

Sagar Sadashiv Kore vs The State Of Maharashtra on 2 February, 2021

Author: Sarang V. Kotwal

Bench: Sarang V. Kotwal

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50.ABA-313-21.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.313 OF 2021

Sagar Sadashiv Kore Applicant
Versus	
The State of Maharashtra Respondent

Mr. Umesh R. Mankapure, Advocate for the Applicant.
Mrs. J.A. Lohokare, APP for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 08th FEBRUARY, 2021 P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No.9/2021 registered at Mangalwedha Police Station, District - Solapur on 7.1.2021 under Sections 328, 188, 272, 273 read with 34 of the Indian Penal Code and under Section 59 of the Food Safety and Standards Act, 2006 (for short, 'said Act').

2. Heard Shri Umesh Mankapure, learned Counsel for the Applicant and Smt. J.A. Lohokare, learned APP for the State.

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3. The FIR is lodged by Food Safety Officer Shri Mangesh Lavate. He has stated that on 15.7.2020, a notification was issued by the State Government under the said Act prohibiting sell, distribution etc. of Gutka, Panmasala, Scented Tabaco, Sented Supari etc.. On 7.1.2021, at about 3:30 p.m., the informant went to Mangalwedha police station on requisition of the police officers. He was informed by the police officers that on that day at about 10:30 a.m. the villagers of Hunoor village had apprehended one person. He was carrying Gutka on his motorcycle. The police officers had gone there.

They found, that, the said person was carrying gunny bags. His name was Arjun Sabale. He did not have documents or bills for those goods. On search of those bags, it was found that he was carrying 36 packets of Panmasala of one company, 17 packets of Panmasala of another company and 17 packets of tobacco. Thus, he was carrying the banned articles worth Rs.7,020/-. The samples were drawn. On enquiry, the police officers were told that these goods were supplied by the present Applicant. On this basis, the FIR is lodged.

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4. Shri Mankapure submitted that the offence under Sections 188, 272 and 273 of IPC are bailable. So is the offence under Section 59 of the said Act. His main thrust of argument was that Section 328 of IPC is not attracted in this case. He relied on various judgments in that behalf.

5. Learned A.P.P. opposed this application. She submitted that recently a Single Judge Bench of this Court has taken into consideration the history behind such judgments and has held in the case of Vinod Ramnath Gupta Vs. State of Maharashtra decided on 6.11.2020 in ABA (St.) No.2451/2020 that in such a case Section 328 of IPC is attracted and, therefore, it is a non-bailable offence.

6. Shri Mankapure relied on various judgments in support of his case, which are discussed in the following paragraphs.

7. I have considered these submissions. The controversy basically is in respect of interpretation of Section 328 of IPC. There are different judgments of different Benches of this Court regarding interpretation of Section 328 of IPC.

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8. The main plank of arguments of Shri Mankapure is the judgment of a Division Bench of this Court in the case of Anand Ramdhani Chaurasia and another Vs. State of Maharashtra and others passed in Criminal Writ Petition No.3607/2019 pronounced on 13.9.2019. In this judgment, it was held that Section 328 of IPC, in such cases, is not attracted because it could not be said that the accused in such cases caused any person to consume these banned articles.

9. The judgment in Anand Chaurasia (supra) was followed by another Division Bench of this Court (Aurangabad Bench) in the case of Ganesh Pandurang Jadhao and another Vs. State of Maharashtra and others in Criminal Writ Petition No.1027/2015 pronounced on 15.10.2020. . Shri Mankapure relied on interpretation of Section 328 of IPC mentioned in these two judgments.

10. In respect of these two judgments, there is further development. Anand Chaurasia's judgment (supra) was carried before the Hon'ble Supreme Court and following order was passed on 31.8.2020 as follows :

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Issue notice.

Until further orders, there shall be a stay of operation of the impugned judgment and order passed by the High Court of Judicature at Bombay."

11. When the judgment was pronounced in Ganesh Jadhao's (supra), learned APP for the State prayed for stay of said judgment by pointing out this particular order dated 31.8.2020 of the Hon'ble Supreme Court. Even the judgment in Ganesh Jadhao's (supra) was challenged in the Hon'ble Supreme Court by the State of Maharashtra and on 7.1.2021 following order was passed :

" Issue notice.

Until further orders, there shall be a stay of operation of the impugned judgment(s) and order(s) passed by the High Court.

Tag with SLP (Crl.) Diary No.8224/2020"

12. In the meantime, a Single Bench of this Court had an occasion to deal with this aspect again in the case of Vinod Gupta (supra). The learned Single Judge heard this matter and passed his order on 6.11.2020 holding that in such cases, Section 328 of

IPC is made out. In this case, extensive 5 of 13 :6: 50.ABA-313-21.odt arguments were heard and even Anand Chaurasia's judgment (supra) was cited and considered. The reasoning is given by the learned Single Judge in paragraphs-10 to 12 of this judgment, which are reproduced as follows :

"10. Be that as it may, section 328 of the IPC is attracted where the substance in question is poison or any stupefying, intoxicating or unwholesome drug or other thing is administered or caused to be taken by any person with an intent to cause hurt or with an intent to commit or to facilitate the commission of an offence or intent it to be likely that he will thereby cause hurt, becomes punishable under the provision. Therefore, first part of Section 328 contemplates a direct involvement of a person whereas, second part suggest any indirect method for causing one of the substances to be taken by any person. Expression "causing" involves some action. "Causation" means the action of causing something. "Intervening causation" means an event that comes between the initial event in sequence and the end result. Manufacturing "unsafe food" is initial event. Causing its movement by transporting or storing it with an intent to reach to end user are the events in sequence caused by active participation (positive act) of intermediate agencies or persons. Thus, all such events involving active participation of persons at each stage, is relevant here. A person at end is a 'consumer' to whom "unsafe food" is sold, knowing well that its consummation would cause hurt to him. Therefore, 6 of 13 :7: 50.ABA-313-21.odt persons involved in manufacturing "unsafe food"; causing its movement to market or storing it with intent to sell it, either himself or through other persons, while prohibitory 'order' promulgated under Section 30 of the F.S.S. Act is in force, in my opinion, such all persons, under express or implied authority either individually or otherwise, "causes person to take" unsafe food with intent to cause hurt. It is 'indirect causation'.

11. The facts of the case show, substantial quantity of unsafe food has been recovered by the State from the coaccused, who were causing its movement at the instance of the applicants and therefore it cannot be said it was for personal use of the applicants. The common course of natural events, obviously suggest, a huge quantity of the "unsafe food articles" seized was being transported or moved to market, with in intent to sell it, while prohibition 'order' was/is in force knowing well, it contains poisonous or unhealthy substance. Abundant research material that are available have established beyond any doubt that tobacco or nicotine have deleterious effect on the human body. That is the reason, why manufacturing and sale of Pan Parag, Areca Nut or Supari which causes oral cancer, throat cancer, liver cancer and diseases like hypertension, cardio-vascular diseases are prohibited in the State of Maharashtra. Infact, Commissioner of Food Safety has notified prohibitory order under Section 30 of the F.S.S. Act, 2006. Therefore while prohibitory order is promulgated is in force, a person who manufactures and/ or stores, substantial quantity of unsafe food and/ or causes its movement from manufacturing unit to 7 of 13 :8: 50.ABA-313-21.odt market for sell, it is to be presumed that he caused the movement with intent to sell

it, knowing fully well that its consumption is unhealthy and would cause the harmful effects on health like cancer, hypertension etc.

12. Thus the manufacturing unsafe food articles, moving these goods from the manufacturing unit to market for its sale is an event and that any action in chain of circumstances which foreseeably leads to and facilitates the sale of food articles is further event may be said to be a cause of that event to bring the action within the expression', "causes to be taken by a person", any poison with intent to cause hurt to such person, in terms Section 328 of the IPC. In my view, the offence under Section 328 of IPC, essentially is not causing someone (another person) else to do prohibited act but 'causing' a person to consume food articles knowing well that its consumption would hurt such person. Even otherwise in the proceeding like in hand where investigation is at initial stage, and the relevant material is yet to be collected; it may not be appropriate to hold that FIR does not make out an offence under Section 328 of IPC. In the consideration of facts of the case, I am not inclined to grant pre-arrest protection to the applicants. Applications are rejected. Interim pre-arrest protection granted, is vacated."

. The learned Single Judge has considered Anand Chaurisia's case (supra) in his judgment.

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13. Section 328 of IPC reads thus :

"328. Causing hurt by means of poison, etc. with intent to commit an offence. - Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

14. I am in complete agreement with the reasoning given by the learned Single Judge in the case of Vinod Gupta (supra).

15. A similar reasoning was given by another Division Bench of this Court (Aurangabad Bench) in the case of Vasim s/o. Jamil Shaikh Vs. State of Maharashtra and another passed in Criminal

Application No.4353/2016 decided on 29.11.2018. This judgment, in turn, had relied on the order passed in Zahir Ibrahim Panja and others Vs. State of Maharashtra and another as decided in Criminal Application No.4986/2016. A reference was 9 of 13 : 10 : 50.ABA-313-21.odt made in that judgment to the purpose for issuing such orders of prohibition. It was noted that the State Government had considered the research material of Tata Memorial, Tata Institute of Fundamental Research, research work done by James E. Harner and many other institutes from India and abroad. It was observed that scientifically it was established that areca nut chewing has been classified as carcinogenic to humans. Tobacco and such food, substance like Pan Masala and Gutkha which contain the substance cause cardiac arrest, oral cancer, esophageal cancer, stomach cancer and other diseases. They cause diseases of various internal organs and glands also. The study revealed that in India in the year 2011, the amount has been spent on treatment in respect of such diseases for persons of age group 35 to 69 was Rs.1,04,500/- Crores. With these observations, the Division Bench in Vasim Shaikh's case (supra) had observed that even Section 328 of IPC is applicable in such cases.

16. Consideration of these judgments assumes importance because Vasim Shaikh's case (supra) was cited in 10 of 13 : 11 : 50.ABA-313-21.odt Anand Chaurisiaya's case (supra). The Division Bench in Anand Chaurisiaya's case (supra) had held that Vasim Shaikh's case (supra) was per incuriam.

17. Now importantly the Hon'ble Supreme Court has stayed the operation of the judgment and order in Anand Chaurisia's case (supra). Thus, it means that the ratio laid down in Vasim Shaikh's (supra) case stands revived.

18. Shri Mankapure submitted that stay of operation of the judgment and order passed in both Anand Chaurasia's case (supra) and Ganesh Jadhao's case (supra) does not mean that those judgments do not exist and also does not meant that their ratio is not applicable. In support of this submission, he relied on a decision of Hon'ble Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India, Trust Association CSI CINOD Secretariat, Madras, as reported in (1992) 3 SCC 1. He relied on the observations of Hon'ble Supreme Court in paragraph-10 of that judgment. Relevant portion of that paragraph is thus :

11 of 13 : 12 : 50.ABA-313-21.odt "..... The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

....."

. This judgment in Shree Chamundi Mopeds Ltd (supra) was followed in few other judgments on which Shri Mankapure relied, but, his contention was mainly based on the observations made by the Apex Court in paragraph-10 of Shree Chamundi Mopeds Ltd.'s case (supra).

19. I am unable to agree with Shri Mankapure on this submission. The judgment in Shree Chamundi Mopeds Ltd (supra) itself clarifies that stay of operation of an order means that the order which has

been stayed would not be operative from the date of passing of the stay order. This sufficiently clarifies the position. The Hon'ble Supreme Court stayed operation of judgment and order in Anand Chaurisia's case (supra) on 31.8.2020. The incident in the present case is of 12 of 13 : 13 : 50.ABA-313-21.odt 7.1.2021. Therefore, obviously operation of Anand Chaurasia's judgment was stayed on that particular date. The mandate of the Hon'ble Supreme Court's order passed in Anand Chaurasia's case (supra) is clear enough. It was specifically observed that there shall be a stay of operation of the impugned judgment and order passed in Anand Chaurisia's case (supra). In this view of the matter, since Anand Chaurisia's case (supra) does not operate at this point of time; and since I am in total agreement with the ratio laid down in Vinod Gupta's case (supra) and Vasim Shaikh's case (supra), in this case Section 328 of IPC is attracted. The offence is serious. These offences need to be curbed for social welfare and health of the society particularly in today's era of COVID-19 pandemic. No leniency can be shown in these matters. The supply of such products has to be stopped. The Applicant is alleged to be one of the suppliers and, therefore, his custodial interrogation is necessary. Hence, no case for anticipatory bail is made out. The Application is rejected.

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