

# Mukesh Kumar vs The State Of Bihar Through The Director ... on 9 February, 2022

**Author: Ashutosh Kumar**

**Bench: Ashutosh Kumar**

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.280 of 2021

Arising Out of PS. Case No.-270 Year-2020 Thana- PANDAU District- Madhubani

=====

MUKESH KUMAR Son of Sri Dhruv Narayan Mahto Resident of Shivaji  
nagar, Pandaul Bazar, P.S. Pandaul, District - Madhubani -847234

... .. Petitioner

Versus

1. THE STATE OF BIHAR THROUGH THE DIRECTOR GENERAL OF  
POLICE, BIHAR, PATNA. Bihar
3. THE SUPERINTENDENT OF POLICE, DISTRICT - MADHUBANI.  
Bihar
4. THE STATION -HOUSE-OFFICER, PANDAU, P.S. DISTRICT -  
MADHUBANI. Bihar

... .. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Satyabir Bharti, Advocate Mr. Avinash Shekhar, Advocate
For the Respondent/s	:	Mr. P.K. Verma, AAG

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date : 09-02-2022

Heard Mr. Satyabir Bharti, learned Advocate for  
the petitioner and Mr. P.K. Verma, learned AAG for the  
State.

This writ petition has been filed for quashing the  
entire prosecution emanating out of Pandaul P.S. Case No.  
270 of 2020 instituted for the offences under Sections  
30(a) and 35(e) of the Bihar Prohibition and Excise Act,  
2016 and under Sections 272, 273, 465 and 420 of the  
Indian Penal Code and restraining the respondents from

taking any coercive step against the petitioner in pursuance of the aforementioned case.

The petitioner is the distributor of various food products in the district of Madhubani including non-alcoholic beverages.

The prosecution case in this instance has been instituted on the written complaint dated 21.10.2020 of one Jitendra Kumar Singh, posted as Additional Station House Officer in Pandaul police station of Madhubani on the instructions of Madhubani Town police station (Madhubani Town P.S. Case No. 265 of 2020 dated 14.10.2020

), he seized the stock from the petitioner's shop bottles of non-alcoholic drink viz. Kingfisher Ultra, Heineken and Warrior Strawberry, which was sent for chemical examination to the Chemical Examiner of the Excise Department of Government of Bihar on 15.10.2020.

It was claimed that in the report of the Chemical Examiner dated 21.10.2020, it was found that in the Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 sample there was fermented liquor having Ethyl Alcohol content of 0.8% v/v and 0.07% v/v respectively.

It was thus alleged that the accused persons including the petitioner were manufacturing and selling alcohol mix drinks under the garb of selling non-alcoholic drinks.

During the pendency of this writ application charge-sheet has been submitted against the petitioner on the basis of which cognizance has been taken against him under Sections 272, 273, 465 and 420 of the Indian Penal Code and Sections 30(a) and 35(e) of the Bihar Prohibition and Excise Act, 2016.

By way of I.A. No. 1/2021 the aforesaid order of cognizance also has been challenged.

The learned Advocate for the petitioner has submitted that he had lawfully purchased - the non-alcoholic drinks through GST invoices for sale in the district of Madhubani. He has a license under

the Food Safety Act of aforesaid beverages.

Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 It is well known that alcohol may occur naturally in a beverage. Scientific studies show that the content of Ethyl Alcohol in beverages is likely to change with change in climatic conditions, temperature, sunlight and other external factors and natural processes.

A reference has been made by the counsel for the petitioners of a judgment of Courts of Appeal for the Tenth Circuit in Adolph Coors Company V. Nicholas Brady.

In the aforesaid case, testimony had been given during Federal Alcohol Control Administration Hearings confirming that the disclosures of the alcohol content in some of the malt beverages were misleading and therefore they could be subjected to misuse. It was found that it was difficult to exactly measure the alcohol content as the content changed with the atmospheric pressures and varying temperatures. It was thus suggested there that some percent error of margin has to be provided for while measuring the content of alcohol in such drinks. ( Adolph Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 Coors Company V. Nicholas Brady reported as 944 F.2d 1543).

In the State of Kerala and others vs. Unni and another (2007) 2 SCC 365, the Supreme Court while considering Rule 9(2) of the Kerala Abkari Shops (Disposal in Auction) Rules, 2002 in respect of toddy, it found that toddy fermented automatically after sunrise. If it were permitted to be sold within a short time after it is tapped, the content could be measured. But it was difficult to fathom as to at what point of time precisely, the Ethyl Alcohol content in such toddy would exceed the base standard. The climatic conditions also would be the reason for change in the measurement and that also is required to be factored in.

The Supreme Court, therefore, was of the view that it was reasonable for the State to frame rules in consonance with equity and good conscience and a rule may not be workable if it imposes a condition which in the Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 absence of guidelines, would become impossible to be performed.

Taking these facts into account Rule 9(2) which provided that the Ethyl Alcohol content of toddy kept or offered for sale drawn from coconut, palmyrah and choondapana palms should not exceed 8.1% v/v, 5.2% v/v and 5.9% v/v respectively was found to have been rendered unworkable and vague unless it would be read and interpreted to allow for some variation above the prescribed limit, based on principles of reasonableness, equity and good conscience.

It has been urged on behalf of the petitioners that for the Bihar Prohibition and Excise Act, 2016 to be workable, the tolerance limit prescribed by the FSSAI (under Regulation 1.3.2) of its regulations which provides for a tolerance limit of  $\pm 0.3\%$  up to 20% has been prescribed for content of Ethyl Alcohol in a beverage.

Without reference to such tolerance limit provided by FSSAI which is based on the principle of Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 reasonableness, the BIS specification of

the permissible range of less than 0.5% would lead to disastrous results and unwarranted prosecution.

The prosecution under the aforesaid act could be taken to its logical conclusion only on the basis of the outcome of the testing of the samples. There are no rules or protocol for such testing and therefore it would be prone to error and deficiencies.

Any wrongful prosecution, based on an erroneous test result may lead to undue harassment of the individuals under the Prohibition Act.

Under the Prevention of Food Adulteration Act, 1954 and the FSSAI, 2006 there are detailed protocols provided for testing of food articles.

This had drawn the attention of the Supreme Court also while deciding *Pepsico India Holdings Private Limited vs. Food Inspector and Another* (2011) 1 SCC

176. Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 In that case while considering the issue of failure of the Government to prescribe rules and methods of analysis for measuring the presence of pesticides in cold drinks under the Food Adulteration Act, it held that any failure to do so by the Central Government would lead to the charge against the accused persons for violations of the Act difficult to prove.

The Supreme Court was of the view that mere presence of pesticide residue does not ipso facto render a food article adulterated unless such adulteration is found to be beyond the tolerance limits.

Testing results are susceptible of errors. In *Nortan Mal vs. State of Rajasthan* 1995 Supp (2) SCC 581, the Supreme Court while dealing with a case under the Food Adulteration Act found that there was a good measure of possibility of error in the judgment in the analysis of the samples and therefore set aside the conviction.

Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 In that case, the Food Inspector had purchased chilly powder for analysis. Under the rules framed under the Food Adulteration Act, the total quantity of ash permissible in such product was prescribed to be below 8%. In the sample which was so tested, ash was found to the extent of 8.38% by weight.

In that context, the Supreme Court observed that the functions of Public Analyst is only that of an expert and therefore his impression in that regard in normal circumstances can be given considerable weightage but it could never be put on an unreasonable pedestal of being sacrosanct and gospel truth.

In cases of marginal adulteration, the Supreme Court found that there could be possibility of an error of judgment in analysis and held that convicting the accused in that case would be very unsafe.

There appears to be only a minor excess of 0.8% in content of Ethyl Alcohol in the sample. Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 The fact that same batch of seized NAB product, when tested by the same Chemical Examiner in the same Excise Laboratory, there was difference in the measurement which is a clear indicator of such analysis being prone to mistakes.

Since there are two conflicting test reports, the benefit must be given to the accused.

There is no prohibition on sale of non-alcoholic beverage. The object of the Prohibition Act is to enforce, implement and promote complete prohibition of liquor and intoxicants in the State of Bihar. A minor infraction would not make a non-alcoholic beverage and alcoholic drink.

In State of Haryana & Others Vs. Bhajan Lal and Others reported in Supp(1) SCC 335, a two Judges Bench of the Supreme Court provided an illustrative set of situations, where the High Court could exercise its jurisdiction under Article 226 of the Constitution of India or Section 482 of the Code of Criminal Procedure for quashing the FIR.

Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 One of the conditions provided is that if the allegations made in the FIR, if taken on its face value and accepted in its entirety does not prima facie constitute any offence or make out any case against the accused, such subject FIR can be quashed.

In a more recent decision of the Supreme Court in Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others (2021) SCC OnLine SC 315 , the Supreme Court has reiterated those principles but has cautioned that the investigation ought not to be thwarted and the power of quashing the FIR should be exercised sparingly with circumspection.

The prosecution of the petitioner in the instant case is on a finding that some of the samples which were seized contained more ethyl alcohol than the tolerance limit. If the articles, so seized, were not sold as intoxicants or could be consumed as intoxicants, it would not fall under the category of liquor which is prohibited under the Act. A margin of error is inherent in such strict legislation. Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 The facts of this case thus does not warrant the prosecution of the petitioner.

There does not appear to be any intention on the part of the petitioner to breach the Excise Law.

There is no prohibition on the sale of non- alcoholic beverage.

The object and purpose of the prohibition law is to enforce, implement and promote complete prohibition of liquor and intoxicants in the State of Bihar and matters connected therewith and incidental thereto.

A minor infraction in the ethyl alcohol content of a non-alcoholic beverage like fruit beer does not at all offend the object and purpose of the Prohibition Act. It is highly unreasonable to conclude that a minor infraction would lead to prosecution of the person compulsorily.

For the reasons aforesaid, the subject FIR viz. Pandaul P.S. Case No. 270 of 2020 is, hereby, quashed. The order of cognizance dated 08.02.2021 also is quashed.

Patna High Court CR. WJC No.280 of 2021 dt.09-02-2022 All other prosecution emanating out of the subject FIR is also quashed.

The application as well as the I.A. No. 1 of 2021 stands allowed and disposed off accordingly.

(Ashutosh Kumar, J) krishna/-

AFR/NAFR	NA
CAV DATE	NA
Uploading Date	26.02.2022
Transmission Date	26.02.2022