

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

CRIMINAL APPLICATION (ABA) NO. 444/2021

Yuvraj S/o Ghanshyam Agrawal V/s. State of Maharashtra

with

CRIMINAL APPLICATION (ABA) NO. 422/2021

Umesh S/o Girdharilalji Baraliya V/s. State of Maharashtra

with

CRIMINAL APPLICATION (ABA) NO. 426/2021

Kalu Jethanand Lalwani V/s. State of Maharashtra

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

Court's or Judge's Orders

Shri S. A. Mohta, Advocate for the applicants.
Shri M. J. Khan, APP and Shri H. D. Dubey, APP for
non- applicant/State.

CORAM : VINAY JOSHI, J.

DATE : 04.08. 2021.

Heard.

2. Both Criminal Applications (ABA) 422/2021 and 426/2021 are arising out of the Crime No. 408/2021 registered at the Police Station Patur, Dist. Akola for the offence punishable under Sections 188, 272, 273, 328 of the Indian Penal Code and Sections 26(2)(i), 30(2)(a), 3(1)(zz)(y), 26(2)(iv), 59 of the Food Safety and Standards Act. Likewise Criminal Bail Application (ABA) No. 444/2021 is

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arising out of Crime No. 401/2021 registered with the Police Station City Kotwali, Dist. Akola for the offence punishable under Sections 172, 173, 188, 328 of the Indian Penal Code and Sections 26(2)(iv), 30(2)(a) of the Food Safety and Standards Act. Though there is no direct nexus in between two crimes registered at different Police Stations, however the allegations levelled against all the applicants as well as submissions made by both sides are same, hence for the sake of convenience, they are taken together for disposal.

3. Applicant Umesh Baraliya and Kalu Lalwani are apprehending to be arrested in Crime No. 408/2021, whilst applicant Yuvraj Agrawal is apprehending to be arrested in Crime No. 401/2021 for almost similar allegations. Hence, they prayed for pre-arrest protection. The main thrust of the applicants is on the point that nothing was seized from their possession nor at the their instance seizure was effected. They are nowhere concerned with the alleged offences. Merely at the instance of disclosure made by the apprehended co-accused, they have been involved in the Crime. Besides Section 328 of the

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Indian Penal Code, rest of the offences are bailable one. It is strenuously argued that the provisions of Section 328 of the Indian Penal Code, cannot be made applicable against applicants. The applicants are ready to cooperate with the Investigating Agency and ready to abide with all the conditions as may be imposed against them. In support of said contentions, reliance has been placed on various decisions. With these prime contentions, applicants have urged for protecting their personal liberty.

4. The State resisted all applications by filing separate reply-affidavits. The contents of the First Information Reports (FIR) have been narrated in brief. It is alleged that huge quantity of contraband articles have been seized from the possession of co-accused. During investigation, it was transpired that the applicants have supplied the seized articles which are prohibited in the State of Maharashtra. The applicants' complicity was revealed at the time of seizure of banned articles itself. The offences are of anti-social nature having vast impact on the Society. The applicants' custodial interrogation is necessary to throw light on various dimension. Moreover, it is

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contended that, there are divergent judicial opinions on the point of applicability of Section 328 of the Indian Penal Code and the said issue is pending for consideration before the Honb'ble Supreme Court. To sum up, considering the nature, gravity and seriousness of the accusation, applications are prayed to be rejected.

5. It is the prosecution case in Crime No. 408/2021 that the Food Safety Officer came across the seizure of banned articles namely "Gutka" of large quantity. Accordingly, the Food Safety Officer has lodged report regarding the occurrence. It was stated that the Police conducted raid on two shop establishments namely S. B. Confeshanary, and Kalash Pan Centre, from where large quantity of 'Gutka' pouches have been seized of which details are stated in the report. Precisely, pouches having brand names like 'Sitar Pan Masala', 'Bahar Pan Masala', 'V One Tobacco', 'Vimal Pan Masal', 'Premium Najjar Pan Masala', and N. 'S. Pan Masala' of total worth of Rs. 13,409/- were seized. Co-accused namely Saiyyad Faijan and Niranjana Vasudeo were apprehended on the spot with these pouches. The apprehended accused have

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disclosed that they have purchased banned 'Gutka' pouches from various persons including Umesh Baraliya (Applicant of Criminal Application (ABA) No. 422/2021) and Kalu Lalwai (Applicant of Criminal Bail Application (ABA) No. 426/2021). The banned material was seized under Panchanama and necessary samples for chemical analysis were taken.

6. As regards to Crime No. 401/2021 is concerned, it was registered at the instance of Food Safety Officer. It is the prosecution case that on receiving secrete information, they went to one unnamed shop wherein one person namely Shaik Salim was found lifting some gunny bags in hurried manner. On suspicion, Police accosted him and inquired about the contents of gunny bags. Initially he gave evasive answers but latter on disclosed that the said shop is owned by applicant – Yuvraj Agrawal who owns adjacent shop namely 'Jagadamba Supari'. The Police took thorough search of the bags in which they found huge quantity of banned articles namely 'Gutka' pouches of various brands like 'Vimal', 'V One', 'Vaha Pan Masala', 'Dost Pan Masala' and 'Gutka Najar of worth of Rs. 63,900-. All the articles were seized

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under Panchanama and necessary samples were collected for chemical examination.

7. The first and foremost contention raised by Shri Mohta, learned counsel for the applicants is about non-applicability of the provisions of Section 328 of the Indian Penal Code. He argued that in view of the decision of the Supreme Court in case of ***Joseph Kurian Philip Jose Vs State of Kerala, (1994) 6 SCC 535***, mere possession of banned articles would not constitute an offence punishable under Section 328 of the Indian Penal Code. He would submit that in order to constitute the offence punishable under Section 328 of the Indian Penal Code, the prosecution has to prove that the substance in question was poison or any stupefying substance and secondly, the accused administered the substance or caused to administer with requisite intention to cause hurt. According to him, both essential ingredients are missing in the cases in hand, therefore the provisions of Section 328 of the Indian Penal Code cannot be made applicable. He has placed reliance on the order dated 09.08.2019 passed by this Court in Criminal Application (ABA) No. 351/2019 to contend that a similarly situated accused

has been protected by this Court by placing reliance on the aforesaid decision of the Supreme Court in case of Joseph Kurian Philip Jose (*supra*). Likewise, he has tendered two orders of this Court (Aurangabad Bench) passed in Anticipatory Bail Application Nos. 553/2020 and 515/2020, wherein this Court has exercised its discretion in granting pre-arrest protection to the accused charged under Section 328 of the Indian Penal Code.

8. Shri Mohta, learned counsel for the applicants would submit that Principal Bench of this Court in case of *Anand Chaurasia and another Vs. State of Maharashtra and others (Criminal Writ Petition No. 3607/2019)* has observed that the provisions of Section 328 of the Indian Penal Code cannot be invoked in such cases. He clarified that though the said order is stayed by the Supreme Court in Special Leave Petition (Criminal) Diary No(s) 8224/2020, however the effect is only to stay the operation of said order. To substantiate said contentions, he relied on the decision of the Supreme Court in case of *Shree Chamundi Mopeds Mopeds Ltd.*

Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, (1992) 3 SCC 1. Shri Mohta, learned counsel for the applicants has fairly conceded the position that there is no bar for prosecution under the offence punishable under the provisions of the Indian Penal Code, as the act is also made punishable under the Food Safety and Standards Act, in view of the decision of the Supreme Court in case of *State of Maharashtra and anr. Vs. Sayyed Hassan Sayyed Subhan & Ors., 2018 LawSuit(SC) 909* as relied by the State.

9. Per contra, learned APP has recorded his strong reservation to the submission laying proposition that in such cases, Section 328 of the Indian Penal Code cannot be made applicable. It is his contention that the said issue is pending for adjudication before the Supreme Court. There are various decisions in the line holding that Section 328 of the Indian Penal Code would apply. According to him, the issue is still open for debate and therefore, at this juncture, the said submission cannot be considered. To substantiate said submission, he relied on the decisions of this Court in

cases of Criminal Application (APL) No. 800/2020 (Ankush S/o Shivnarayan Jaiswal Vs. State of Mah. Thru. P.S.O., P.S. Imamwada, Nagpur and another) order decided 14.12.2020, Criminal Application No. 3194/2019 with Criminal Application No. 3423/2019 (Sandip S/o Kailasappa Lakade Vs. The State of Maharashtra and another) with another decided on 09.10.2019 and Criminal Application No. 4353/2016 (Vasim S/o Jamil Shaikh Vs. The State of Maharashtra and Anr.) with another decided on 29.11.2018.

10. True, there are divergent opinions on the issue of applicability of Section 328 of the Indian Penal Code, in such cases. It is not in dispute that the issue is pending for consideration before the Hon'ble Supreme Court. Almost, in all cases in context with the application under Section 482 of the Code of Criminal Procedure, relating to quashing of FIR, the issue was considered by this Court in different petitions by the Division Benches of this Court. I am mindeful of the fact that the matter in hand pertains to the entitlement of the applicants for pre-arrest bail. Yet, investigation is under way and thus, at this

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juncture in bail applications, it is not appropriate to consider the above submissions, of course, it will be an issue for consideration at the time of trial.

11. Reverting to the prosecution case, in Crime No. 408/2021, the Police conducted raid and apprehended co-accused Saiyyad Faijan and Niranjana Vasudeo along with banned tobacco articles of large quantity. During interrogation, they disclosed the names of applicants from whom the apprehended accused have purchased the 'Gutka' pouches. Likewise, in Crime No. 401/2021, apprehended accused Shaikh Salim disclosed that the concerned unnamed shop is owned by the applicant Yuvraj Agrawal and the goods therein are owned by him. Admittedly, on the date of raid itself, the names of applicants have been disclosed by co-accused as seller or owner of the seized goods.

12. There is no dispute that the sale and possession of sainted Gutka and flavoured tobacco are banned in the State of Maharashtra. Learned counsel for the applicants by disowning applicants' nexus with the concerned seizure, has strenuously argued about false implication. It is submitted that

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there are no criminal antecedents against applicant – Umesh Baraliya who is mere agriculturist. Though some prior offences were registered against rest of the applicants, however in those cases final reports have not been filed. It is submitted that neither the applicants found in possession of banned articles nor there are statements of independent witness to connect the applicants with the seizure.

13. The prosecution contended that the applicants are main culprits as they are dealers of banned products which are injurious for human consumption. The applicants' custody is necessary to trace the Manufacturer and the Godowns from where the goods were procured. Suspicion was expressed that banned articles might have smuggled from neighboring States in calculated manner. According to the State, there is big racket indulging into banned articles, of which applicants are participants. The Police wanted to interrogate applicants to know the details and to verify about the involvement of all other connected persons. It is stated that from call detail record, the Police got clue about the involvement of accused inter-se. Perusal of case diary indicates that

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there are statements to indicate the seizure of banned articles from co-accused and discloser of applicants' authorship. At this juncture, said discloser will certainly help the Investigating Agency at least to navigate towards the correct direction.

14. Having regard to the disastrous effect of consumption of tobacco, way back in the year 2012, the State of Maharashtra has initially banned sale and storage of tobacco products. Considering the need, the Maharashtra Food and Drugs Administration had re-imposed a ban on Manufacturer storage, destruction transport and sale of tobacco and allied products. The ban was imposed by the State after considering various study reports submitted by the Health Organization. Undeniably, the tobacco products are injurious to health. The World Health Organization (WHO) and several studies have proven beyond doubt that 'Pan Masala' causes serious health hazardous including mouth and throat cancer. According to the Global Adult Tobacco Survey (GATS), around 8.3 percent of people in Maharashtra are 'Gutka' users. 'Gutka' consumption not only causes oral cancer but has also been linked with development of oral Submucous

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Fibrosis. Considering its harmful effects, 'Gutka' and 'Pan Masala' were initially banned by the Maharashtra Government on 19.07.2012 and it was time to time renewed.

15. It is very unfortunate to note that despite prevailing ban from a decade, still the large number of cases are emerging in the State about seizure of 'Gutka' products. Sizable number of youths are mostly affected by free sale of 'Gutka'. It is noticed that there was fearless smuggling of 'Gutka' products from the neighboring States. Though the punishment for the offence was made more stringent, still in the quest of making quick money, 'Gutka' is freely made available at the cost of Society. Emphasis is on the point that it ruins the new generation which is a matter of great concern.

16. The submission that seized quantity of 'Gutka' is worth of lesser amount, has no place. The seizure of 'Gutka' pouches are more than hundreds in number meaning thereby obviously, they were purchased for sale. In such kind of cases, the investigation has to be done thoroughly to uproot the

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genesis. The applicants' names were disclosed by co-accused at the moment of their arrest. It is not out of place to state that, arrested co-accused are the mere handlers but the real culprits are yet to be booked on proper investigation. There are various areas in which the Police can get clue only on custodial interrogation of applicants. In such cases, particularly having large impact on the health and economy of poor strata of Society, the matter requires thorough probing. Grant of pre-arrest protection, in such cases may have impact to cut down further process of investigation. Amongst other, it is also one of the consideration for deciding pre-arrest bail is to see the social impact of the crime. The offence is having large repercussions on the overall health of Society. In order to reach to the truth, custodial interrogation is necessary therefore, it is not a fit case to exercise judicial discretion. In that view of the matter, bail applications stand rejected.

17. At this juncture, learned counsel Shri S. A. Mohta, appearing for the applicants, seeks to grant interim protection to approach the Hon'ble Supreme Court. Shri M. J. Khan, learned APP for the

respondent has objected to the request.

18. Initially, *ad-interim* protection was not granted to all applicants. Today, on scrutiny, it was held on merit that applicants are not entitled for pre-arrest bail. In the circumstances, I do not find any propriety to grant protection which was not in existence. Hence, request for grant of *ad interim* protection stands rejected.

JUDGE

Gohane.