

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

CRIMINAL APPLICATION (BA) NO.210/2022

- APPLICANTS :**
1. Sheikh Abrar Sheikh Gaffar,
aged about 47 years, Occ – driver/labour,
R/o Mominpura, Arni, Tq. Arni,
Distt. Yavatmal.
 2. Bhimrao S/o Madhukar Uike,
aged about 38 years, occ- cleaner/labour,
R/o Gandhinagar, Arni, Tq. Arni,
Distt. Yavatmal.

...VERSUS...

- RESPONDENT :**
- State of Maharashtra through its P.S.O.
P.S. Parwa, Tq. Ghatanji, Distt. Yavatmal.

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 applicants
Mrs. S.Z. Haider, APP for respondent

CORAM : AVINASH G. GHAROTE, J.

Order reserved on : 22/03/2022
Order pronounced on : 13/04/2022

O R D E R

1. Heard Shri Mohta, learned Counsel for the applicants and Mrs. Haider, learned Additional Public Prosecutor for the respondent.

2. The applicants are arrayed for the offence punishable under Sections 188, 272, 273, 328 r/w Section 34 of IPC read with Sections 26 (2) (i), 27 (2) (e), 30 (2) (a) and 59 of the Food Safety and Standards Act, 2006 (for short “the FSS Act”, hereinafter) vide Crime No.0488/2021 dated 20/11/2021. The applicants have been arrested on 20/11/2021. The charge-sheet has been filed on 19/01/2022 vide R.C.C. No.41/2022.

3. Mr. Mohta, learned Counsel for the applicants submits, that the allegations against the applicants are false and they have been falsely implicated. He further, by inviting my attention to Section 11 of IPC submits, that the word “person” has been defined therein and so also the word “public” has been defined in Section 12 of IPC. Inviting my attention to Chapter XVI of IPC and specifically Section 301 of IPC, it is submitted that the word used therein, is “any person”, which is also the word used in Section 328 of IPC and therefore, before imposing the said section, it has to be demonstrated, that such a person was in existence. Further inviting my attention to the form of charge under Section 328 of IPC, it is contended that it contemplates an individual person and not the public at large. Reliance is placed upon ***Madhukar Damu Patil Vs. State of Maharashtra, 1997 (Supp) BCR 132 = 1997 (1) Mh.L.J. 581*** (para 18), which holds that for the purpose of the offence under Section 328 of IPC to be

complete, two ingredients are necessary (i) some person or persons should administer or causes to be taken by any person, any poison or any stupefying, intoxicating or unwholesome drug or other thing (ii) the intention of the person or persons mentioned in (i) should be to cause hurt to the person concerned or should be to commit or to facilitate the commission of an offence or there should be knowledge on the part of the person or persons that the result of his act or their act was likely to cause hurt to the concerned person and both these elements should exist conjunctively, then and then alone would the offence under Section 328 of IPC be complete and the person/s as the case may be, would be guilty of an offence (this was a case in appeal after the Trial Court had convicted the accused) and ***Joseph Kurian Philip Jose Vs. State of Kerala, (1994) 6 SCC 535*** (para 8 and 10) [this was also a case on merits].

4. He further submits, that considering the provisions of Section 89 of the FSS Act, the same gives an overriding effect to the provisions of the FSS Act and therefore, the invocation of Section 328 of IPC would be prohibited, for which, reliance is placed upon ***Sharat Babu Digumarti Vs. Government of NCT of Delhi, AIR 2017 SC 150*** (para 32) to contend that since the FSS Act was a special statute having an overriding effect, the same would prevail and the provisions of IPC would not be attracted. It is further submitted that

Section 59 of FSS Act, is equivalent to Section 328 of IPC and therefore, any alleged violation of Section 59 of FSS Act, in view of Section 89 of FSS Act, would preclude the applicability of Section 328 of IPC.

5. He further submits, that considering the role of the applicants, which was of driving and occupying a Tata Sumo vehicle, from which nothing was found; there were no lab tests reports; no sanction, the main accused were already released on bail by the learned Sessions Court itself on 10/12/2021 (pg.26), the applicants also are entitled to be released on bail.

6. Mrs. Haider, learned Additional Public Prosecutor for the respondent/State opposes the application and contends that the applicants are not as innocent as is being portrayed. It is submitted that the applicants were acting as an advanced piloting team, for the vehicle, in which the contraband was being transported and thus, were equally involved as members of a gang, indulging in transport of the contraband in the State, in spite of being aware that its sale, transport etc. was prohibited in the State and therefore, the application needs to be rejected.

7. The role of the applicant, in the present matter, needs to be considered, for the purpose of deciding whether

they are entitled to bail or not. Though the reply of the State mentions that the applicants were in the piloting vehicle i.e. Tata Sumo, however, the FIR indicates otherwise. In the instant case, on 20/11/2021, the police party, accosted one Bolero pick-up MH-31-J-951, which was transporting crates of vegetables, and upon a search it was found that these crates were containing the prohibited Pan Masala pouches. The said incident had taken place on Umari Kapeswar to Sadoba Saoli road within the jurisdiction of Police Station Parwa. Another vehicle, TATA Sumo bearing No. MH-03-Z-2916 was also seized on the ground, that it was conducting a reconnaissance in front, with an intention to warn the persons travelling in the Bolero pick-up, which also has been seized.

8. The FIR (pg.44) indicates that the applicant no.1 was driving the Bolero pick-up, while the applicant no.2 was accompanying him as a loader. This position is also reflected from the order dated 10/12/2021, passed by the learned Sessions Judge in Criminal Bail Application No.415/2021, whereby the bail application of the applicants came to be rejected. The contraband was found in this Bolero pick-up inside vegetable crates, under the vegetables from which it was seized, which indicates the direct involvement of these persons in transporting the contraband, which is banned in the State of Maharashtra. A judicial notice of the fact that though the transportation, sale, possession of the material has been

banned in the State, it is found in every nook and corner of each town and village of the State, ought to be taken, to appreciate the widespread network of the persons, illegally bringing the contraband inside the State. The provisions of Section 328 of IPC, have to be construed in the background of the facts of the present case and the change in the Society, technology and has to be interpreted accordingly. However, since the question of interpretation of Section 328 read with Sections 11, 12 and 301 of IPC is already before the Hon'ble Apex Court, it would be improper for me to dilate upon it. Suffice it to say that at this stage of considering whether to grant bail or not, the actions on part of the applicants, constrain me to hold otherwise.

9. The contention that Section 328 of IPC is equivalent to Section 59 of the FSS Act is clearly misplaced, which would be apparent from a bare comparison of the aforesaid provisions.

<i>Section 328 of IPC</i>	<i>Section 59 of FSS Act</i>
<i>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</i>	<i>Punishment for unsafe food.-Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable,-</i>

<i>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 extend to ten years, and shall also be liable to fine.</i>	<i>(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;</i> <i>(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;</i> <i>(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which may extend to five lakh rupees;</i> <i>(iv) where such failure or contravention results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees</i>
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‘Food’ is defined in Section 3 (j) of the FSS Act and does not include poison etc. as contemplated by Section 328 of IPC, due to which the contention based upon Section 59 of FSS Act is clearly unsustainable.

10. The role of the persons driving the Tata Sumo (the reconnaissance vehicle) and that of the applicants is totally different, considering which, no benefit of them having being released on bail can be availed of by the present applicants.

11. Thus, considering the role of the applicants and the larger public interest, no case for bail is made out. The criminal application is rejected.

(AVINASH G. GHAROTE, J.)

Wadkar