

Abdul Nisar Haji Abdul Kadir Qureshi vs State Of Maharashtra Thr. P.S. Raipur, ... on 12 April, 2022

Author: Amit B. Borkar

Bench: V. M. Deshpande, Amit B. Borkar

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19-apl-189-190-19.odt

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

CRIMINAL APPLICATION (APL) NO. 189 OF 2019
WITH
CRIMINAL APPLICATION (APL) NO. 190 OF 2019

CRIMINAL APPLICATION (APL) NO. 189 OF 2019

Abdul Nisar Haji Abdul Kadir Qureshi,
Aged about 48 years, Occ. Business,
R/o. Chikhli, Dist. Buldhana
Mob. 9028401027

. . . APPLICANT

...V E R S U S..

1. State of Maharashtra through
Police Station Buldhana City,
Buldhana.
2. Nitin Mahadevrao Navalkar,
R/o. Food Safety Officer,
Food and Drug Administration,
Buldhana.

. . . NON-APPLICANTS

WITH

CRIMINAL APPLICATION (APL) NO. 190 OF 2019

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19-apl-189-19

Shri Mir Nagman Ali, Advocate for applicant.
Shri M. K. Pathan, APP for non-applicant/State.

CORAM :- V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.

DATED :- 12.04.2022

JUDGMENT (PER : AMIT B. BORKAR, J.) :

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1. Heard.

2. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

3. Since both the applications arise out of the common factual matrix and the First Information Reports challenged in both the applications contain similar allegations, we are disposing them of by common order.

4. By these applications, the applicants are challenging registration of the First Information Reports for the offences punishable under the provisions of the Indian Penal Code & the Food Safety and Standards Act, 2006.

5. Since we are treating Criminal Application (APL) No. 189/2019 as a lead application, we are referring to the parties and pleadings as stated in Criminal Application (APL) No. 189/2019. The 3 19-apl-189-190-19.odt First Information Report came to be registered against the applicant on 05.02.2019 at about 01:57 hours on the information received to Police Station Buldhana City that the applicant was found to be in possession of the material containing flavoured tobacco, Pan Masala etc. while going on Maruti Swift bearing registration No. MH-46/AL- 7839.

6. Since the articles found in the applicant's possession are banned in the State of Maharashtra, the offences were registered against the applicant. The applicant thereafter challenged the registration of the First Information Report by filing this application. This Court issued notice to the non-applicants, and the non-applicant- Investigating Agency filed a reply stating that prima-facie, the ingredients of the offences alleged against the applicant is made out. It is stated that the Food Safety and Standards Act is a special law, and the Indian Penal Code is a general law, but the offences can be registered under both the Acts. Reliance is placed on the judgment of the Hon'ble Apex Court in the case of State of Maharashtra vs. Sayyad Hassan Sayyad Subhan and others in Criminal Appeal No. 1195/2018 in support of the contention that there is no bar to a trial or

conviction of an offender under two different enactments. Reliance is also placed on the un-reported judgment of the Co-ordinate Bench of this Court at Aurangabad Bench dated 16/10/2018 in Criminal Application No. 4 19-apl-189-190-19.odt 4968/2016, wherein the Co-ordinate Bench of this Court repealed the challenge to the registration of the First Information Report on the similar grounds. It is stated that the material collected by the answering non-applicant is sufficient to bring home the guilt in the present crime and therefore prayed for dismissal of the applications.

7. We have heard Shri M. N. Ali, learned Advocate for the applicant in respective applications and Shri M.K. Pathan, learned APP for the non-applicant/State.

8. Learned Advocate for the applicant submitted that no offence could be registered under the provisions of the Indian Penal Code. It is submitted that the essential ingredients of the offences alleged against the applicant is not made out even if the allegations in the First Information Reports are taken at their face value. It is alleged that there is no allegation that the intoxicating substance had been administered to an individual.

9. Per contra, learned APP placed reliance on the judgments of the Co-ordinate Bench of this Court in Criminal Application (APL) No. 444/2014 (Sunil Gajawani vs. State of Maharashtra & Anr.) and other connected matters wherein this Court refused to interfere with the registration of the offences and permitted the Investigating Agency 5 19-apl-189-190-19.odt to file the Charge-sheet. Furthermore, he placed reliance on the judgment in the case of Mohammad Yamin Naeem Mohammad & Ors. vs. State of Maharashtra & Ors. reported in 2021 Criminal Law Journal 1811. He, therefore, submitted that in view of the judgment of the Hon'ble Apex Court in the case of Sayyad Hassan (supra) and other judgments of the Co-ordinate Bench of this Court in Criminal Application No. 4968/2016 & Criminal Application (APL) No. 444/2014 and the judgment in the case of Mohammad Yamin (supra), no interference is called for.

10. We have carefully analyzed the allegations in the First Information Reports registered in both the applications. The parties to the applications agreed that the facts and issues involved in both the applications are similar. In substance, the allegation against the applicants are that the applicants were found to be in possession of the material containing Pan Masala Scented Tobacco, a prohibited substance in the State of Maharashtra.

11. In our opinion, the Co-ordinate Bench of this Court in Mohammad Yamin (supra) was considering the challenge to the similar First Information Reports containing similar allegations, and the Co-ordinate Bench of this Court repealed the challenge by observing in Paragraphs 49 & 50 as under:-

6 19-apl-189-190-19.odt "49. Mr. Bhangde, learned Senior Counsel, also attacks the charging of the petitioners of offences under the Penal Code, 1860, namely, those under Sections 188, 272, 273 and 328 of the I.P.C. In respect of his contention that the petitioners could not have been charged with by an offence under Section 328 of I.P.C., he contends that the ingredients thereof as are required to be fulfilled by the requirements as spelt out from the language of Section 328 of I.P.C. have not been

made out. To buttress his submission he has relied upon Anand Ramdhani Chaurasia (supra) and Nilesh Narayan Sanghvi (supra). Anand Ramdhani Chaurasia (supra) was a case for quashing the offence under Section 328 of I.P.C., wherein, on the facts of the case, it was held that since the FIR did not disclose the ingredients of Section 328 of I.P.C., the same was quashed. It is, however, worthwhile to note, though not disclosed by Mr. Bhangde, learned Senior Counsel appearing for the petitioners, but as contended by Shri Ashirgade, learned Additional Public Prosecutor, that the judgment in Anand Ramdhani Chaurasia (supra), was stayed by the Apex Court in S.L.P. (Cri) No. 004101/2020, which was filed on 28/2/2020 and registered on 1/9/2020, by an order dated 31/8/2020. In Nilesh Narayan Sanghvi (supra) the issue involved, was that, though the contraband articles such as Gutkha, Pan Masala, scented tobacco were found in the vehicle of the applicant, the offence under Section 328 of I.P.C. was not attracted, and the FIR registered for the said offence was sought to be quashed under Section 482 Cr.P.C. The Court relying upon the judgment in the case of Anand Ramdhani Chaurasia (supra), held that mere transportation, without any further action, on an apprehension that the contraband goods would be sold in the market and would be bought and consumed by a person, was too far fetched a consequence of an act of "administering", or "causing to be taken" and mere transportation could not be construed as an attempt to commit an offence under Section 328 of I.P.C. and had quashed the FIR in respect of the offence under Section 328 of I.P.C. alone. The Court in Nilesh Narayan Sanghvi (supra), which was decided on 9/9/2020, it clearly appears, was not informed that the judgment in Anand Ramdhani Chaurasia (supra), which was being relied upon, stood stayed by an order dated 31/8/2020, by the Hon'ble Apex Court. It is needless to state here that when a Counsel places reliance upon a judgment of the High Court, it is the solemn and obligatory duty of the Counsel, to the Court, to inform the position as to whether the judgment was carried to the Apex Court, and if so, the fate of the same, as on the date of deciding of the matter by the High Court. It is not permissible for a Counsel, to merely place reliance upon a judgment in support of his case and to leave it to the Court, to make efforts to ascertain whether any challenge was laid to it, before the Apex Court and to ascertain the fate of such a challenge. The Counsel would be failing in his duty both as a Counsel and as an officer of the Court, if he does so, as by citing the judgment, he is calling upon the Court, to not only to assume its correctness, but is also inviting the Court to place 7 19-apl-189-190-19.odt reliance upon what has been stated therein and render judgment in consonance thereof, that too on a premise that the same had attained finality, in absence of any further challenge.

50. That there is an order as contemplated by Section 188 of I.P.C. cannot be controverted in light of the impugned order dated 15/7/2020. The Chemical Analyser's report indicates the presence of magnesium carbonate and nicotine in the seized goods (Section 272 of I.P.C.), both of which are prohibited and are also indicative causes of cancer. The word 'noxious', means harmful (Webster), harmful to health, injurious, unwholesome, corruptive (Black's law dictionary) or repugnant to human use. It cannot be disputed that both magnesium carbonate and nicotine are harmful to human health (see : hazardous properties and toxicity of both) (Section 273 of I.P.C.). The only

question is whether the goods were sold, offered or exposed for sale, as food (Section 273 of I.P.C.) or were administered with an intent to cause hurt (Section 328 of I.P.C.). Obviously, due to the various studies made, the advertisements as issued by the Government, the films shown in Cinema halls, regarding the harmful effects of tobacco and tobacco products, it no longer can be said that any person, would now be oblivious as to the harmful effects of tobacco and tobacco products. In spite of knowing about the harmful effects, if a person transports such products, from one place to another, could it be said that such person was unaware that the same was not for sale? The word 'sale', would be applicable to a manufacturer, distributor, dealer, retailer or the shop-keeper, each of whom, performs the activity of sale, well knowing that such sale would be for human consumption. Instead of using the easier and shortest route from the point of origin to the point of destination, the use of a circuitous route, would entitle the authorities to draw an adverse inference, that the goods were intended for sale within the State, through which they were being transported and the case was not that of an inter-State transport. Too technical a meaning to the language of the relevant sections, may not be called for, considering the changing situation. The law is not static, but is a live concept, keeping in pace with the changes in the society as well as evolving technology. To fetter the law, to its literal sense or meaning, would not be apt, rather, such an approach would sound its death knell. The Courts must also be alive to such changes and apply the law, accordingly."

12. We also agree with the learned APP that the Co-ordinate Bench of this Court at Aurangabad Bench in Criminal Application No. 4968/2016 has repealed the similar challenge as regards the First Information Report containing similar allegations. Therefore, in our 8 19-apl-189-190-19.odt view, whether the substance seized by the Authorities comes within the purview of Section 328 of the Indian Penal Code and whether the allegations against the applicants are proved or not, the Investigating Agency needs to be given an opportunity to prove their case in the trial.

13. Therefore, we are satisfied that prima-facie, the essential ingredients of the offences alleged against the applicants are fulfilled.

14. Both the Criminal Applications are dismissed. Rule is discharged.

15. Pending Application(s), if any, stand(s) disposed of.

16. It is made clear that the learned Trial Court shall not be influenced by the observations made in this order, and it shall be open for the applicants to raise all contentions before the learned Trial Court as permissible in law.

(AMIT B. BORKAR, J.)

(V. M. DESHP

RR Jaiswal

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