IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3607 OF 2019

1. Anand Ramdhani Chaurasia,]
R/o. Ramadhar Chawl, Narsipada,]
Akurli Road, Hanuman Nagar,]
Kandivali (E), Mumbai – 400 101.]

2. Vijay Banarasi Chaurasia,]
R/o. Ramadhar Chawl, Narsipada,]
Akurli Road, Hanuman Nagar,]
Kandivli (E), Mumbai – 400 101.] … Petitioners

Versus

1. The State of Maharashtra,]
through Public Prosecutor Office,]
Samta Nagar Police Station, Kandivali]
(East), Mumbai.]

2. The State of Maharashtra]
through the Principal Secretary,]
Home Department, Mumbai – 400]
032.]

3. The Director General of Police,]
Maharashtra State, Mumbai.]

4. Suresh Posane Torab,]
Food Safety Officer, Food & Drugs]
Department, 351, Madhusudan]
Kalekar Marg, Bandra (E), Mumbai –]
400 051.] … Respondents

AJN

Mr. Abad Ponda with Dr. Abhinav Chandrachud, Mr. Subhash Jadhav, Mr. Chandansingh Shekhawat i/b M/s. Parinam Law Associates for the Petitioners.

Mr. Deepak Thakare, Public Prosecutor with Ms. S.D. Shinde, A.P.P. for the State.

CORAM : SHRI RANJIT MORE &
SMT. BHARATI DANGRE, JJ.

RESERVED ON : 8th AUGUST, 2019

PRONOUNCED ON: 13th SEPTEMBER, 2019.

JUDGMENT:- [Per: Smt. Bharati Dangre, J.]

1. The tobacco epidemic is one of the biggest public health threat the world ever faced, killing 8 million and the Report of the World Health Organization dated 26/07/2019 brings out that more than 7 million of those deaths, are the result of the direct use of tobacco. Good monitoring tracks the extent and character of this tobacco epidemic and indicates how to evolve best policies to deal with this menace. The steps taken throughout the world in the form of bans imposed on tobacco advertisement and promotion, pictorial health warning and the high rate of taxes dealing with illicit trade of tobacco, has yielded some positive results.

2. The scale of human and economic tragedy that tobacco

imposed is shocking. In 2003, the World Health Organization member states universally adopted the WHO Framework Convention on Tobacco Control ("**WHO FCTC**"), which came into force in 2005. It has currently 185 parties covering more than 90% of the world population. There is a fundamental and irreconcilable conflict between the tobacco industries' interest on the one hand and public health industries' interest on the other hand.

The present writ petition is an illustration depicting such a conflict in the form of transportation and sale of Gutka and Pan Masala, the former being a chewing tobacco, preparation made of crushed areca nut, tobacco, catechu, paraffin wax, slaked lime and sweet or savory flavourings. It contains carcinogens, which is identified to be a cause for oral cancer and other severe negative health effects. Pan Masala on the other hand, is a combination of betel leaf and areca nut and may contain tobacco. Both the aforesaid products are highly addictive in nature.

3. The primary duty of every State in terms of the Directive Principles of the State Policy as enshrined in Article 47 of the Constitution being to improve public health which implicitly includes the concept of provision of measures to be taken for prevention of deterioration of citizen's health. The Food Safety Commissioner of Food & Drug Administration, Government of Maharashtra in exercise of his power to be discharged in the form

of duty under Section 30(2)(a) of the Food Safety & Standards Act, 2006 (hereinafter referred to as "**the FSS Act, 2006**") in order to prohibit in the interest of public health, has issued orders from time to time in exercise of said power and has identified tobacco as one of such article of food listed at Sr.No.40 in table under sub-regulation 2.3.1 and has made tobacco, whether flavoured, scented or mixed with other ingredients such as nicotine, menthol, etc. and in terms of the Food Safety & Standards (Prohibition & Restriction on Sales) Regulations 2011 has imposed a complete prohibition for a period of one year, on the manufacture, storage, distribution, transport or sale of tobacco in whatsoever form and name being available in the market. The regime in which the present writ petition emanated had the existence of order issued by the Commissioner of Food Safety on 20/07/2018 and here we deem it appropriate to note that such notifications have been issued in the past prior to the present notification.

4. The Petitioners, who are arraigned as accused in FIR bearing No.87 of 2019 registered with Samta Nagar Police Station on 02/03/2019 for the offences punishable under Sections 179, 188, 273 and 328 of the IPC read with Section 26(2)(p) read with Section 3(1)(zz)(A) read with Section 59 along with Section 26(2)(4) read with Section 27(3)(d) and Section 27(3)(E) of the FSS Act, 2006 have approached this

Court for quashing and setting aside the said FIR.

The FIR is registered on the basis of complaint received from the Food Safety Officer i.e. Respondent No.4 recording that when the residents and godown of the Petitioners was raided, Gutka and Pan Masala pouches were found to be stored and this storage contravened to the Notification dated 20/07/2018 issued by the Food Safety Commissioner, State of Maharashtra. Pursuant to the registration of the FIR, the Petitioners came to be arrested on 02/03/2019 and were released on bail on 05/03/2019. It is in the backdrop of this limited facts, the petition poses a challenge to the action initiated against them by registering the FIR and invoking and applying Section 328 and Section 188 of the IPC.

5. The arguments advanced by Mr. Ponda, the learned counsel appearing for the Petitioners is enlaced around the Food Safety & Standards Act, 2006 which according to him is a complete Code in itself empowering the Food Safety Officer to take necessary steps and regulate the manufacture, storage, distribution and sale and import of food products to ensure that safe and wholesome food is available for human consumption. Mr. Ponda has invited our attention to the gamut of the litigation revolving around the FSS Act and the provisions of the IPC, in specific, Section 328 and Section 188 of the IPC and would submit that in the State of

Maharashtra, several complaints came to be lodged by the Food Safety Officers resulting into registration of FIRs for the offences punishable under the provisions of Sections 26 and 30 of the FSS Act and under the provisions viz. 188, 272, 273 and 328 of the IPC. He has invited our attention to the judgment of the Division Bench of this Court in the case of ***Ganesh Pandurang Jadhao v. State of Maharashtra reported in 2016 Cri. L.J. 2401*** and the judgment of the Apex Court in the case of ***State of Maharashtra & Anr. v. Sayyed Hassan Sayyed Subhan & Ors***. reported in ***2018 AIR (SC) 5348*** where the Apex Court after recording that there is no bar to a trial or conviction of offender under the two different enactment but limiting the bar to the punishment to be imposed on the offender, had remanded the matters to the High Court in respect of the issues as to whether the offences under Sections 188 , 272, 273 and 328 of the IPC are made out in the FIR which were subject matter of the cases. Mr. Ponda has thus invited our attention to the Division Bench judgment delivered at Aurangabad dealing with the issue as regards the applicability and invocation of Sections 272, 273 and 328 of the IPC in case of ***Vasim s/o. Jamil Shaikh v. State of Maharashtra & Anr. (Order dated 29/11/2018 in Criminal Application No.4353 of 2016)*** and several other orders passed by the Division Benches and Single Benches.

6. The leanred counsel at the outset submits that none of the

aforesaid judgments take into account the observations of the Apex Court in the case of ***Joseph Kurian Philip Jose v. State of Kerala reported in (1994) 6 SCC 535*** in which the Apex Court had an occasion to deal with Section 328 of the IPC in the backdrop of the Kerala Abkari Act. Mr. Ponda would submit that the invocation and applicability of the provisions of IPC along with the provisions of FSS Act is a possibility but he would canvass before us that the ingredients of the two sections must be made out in order to invoke and apply Section 328 and Section 188 of the IPC to the Petitioners, who have been arraigned as accused. As far as Section 328 of the IPC is concerned, Mr. Ponda would submit that the said Section can be bifurcated to cover two acts, one by a direct method and another by an indirect method. He would submit that for the direct method to be attracted, there must be administration to another of one of the substance mentioned and an indirect method would involve a person causing one of the substance to be taken by any other person. He would further submit that in both these methods, the substance enumerated in the section must be consumed and, in the first case, it is taken without the intervention of the third person and it presupposes involvement of the accused and the victim whereas in the second case, where the substance must be "caused to be taken", which necessarily involves a third person who is also involved in the act of the victim taking the said substance. Mr. Ponda would attribute the distinct connotation of the term

"caused to be taken" and according to him, it clearly relates to the past tense/present perfect tense and by no stretch of imagination would entail an act in future tense. According to him, the use of the words "caused to be taken" is indicative of legislative intent that a precondition for the section to apply is that the substance must be taken in the first place or else the section will not apply and thus, according to him, unless the act of consumption/taking is not complete, Section 328 of the IPC is not attracted. Applying the said corollary, according to him, simple storage of the substance without anything mentioned in Section 328 and in the case of the Petitioners, storage of Gutka and Pan Masala *ipso facto* would not attract the offence under Section 328 of the IPC as it would contempalte something more, over and above simple storage. He would place reliance on the judgment of the Apex Court in case of ***Malkiat Singh & Anr. v. The State of Punjab reported in 1969 (1) SCC 157*** through which the Apex Court brings out the distinction between the preparation and an attempt in the backdrop of the provisions of Essential Commodities Act, 1965. He would also place reliance on the judgment of the Apex Court in case of ***Aman Kumar & Anr. v. State of Haryana reported in (2004) 4 SCC 379*** where a proposition of law came to be pronounced to the effect that mere intention to commit an offence, not followed by any act, cannot constitute an offence and the mere intention is not to be taken for the deed unless there is some external act to show that progress has been made in the

direction of it or towards maturing or effecting it. With the assistance of the said judgments, Mr. Ponda would asseverate that preparation to commit an offence is punishable only under Section 122 of the IPC (waging war against the Government of India) and Section 399 of the IPC (preparation to commit dacoity) and with the assistance of the aforesaid judgment, he would submit that even assuming for a moment that if there is storage of prohibited food substance by the Petitioners, it does not straight away lead to they being instrumental in people at large consuming the same and thereby attracting the provisions of Section 328 of the IPC. As far as Section 188 of the IPC is concerned, Mr. Ponda would submit that the allegations in the FIR is only restricted to the storage of the prohibited food product and by storing the said product, it may be alleged that there is disobedience of the direction issued by the Commissioner under Section 30 of the FSS Act for which a distinct course of action in terms of Section 35 of the FSS Act would lie. The disobedience qua the direction is only for the storage of the food product and nothing more than that. According to him, Section 188 of the IPC deals with punishment for disobedience of the order which is promulgated but such disobedience alone is not punishable under Section 188 of the IPC but it is punishable only when such disobedience causes or tends to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed and it is only in this contingency

the disobedience is liable for culpability. He has placed reliance on the judgment of the Apex Court in the case of ***Ramlila Maidan Incident reported in (2012) 5 SCC 1***.

Mr. Ponda has also placed reliance on the two judgments reported in ***1954 (2) All ER 280 (Queen's Bench Division) in the case of Shave v. Rosner*** and ***1975 (1) WLR 988 in the case of Price v. Cromack*** to explain the terminology used in Section 328 as well as Section 188 of the IPC viz. the word "causes". The submission of learned counsel for the Petitioners can thus be summarized in nutshell to convey that the Petitioners cannot be made liable for the offence punishable under Section 328 of the IPC and Section 188 of the IPC and he is ready and willing to face the contravention as contemplated under the FSS Act.

7. We have also heard Mr. Deeapk Thakare, learned Public Prosecutor representing the State of Maharashtra and he would painstakingly invite our attention to the ill-effect of consumption of tobacco and any other products containing tobacco viz. Gutka and Pan Masala and he would submit that all over the world scientific evidence demonstrate that food products containing tobacco have extremely deleterious effect on human health and well being with consequential impact on society. He would emphasize on the research done by Tata Institute of Fundamental Research as well as the study conducted by Dr. James Hamner so

also the Report of the Government Dental College stressing that the consumption of Gutka or Pan Masala, etc. causes oral submucous fibrosis. Mr. Thakare, learned Public Prosecutor would vehemently submit that it is the duty of the State to take necessary steps to improve public health and after going through various scientific opinion and research it was noted that these products containing tobacco by whatsoever name referred to it, cause immense damage to the health of consumers and their adverse impact could also lead to alterations of the genetic make-up of future generations. He would further submit that Gutka and Pan Masala have been construed to be "food" as defined in Section 3(j) of the FSS Act, and he would place reliance on the judgment of the Bombay High Court in the case of ***Dhariwal Industrial Limited & Anr. v. State of Maharashtra & Ors. (Judgment dated 15/09/2012 in Writ Petition No.1631 of 2012)*** to submit that the said products can be subjected to the regime of FSS Act. Mr. Thakare would also contradict the submission of Mr. Ponda by advancing a submission that Section 328 of the IPC intends to cover an act where a person consume a thing like poison or any stupefying, intoxicating or unwholesome drug, which causes a hurt to such person and any person who administers or causes to be taken such a substance by any person knowing that it is likely to cause hurt would be brought within the ambit and scope of Section 328 of the IPC and liable for punishment under the said section, which is cognizable and non-

compoundable. He has placed reliance on a series of judgments of this Court taking a view that in the present set of facts, Section 328 of the IPC is attracted.

8. Mr. Thakare, learned Public Prosecutor has invited our attention to the definition of the term 'hurt' under Section 319 of the IPC to mean any hurt bodily pain, disease or infirmity caused to any person and he would assert that when the entire scientific data has been analyzed and contained in the Notification issued by the Food Safety Commissioner, which is demonstrative of the ill-effect of use of such food substance and the Commissioner of Food Safety in the interest of public health has prohibited manufacture, storage, distribution, transport or sale of any such article or food which is either tobacco or known by whatsoever name or whatsoever form, is sold in the market, then according to Mr. Thakare, the Petitioners are covered by the provisions of the penal code contained in Sections 328 and 188 of the IPC and he would pray that the petition be dismissed.

9. We have heard learned counsel for the parties and we can perceive that the moot question which is placed before us for adjudication in the present writ petition being whether the violation of order issued by the Food Safety Commissioner in exercise of powers conferred under Section 30(2)(a) of the FSS

Act which prohibits the manufacture, storage, distribution, transport or sale of tobacco either flavoured, scented or mixed with any of the said additives, and whether known by any name whatsoever, Gutka, Pan Masala, manufactured chewing tobacco with additives, kharra or otherwise, whether packaged or unpackaged and/or sold as one product for its consumption would attract the provisions of Section 328 and Section 188 of the IPC.

10. Before proceeding to deal with the said issue, we would like to make a reference to the provisions of the FSS Act, 2006. The FSS Act, 2006 which came into force in August, 2006 consolidates the laws relating to food and aims to establish the Food Safety & Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith. The said enactment is based on international legislations and envisages an overarching policy framework and contains a single window to guide and regulate persons engaged in manufacture, marketing, handling, importing and sale of food. It contains provision for graded penalty depending upon the gravity of offences and prescribe civil penalty for minor offences and punishment for serious violations.

11. The Act defines the term 'food' in a very comprehensive way so as to cover any substance intended for human consumption and open the window to include any article declared as food by notification in the Official Gazette the Central Government may declare. The FSS Act defines the Food Authority and provides for establishment of Food Safety Authority of India, a body corporate, cast with the duty to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food. The Authority is empowered by regulations to specify the standards and guidelines in relation to articles of food can specify the mechanisms and guidelines for accreditation of certification bodies engaged in certification of food safety management systems for food businesses. It also empowered to provide scientific advice and technical support to the Central Government and the State Governments in matters of framing the policy and rules in areas which have a direct or indirect bearing on food safety and nutrition. The said Authority is responsible for enforcing of the FSS Act. The Commissioner of Food Safety and the Designated Officer are empowered to exercise the powers similar to the powers exercised by Food Safety Officer. It is imperative on the State Government to appoint a Commissioner for Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under the

FSS Act and the rules and regulations made thereunder. Under Section 30(2)(a) of the FSS Act, the Commissioner of Food Safety appointed by the State Government is empowered to impose prohibition on the manufacture, storage, distribution or sale of any article of food for a period of one year either in the whole State or part thereof if it is in the interest of public health.

12. The Commissioner of Food Safety by invoking the said power has issued notification from time to time by which it has prohibited the manufacture, storage, distribution or sale of tobacco and its other forms viz. Gutka, Pan Masala, manufactured chewing tobacco, etc. for a period of one year. The issuance of such notification and the power of the Commissioner to issue the said Notification is not in dispute. According to Mr. Ponda, the FSS Act is a complete Code and Section 55 of the said Act sets out a penalty for failure to comply with the directions of the Food Safety Officer and it is his submission that if the order which is in the form of direction issued by Food Safety Officer under Section 30(2)(a) of FSS Act is not complied with then the consequences are provided in the FSS Act itself. The perusal of the provisions of the enactment discloses that there is a special power conferred on the Food Safety Officer under Section 41 of the FSS Act in the form of power of search, seizure, investigation, prosecution and procedure thereof. Section 42 of the FSS Act, 2006 is a very peculiar section in the Act and it sets out the procedure for

launching prosecution. We deem it appropriate to reproduce Section 42 of the FSS Act which reads thus:

> *"42. Procedure for launching prosecution. – (1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis.*
>
> *(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety.*
>
> *(3) The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.*
>
> *(4) The Commissioner of Food Safety shall, if he so deems fit decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to,–*
>
> *(a) a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or*

> *(b) a Special Court in case of offences punishable with imprisonment for a term exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a Court of ordinary jurisdiction.*
>
> *(5) The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken under section 40."*

13. On perusal of the above provisions, the position that emerges is to the effect that a Designated Officer is competent to decide as to whether contravention, if any, is to be punished by imprisonment or with fine and this, he would decide on scrutiny of the report of the Food Analyst. If he is satisfied that the contravention is liable to be punished with imprisonment, he is bound to send his recommendation to the Commissioner within fourteen days seeking his sanction for prosecution. However, when he arrives at a conclusion that the contravention should be punishable with fine only, he himself would decide the same. Thus what is to be noted is that the contravention contemplated under the enactment would be dealt with by two distinct methodology and needless to say that those contraventions which

entail with imprisonment are necessarily of serious nature and, therefore send for adjudication to the court of law. Section 49 of the FSS Act then deals with the quantum of penalty for committing an offence of rendering food injurious to health. The cases can be made over to the police station in case where the Designated Officer arrives at a conclusion that the prosecution has to be launched. The penalty can be imposed for failure to comply with the directions of the Food Safety Officer under Section 55 of the FSS Act and even Section 59 of FSS Act would get attracted if 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 and the penalty is then prescribed depending upon the nature of the injury. Section 59 of the FSS Act which prescribed punishment for unsafe food reads thus:

> *"**59. 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) 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;*

(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;

(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;

(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."

It can thus be seen that sale, storage of any food which is unsafe for human consumption if it results in grievous injury is punishable under clause (iii) of Section 59 of the FSS Act if it results in death is punishable under clause (iv) of Section 59 of the FSS Act and the punishment may extent under clause (iv) to imprisonment for life and a heavy fine not less than ten lakhs of rupees.

On perusal of the entire scheme of FSS Act, it would emerge that it is a self contained enactment taking care of such

acts or conducts dealing with unsafe food articles and such acts are liable for penalty in the form of fine or imprisonment as prescribed.

14. In the present case, the FIR registered against the Petitioners invoke the provisions of the FSS Act and the Petitioners are charged with Section 59 which prescribes punishment for indulging in unsafe food either by manufacturing it for sale, storage or selling or distributing or importing any such articles with knowledge that it is unsafe. Mr. Ponda has not argued to the effect that the Petitioners cannot be charged under the relevant provisions of the FSS Act. His objection is only to the invocation and application of Sections 328 and 188 of the IPC.

15. On perusal of the decision of the Apex Court in the case of ***Sayyed Hassan Sayyed Subhan (supra)***, the Apex Court has clearly held that non compliance of the prohibitory order which prohibited transportation and sale of Gutka and Pan Masala would entail a prosecution under Section 55 of the FSS Act but it has been held that the provisions of IPC can also be invoked and applied. The Apex Court did not find favour with the findings of the High Court which had held that the non compliance of the notification issued by the Food Safety Commissioner can be

penalized only by imposing fine mentioned in Section 55 and no complaint under the IPC could have been preferred by the Food Security Officer for violation of the prohibitory order. Whiel setting aside the said finding, Their Lordships of the Apex Court held that the High Court was wrong in holding that the action can be initiated against the defaulters only under Section 55 of the FSS Act or under Section 68 of FSS Act for adjudication. The following observations of the Apex Court need a noting.

> *"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the Indian Penal Code and at the same time, an offence under any other law. The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows:*
>
> > *"**Provisions as to offences punishable under two or more enactments**-Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be*

> *prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."*

> *8. In Hat Singh's case this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in State (NCT of Delhi) v. Sanjay held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the Indian Penal Code merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point."*

16. After making the aforesaid observations, the point as to whether the offences punishable under Sections 188, 272, 273 and 328 of the IPC have been made out or not, the matter was remanded to the High Court to be decided afresh by permitting both the sides to raise all their contentions. The Aurangabad Bench of this Court proceeded to deal with the said arguments on the applicability of the relevant provisions of the IPC in the case

of ***Vasim Shaikh (supra)***.

Before we go to the said judgment, it would be apposite for us to reproduce Section 328 of the IPC which reads 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 extend to ten years, and shall also be liable to fine."*

17. The Apex Court had an occasion to deal with Section 328 of the IPC in case of ***Joseph Kurian Philip Jose (supra).*** The criminal appeals placed before the Apex Court arose out of a phase of sporadic incidents referred to as "Punalur Liquor Tragedy" where certain persons died and others received injuries due to consumption of poisonous adulterated arrack, ethyl alcohol adulterated with methyl alcohol. Cases under Sections 272 and 328 of the IPC and Section 57(a) of the Kerala Abkari Act were registered. On recording a finding of guilt against A-1 and A-4, the Sessions Court imposed sentence. The remaining accused were found guilty of offences punishable under the Abkari Act and were imposed nominal sentences of fine only.

The High Court confirmed the conviction and sentence of A-1 and conviction of A-4 came to be set aside and he was convicted under Section 109 for abetting the offences punishable under Sections 272 and 328 of the IPC. In the backdrop of these facts, the Apex Court was called upon to decide the applicability of Sections 272 and 328 of the IPC against the said Accused. Adulteration of liquor is prohibited under Section 57 of the Abkari Act to a licensed vendor or manufacturer. After making a reference to the provisions of Section 328 of the IPC, the Apex Court observed thus:

> *"In order to prove offence under Section 328 the prosecution is required to prove that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug etc, that the accused administered the substance to the complainant or caused the complainant to take such substance, that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or with the intention to commit or facilitate the commission of an offence. It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another. In other words, the accused may accomplish the act by himself or by means of another. In either situation direct, reliable and cogent evidence is necessary. Now on that basis it has to be seen whether A-1 had any role to play in directly administering to or causing to be taken the poisonous liquor by Sreedharan*

Pillai deceased, who had purchased and consumed liquor from a retail shop, with intent to cause hurt to him or knowing it to be likely that it would cause hurt to him. This has to be solved remaining cognizant that Sections 272 and 328 are separate offences described in the Indian Penal Code."

11. As it appears both the findings of the Trial Judge as also by the High Court are somewhat vague and confusing. The Trial Court observed, as is evident from the emphasised portion, that it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol (2.64% as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding applicability of Section 302 or even that of Section 304 I.P.C. has been ruled out. This finding on the fact situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt also. The act of the accused in adulterating liquor per se, as the law then stood sans amendments, would not attract the provision of Section 328 of I.P.C. unless there is positive evidence that A-1 administered the poisoned liquor directly or by Sreedharan, deceased indirectly caused it to be taken by Sreedharan indirectly with the necessary intent and mens rea. This view of the learned Trial Judge as confirmed by the High Court does not appear to us to be sound in the back drop of the death actually occurring. But since it has taken that view it cannot stop short of hurt and so must

slip down to a fall downright. Important links in the prosecution case on this particular remain otherwise missing. A-1 would thus have to be acquitted of the charge under Section 328 IPC in carrying out the findings of the High Court to their logical end."

18. The said observations are accordant in the backdrop of the facts of the case which we are dealing. It is held that in order to prove an offence under Section 328 of the IPC, it is essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another and it is further clarified that the accused may accomplish the act by himself or by means of another and in either of these situations direct, reliable and cogent evidence is necessary and in the backdrop of this proposition the Apex Court examined whether A-1 had any role to play in directly administering to or causing to be taken the poisonous liquor by the deceased, who had purchased and consumed liquor from a retail shop.

The conviction of A-1 under Section 328 of the IPC was set aside since the prosecution was not been able to prove that it was he who administered the said liquor to the deceased or he caused it to be consumed by the deceased though the case of the prosecution was that the liquor was sold out from the Punalur Depot where from the adulterated sample was taken. The adulterated liquor was sold out at the said Depot by A-1 and,

therefore, his conviction under the Abkari Act came to be maintained.

19. This binding precedent has clearly missed the attention by the Division Bench of this High Court while deciding the case on remand from the Apex Court. In case of ***Vasim Shaikh*** in dealing with an application under Section 482 of Cr.P.C. for quashing of FIR which came to be registered when huge quantity of Pan Masala and scented tobacco were seized on search of the house of one Khurshida Hamid Shaikh, the Division Bench while taking note of the case of prosecution that the accused did not produce bills of purchase nor supply any information as to from where he has brought these goods and after noting that the Pan Masala and Gutka contained harmful contents which are possible for causing of disease like cancer, recorded a finding to the following effect.

> *"5. It is not disputed that in Maharashtra, there is prohibition to manufacture, possess and on sale of aforesaid food articles and the possession or sale or manufacture is made punishable under the Act. The relevant provisions of this Enactment 26(2)(1), 3(1)(ZZ), 27(3)(E) R/w. 59 and 27(3)(d) are also mentioned by the Food Safety Officer. There was no question of licence of any kind with the applicants and from the huge quantity which is recovered, it can be said that they had the intention to sell these articles as food articles."*

The subsequent judgments follow the same path and are relied upon by the learned Public Prosecutor to submit that the issue as to the applicability of Section 328 of the IPC in case of the Petitioners is already put to rest by the aofresaid judgments.

20. We must candidly express that the Division Bench has not taken into consideration the judgment of the Apex Court in the case of ***Joseph Kurian Philip Jose (supra)*** and, therefore, we do not felt bound by the same as it is *per incuriam*. Apart from this, it did not go to the root of the issue as to whether offence under Section 328 of the IPC is made out.

21. Section 328 of the IPC finds place in Chapter XVI under caption "Causing hurt by means of poison, etc". The offence under Section 328 IPC is cognizable, non-bailable and non-compoundable. We can analyse the said section by dissecting it into two parts, first part viz. "whoever administers to" and second part "or causes to be taken by any person". The first part uses the terminology 'Administers to'. The Cambridge Dictionary defines the term 'Administer' to mean to control the operation or arrangement of something and its colloquial meaning is to cause someone to receive something. The Collins Dictionary defines it to mean 'to direct or control or to put into execution; dispense'.

The first part of Section 328 of IPC therefore contemplates a direct involvement of a person to be brought within the purview of Section 328 of the IPC and it covers a situation of administration of one of the substance mentioned, to another. The second part of the section which uses the phraseology 'cause to be taken' employs an indirect method where a person causes one of the substance to be taken by another person. This 'causing' is suggestive of involvement of a third person and, therefore, employs an indirect method. The word 'causes' involves some degree of dominance or, control or some express or positive mandate and necessarily induces an element of some active operation aimed at a result. The word 'cause' which denotes to make something happen is a verb whereas the word 'causing' is present participle of the word 'cause'.

The judgment of the Queens Bench in the case of **Shave (supra)** relied upon by Mr. Ponda aptly depicts an illustration of 'causing' in the backdrop of the provisions contained in the Motor Vehicles (Construction and Use) Regulations, 1951. The pronouncement came in the backdrop when an owner of a motor vehicle left it at the respondent's garage to have the brakes re-shoed and after the work was completed, the vehicle was delivered to the owner, who drove the respondent back to garage so as to test the brakes himself. Later on, the same day, while the owner was driving the vehicle, one of the front wheels came off and injured a passer-by and the accident occurred since the nuts

were not properly fastened by the respondent's workmen while carrying out the works of the brakes. The respondent was charged with 'unlawfully causing' a vehicle to be used on a road in such condition that danger was caused to a person on the road contrary to the Motor Vehicles (Construction and Use) Regulations, 1951. The Queens Bench in these facts held that the word 'causes' in the Regulations of 1951 involved some degree of dominance or control over the person who used the vehicle, or some express or positive mandate to him, by or from the person alleged to have caused the user after the respondent had delivered the vehicle back to the owner he ceased to have any control over it; and, therefore, he had not caused it to be used on a road within the meaning of Regulation 101. Lord Goddard, C.J., by referring to the Regulation penned his verdict in the following manner 'if any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations, he shall for each offence will be liable to a fine' held that the expressions 'causes or permits' in contrast or juxtaposition 'permit' means giving leave and licence to somebody to use the vehicle, and 'causes' involves a person, who has authority to do so, ordering or directing another person to use it". The distinction is succinctly brought out in the following word of Lord Goddard, C.J. - "If I allow a friend of mine to use my motor car, I am permitting him to use it. If I tell my chauffeur to bring my car

round and drive me to the courts, I am causing the car to be used. There may be a civil liability to indemnify the owner if he is made liable, …. but if the owner is sued, the garage proprietor would have an action brought against him and part of the damage for not doing the work properly would be the damages the owner is caused to pay to the person injured. But, from the point of view of the criminal law, I do not think the regulation is wide enough to catch this case." The word 'causes' was therefore interpreted to be something involving control or dominance or compulsion.

22. Reliance by Mr. Ponda on another Queens Bench judgment in ***Price (supra)*** which also drive home the succinct distinction between the words 'permitting' and 'causing' in the following words of Lord Widgery C.J. "*It is important to note that the distinction between 'causing' and 'knowingly permitting' was very much in their Lordship's minds. It seems to me that the overwhelming opinion of their Lordships in that case was, that whatever else 'causing' might or might not involve, it did involve some active operation as opposed to mere tacit standing by and looking on.* That is made good first of all by Lord Wilberforce, who said "*The subsection evidently contemplates to things – causing, which must involve some active operation or chain of operations involving as the result the pollution of the stream; knowingly permitting, which involves a failure to prevent the pollution, which failure, however, must be accompanied by*

knowledge."

The term 'causes' thus demand some action – some involvement and when we refer this term in Section 328, the upshot is that Section 328 of the IPC gets attracted in two possibilities one of direct administration of anything with an intent to cause hurt or indirect causation of a thing to be taken by any person with an intent to cause hurt. It is only in the presence of two aforesaid ingredients, the section gets attracted and in the absence of any 'administration' to another or the accused 'causing' any person to take the substance, person cannot be made liable for an offence under Section 328 of the IPC. The act of storage which is alleged against the Petitioners fall short of the ingredients of Section 328 of the IPC. Mere storage without any further action and on a contemplation that it would be sold in the market, brought by a person from the market and consumed by him is too far fetched consequence of an act of 'administering' or 'causing to be taken'.

Mere storage cannot even be construed as an attempt to commit an offence under Section 328 of the IPC since an act would become an attempt only on a positive act being committed by a person which would have resulted in commission of offence. However, the unforeseen act beyond the control of the accused, can only be an attempt. Mr. Ponda has rightly relied upon the judgment in the case of ***Malkiat Singh (supra)*** to drive succinct distinction between the preparation and attempt to commit a

crime where the Apex Court has held that only preparation is not an attempt and the test for determining whether the act constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. The transportation of paddy in violation of Punjab Paddy (Export Control) Order, 1959 and when a truck was seized in Samalkha, Punjab Boundary 32 miles away from Delhi, the Apex Court held that there was no attempt on the part of the Appellant to commit the offence of export. It was merely preparation and the preparation for committing an offence is distinct from attempt to commit it. The preparation, according to the Apex Court would consists in devising or arranging the means or measures necessary for the commission of the offence whereas an attempt is a direct movement towards the commission after the preparation was made. The storage of the prohibited substance could not therefore be brought within the purview of an attempt to commit an offence under Section 328 and nevertheless it do not attract Section 328 of the IPC.

23. The argument as regards Section 188 of the IPC advanced by Mr. Ponda is also required to be considered with reference to the use of the phraseology employed in the said section. Section 188 of the IPC reads thus:

> *"188. Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. Illustration An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section."*

24. A close analysis of the said section would reveal that whoever disobeys an order promulgated by a public servant

directing to abstain from certain acts, or to take certain orders with certain property in his possession, disobeys such direction, would attract Section 188 of the IPC if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of it, to any person lawfully employed and if such disobedience causes or tends to cause danger to human life, health or safety shall be punished under the said section. The keywords being '*causes or tends to cause danger to human life, health or safety*'. The disobedience of the public order apart from attracting a penalty under Section 55 of the FSS Act would, in view of the decision of the Apex Court in ***Sayyed Hussain (supra)***, attract Section 188 of the IPC but it would have to be examined whether it falls within the mischief sought to be penalised by the said section. The FIR lodged against the Petitioners alleges only storage. Undisputedly, there is a disobedience of an order which prohibits storage of tobacco, Pan Masala and Gutka. Far away Nothing in the FIR attribute any other act to the Petitioners viz. manufacture, distribution or sale. Disobedience of the promulgated order under Section 188 of the IPC is punishable if it causes or tends to cause danger to human life. The section do not use the term 'likely to cause', conveying that there has to be a positive evidence of causing or tends to cause danger to human life and in absence, Section 188 is not attracted. It is not in doubt that the tobacco and its products are dangerous to human life and safety. However, mere possession or storage cannot fall within the

purview of 'Danger' contemplated under the said section. The goods, as long as they remain stored, do not pose any danger. The goods will have to be moved beyond the store to be sold - '*to be purchased for consumption'* and mere storing a food item would not pose the intended danger to human life. The gap between the storage and the consumption by a consumer will have to be bridged before the danger or the hurt contemplated under Sections 328 and Section 188 of the IPC get attracted and it is only when the prosecution proves that it is the Petitioners who are the one who did it, their prosecution would be a success. The Apex Court in ***Joseph Kurian Philip Jose (supra)***, has succinctly drawn a distinction in the two terminologies applied by Section 328 of the IPC in the form of direct and indirect methods and the said judgment continues to be an authoritative and binding precedent till date. In the light of the aforesaid position emerging from the submissions advanced before us, we do not intend to continue the prosecution against the Petitioners as it would merely amount to an abuse of process of law and the prosecution of the Petitioners under Sections 328 and 188 of the IPC, therefore, cannot continue. We do not make any comment on the prosecution of the Petitioners under the FSS Act and we are not inclined to show any indulgence to the Petitioners on that count. The Respondent-Authorities are permitted to prosecute the Petitioners under the provisions of the said enactment.

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Resultantly, we quash and set aside the FIR bearing No.87 of 2019 dated 2nd March 2019 registered against the Petitioners only to the extent it registered offence against the Petitioners under Section 328 and 188 of the IPC and we restrain the Respondents from initiating any action against the aforesaid provisions under the IPC.

(SMT. BHARATI DANGRE, J.) (RANJIT MORE, J.)

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