

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO.1044 OF 2019

Imran Iqbal Patavekar

.... Applicant

versus

The State of Maharashtra

.... Respondent

.....

- Mr.Umesh Mankapure, Advocate for Applicant.
- Mr.Deepak Thakare, PP, a/w Mr.S.H. Yadav, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 06th JUNE, 2019

P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No.88/19 registered with Gandhi Nagar Police Station, Distrcit-Kolhapur, under sections 188, 272, 273, 328 of the Indian Penal Code and section 26(2)(i), 26(2)(iv), 27(2)(e), 30(2)(a) of Food Safety and Standard Act 2006.

2. The prosecution case in brief is as follows;

That the complainant namely Ramakant Pandurang

Patil, Food Safety Officer, Class II, attached to Food and Drugs Office situated at Kolhapur lodged FIR on 18/03/2019 with Gandhinagar Police Station, inter alia contending therein that on 18/03/209, a driver was found in possession of a Tempo No.MH-04-CA-7205 carrying therein prohibited food stuffs for sell of the same. When raiding party stopped the said vehicle at Sarnobatvadi and inquired with the said driver about his name that time he disclosed his name as Santosh S. Mali. During the course of search, the raiding team found prohibited articles like scented tobacco, pan masala etc. in the said tempo.

3. On the basis of the complaint made by the complainant, offence vide C.R. No.88/19 under sections 188, 272, 273, 328 of Indian Penal Code and under sections 26(2)(i), 26(2)(iv), 27(2)(e), 30(2)(a) of Food and Safety Standard Act, 2006 was registered with Gandhinagar Police Station, District Kolhapur on 18/03/2019 and investigation was commenced.

4. I have heard learned Counsel Mr. Umesh Mankapure

for the Applicant and learned APP Mr.S.H. Yadav for the State. Mr.Mankapure submitted that provisions u/s 328 of IPC are not applicable to the present facts of the case. He submitted that except section 328 of the IPC, the other offences are bailable and therefore the Applicant cannot be arrested. He further submitted that the Applicant's name is not mentioned in the FIR and only on the basis of information given by the co-accused, driver, the present Applicant is sought to be arrested.

5. As against this, the learned APP Mr.Yadav submitted that the driver of the vehicle Mr.Santosh Mali was arrested on 18/03/2019 and during the course of investigation, the name of the present Applicant transpired. The call detail records of the mobile phone was obtained and the records show that the arrested accused Santosh Mali and the present Applicant were constantly in touch with each other at the relevant time. Mr.Yadav further submitted that the Applicant has similar antecedents against his name. The case of the prosecution is mentioned in the affidavit filed by the investigating officer.

6. Here, two questions arise before me for deciding this application; the first question is of law in respect of possibility of applying section 328 of IPC and other is question of facts.

7. Insofar as the argument that section 328 is not applicable, is concerned; Mr.Mankapur invited my attention to the section 328 of IPC which reads as 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 extent to ten years, and shall also be liable to fine.”

8. He further submitted that it cannot be said that either of the accused actually administered any banned substances to anybody and therefore section 328 per se was not applicable.

9. On the other hand, Mr.S.H. Yadav placed reliance on the judgment of a Division Bench of this Court delivered by the Bench at Aurangabad on 29/11/2018 in the case of Vasim Jamil Shaikh Vs. State of Maharashtra & Anr.

10. This very issue of applicability of section 328 in such cases was considered by the Division Bench and it was observed in paragraph No.9 of the said judgment as follows;

“9. In **Writ Petition No. 830/2016 (Umraosing Julalsingh Patil Vs. The State of Maharashtra and Ors.)** decided on 10.1.2017 at this seat though by Single Judge, the possibility of use of provision of section 328 of IPC was considered by this Court in relation to the similar substance. This Court had considered the notification of the State Government dated 15.7.2014 and the provisions of the Act. In that case, the Single Judge had held that these substances contain nicotine and magnesium carbonate and they can take life. This Court had considered the ingredients of provision of section 328 of IPC like

- (i) causes to be taken by any person unwholesome drug and
- (ii) knowing it to be likely that he will thereby cause hurt.

Thus, if these two ingredients are made out, then the prosecution for offences punishable under section 328 of IPC is also possible. In present two matters, huge quantity of tobacco and Pan Masala is recovered and only inference from the circumstance like the food article was in huge quantity is that the applicants wanted to make money by selling it in this State as there was ban for manufacture, possession and sale of these articles. When there is such ban, the persons like applicants are making more money as the persons who are addicted to these substances are ready to pay any price. In recently decided case **Criminal Application No. 4968/2016 (Zahir Ibrahim Panja and Ors. Vs. The State of Maharashtra and Anr.)** decided with other case on 16.10.2018, this Court has again considered the applicability of provisions of sections 273 and 328 of IPC and also the provisions of the Act when such articles are found in possession in Maharashtra. The

relevant portion of the observations are at paragraph

Nos. 3, 4 and 5 and they are as under :-

“3. The learned counsel for applicants in both the proceedings made following submissions :-

(i) When there are the provisions to cover such offences in Food Safety and Standards Act 2006 and Rules framed thereunder, police ought not to have register the crime.

(ii) The offences punishable under sections 328, 272, 273 of IPC are not made out due to allegations and so, police ought not to have taken cognizance. However, it is admitted that there was the order issued by the Government and the provision of section 188 of IPC could have been used.

(iii) The provisions of aforesaid Special Enactment with regard to sending copy of report to Commissioner etc. were not strictly followed, so J.M.F.C. ought not to have entertained the complaint.

4. Recently in **Criminal Application No. 1195/2018 [The State of Maharashtra and others Vs. Sayyed Hasan and others]** decided on 20.09.2018, the Apex Court has considered the various provisions of Special Enactment, the provisions of Indian Penal Code and also the provision of section 26 of General Clauses Act and the Apex Court has laid down that in aforesaid Special Enactment, there is no specific bar to register the crime under the provisions of IPC even if the provisions of Special Enactment are attracted due to the offences committed. In view of these circumstances, this Court holds that there is no force in the contention that the crime ought not to have been registered. Second contention made against use of provisions of sections 272 and 273 of IPC is also not having any force. The provision of section 272 covers the persons who are responsible for adulteration of any food article, to make such article noxious as found and which is

intended for sale. The provision of section 273 of IPC covers the seller and also the person who is exposing the articles for sale and those articles are noxious or in the state unfit for consumption as food. Both provisions can be used against the present applicants as huge quantity of prohibited food articles was found in their possession. There is copy of order issued by the Government in that regard dated 15.7.2016.

5. The contention that the provision of section 328 of IPC cannot be used in the present case also is not acceptable. This provision shows that whoever administers to or causes to be taken by any person anything which is likely to cause hurt then he can be punished under provision of section 328 of IPC. Specific person to whom the thing is administered or the specific incident in which it was caused to be taken need not be mentioned in the case like present one. The persons who are indulging in to illegal activity like possessing and selling the substances which are

likely to cause hurt are covered by the provision of section 328 of IPC. This point was dealt with by this Court in Criminal Application No. 560/2013 [Manik More Vs. State and others). How these substances are injuries to health is considered by this Court while deciding in **Writ Petition No. 3398 of 2011 [Sanket Food Products Private Limited Vs. Union of Indian and others]** decided in the year 2011 itself. Further, the aforesaid order dated 15.7.2016 of the State Government shows that for issuing that order of prohibition, the State Government considered the research material of Tata Memorial Hospital, Tata Institute of Fundamental Research, research work done by James E. Harner and many other institutes from India and abroad. Scientifically, it is 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 substances 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/- Crore. The States like Maharashtra, West Bengal, Utter Pradesh and Andhra Pradesh together contributed 60% of the diseases born from tobacco attributable C.V.D. as the study strongly recommends prohibition of manufacture, sell of tobacco products and in view of the aforesaid substances the order was issued by the State Government. These circumstances need to be kept in mind while considering the grounds raised by the persons like present applicants.”

11. In this view of the matter, the issue stands concluded by the judgment of the Division Bench and it can safely be held that section 328 will be attracted even in the facts of the present case.
12. Insofar as the other argument of Mr.Mankapure that

the present Applicant is not involved in the offence, is concerned; the affidavit filed by the Investigating Officer has in sufficient details showed his involvement and it is quite clear that the offence was committed at his instance. In this view of the matter, custodial interrogation of the Applicant is necessary and therefore he does not deserve protection of anticipatory bail. Hence the application is rejected and is disposed of as such.

(SARANG V. KOTWAL, J.)