

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

CRIMINAL APPLICATION (ABA) NO. 773/2021

(Gajanan S/o Ashok Agrawal Vs. State of Maharashtra)

And

CRIMINAL APPLICATION (ABA) NO. 774/2021

(Nasib Khan Hafiz Khan Pathan Vs. State of Maharashtra)

And

CRIMINAL APPLICATION (ABA) NO. 778/2021

(Wahid Khan S/o Jahagir Khan & anr. Vs. State of Maharashtra)

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

Court's or Judge's orders

ABA NO. 773/2021

Shri Anil Mardikar, Sr. Advocate Assisted by Shri S. D. Dewani,
Advocate for applicant.

Shri M. J. Khan, APP for non-applicant/State.

ABA NO. 774/2021

Shri K. H. Anandani, Advocate for applicant.

Shri M. J. Khan, APP for non-applicant/State.

ABA NO. 778/2021

Shri Anil Mardikar, Sr. Advocate Assisted by Shri V. Deshpande,
Advocate for applicants.

Shri M. J. Khan, APP for non-applicant/State.

CORAM : VINAY JOSHI, J.

DATED : 07.12.2021.

Heard

2. Criminal Bail Application (ABA) Nos. 773/2021 and 774/2021 arises out of Crime No. 435/2021 registered with the Police Station Murtizapur City, District Akola for offence punishable under Sections 188, 272, 273, 328 of the Indian Penal Code and Sections 26 and 59 of the Food Safety and Standards Act, 2006 whilst Criminal Application (ABA) No. 778/2021 arises out of crime No. 798/2021 registered with Police Station MIDC, Akola for offence punishable under Sections 188, 272, 273, 328 of the Indian Penal Code and Sections 26(2)(iv), 26(2)(e) and 59 of the Food Safety and

Standards Act, 2006. All applications arise out of seizure of huge quantity of 'Gutka' pouches. Since the submissions are on the same line, for the sake of convenience, they are taken together for disposal.

3. Criminal Application (ABA) No. 773/2021 is filed by applicant Gajanan Agrawal who is allegedly owner of contraband articles namely 'Gutka' seized on 25.10.2021 from a vehicle and Genning Godown. Criminal Application (ABA) No. 774/2021 is of one Nasib Khan relating to the same crime who allegedly stored said 'Gutka' in the concerned Godown. In another Criminal Application (ABA) No. 778/2021, applicant Wahid Khan has allegedly stored prohibited 'Gutka' articles in the Godown possessed by another applicant Amit Agrawal. None of the above applicant was apprehended at the time of seizure along with prohibited articles. However, on the basis of their nexus with seized material of huge quantity of contraband articles, they have been arrayed as an accused.

4. Rather it was the main thrust of the applicant that neither banned articles were seized from their possession nor they were found at the time of seizure. The applicants disowned their nexus with seized material by claiming innocence. It is argued that merely at the instance of alleged discloser by co-accused, they have been involved in the crime. According to the applicants, the statement of co-accused made while in custody is inadmissible. Much stradce has been given on the point that the provisions of Section 328 of the Indian Penal Code cannot be made applicable against the applicants. Besides that, certain usual grounds like innocence, false

implication, inadequacy of material have been canvassed.

5. In resistance, the State has filed reply affidavit contending the factual aspect as well as seriousness of crime. It is stated that in Crime No. 435/2021, a huge quantity of 'Gutka' stuffed in Godown worth Rs. 43,28,000/- has been seized. Likewise, in Crime No. 798/2021, 'Gutka' pouches worth Rs. 44,34,750/- were came to be seized. It is stated that during the course of investigation, it was transpired that either applicants have stored the prohibited goods or they are owner thereof. The complicity of applicants was revealed during the course of investigation. Use and consumption of 'Gutka' is prohibited in the State of Maharashtra. Offences are of anti-social nature, hence thorough investigation is necessary on various angles. Learned APP would submit that there are divergent judicial opinions on the point of applicability of Section 328 of the Indian Penal Code in like cases and the issue is pending before the Supreme Court. In short, considering the gravity, seriousness and hazardous effect of 'Gutka' consumption, bail applications are prayed to be rejected.

6. So far as the Crime No. 435/2021 is concerned, on receipt of secret information, the Police went near Hariya Ginning Godown behind Kohinoor Dhaba on National Highway No. 6, Murtijapur on 25.10.2021. It was noticed that some persons were loading the goods in one Tata-AC vehicle. On suspicion, the Police inspected the goods on which found 'Gutka' pouches of various brands worth Rs. 2,88,000/- stored in 18 gunny bags. On deeper inquiry, the Police have inspected the nearby Godown wherein found 63 gunny bags stuffed with

prohibited 'Gutka' articles total worth Rs. 43,28,000/-. In presence of Panch witnesses, the prohibited articles were seized and samples were collected for analysis. At the relevant time, during inquiry, it was informed that those prohibited goods were owned by applicant Gajanan Agrawal. On the basis of said material, the Police have registered crime and commenced the investigation.

7. In another crime No. 798/2021, on 27.10.2021, similarly, the Police received secret information about storage of prohibited 'Gutka' articles. Accordingly, the Police went to the Godown of Amit Agrawal. It was specific information that owner of Welcome Pan Shop namely Wahid Khan has stored 'Gutka' articles in Godown, hence the Police took search of Godown from where found huge quantity of 'Gutka' articles worth Rs. 44,34,750/-. Similarly, those articles were seized under Panchanama and samples were collected. On the basis of said information, crime was registered.

8. Much has been argued on the point of non-applicability of the provisions of Section 328 of the Indian Penal Code. By placing reliance on the decision in case of **Joseph Kurian Vs. State of Kerala, (1994) 6 SCC 325**, it has been argued that mere possession of banned articles would not constitute an offence punishable under Section 328 of the Indian Penal Code. It is submitted that the prosecution must prove by drawing reliable, cogent evidence with requisite *mens rea* to attract the essential ingredients of the offence. It was a case relating to adulterate liquor under the Abkari Act. Herein, the seized articles were 'Gutka' which itself is totally banned in the State of Maharashtra. It is a matter of trial to establish the

requisite *mens rea* in storage of prohibited articles.

9. On the same point, learned counsel for the applicants relied on the decision of the Supreme Court in case of **Dipakbhai Jagdischandra Patel Vs. State of Gujarat and another [Criminal Appeal No. 714/2019 [@ SLP (Criminal) No. 5415/2017]** decided on 24.04.2019 to impress that in order to constitute the offence, *mens rea* is essential ingredient. The said case relates to Sections 489-B and 489-C of the Indian Penal Code, meaning thereby, counterfeit of currency notes. In that connection, it has been observed that the accused must have reason to believe that the currency notes or bank notes are forged or counterfeit. Herein, the facts are different as the seized material 'Gutka' itself is banned, therefore, being distinct facts, no strength can be taken from said proposition of law.

10. Learned counsel for the applicants fairly conceded that the issue about applicability of the provisions of Section 328 of the Indian Penal Code in like cases is pending before the Supreme Court. However, they would submit that the Division Bench of this Court in case of **Anand Chaurasia and anotehr 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 invoke in such a cases. Admittedly, the said order is stayed by the Supreme Court. Besides that, learned counsel for the applicants relied on the another decision of the Division Bench of this Court in case of **Ganesh Pandurang Jadhao and another Vs. State of Maharashtra, 2016 Cri LJ 2401**, wherein a view was taken that possession of 'Gutka' does not amount

to administration of poison. Additionally two orders passed in **Anticipatory Bail Application No. 461/2020 (Satish S/o Prakash Jaiswal Vs. The State of Maharashtra)**, decided on 25.06.2020 and **Anticipatory Bail Application No. 944/2020 (Munjabhau Manchakrao Rokde Vs. The State of Maharashtra)** and other connected matters decided on 30.09.2021 by the Aurangabad Bench are pressed into service.

11. On the other hand, learned APP submitted that since issue involved is pending before the Supreme Court, reliance cannot be placed on above referred decisions. He would submit that there is another line of decisions of this Court holding that Section 328 of the Indian Penal Code would apply in such a cases. For this purpose, he relied on the two decisions of the Division Bench rendered by this Court in **Criminal Application No. 3194/2019 (Sandip S/o Kailasappa Lakade Vs. The State of Maharashtra)** decided on 09.10.2019 and **Criminal Application (APL) No. 800/2020 (Ankush S/o Shivnarayan Jaiswal Vs. State of Maharashtra)** decided on 14.12.2020. Besides that, the order passed by this Court in case of **Vinod Ramnath Gupta Vs. State of Maharashtra** decided on 06.11.2020 in **Criminal Application (ABA) (St) No. 2451/2020** and **Sagar Sadashiv Kore Vs. The State of Maharashtra in Anticipatory Bail Application No. 313/2021** decided on 08.02.2021 are produced to show the contrary view expressed by this Court. True, there are divergent opinions on the issue involved and the matter is subjudice. In the said scenario, I am dealing with the bail applications. it is not appropriate to consider the submissions at this stage since it was an issue for consideration at the time of trial.

12. There is no dispute that the sale and possession of sainted 'Gutka' and flavour tobacco are completely banned in the State of Maharashtra. Having regard to the disastrous effect and health hazardous, ban has been imposed throughout the State in the year 2012 and still it is prevailing. Day by day, cases of possession of banned articles having concern with the health of poor strata of the Society are on rise. The far reaching effect of the banned product and impact on the Society, is also one of the factor for consideration.

13. In Crime No. 435/2021, the applicant Gajana Agrawal (Criminal Application (ABA) No. 773/2021) and applicant Nasib Khan (Criminal Bail Application (ABA) No. 774/2021) are seeking pre-arrest protection. The name of applicant Gajana Agrawal has been disclosed as owner of goods at the time of registration of crime itself. Though it is argued that the name of applicant Nasib Khan was not mentioned in the FIR, I am not impressed by said submission. Perusal of case diary indicates that said Godown from where the goods were seized was owned by one Hariya and taken on lease by applicant Nasib Khan of which rent document dated 12.03.2021 has been collected during the course of investigation. Non-mentioning of name in FIR does not give any right to claim bail but it depends upon facts and circumstances of each case. Most of the time, the crime is registered on the basis of initial information, but during the course of investigation, complicity of accused would be revealed.

14. Learned APP would submit that Gajanan Agrawal i.e. owner of seized goods was in constant touch with

accused Nasib Khan for which call details are produced. As per the prosecution case, raid was conducted on 25.10.2021 whilst there appears to be various calls in between them preceding to the date of seizure. *Prima facie*, the said material at-least indicate a link between both of them. *Pirma facie*, the material collected during the course of investigation indicates that the concerned Godown was taken on rent by applicant Nasib Khan in which, he has stored huge quantity of contraband articles owned by applicant Gajanan Agrawal. Co-accused who are arrested on the spot are rather labourers or handler, however unless the applicants' custodial interrogation is made, there would be no trace about the manufacturer, distributor, purchaser etc.

15. In case of applicants Wahid Khan and Amit Agrawal are concerned, First Information Report itself indicates that the applicant Wahid Khan has stored huge quantity of contraband articles namely 'Gutka' in the Godown of Amit Agrawal. The secret information itself spells out that applicant Wahid Khan was running Welcome Pan Shop, who has stored goods in the Godown of Amit Agrawal. Though it is argued that case of Amit Agrawal lies on the distant footing, however the investigation paper reveals that the Godown was taken on rent by Amit Agrawal from one Shri Khetanmal. Therefore, it cannot be said that Amit Agrawal who was in the actual possession of Godown, was totally noway concern with the storage of goods. *Prima facie*, it is evident that both of them co-jointly stored huge quantity of 'Gutka' and sainted tobacco articles which requires thorough investigation.

16. 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.

17. The seizure of 'Gutka' in large quantity itself postulates that they were not for personal consumption but for sale. In order to reach to the genesis, thorough investigation is necessary. Grant of pre-arrest protection would cut down the further process of investigation. The offence is having larger impact on the health of Society. Considering all these circumstances, I do not find that these are fit cases where judicial discretion can be exercised.

18. In view of the above, all bail applications stand rejected and disposed of.

JUDGE

Gohane

JITENDRA
BHARAT
GOHANE
Digitally signed
by JITENDRA
BHARAT
GOHANE
Date: 2021.12.07
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