

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

ANTICIPATORY BAIL APPLICATION NO.207 OF 2024

Mohammed Sadiq Adam Shaikh Applicant

versus

State of Maharashtra Respondent

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- Mr. Saurabh Butala i/b. Meghashyam Kocharekar, Advocate for Applicant.
- Dr. Birendra Saraf (Advocate General) a/w Smt. M. H. Mhatre a/w Ms. Mahalakshmi Ganapathy, APP for the State/Respondent.

**CORAM : SARANG V. KOTWAL, J.
DATE : 30th JANUARY, 2024**

P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No.288/2023, dated 02/10/2023, registered with Kankavali Police Station, Sindhudurg, under sections 328 of the Indian Penal Code and under sections 26(2)(iv), 27(3)(e), 30(2)(a) and 59 of the Food Safety and Standards Act, 2006.

2. Heard Mr. Saurabh Butala, learned counsel for the Applicant and Dr. Birendra Saraf, learned Advocate General for the State.

3. The FIR is lodged by PC Santosh Shinde. He has stated that, on 02/10/2023, when they were patrolling within the jurisdiction of Kankavali police station, PSI Patil received a secret information that one tempo bearing No.MH-07-X-0305 was transporting Gutkha on Goa-Mumbai Highway and was proceeding towards Mumbai. After receiving that information, the police arranged to conduct a raid. They called two Panchas for that purpose. At about 04.30 p.m., they saw the said tempo travelling towards Mumbai. The vehicle was stopped. There was only a driver in the tempo. There was no one else. The tempo was searched. It was found that the vehicle was transporting the following articles :

- (1) 19 brown bags containing 50 packets of Panmasala worth Rs.9,50,000/-.
- (2) 6 brown bags containing Tobacco worth Rs.2,20,500/-.

- (3) 4 brown bags containing Tobacco worth Rs.1,66,400/-.
- (4) 3 brown bags containing Panmasala worth Rs.1,78,200/-.

4. Thus, the total articles were worth around Rs.15,00,000/-. The FIR mentions that all these articles were prohibited food articles. Some samples were taken and the articles were seized. The driver informed the police that those banned articles were belonging to the present Applicant. On this basis, the FIR is lodged.

5. The Applicant is apprehending his arrest and therefore he has preferred this application u/s 438 of Cr.PC.

6. Learned counsel for the Applicant submitted that the Applicant has not committed any non-bailable offence and yet the police are trying to take him in custody. He submitted that section 328 of the IPC is the only non-bailable provision applied at the time of registration of the FIR. He submitted that section 328 is not attracted at all. In support of his contention, learned counsel relied on the judgment of a Single Judge Bench in the case of *Madhukar Damu Patil Vs. State of Maharashtra*, as

reported in 1997 (1) Mh.L.J. 581 and a Division Bench judgment of this Court in the case of *Nilesh Vs. State of Maharashtra, as reported in 2020 SCC onLine Bom. 11669*.

7. He submitted that in many cases Anticipatory Bail Applications with reference to section 328 of IPC were rejected by different benches of this Court. Those orders are challenged before the Hon'ble Supreme Court and in many such matters, the accused in those cases are protected by ad-interim relief.
8. On the other hand, learned Advocate General appearing for the State of Maharashtra submitted that section 328 of IPC is squarely applicable in this case. He relied on the various judgments dealing with this particular aspect. He submitted that apart from section 328 of the IPC, the Court may also consider that section 511 of IPC can also be invoked. He further submitted that the investigation is at a very preliminary stage. The investigating agency has to trace the source of those banned food articles including the manufacturers, suppliers, sellers and

shop keepers. The investigating agency has to find the chain of this entire transaction. He submitted that the arrested accused and the present Applicant do not have any documents to show that those articles were legally purchased by them from some person. Therefore, the investigating agency has to find out whether the seized articles form a part of any stolen or misappropriated property as defined u/s 410 of the IPC as well as u/s 403 r/w Explanation 2 of section 403 of the IPC. He submitted that this is a serious offence and it needs to be dealt with strictly to prevent spread of these dangerous food articles in the society. He submitted that there is urgent necessity of the Applicant's custodial interrogation, as otherwise the vital links will be lost and the other culprits will not be found. This chain needs to be broken immediately and therefore this application be decided at this stage itself. He further submitted that these banned food articles are liable to be confiscated and yet the accused were trying to misappropriate them. He referred to various judgments which shall be considered in the following discussion.

9. As submitted by both the parties, certain sections of IPC are important which are as follows:

Section 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 extend to ten years, and shall also be liable to fine.

Classification of offence – The offence under this section is cognizable, non-bailable, non-compoundable and triable by Court of Session.

Section 511 - Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.

Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the

offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.

Classification of offence – The offence under this section is, according as the offence is cognizable or non-cognizable; according as the offence attempted is bailable or non-bailable, non-compoundable and triable by the Court by which the offence attempted is triable.

Section 410 - Stolen property.

Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without [India]]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Section 411 - Dishonestly receiving stolen property.

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Classification of offence – The offence under this section is cognizable, non-bailable, compoundable and triable by any Magistrate.

Section 403 - Dishonest misappropriation of property.

Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation with the meaning of this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the

owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

10. The main argument revolves around the applicability of section 328 of the IPC. The main contention is that the Applicant or the arrested accused had not caused anybody to consume those food articles. They had not administered those articles and therefore section 328 is not applicable.

11. Mr. Butala relied on the case of Madhukar Patil (supra). However, in that case, the facts were completely different. The intention of the accused in that case was to commit theft and in that act they had given some sugarcane juice causing unconsciousness to the victim, facilitating the commission of theft. In that context, a Single Judge bench of this Court has observed that the main ingredients of section 328 were that some person should administer or cause to be taken any such substance and the intention of the person should be to cause hurt to the person concerned. In that case the intention was to commit theft and therefore the benefit was given to the

accused. The intention of the accused in that case was not to cause hurt but to commit theft. The facts of that case are completely different. As far as Mr. Butala's reliance on Nilesh's judgment (supra) is concerned, the same issue is dealt with by various Division Bench judgments as well as Single Bench judgments of this Court.

12. Learned Advocate General relied on the judgment of a Single Judge Bench of this Court at Aurangabad bench in the case of *Umraosingh Jhulalsingh Patil Vs. State of Maharashtra decided on 10/01/2017 in Criminal Writ Petition No.830 of 2016*. In that case section 328 was considered in a similar set of facts. It was held that section 328 of IPC was applicable. This judgment has also referred to the provisions of section 511 of IPC.

13. Learned Advocate General then referred to a judgment of the Division Bench of this Court at Aurangabad bench in the case of *Vasim s/o Jamil Shaikh Vs. The State of Maharashtra*

and Anr., decided on 29/11/2018 in Criminal Application No.4353 of 2016. The important observation in that judgment is in paragraph No.9 which reads thus:

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, Uttar 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.”

14. This particular judgment in Vasim’s case (supra) was considered by another Division Bench of this Court in the case of ***Anand Ramdhani Chaurasia & Anr. Vs. State of Maharashtra***, as reported in ***2019 SCC Online Bom. 1857***. In that judgment section 328 of the IPC was interpreted and in paragraphs Nos.26 and 28 it was observed that Vasim’s judgment (supra) was per incuriam.

15. The State of Maharashtra challenged this Division Bench's judgment before the Hon'ble Supreme Court and a three Judge's Bench of the Hon'ble Supreme Court passed the following order :

- “(1) Delay condoned
- (2) Issue notice.
- (3) Until further orders, there shall be a stay of operation of the impugned judgment and order passed by the High Court of Judicature At Bombay.”

This order is reported in *2020 SCC OnLine SC 1422* in the case of *State of Maharashtra and others Vs. Anand Ramdhani Chaurasia and another.*

16. Thus, in effect Vasim's judgment has stood revived and all the observations made in respect of section 328 of IPC, in Vasim's judgment stood revived. This aspect was considered by this Court in the order dated 08/02/2021 passed in *Anticipatory Bail Application No.313 of 2021* in the case of *Sagar Sadashiv*

Kore Vs. The State of Maharashtra. This order made reference to various other orders as well and in particular the order passed by the Single Judge bench of this Court in the case of ***Vinod Ramnath Gupta Vs. The State of Maharashtra in Anticipatory Bail Application (ST) No.2451 of 2020.***

17. Paragraph Nos.10, 11 and 12 of the Vinod Gupta's case (supra) are important, which read thus:

“10. Be that as it may, section 328 of the IPC is attracted where the substance in question is poison or any stupefying, intoxicating or unwholesome drug or other thing is administered or caused to be taken by any person with an intent to cause hurt or with an intent to commit or to facilitate the commission of an offence or intent it to be likely that he will thereby cause hurt, becomes punishable under the provision. Therefore, first part of Section 328 contemplates a direct involvement of a person whereas, second part suggest any indirect method for causing one of the substances to be taken by any person.

Expression “causing” involves some action. “Causation” means the action of causing something. “Intervening causation” means an event that comes between the initial event in sequence and the end result. Manufacturing “unsafe food” is initial event. Causing its movement by transporting or storing it with an intent to reach to end user are the events in sequence caused by active participation (positive act) of intermediate agencies or persons. Thus, all such events involving active participation of persons at each stage, is relevant here. A person at end is a ‘consumer’ to whom “unsafe food” is sold, knowing well that its consummation would cause hurt to him. Therefore, persons involved in manufacturing “unsafe food”; causing its movement to market or storing it with intent to sell it, either himself or through other persons, while prohibitory ‘order’ promulgated under Section 30 of the F.S.S. Act is in force, in my opinion, such all persons, under express or implied authority either individually or otherwise, “causes person to take” unsafe food with intent to cause hurt. It is ‘indirect causation’.

11. The facts of the case show, substantial quantity of unsafe food has been recovered by the State from the co-accused, who were causing its movement at the instance of the applicants and therefore it cannot be said it was for personal use of the applicants. The common course of natural events, obviously suggest, a huge quantity of the “unsafe food articles” seized was being transported or moved to market, with in intent to sell it, while prohibition ‘order’ was/is in force knowing well, it contains poisonous or unhealthy substance. Abundant research material that are available have established beyond any doubt that tobacco or nicotine have deleterious effect on the human body. That is the reason, why manufacturing and sale of Pan Parag, Areca Nut or Supari which causes oral cancer, throat cancer, liver cancer and diseases like hypertension, cardio-vascular diseases are prohibited in the State of Maharashtra. In fact, Commissioner of Food Safety has notified prohibitory order under Section 30 of the F.S.S. Act, 2006. Therefore while prohibitory order is promulgated is in force, a person who manufactures and/ or stores, substantial quantity of unsafe food and/ or causes

its movement from manufacturing unit to market for sell, it is to be presumed that he caused the movement with intent to sell it, knowing fully well that its consumption is unhealthy and would cause the harmful effects on health like cancer, hypertension etc.

12. Thus the manufacturing unsafe food articles, moving these goods from the manufacturing unit to market for its sale is an event and that any action in chain of circumstances which foreseeably leads to and facilitates the sale of food articles is further event may be said to be a cause of that event to bring the action within the expression', "causes to be taken by a person", any poison with intent to cause hurt to such person, in terms Section 328 of the IPC. In my view, the offence under Section 328 of IPC, essentially is not causing someone(another person) else to do prohibited act but 'causing' a person to consume food articles knowing well that its consumption would hurt such person. Even otherwise in the proceeding like in hand where investigation is at initial stage, and the relevant material is yet to be collected; it may not be appropriate to hold that FIR

does not make out an offence under Section 328 of IPC. In the consideration of facts of the case, I am not inclined to grant pre-arrest protection to the applicants. Applications are rejected. Interim pre-arrest protection granted is vacated.”

18. Both these orders were then considered in a group of matters by another Single Judge Bench of this Court in *Anticipatory Bail Application No.1405 of 2021* in the case of *Pathan Shafi Khan Rahemat Khan Vs. The State of Maharashtra* and other group of matters.

19. Thus, this is a consistent stand taken by different benches of this Court holding that section 328 of IPC was attracted in the similar set of facts. The Nilesh’s judgment (supra) cited by the learned counsel for the Applicant does not take into account the fact that Anand Chaurasia’s case was stayed by the Hon’ble Supreme Court. The reasons in Nilesh’s Judgment (supra) are based on Anand Chaurasia’s case. Therefore, in view of the discussion since Vasim’s case (supra) has stood revived, Nilesh’s judgment is not applicable.

20. The issue undoubtedly is of great public importance. A reference needs to be made to two more judgments highlighting the necessity to curb the activities regarding manufacturing, transport, sale etc. of these products. Those two judgments are as follows:

(i) E. Sivakumar Vs. Union of India and others, as reported in (2018) 7 Supreme Court Cases 365.

(ii) Anbazhagan Member of Legislative Assembly Chepauk Vs. The Union of India, as reported in 2018 SCC Online Madras 1231.

21. In E. Sivakumar's case the Hon'ble Supreme Court affirmed Anbazhagan's judgment. The Hon'ble Supreme Court observed that the High Court had cogitated over all the issues exhaustively and being fully satisfied about the necessity to ensure fair investigation of the crime in question, issued a writ of mandamus to transfer the investigation to CBI.

22. Therefore, the observations in Anbazhagan's case are very important. The Division Bench of the Madras High Court has extensively dealt with the provisions of the FSS Act and made certain observations. Those observations are made in the following paragraphs :

“4. According to the petitioner, India enjoys the dubious distinction of being the oral cancer capital of the world due to the high use of smoke free tobacco or chewable tobacco. The use of chewable tobacco is particularly prevalent amongst the younger generation and their addiction to it ruins their health and even causes death at a young age. The petitioner submitted that Gutkha and Tobacco are highly addictive and is one of the leading causes of oral cancer and other periodontal ailments.

14. It is the case of the petitioner that notwithstanding the provisions of the Food Safety Act and the 2011 Regulations, as well as the orders of the Supreme Court, as also the

gazette notifications dated 23.5.2015, 23.5.2016 and 23.5.2017 gutkha is being sold with impunity in the open market.

92. The illegal manufacture, distribution and sale of gutkha and other forms of chewable tobacco is an organized crime which has inter- state ramifications. It involves breach of Central Laws, including Central Excise Laws and the Income Tax Laws, apart from the Food Safety Act, which in itself is a Central Law, which the Central Government and the State Governments are obliged to enforce.
98. Notifications issued by the Central Government under Section 3 of the DSPE Act enable the CBI to enquire and investigate into offences punishable under different provisions of the Indian Penal Code, the Central Excise Act, the Income Tax Act, the Prevention of Corruption Act and the Prevention of Food Adulteration Act, 1954.
101. In our considered view, the handing over of investigation to CBI only ensures a co-ordinated investigation, particularly in specified categories

of serious offences having ramifications in more than one State. It neither casts any aspersion on the mode and manner of investigation conducted by the State Police or the State Vigilance authorities nor does it necessarily reflect any finding even prima facie of interference of any constitutional authority or any high official of the State Government in such investigation.

142. Investigation by a centralized agency like the CBI would be more comprehensive and cover all aspects of the illegal manufacture, import, supply, distribution and sale of banned chewable tobacco items, including the detection of all those involved in such illegal import, manufacture, supply, distribution and sale, as also the detection of corruption and complicity of public servants and/or government servants in this regard. As observed above, there is no conflict between CBI investigation and investigation by the State machinery. Investigation can be carried out more effectively with the CBI and the Vigilance Department working in cooperation.

143. The underground gutkha business is a crime against society which needs to be curbed. We, therefore, deem it appropriate to direct the CBI to investigate into all aspects of the offence of illegal manufacture, import, supply, distribution and sale of gutkha and other forms of chewable tobacco which are banned in the State of Tamil Nadu and the Union Territory of Puducherry, including detection of and action against those involved in the offence as aforesaid, whether directly or indirectly, by aiding abetting the offence or interfering with attempts to curb the offence.
144. This order is, in our view, not only imperative to stop the menace of the surreptitious sale of gutkha and chewable forms of tobacco which pose a health hazard to people in general and in particular the youth and to punish the guilty, but also to instil faith of the people in the fairness and impartiality of the investigation. We see no reason for the State to view the entrustment of investigation to the CBI as an affront to the efficiency or efficacy of its own investigation

system and we make it absolutely clear that this direction is not to be construed as any definite finding of this Court of the complicity of any constitutional functionary or of any specific official of the State Government.”

Though this Judgment refers to transfer of investigation to C.B.I. in that particular case, the observations regarding seriousness of crime, necessity of thorough investigation, deep rooted interstate chains are extremely important and relevant for considering the necessity of custodial interrogation.

23. All these paragraphs highlight the importance of the issue and the necessity of extensive investigation to curb these activities. These observations are approved by the Hon’ble Supreme Court in E. Sivakumar’s case.

24. Section 328 of IPC is non-bailable, section 511 of IPC in the context of section 328 of IPC is also non-bailable. The banned food articles are liable to be confiscated by the State. Yet they were being misappropriated by selling them. As submitted

by the learned Advocate General, the source of these goods, whether it is a stolen property, who is the receiver of stolen property is being investigated. There is angle of deep rooted conspiracy as well. All these offences, though not specifically mentioned in the proforma of the FIR; are seen from the facts of the present case. This needs immediate investigation as submitted by the learned Advocate General.

25. Considering the above discussion, it is quite clear that the investigation into this offence needs to be carried out with utmost seriousness and sincerity. In the present case, therefore the custodial interrogation of the Applicant is absolutely necessary.

26. In this view of the matter, protection u/s 438 of Cr.P.C. cannot be granted to the Applicant. The application is therefore rejected.

(SARANG V. KOTWAL, J.)