

Vijaysing @ Dnyaneshwar @ Gotya S/O ... vs State Of Mha. Thr. Officer In Charge Of Ps ... on 13 January, 2022

Author: Avinash G. Gharote

Bench: Avinash G. Gharote

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (BA) NO. 1339/2021

Vijaysingh @ Dnyaneshwar @ Gotya Raghunandan Pawar...Versus...State of
Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Mr. H.R.Gadhia, Advocate for applicant
Mr. I. Damle, APP for Respondent State.

CORAM : AVINASH

DATE : 13/01/2022 Heard Mr. Gadhia, learned counsel for the applicant and Mr. Damle, learned APP for State.

The facts of the case are that, the applicant has been arrested on 25.11.2021 in Crime No. 221/2021 for the offences punishable under Sections 188, 272, 273, 328 of the IPC as well as under Sections 26(2)(i), 26(2)

(iv), 26(2)(v), 27(2)(e), 30(2)(a) and 59 of the Food Safety and Standard Act 2006. The FIR indicates that on 24.11.21 when the I.O. and other police staff were doing vehicle checking on Malkapur-Kurha road at Harsoda diversion, upon receipt of information that a person is carrying contraband (Ghutka) on his motor-cycle proceeding on the aforesaid road, the panchas were called and after disclosing them that the information was received, the applicant was apprehended on his motor- cycle with a gunny bag, which upon search, was found to contain Ghutka worth Rs. 22,000/- in his possession 20ba1339.21.odt which was seized and sent for chemical analysis. The applicant came to be arrested on 25.11.2021 and is in MCR, since the PCR was refused, though demanded on the ground that the source from which the contraband articles were procured was to be ascertained by custodial interrogation.

The request for bail has been rejected by the Additional Sessions Judge, Malkapur on 13.12.2021, noting the social impact of the crime on the poor strata of the society and the non-cooperation of the applicant with the investigating machinery.

Mr. Gadia, learned counsel for the applicant submits that considering the nature of the offence and the fact that the PCR was refused, there is no further necessity of incarceration of the applicant who is in MCR since 26.11.2021. He further submits that in the given case, even Section 328 of the IPC may not be attracted, for which reliance is placed upon Ganesh Pandurang Jadhao vrs. State of Maharashtra and others; Cri W.P. No. 1027/15 decided on 15.10.2020 and though the operation of the said judgment has been stayed by the Hon'ble Apex Court in SLP No. 5861 of 2020 by an order dated 7.1.2021, however, relying upon Chhaya Javantsingh Hajari and ors vrs. Committee for Scrutiny and Verification of Tribe Claims and others, 2018 (6) Bom. C.R. 492, it is submitted that merely grant of stay by the Hon'ble Apex Court does 20ba1339.21.odt not take away the efficacy of the judgment rendered by learned Division Bench and therefore, what has been held in Ganesh Pandurang Jadhao would prevail.

Learned APP opposes the application and submits that production, manufacture, sale, transport of Ghutka has been prohibited in the State of Maharashtra and apart from Section 328 of the IPC, the action of the applicant also attracts the provisions of Sec 26(2)(i), 26(2)(v), 26(2)(iv), 27(2)(e), 30(2)(a) of the Food Safety and Standard Act, 2006. Inviting my attention to the judgment in Union of India and others vrs. Unicorn Industries; (2019) 10 SCC 575 and specifically para 27, it is contended that even the Hon'ble Apex Court has taken judicial notice of the various scientific studies in respect of Ghutka, which indicates that chewing the same may result in oral cancer and other serious bodily infirmities. He submits that when the applicant was well aware that the transport of Ghutka was prohibited within the State, it was not permissible for him to undertake the activity, in spite of which having undertaken the transport of the contraband and his refusal to disclose the source from which the same is procured, would indicate the propensity to reiterate in the transport of contraband. He therefore submits that considering the larger perspective, the continued incarceration of the applicant is necessary, in order to send a message to the persons indulging in the contraband activities that illegal transport of the 20ba1339.21.odt contraband articles shall not be permitted in the State.

In so far as the contention that Section 328 of the IPC may not be attracted, in my considered opinion this is not the stage where such an argument can be considered, which would be permissible in a petition seeking quashing of the imposition of Section 328 of the IPC. The arguments advanced in this regard therefore are of no assistance to the applicant.

It is necessary to note, what the Hon'ble Apex Court has noticed in Unicorn Industries (supra) by taking judicial notice of the harmful effects of tobacco, scented pan masala which in normal parlance is called as Ghutka in paras 27 to 32.

27. Judicial notice can be taken of the fact that by various scientific studies on betel quid and substitutes, tobacco and their substitutes, i.e., pan masala with tobacco and without tobacco, these products have been found to be one of the main causes for oral cancer. A detailed study has been

considered by three Experts, namely, Urmila Nair, Helmut Bartsch and Jagadeesan Nair in the Division of Toxicology and Cancer Risk Factors, German Cancer Research Centre (DKFZ), Heidelberg, Germany. The research paper is titled as "Alert for an epidemic of oral cancer due to use of the betel quid substitutes gutkha and pan masala: a review of agents and causative mechanisms". After considering the entire material in detail and considering the various earlier studies, the paper observes thus:

"Perspectives Banning of gutkha and pan masala has been strongly advocated by oncologists as a preventive measure to reduce oral cavity cancers. Recently, a number of States in India have banned the manufacture and sale of both products and this should reduce the incidence rate. Similar regulations regarding other health-impairing tobacco products which have been on the market for centuries, together with cigarettes and bidis (an indigenous smoking product), should also be reinforced.

However, for those who are addicted to these products or are already affected by premalignant lesions, educational interventions to encourage stopping the habit are essential. Additionally, chemopreventive interventions are being explored. Retinoids, NSAIDs and green tea are among the promising agents (Garewal, 1994; IUSHNCC, 1997;

Papadimitrakopoulou and Hong, 1997; Lin et al., 2002a). Although a large percentage of lesions did respond to treatment, recurrence after terminating the chemopreventive regime was also observed (Sankaranarayanan et al., 1997), perhaps due in part to continuation of the addictive habit.

As with all cancers, early diagnosis is important for successful treatment of oral cancer, as its prognosis is still very poor. There is, nowadays, a strong drive to apply proteomics technology to molecular diagnosis of cancer. Expression profiling of tumour tissues, molecular classification of tumours and identification of markers to allow early detection, sensitive diagnosis and effective treatment are now being explored for oral cancers. Genes with significant differences in expression levels between normal, dysplastic and tumour samples have been reported and this should help in better understanding the progression of oral squamous cell carcinoma (Kuo et al., 2002; Leethanakul et al., 2003).

DNA aneuploidy in oral leukoplakia in Caucasian tobacco users has been found to signal a very high risk for subsequent development of oral squamous cell carcinomas and associated mortality (Sudbo and Reith, 2003; Sudbo et al., 2004). A risk assessment model to predict progression of premalignant lesions that includes histology and a score combining chromosomal polysomy, expression and loss of heterozygosity on 3p or 9p has also been described (Lee et al., 2000; Rosin et al., 2002). Once diagnosed, these premalignant lesions could be treated at a much earlier stage by chemo preventive agents, surgery, chemotherapy and/or intense radiotherapy to prevent new lesions and premalignant lesions from progressing to invasive cancer.

20ba1339.21.odt Conclusions Gutkha and pan masala have flooded the Indian market as cheap and convenient BQ substitutes and become popular across all age groups wherever this habit is practised. There is sufficient evidence that chewing of tobacco with lime, BQ with tobacco, BQ without tobacco and areca nut are carcinogenic in humans (IARC, 1985, 2004). These evaluations in conjunction with the available evidence on the BQ substitutes gutkha and pan masala implicates them as potent carcinogenic mixtures that can cause oral cancer. Additionally, these products are addictive and enhance the early appearance of OSF, especially so in young users who could be more susceptible to the disease. Although recently some curbs have been put on the manufacture and sale of these products, urgent action needs be taken to permanently ban gutkha and pan masala, together with the other well-established oral cancer- causing tobacco products. Finally, as the consequences of these habits are significant and likely to intensify in the future, an emphasis on education aimed at reducing or eliminating the use of these products as well as home-made preparations should be accelerated."

28. Recently, the Department of Oral Medicines and Radiology, Dental Institute, Rajendra Institute of Medical Sciences, Ranchi has through its experts, namely, Anjani Kumar Shukla, Tanya Khaitan, Prashant Gupta and Shantala R. Naik conducted a study on the subject "Smokeless Tobacco and Its Adverse Effects on Hematological Parameters: A Cross- Sectional Study". The study paper considered the consumption of smokeless tobacco (SLT) in various forms in India such as pan (betel quid) with tobacco, zarda, pan masala, khaini, areca nut. After conducting an in-depth analysis, the paper concludes and recommends as under"

"Conclusion and Recommendation SLT use has severe adverse effects on hematological parameters. The present study might serve as an early diagnostic tool in any systemic diseases and be helpful in spreading awareness on the deleterious effect in the populace consuming SLT. Timely intervention among students can prevent the initial experimentations with tobacco from developing into addiction in adulthood. People should be counselled to avoid all habits of tobacco and undergo nicotine replacement therapy along with antioxidants. Knowledge and awareness about systemic and oral ill effects of tobacco should be spread through tobacco control programs in the pursuit for 20ba1339.21.odt a tobacco-free world."

29. It was sought to be argued on behalf of the manufacturers of pan masala without tobacco, that the pan masala without tobacco stands on a different pedestal than the pan masala with tobacco. It was sought to be argued that, pan masala without tobacco cannot be considered to be hazardous to health. The Department of Head and Neck Surgery, Tata Memorial Hospital, Mumbai through its experts Garg A, Chaturvedi P. Mishra A. and Datta S. had conducted a study on "A review on Harmful Effects of Pan Masala". It is to be noted that this study is of 'pan masala without tobacco'. It will be apposite to refer to the following observations of the said report:

"Policy Issues Concerning Pan Masala Pan masala use is rampant in India by all the sections and age groups of the society. It has emerged as a major cause of oral cancer in India. National Family Health Survey-2 showed that 21% of people over 15 years of age consumed PM or tobacco. Study in the state of Tamil Nadu showed that the age at

which people start consuming areca nut products ranges from 12 to 70 years. 58% of the subjects chewed the products more than twice a day. Advertising tobacco products including PM containing tobacco is banned in India since 1.5.2004. To bypass this ban tobacco companies are advertising PM ostensibly without tobacco, heavily in all forms of media. PM is surrogate for tobacco products as the money spent on marketing, and advertising is many times of the revenue generated from the sale of PM. In Mumbai after the ban on PM and gutka the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively. The main reason of quitting and reduction in consumption was non availability of these products. In spite of the ban gutka was still available but in different forms or at increased cost. Strict law in the form of Cigarettes and other Tobacco Products Act 2003 has been made in India, but the enforcement and compliance is lax. There is a need for strong enforcement and compliance of laws throughout the country. The genotoxic, carcinogenic properties and numerous other harmful effects of PM need immediate and strict action by the government on PM without tobacco as it has banned PM with tobacco. The consumers should also be made aware of the harmful effects of PM as they are under a false impression that it is not harmful.

20ba1339.21.odt "Conclusion Pan masala is widely used across all the strata of society and is freely available in many parts of the country. It is carcinogenic, genotoxic, and has harmful effects on the oral cavity, liver, kidneys and reproductive organs. Government action is immediately required to restrict the consumption and to make the people aware about its harmful effects."

30. The study which has been conducted in 2004, found that gutkha and pan masala have been one of the major causes of oral cancer. The Oncologists as early as in 2004 had strongly advocated banning of gutkha and pan masala. They further find that banning the manufacture and sale of these products would reduce oral cancer incidence rates. It is found that gutkha and pan masala have flooded the Indian markets and become popular amongst all age groups. It is observed that pan masala with tobacco as well as without tobacco have been found to be having a potent carcinogenic mixtures that can cause oral cancer. It further found that, these products are an addictive and enhance the early appearance of oral sub- mucous fibrosis (OSMF). It is especially so in the young users who could be more susceptible to the disease.

31. The report further finds that, in the National Family Health Survey-2, it has been found that 21% of people over 15 years of age consumed pan masala or tobacco. The report finds that, though advertising tobacco products including pan masala containing tobacco is banned in India since 01.05.2004, to bypass this ban, tobacco companies are advertising pan masala ostensibly without tobacco, heavily in all forms of media. It has been found that, after the ban on pan masala and gutkha, the sale has come down. The 2016 report finds that, in Mumbai, after the ban on pan masala and gutkha, the sale has come down and the percentage of users quitting and reducing the habit was 23.53% and 55.88% respectively.

32. It could thus be seen that, by a scientific research conducted by Experts in the field, it has been found that the consumption of pan masala with tobacco as well as pan masala sans tobacco is hazardous to health. It has further been found that, the percentage of teenagers consuming the hazardous product was very high and as such exposing a large chunk of young population of this Country to the risk of oral cancer. Taking into consideration this aspect, if the State has decided to withdraw the exemption granted for manufacture 20ba1339.21.odt of such products, we fail to understand as to how it can be said to be not in the public interest.

Considering the above aspect and the fact that the transport of Ghutka has been prohibited in the State of Maharashtra and taking judicial notice of the fact that inspite of the ban, the same is found to be readily available in every nook and corner of the entire State, such availability can directly be attributed to the actions of the persons like the applicant in transporting the contraband substance, inspite of the prohibition. It is further noteworthy to consider that Sections 26(2)(i), 26(2)(v), 26(2)(iv), 27(2)(e), 30(2)(e) of the Food Safety & Standard Act, 2006, in fact add to the prohibition and provide stringent punishment to the persons who have indulged in transport of the contraband articles. The attitude of the applicant in not disclosing the source from which the consignment has been procured by him to the I.O., in fact indicates that in case the applicant is enlarged on bail he may continue with his activities, which is harmful for the health of the society at large, considering which I am not inclined to entertain the present application, the same is accordingly dismissed.

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Signing Date:14.01.2022 11:07