify the result of the test of the blood forwarded to him, stating therein the prescribed form, the percentage of alcohol, and such other particulars as may be necessary or relevant. (3) If any person offers resistance to his production before a registered medical practitioner under sub-section (1) or on his production before such practitioner to the examination of his body or to the collection of his blood, it shall be lawful to use all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test.

(4) x x x x "(5) Resistance to production before a registered medical practitioner as aforesaid, or to the examination of the body under this section, or to the collection of blood as aforesaid, shall be deemed to be an offence under section 186 of the Indian Penal Code.

(6) x x x
(7) x x x

(8) Nothing in this section shall preclude the fact that the person accused of an offence has consumed in intoxicant from being proved otherwise than in accordance with the provi- sions of this section."

The section is intended primarily to provide for compelling a person reasonably believed by an Officer investigating an offence under the Act or by a Prohibition Officer duly empowered, to have consumed liquor, to submit himself to medical examination, and collection of blood. Before a person can be compelled to submit himself to examination, two conditions have to be fulfilled. It must be in` the course of investigation of an offence under the Act; and that a Prohibition Officer duly empowered in that behalf by the State Government, or Police Officer has reasonable ground for believing that a person has consumed liquor, and that for the purpose of establishing that such a person has consumed an intoxicant, or for procuring evidence thereof, it is necessary that his body be medically examined or his blood be collected. It is only when these conditions exist that a person can be sent or produced before a registered medical practitioner for purposes of medical examination or collection of blood. By sub-s. (5), resistance to production before a registered medical practitioner or to the examination of his body or collection of blood is made unlawful. By sub-s. (2), the registered medical practitioner is obliged to examine the person produced before him and to collect and forward in the manner prescribed the blood of such person and to furnish to the Officer a certificate in the prescribed form containing the result of his examination. But sub-s. (8) expressly provides that proof of the fact that a person has consumed an intoxicant may be secured in a manner otherwise than as provided in s. 129 A. Therefore, production for examination of a person before a registered medical practitioner during the course of investigation by a competent officer who has reason. able ground for believing that the person has consumed an intoxicant and for establishing that fact examination is necessary, is not the only method by which consumption of an intoxicant may be proved. An investigating officer or a Prohibition officer empowered by the State Government must, ,if he desires to have a person examined, or his blood taken, in the course of investigation for an offence under the Bombay Prohibition Act, take steps which are prescribed in s. 129-A and the certificate of the registered medical practitioner and the report of the Chemical Examiner made on the result of the test of the blood forwarded to him are by s. 129 B made admissible as evidence in any proceeding under the Act, without examining either the registered medical practitioner or the Chemical Examiner. But if examination of a person or collection of blood from the body of a person is made otherwise than in the conditions set out in s. 129-A, the result of the exa- mination or of the blood may, if it is relevant to a charge for an offence under the Act, be proved by virtue of cl. (8), and there is nothing in s. 129 A or s. 129-B which precludes proof of that fact if it tends to establish that the person whose blood was taken or was examined had consumed illicit liquor.

Nazir Ahmed v. The King' Emperor (1), on which strong reliance was placed by counsel for the appellant in support of his plea that s. 129 A (1) & (2) and s. 129 B prescribe the only method of proving concentration of alcohol in blood; is of little assistance in this case. In that case the judicial Committee held that ss. 164 and 364 of the Code of Criminal Procedure prescribed the mode in which confessions are to be recorded by Magistrates when made during investigation and a

confession before a Magistrate not recorded in the manner provided was inadmissible. In so holding the judicial Committee relied upon the rule that where power is given to, do a certain thing in a certain way the thing must be done in that way to the exclusion of all other (1) (1936) L.R. 63, I.A. 372.

methods of performance or not at all, and that the rule was applicable to a Magistrate who was a ,judicial officer acting under s. 164 of the Code of Criminal Procedure. It was therefore held that ss. 164 and 364 of the Code of Criminal Procedure conferred powers on Magistrates and delimited them, and these powers could not be enlarged in disregard of the provisions of s. 164. The judicial Committee observed :

> "'As a matter of good sense, the position of accused persons and the position of the magis- tracy are both to be considered. An exami-

nation of The Code shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. Nor is this surprising in a jurisdiction where it is not permissible for an accused person to give evidence on oath. So with regard to the magistracy; it is for obvious reasons most desirable that magistrates and judges should be in the position of witnesses in so far as it can be avoided. Sometimes it cannot be avoided, as under s. 533; but where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature designed that it should be,made available in that form and no other. In their Lordships view, it would be particularly unfortunate if magistrates were asked at all generally to act rather as police-officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police-officers under s. 162 of the Code; and to be at the same time freed, notwit hstanding their position as magistrates, from any obli- gation to make records under s. 164. In the result they would indeed be regulated to the position of ordinary citizens as witness, and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships are, however, clearly, of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

The rule in Taylor v. Taylor (1), on which the Judicial Committee relied has, in our judgment, no Application to this case. Section 66 (2), as we have already observed, does not prescribe any particular method of proof of concentration of alcohol in the blood of a person charged with consumption or use of an intoxicant. Section 129 A is enacted primarily with the object of providing when the conditions prescribed are fulfilled, that a person shall submit himself. to be produced before a registered medical practitioner for examination and for collection of blood. Undoubtedly' s. 129 A (1) confers power upon a Police or a Prohibition Officer in the conditions set out to compel a person suspected by him of having consumed' illicit-liquor., to -be produced for examination and for collection of blood before a registered medical practitioner. But proof of concentration of alcohol may be obtained in the manner described in s. 129A(1) & (2), or otherwise; that is expressly

provided by s. (8) of s. 129A. The power of a Police Officer to secure examination of a person suspected of having consumed an intoxicant in the course of investigation for an offence under the Act is undoubtedly restricted by s. 129A. But in the present case the Police Officer investigating the (1) [1875] 1 Ch. D. 426.

offence had not produced the accused before a medical officer : it was in the course of his examination that Dr. Kulkarni, before any investigation was commenced, came to suspect that the appellant had consumed liquor, and he directed that specimen of blood of the appellant be collected. This step may have been taken for deciding upon the line of treatment, but certainly not for collecting evidence to be used against the appellant in any possible trial for a charge of an offence of consuming liquor contrary to the provisions of the Act. If unlawful consump- tion of an intoxicant by a person accused, may be proved otherwise than by a report obtained in the conditions mentioned in s. 129A(1) & (2), there would be no reason to suppose that other evidence about excessive concentration of alcohol probative of consumption is inadmissible. Admissibility of evidence about concentration of alcohol in blood does not depend upon the exercise of any power of the police or- Prohibition Officer. Considerations which were present in Nazir Ahmad's case (1), regarding the inappropriateness of Magistrates being placed in the same position as ordinary citizens and being required to transgress statutory provisions relating to the method of recording confessions also do not arise in the present case.

Section 129B reads as follows ""Any document purporting to be-

(a) a certificate under the hand of a registered medical practitioner, or the Chemical Examiner or Assistant Chemical Examiner to Government, under section 129A or of an officer appointed under sub-section (1) of that section, or

(b) a report under the hand of any registered medical practitioner in any hospital or dispensary maintained by the State Government or a (1) (1936) L.R. 63 I.A. 372.

local authority, or any other registered medical practitioner authorised by the State Government in this behalf, in respect of any person examined by him or upon any matter or thing duly submitted to him for examination or analysis and report, may be used as evidence of the facts stated in such certificate, or as the case may be, report, in any proceedings under this Act; but the court may if it thinks fit, and shall, on the application of the prosecution or the accused person, summon and examine any such person as to the subject matter of his certificate or as the case may be, report." Section 129B, cl. (a) makes a certificate by a registered medical practitioner or the Chemical Examiner admissible as evidence of the facts stated therein. Clause (b) of s.129B makes another class of documents admissible as evidence of facts therein. These are reports of certain classes of registered medical practitioners in respect of persons examined by them or upon any matter or thing duly submitted for examination or analysis and report. Therefore cl. (a) of s. 129B makes the certificate under s. 129A admissible: cl. (b) makes reports of registered medical practioners in respect of persons, matters or things submitted to them admissible. Section 129B is an enactment dealing with a special mode of proof of facts stated in the certificates and reports mentioned therein : it has no other effect or operation. The Sessions judge in more places than One has in the course of

his judgment referred to "the presumption under s. 126B". The section however deals with proof of facts, and not presumptions : it enacts a rule Of evidence similar to s. 510 of the Code of Criminal Procedure. Without proof of the facts stated, the contents of the certificate or report may by s. 129B be proved by tendering the document. If the document is tendered, it is admissible as evidence of the contents thereof. The certificate or the report proved in the mariner provided by s. 129B raises no presumption about consumption of liquor in contravention Of the provisions of the Act: it is proof by evidence of concentration of alcohol in excess of the prescribed percentage whether it is the manner provided by cl. (a) or cl. (b) of s. 129B, or otherwise, that gives rise to a presumption under s. 66(2). Section 129A contemplates two classes of certificates- certificate of the result of the examination by a registered medical practitioner whether the person sent to him has consumed any intoxicant and the certificate of the Chemical Examiner of the examination of blood collected by a registered medical practitioner and sent to him for examination. These are made admissible by virtue of cl. (a) of s. 129B. Clause (b) of s. 129B deals with the admissibility of reports in respect of examination of persons or of matters or things submitted to the registered medical practitioners for examination or analysis and report. These are undoubtedly different from the certificates of examinations made under s. 129A. The report of a registered medical practitioner under cl. (b) of s. 129B may be upon a ,'matter or thing" and so may be in respect of blood specimen submitted to him. On an analysis of ss. 129A and 129B, it is clear that the Legislature has provided in the first instance for compelling persons suspected of consuming intoxicants to be produced and to submit themselves for examination and extraction of blood which, under the law as it stood, could not be secured, but thereby the law did not provide for only one method of proving that a person had consumed illicit liquor within the meaning of s. 66 (2). The Legislature has made the certificate of the examination under s. 129A, sub- ss. (1) and (2) admissible without formal proof, but by sub- s. (8) of s. 129A, the adoption of any other method of collection of evidence for proving that a person accused has consumed an intoxicant is not precluded and a report of any registered medical practitioner which tends to establish that fact in respect of matters specified in cl. (b) of s. 129B is also made admissible. On that view of ss. 129A and 129B, there is no warrant for assuming that it was intended thereby to exclude in trials for offences under s. 66 (1) (b) of the Act the operation of s. 510 of the Code of Criminal Procedure. The Code makes a document purporting to be a report under the hand of a Chemical Examiner and certain other documents upon any matter or thing duly submitted to him for examination or analysis and report admissible in any-enquiry, trial or other proceeding under the Code. The terms of s. 510 of the Code of Criminal Procedure are general; but on that account it cannot justifiably be assumed that by enacting ss. 129A and 129B, the Legislature intended that the certificate of a competent officer in respect of matters not governed thereby shall become inadmissible. It is open to the prosecution to rely in corroboration of a charge of consumption of illicit liquor upon a certificate under cl. (a) of s. 129B if it is obtained in the manner prescribed by s. 129A, and also to rely upon the report of a registered medical practitioner in respect of any person examined by him or upon any matter or thing duly submitted to him for examination or analysis and report. It is also open to the prosecution to rely upon the report of the Chemical Examiner in cases not covered by s. 129A as provided under s. 510 of the Code of Criminal Procedure.

It was urged that by the enactment of s. 129A and s. 129B of the Act, s. 510 of the Code stood repealed in its application to offences under s. 66 (1) of the Bombay Prohibition Act, and reliance in

this behalf was placed upon Art. 254 (2) of the Constitution. It is true that power to legislate on matters relating to Criminal Procedure and evidence falls within the Third List of the Seventh Schedule to the Constitution and the Union Parliament and the State Legislature have concurrent authority in respect of these matters. The expression "'criminal procedure" in the legislative entry includes investigation of offences, and ss. 129A and 129B must be regarded as enacted in exercise of the power conferred by Entries 2 and 12 in the Third List. The Code of Criminal Procedure was a law in force. immediately before the commencement of the Constitution, and by virtue of Art. 254 (2) legislation by a State Legislature with respect to any of the matters enumerated in the Third List repugnant to an earlier law made by Parliament or an existing law with respect to that matter if it has been reserved for the consideration of the President and has received his assent prevails in the State. Bombay Act No. 12 of 1959 was reserved for the consideration of the President and had received his assent: ss. 129A and 129B will prevail in the State of Bombay to the extent of inconsistency with the Code,, but no more. That they so prevail only to the extent of the repugnancy alone and no more is clear from the words of Art. 254 : Deep Chand v. The, State of Uttar Pradesh (1) and Ch. Tikaramji v. The State Uttar Pradesh (2). It is, difficult to regard s. 129B of the Act as so repugnant to s. 510 of the Code as to make the latter provision wholly inapplicable to trials for offences under the Bombay Prohibition Act. Section 510 is a general provision dealing with proof of reports of the Chemical Examiner in respect of matters or things duly submitted to him for examination or analysis and report. Section 129B deals with a special class of reports and certificates. In the investigation of an -offence under the Bombay Prohibition Act, examination of a person suspected by a Police Officer or Prohibition Officer of having consumed an intoxicant., or of his blood may be carried out only in the manner prescribed by s.129A: (1) [19591 Supp. 2 S.C.R. 8.

(2) [1956] S.C.R. 393.

and the evidence to prove the facts disclosed thereby will be the certificate or the examination viva voce of the registered Medical Practitioner, or the Chemical Examiner, for examination in the course of an investigation of an offence under the Act of the person so suspected or of his blood has by the clearest implication of the law to be carried out in the manner laid down or not at all. Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act, otherwise than in the manner set out in s. 129A cannot therefore be used as evidence in the case. To that extent S. 510 of the Code is superseded by s. 129B. But the report, of the Chemical Examiner relating to the examination of blood of an accused person collected at a time when no investigation was pending, or at the instance not of a Police Officer or a Prohibition Officer remains admissible under s. 510 of the Code.

It was urged before the Court of Session that the report of the Chemical Examiner was submitted by that officer not to the Court or to the medical officer but to the police officer and it was by virtue of s. 162 of the Code of Criminal Procedure inadmissible, except to the extent permitted within the strict limits prescribed by that section, But s. 510 makes provision with regard - to proof of documents by production thereof, and the application of s. 162 (1) is expressly made subject to what is provided in the Code of Criminal Procedure. Exclusion from evidence of any part of a statement made to a police officer or a record from being used for any purpose at any enquiry or trial in respect of an offence under investigation at the time when such statement was made is "save as hereinafter provided".

The word "hereinafter" is, in our judgment not restricted in its operation to s. 162 alone but applies to the body of the Code; to hold otherwise would be to introduce a patent inconsistency between s. 207 A and s. 162 of the Code, for by the former section in committal proceeding, statements recorded under s. 162 are to be regarded as evidence. The contention raised that the report made to the police officer by the Chemical Examiner was inadmissible in evidence was rightly rejected.

Finally, it was urged that the blood specimen was not submitted in the manner prescribed by rules framed under the Bombay Prohibition Act, and therefore it could not be regarded as, "duly submitted." The Government of -Bombay has, by notification dated April 1, 1959, framed rules under cl. (w) of s. 143 of the Bombay Prohibition Act, called the Bombay Prohibition (Medical Examination and Blood Test) Rules. Rule 3 deals with the examination of a person by a registered medical practitioner before whom he is produced under sub-s. (1) of s. 129A. Rule 4 provides for the manner of collection and forwarding of blood specimen and r. 5 deals with certificates of tests of "sample blood". All these rules deal with medical examination of a person who is produced before a registered medical practitioner under sub- s. (1) of s. 129A. To an examination to which s. 129A does not apply, the rules would have no application. The law not having prescribed a particular method of submitting specimen of blood collected from an accused person when blood has been collected before any investigation has started, it is unnecessary to consider the argument whether the expression "duly submitted" used in s. 510 of the Code of Criminal Procedure means merely in the manner prescribed by rules in that behalf or as pointed out by the learned Sessions judge, submitted after taking adequate precautions for ensuring its safety and for securing against tampering. In the present case, the blood specimen was collected by Dr. Rote and thereafter it was handed over to the police officer on demand by him and ultimately submitted to the Chemical Examiner for his examination, it would'.. in our judgment, be regarded as "duly submitted."

We are unable to accept the contention of counsel for the appellant that the appellant should, on the view taken by the Sessions judge. be acquitted, but for reasons already stated, we are also unable to agree with the learned judge that the appellant should be retried before the trial Court. We accordingly set aside the order passed by the Trial Magistrate and direct that the Sessions judge do hear the appeal and dispose of it according to law, after giving an opportunity to the prosecution to lead evidence on the matters which are indicated in the course of this judgment, the additional evidence may be taken by the Sessions judge himself or may be ordered to be recorded in the Trial Court. The accused shall be examined under s. 342 of the case of Criminal Procedure and be given an opportunity to lead evidence in rebuttal, if he so desires. The Sessions judge may require the presence of the Chemical Examiner for examination before him or before the Magistrate, if he thinks that examination viva voce of the Chemical Examiner is necessary to do complete justice in the case. Subject to the above modification, the appeal is dismissed.

DAS GUPTA, J.-I think this appeal should be allowed. The appellant was convicted under s. 66 (1) (b) of the Bombay Prohibition Act, 1949 on the charge of having consumed an intoxicant against the provisions of the Prohibition Act and was sentenced to pay a fine of Rs. 500/- or in default to suffer rigorious imprisonment for two months. On appeal, the Sessions judge, jalgaon, being of opinion that the evidence already on the record was not sufficient to establish the guilt of the accused, set aside the conviction and sentence passed against him. He, however, ordered the case to be sent back

to the learned judicial Magistrate, Bhusawal, for re-trial so that the prosecution might have an opportunity of adducing evidence to connect the report of the chemical examination which was produced at the trial with the blood of the accused person which was taken at 6 a. m. on April 3, 1961, a few hours after the alleged consumption of the intoxicant. It is obvious that the only purpose that such additional evidence was expected to serve was that the prosecution would get the benefit of s. 66 (2) of the Bombay Prohibition Act. The Revision petition filed by the accused against this order was rejected by the High Court of Bombay. Against that order of rejection, this appeal has been preferred after obtaining special leave from this Court. The main contention urged in support of the appeal is that as the blood that was taken at 6 a. m. was not taken in accordance with the provisions of s. 129 A of the Prohibition Act, no evidence as regards the contents of that blood -As admissible in law for the purpose of s. 66 (2) of the Prohibition Act. It is necessary to consider this contention carefully as it is not disputed that the prosecution must fail unless it can get the benefit of s. 66 (2) of the Prohibition Act.

To understand, the nature of the right conferred on the prosecution by s. 66 (2) it will be helpful to maintain briefly a few other sections of the Act. Section 13 of the Act prohibits among other things the consumption of an intoxicant. Section 2 (22) defines intoxicant to mean "any liquor, intoxicating drug, opium or any other substance., which the State Government may by notification in the official gazette declare to be an intoxicant." ",Liquor" is defined ins. 2 (24) to include (a) spirits of wine (denatured spirits), wine, beer, toddy and all liquids consisting of -or containing alcohol; and (b) any other intoxicating substance which the State Government may by notification in the official gazette, declare to be liquor for the purpose of this Act. It is important to mention also s. 24 A of the Act, the relevant portion of which for our present purpose runs thus :-

> "Nothing in this Chapter shall be deemed to apply to:
>
> (1) Any toilet preparation containing alcohol which is unfit for us as intoxicant liquor;
>
> (2) Any medicinal preparation containing alcohol which is unfit for use as an intoxicating liquor;
>
> (3) Any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor;
>
> (4) Any flavouring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor."

As section 13 is in Chapter III the position in law is that the prohibition in s. 13 against consumption of liquor does not apply to any of the substances mentioned in s. 24- A. It is necessary to mention also that it has been held by this Court in State of Bombay (now Gujarat) v. Narandas Mangilal Aggarual (1), that the burden of proving that the substances in respect of which the prohibition in s. 13 or any other section of the Chapter is alleged by the prosecution to have been contravened, does not fall within any of the four classes mentioned in s. 24-A, is on the prosecution.

It is clear therefore that a prosecution for an offence under s. 66(1) (b) cannot succeed by the mere proof of the fact that the accused consumed liquor. It is also to be proved that the liquor does not fall (1) [1962] Supp. 1 S.C.R. 15.

within any of the substances mentioned in s. 24(A). In other words, before a person can be convicted under s. 66(1)(b) of the Prohibition Act for consumption of an intoxicant the prosecution has to prove two things. It has first to prove that the accused consumed an intoxicant, and secondly, it has to prove that intoxicant was not either a toilet preparation or a medicinal preparation or an anti- septic preparation or solution containing alcohol or a flavouring extract, essence or syrup containing alcohol, which while containing alcohol was not unfit for use ,as intoxicating liquor. Section 66(2) of the Act comes to the aid of the prosecution in proving both these things by providing that if after alleging that the accused consumed liquor the prosecution proves that "'the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent weight in volume " then the burden of disproving the ingredients of the offence as mentioned above will be shifted to the accused. The result of this is that where the prosecution proves such concentration of alcohol in the blood of the accused person the accuse will be liable to conviction until and unless the accused proves either that he did not consume any intoxicant or that the substance he consumed was a medicinal or toilet preparation or any antiseptic preparation or solution containing alcohol or any flavouring extract, essence or syrup containing alcohol, "which is unfit for use as intoxicating liquor." If there had been no special provision in the Act as to how this concentration of alcohol in the blood of the accused person could be proved by the prosecution, it would undoubtedly be open to the prosecution, to obtain the blood of the accused person in any -manner not prohibited by law, have it examined by an expert and produce the evidence of the expert before the Court-either by examining the expert himself or if the law permits by producing his report even without such examination. A special provision has however been made by the legislature as regards the mode in which the prosecution can bring before the Court the evidence as regards the concentration of alcohol in the blood of the accused person. This provision appears in s. 129A of the Act. That section runs thus :-

Section 129A.

(1) Where in the investigation of any offence under this Act, any Prohibition Officer duly, empowered in this behalf by the State Government or any Police Officer, has reason. able ground for believing that a person has consumed an intoxicant and that for the purpose of establishing that he has consumed an intoxicant or for the procuring of evidence thereof it is necessary that his body be medically examined, or that his blood be collected for being tested for determining the percentage of alcohol therein, such Prohibition Officer or Police Officer may produce such person before a registered medical practitioner (authorised by general or special order by the State Government in this behalf) for the purpose of such medical examination or collection of blood, and request such registered medical practitioner to furnish a certificate on his finding whether such person has consumed any intoxicant and to forward the blood collected by him for test to the Chemical Examiner or Assistant Chemical Examiner to Government, or to such other officer, as the State Government may appoint in this behalf.

(2) The registered medical practitioner be. fore whom such person has been produced shall examine such person and collect and forward in the manner prescribed, the blood of such person, and furnish to the officer by whom such person and collect and forward in the manner prescribed, the blood of such person, and furnish to the officer by whom such person has been produced, a certificate in the prescribed form containing the result of his examination. The Chemical Examiner or Assistant Chemical Examiner, to Government, or other officer appointed under sub-section (1) shall certify the result of the test of the blood forwarded to him, stating therein, in the prescribed form, the percentage of alcohol, and such other particulars as may be necessary or relevant.

(3) If any person offers resistance to his production before a registered medical practi- tioner under sub-section (1) or on his production before such medical practitioner to the examination of his body or to the collection of his blood, it shall be lawful to use all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test.

(4) If the person produced is a female, such examination shall be carried out by, and the blood shall be collected by or under the supervision of a female registered medical practitioner authorised by general or special order, by the State Government in this behalf, and any examination of the body, or collection of blood, of such female shall be carried out or made with strict regard to decency.

(5) Resistance to production before a registered medical practitioner as aforesaid or to the examination of the body under this section, or to the collection of blood as aforesaid, shall be deemed to be an offence under section 186 of the Indian Penal Code. (6) Any expenditure incurred for the purpose of enforcing the provision of this section including any fees payable to a registered medical practitioner or the officer appointed under sub-section (1), be defrayed out of the money provided by the State Legislature.

(7) If any Prohibition Officer or Police Officer vexatiously and unreasonably proceeds under sub-section (1), he shall, on conviction, be punished with fine which may extend to five hundred rupees.

(8) Nothing in this section shall preclude the fact that the person accused of an offence has consumed an intoxicant from being proved otherwise than in accordance with the provisions of this section".

On behalf of the appellant, it is contended that no evidence as regards the concentration of alcohol in the blood can be given by the prosecution unless the blood has been collected and forwarded and thereafter examined in accordance with the procedure laid down in s. 129 A. In my opinion, this contention should succeed. It has to be noticed, in the first place, that the very detailed provisions made in this section s. 129 A-were made by the same amending Act which created this special right in favour of the prosecution by enacting s. 66 (2). It does not, in my opinion. stand to reason to say that even when making such detailed procedure the legislature contemplated that those in charge of the prosecution might choose not to follow the procedure at all.

It has to be noticed that the production of an accused person before a medical officer is provided for in the first sub-section for two different purposes. One is for the examination of his body for procuring evidence of consumption of an intoxicant by him and the other is the collection of his blood for being tested for determining the percentage of alcohol therein. When the accused has been produced the medical practitioner will examine the accused and himself give a certificate whether the person has consumed an intoxicant. He will also take the person's blood if so requested but he is given no authority to examine the blood himself. The definite provision as regards the examination of the blood is that after the blood has been collected by the registered medical practitioner he will forward the same either to the Chemical Examiner or the Assistant Chemical Examiner to Government or any other officer as the State Government may appoint. It is the duty of the officer be he the Chemical Examiner or the Assistant Chemical Examiner or any other officer appointed for the purpose to whom the blood has been forwarded, to test the blood and to give a certificate stating the percentage of alcohol in the blood and such other particulars as may be necessary or relevant. Provision is also made in the third sub-section for "use of all means" that may be necessary to secure the production of such person or the examination of his body or the collection of his blood, if he offers resistance. The fourth sub- section makes special provision as regards how the medical examination shall be carried out and the blood shall be collected where the person is a female. The fifth sub- section provides that resistance to production before a medical practitioner or to the examination of the body or to the collection of blood shall be deemed to be an offence. The sixth sub-section provides as to how the expenditure shall be met. The seventh sub-section makes the Prohibition Officer or Police Officer liable to penalty if he has proceeded vexatiously and unreasonably under sub-section (1). The eighth sub-section which is the last in the section and deserves special consideration will be separately dealt with.

One of the well-recognised principles of interpretation of statutes is that when a law creates a new right and at the same time prescribes a mode in which that right may be exercised, it will, in the absence of anything indicating a contrary intention, be ordinarily reasonable to hold that the right cannot be exercised in any other mode. In the present case, far from there being any indication to the contrary, all the indications are, in may opinion, in favour of the view that the prescribed mode in s. 129A was intended by the legislature to be the only mode in which the right given to the prosecution by s. 66 (2) can be exercised. What was the reason behind the legislature's intention to prescribe such a detailed procedure in s. 129A for the ascertainment of the alcoholic content of the blood of a person accused of an offence in connection with the consumption of an intoxicant ? Why did it make such a careful demarcation of functions between the registered medical practitioner before whom a person is first produced by entrusting to him only the duty of examining the body of the person and if so requested of collecting his blood -"for being tested for determining the percentage of alcohol ", and the Chemical Examiner or the Assistant Chemical Examiner or any other officer appointed by the State Government in this behalf by entrusting to them only the duty of testing the blood? It appears reasonable to think that the real reason behind all this detailed provision was the legislature's anxiety to ensure that the very special right created by s. 66 (2) in favour of the prosecution for the proof of alcoholic content of the blood shifting the onus on the accused should not be availed of in a manner that might leave loopholes for either errors or unfair practices. This motive is also clear from the provision made in the seventh sub-section that " if any Prohibition Officer or Police Officer, vexatiously and unreasonably proceeds under sub- section (1),

he shall, on conviction, be punished with fine which may extend to five hundred rupees." All these steps taken by the legislature for prescribing a special procedure would be set at naught if it was left open to the Prohibition Officer or Police Officer to arrange for the taking of blood and testing thereof in any other manner. Thus, to say that it is open to the Prohibition Officer or the Police Officer to have the blood taken and also tested by the registered medical practitioner himself for using his finding as evidence to prove alcoholic concentration in the blood for the purpose of s. 66 (2) would be to fly in the face of the clear indication in S. 129A that it is not for the registered medical practitioner before whom a person is produced to test the blood, that it is for him only to collect the blood and then forward it to the Chemical Examiner or the Assistant Chemical Examiner or such other officer as the State. Government may appoint in this behalf to test the blood for the alcoholic content. To say that the legislature did not intend the procedure as prescribed ins. 129A to be the only procedure for the ascertainment of alcoholic content in a person's blood for the purpose of getting the benefit of s. 66 (2) of the Act is really to hold that even though the legislature did definitely say that the registered medical practitioner should only collect the blood and forward it to the other functionary named in the section whose duty would be to test it, the legislature was quite content that this direction need not be complied with. With great respect for the learned brethren who take the contrary view, I am of opinion, that it is wholly arbitrary to attribute to a legislature an intention that it did not mean what it said. Even if there had been any scope for doubt on the question whether the legislature intended to prescribe the procedure to be the only procedure available to enable the prosecution to get the aid of S. 66 (2), that doubt is, in my opinion, completely set at rest by the 8th sub-section of s. 129A. This sub-section, as already set out, says that "nothing in this section shall preclude the fact that the person accused of an offence has consumed an intoxicant from being proved otherwise than in accordance with the provisions of this section." It is important to note at once that the legislature did not in this sub-section say "that nothing in this section shall preclude the fact of the alcoholic content of the blood of the person from being proved otherwise than in accordance with the provisions of this section," This omission cannot but be held to be deliberate. The operative portion of the section deals, as has already been pointed out earlier' with two distinct matters-one as regards the medical examination of a person's body for the purpose of establishing that he has consumed an intoxicant and the other as regards the testing of his blood for determining the percentage of alcohol therein. As regards the first of these purposes the 8th sub-section makes a clear provision that the section shall not have the effect of excluding any other mode of proof In other words, the fact that a person has consumed an intoxicant may be proved by evidence other than what is made available under the provisions of this section. As regards the other purpose, viz., the determination of the percentage of alcohol in the blood no such saving clause is enacted. In my opinion, this is an eminent case for the application of the principle expressio unius exclusio alterius and that the expression of the legislature's intention that the provisions of the section shall not preclude the fact of consumption of an intoxicant being proved by other modes justifies a conclusion that the legislature's intention was that the section shall preclude the fact that the person had a particular percentage of alcohol in his blood from being proved otherwise than in accordance with the provisions of the section.

It appears clear to me, on a consideration of s. 66 (2) together with s. 129A that having conferred on the prosecution the benefit in s. 66 (2) that if the alcoholic percentage of an accused person's blood is proved to be not less than 0.05 the accused would be presumed to be guilty of an offence under s.

66 (1) unless he proves to the contrary, the legislature-- at the same time intended that this fact can be proved only by evidence obtained in the manner provided by the same amending Act in the new section 129A. It is for this reason that while leaving it open to the prosecution to prove the consumption of an intoxicant by an accused person "otherwise than in accordance with the provisions of (s. 129A)" it did not leave it open to the prosecution to prove the fact of percentage of alcohol in the blood also "otherwise than in accordance with the provisions of this section."

In coming to this conclusion I have not overlooked the fact that s. 129B in providing for certain reports and certificates being used as evidence even without the examination of the person who prepared the report or gave the certificate, has mentioned in cl. (b) a report by a registered medical practitioner "upon any matter or thing duly submitted to him for examination or analysis and report", outside s. 129A. It was pointed out that this very fact shows that the legislature contemplated the examination by a registered medical practitioner of "any matter or thing", even apart from s. 129A. The argument is that this can only refer to the examination of blood for ascertaining its alcoholic content. I am unable to agree that the only "matter" or "'thing" that can be submitted to a registered medical practitioner for examination or analysis must be the blood of an accused person and the examination can only be for ascertaining the alcoholic percentage.

It is worth noticing that nothing is said in this clause as to how the ,'submission" of the "thing"

has to be proved. One can understand the submission of things like, say, some vomit by an accused person being seized by an investigating officer and submitting it to a registered' medical practitioner for examination or analysis and himself coming to prove the fact of such submission. Where, however, as suggested, the blood of a person is being submitted to a registered medical practitioner it will be unreasonable to think that anybody except a qualified medical practitioner could have collected the blood. There is no provision in this clause that his report in the matter will be available as evidence of the fact stated therein. Or the construction suggested by the respondent that "thing" in cl. (b) of s. 129B can only mean blood of the accused person, we shall have the curious position that while the registered medical practitioner who examined the blood need not come into the witness box to prove that fact and the result of his examination, the other medical practitioner who actually collected the blood will have to come into the witness box to prove that fact and his certificate or report will not be evidence of facts stated therein. I can see..... no compelling reason for accepting a construction which will have such curious consequences. A question somewhat similar to the one now before us fell to be decided by the Privy Council in Nazir Ahmad v. The King Emperor (1). That question arose in connection with the procedure laid down in the Code of Criminal Procedure for the record of confessions by magistrates. While s. 164 of the Code lays down a detailed procedure for recording by magistrates of any confession made in the course of an investigation of a case or at any time afterwards before the commencement of the enquiry or trial, s. 364 lays down the procedure that should be followed by a magistrate or by any court other than a High Court established by a Royal Charter (1) (1936) L.R.63 I.A. 372.

when any accused is examined. The appellant, (Nazir Ahmad was convicted mainly, if not entirely, on the strength of a confession said to have been made by him to a magistrate of which evidence was given by the magistrate but which was not recorded by the magistrate in the manner required by s.

164 and s. 364 of the Code. The High Court held that this evidence was admissible. In support of that view it was urged before the Privy Council that the evidence was admissible just because it has nothing to do with s. 164 or with any record and that by virtue of ss. 17, 21 and 24 of the Evidence Act the statement was admissible just as much as it would be if deposed by a person other than a magistrate. This argument was repelled by the Privy Council in these words :-

> "On the matter of construction ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves." Later on their Lordships proceeded thus :- "It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by ss. 164 and 364 would be of such trifling value as to be almost idle. Any magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said, or asking for the confession to be vouched by any magistrate. The range of magisterial confessions would be so enlarged by this process that the provisions of s. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in tile present case."

It appears to me that these considerations which weighed with the Privy Council in rejecting the argument that evidence of confession not recorded in accordance with the procedure laid down in the Code of Criminal Procedure could still be admissible, apply with equal force to our present problem. If evidence as' regards alcoholic content of the blood is allowed to be given even where the procedure laid down in s. 129A has not been followed the salutary provisions of that section would "almost inevitably be widely disregarded". That the legislature did not intend this is clear, as I have already pointed out above, from what it laid down in the 8th sub-section of s. 129A. For all these reasons, I have come to the conclusion that as admittedly the procedure laid down in s. 129A was not followed for testing of the blood that was taken at 6 a.m., the prosecution cannot get the benefit of s. 66(2) of the Prohibition Act. There is no justification, therefore, for the order made by the Sessions judge, sending the case back to the Magistrate for re-trial in order to give the prosecution an opportunity of adducing evidence as regards the examination of the blood taken at 6 a.m. on April 3, 1961.

I would therefore allow the appeal, set aside the order of the High Court and also the order of the Sessions judge directing re-trial and order that the appellant be acquitted.

By COURT. In accordance with the opinion of the majority the Appeal is dismissed subject to the modifications mentioned in the judgment.

Appeal dismissed.