

(2019) 10 PAT CK 0098

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 1437 Of 2019

M/S. Kankanady Homeo Hall

APPELLANT

Vs

State Of Bihar Through Director And Ors

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Indian Penal Code, 1860 — Section 172, 173, 174, 175, 176, 177, 178, 179, 180,
181, 182, 183, 184, 185, 186, 187, 188, 276
Code Of Criminal Procedure, 1973 — Section 155, 155(2), 155(4), 195(1)(a)(i)
Drugs And Cosmetics Rules, 1945 — Rule 106(B)

Citation : (2019) 4 PLJR 1163

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Dhananjay Kumar, Md. Nasrul Huda Khan

Final Decision : Allowed

Judgement

1. This application under Articles 226 and 227 of the Constitution of India has been filed by the petitioner Rameshwar Sah @ Rameshwar Prasad Sah

for quashing the First Information Report (for short "FIR") of Hajipur Town P.S. Case No.451 of 2019 registered under Sections 276 and 188

of the Indian Penal Code (for short "Code") and Rule 106B of the Drugs and Cosmetics Rules 1945 (for short "Rules").

2. The informant of the case is one Seema Kumari, Drug Inspector, Vaishali. In her written report dated 17.05.2019 submitted to the Officer-in-

charge, Town Police Station, Hajipur, Vaishali, she has stated that in view of direction given by the Assistant Drug Controller, Vaishali, Hajipur vide

his letter no. 1603 dated 15.05.2019, a joint inspection was conducted by her along with the officers of the Excise Department in the premises of

Kankanady Homeo Hall situated at Kuthchehry Road, Hajipur, Vaishali. She has further stated that the proprietor (petitioner) is the licensee. During

the inspection of the aforesaid Homeo Hall, five bottles containing 450 ml each Hepar Sulphur of Wheezal Laboratories Pvt. Ltd. were recovered. It

is alleged that sale of Hepar Sulphur in bottle of 450 ml is prohibited and any violation of the same would be contrary to Rule 106-B of the Rules.

3. On the basis of the aforesaid information, Hajipur Town P.S. Case No.451 of 2019 dated 20.05.2019 was registered and investigation was taken

up.

4. Mr. Dhananjay Kumar, learned counsel appearing for the petitioner submitted that the ingredients of the offences under the penal code are totally

lacking in the instant case. He contended that Hepar Sulphur is a homeopathic remedy that was created by Samuel Hahnemann, the father of

homeopathy. Mere recovery of the 5 bottles containing 450 ml from the homeopathic shop of the petitioner by itself would not constitute any offence.

5. He has further contended that section 276 of the Code is a non-cognizable offence. Hence, institution of an FIR could be barred in view of

provision prescribed under section 155(2) of the Code of Criminal Procedure (for short 'CrPC'). He argued that it is well settled that under

Section 188 of the Code only complaint and not an FIR would be maintainable. In support of his contention, he has placed reliance on the judgment of

this Court in the matter of Praveen Amanullah v. State of Bihar, since reported in (2017) 3 PLJR 101.

6. He has further contended that as far as Rule 106-B of the Rules is concerned, the said provision does not attract any penal provision.

7. He has urged that even if the entire allegations made in the FIR are taken to be true at their face value, no cognizable offence is made out. Hence,

allowing the investigation to continue would be nothing but an abuse of the process of the court.

8. A counter affidavit has been filed on behalf of respondent no.2.

9. In the counter affidavit, it is stated that from the FIR, it would be apparent that offence punishable under Section 276 of the Code is made out.

10. In para 20 of the counter affidavit, it is stated that the seized article has not been given to the SHO of Hajipur Town Police Station or to the

investigating officer of the case either at the time of lodging of the FIR or

investigation. Hence, the seized article has not been tested.

11. Mr. Nasrul Huda Khan, learned counsel appearing for the State submitted that if one of the offences alleged is cognizable, the police would have statutory right to investigate the case. According to him, since section 188 of the Code is a cognizable offence, the police have the authority to investigate the case.

12. I have heard learned counsel for the parties and carefully perused the record.

13. Rule 106-B of Rules provide that no homeopathic medicine containing more than 12% alcohol (Ethyl Alcohol) shall be packed and sold in packing or bottles of more than 30 mililitres, except that it may be sold to hospitals/ dispensaries in packing or bottles of not more than 100 mililitres.

14. The said provision is apparently not a penal provision.

15. Learned counsel for the State has failed to show any other provision under the Drugs and Cosmetics Act, 1940 (for short "the Act") or the Rules, which provides punishment for violating Rule 106-B of the Rules.

16. Furthermore, there is no allegation in the FIR that the Hepar Sulphur seized from the shop of the petitioner contained more than 12% of alcohol (Ethyl Alcohol). In that view of the matter, mere seizure of certain bottles of Hepar Sulphur would not amount to violation of even Rule 106-B of the Rules.

17. As far as Section 276 of the Code is concerned, the same provides that whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, 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.

18. In order to constitute an offence under Section 276 of the Code, following are the necessary ingredients:-

- (a) the accused sold, or offered or exposed for sale, or issued from a dispensary for medical purposes, the drug or medical preparation;
- (b) that it was so sold, etc. by him, as a drug or medical preparation different from what it is;
- (c) that he knew of such difference at the time it was sold.

19. From the allegation made in the FIR, it does not appear that there is any

allegation against the petitioner that he sold or offered or exposed or issued from his homeopathic medicine shop any drug or medical preparation different from what it was. Hence, the ingredients of the offence

punishable under Section 276 of the Code are not attracted in the present case.

20. Moreover, the said offence has been classified as a non-cognizable offence.

21. Section 155 of the CrPC deals with information as to non-cognizable cases and investigation of such cases.

22. Sub-section (2) of Section 155 of the CrPC provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate

having power to try such case or commit the case for trial. It clearly prohibits a police officer from investigating a non-cognizable offence without the

order of a Magistrate.

23. In the instant case, admittedly, there is no order of the Magistrate having power to try such case to the police to investigate the case. Hence,

institution of an FIR for the offence under Section 276 of the Code was clearly impermissible.

24. At this juncture, it would be of salience to note that it has rightly been submitted by the learned counsel for the respondents that Section 155(4) of

the CrPC provides that where a case relates to two or more offences of which at least one is cognizable case, notwithstanding that the other offences

are non-cognizable.

25. In the present case, the FIR has been registered under Section 188 of the Code also, which is a cognizable offence. Hence, it is to be examined as

to whether (a) the offence under section 188 of the Code is made out and (b) can an FIR be lodged for the offence punishable under Section 188 of

the Code.

26. Section 188 of the Code deals with disobedience to order duly promulgated by public servant. It provides that 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 tender 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.

27. In order to attract an offence under Section 188 of the Code following ingredients have to be proved:-

(a) that there must be an order promulgated by public servant;

(b) that such public servant should be lawfully empowered to promulgate it;

(c) that the person with knowledge of such order and being directed by such order to abstain from doing certain act or to take certain order with

certain property in his possession and under his management, has disobeyed; and

(d) such disobedience causes or tends to cause:-

(i) obstruction, annoyance or injury to any person lawfully employed; or

(ii) danger to human life, health or safety; or

(iii) causes or tends to cause a riot or affray.

28. In the instant FIR, there is no allegation of disobedience to order promulgated by public servant lawfully empowered to promulgate such order. In

absence of the said allegation as also in absence of the other ingredients of the offence, the application of Section 188 of the Code in the FIR is

patently bad.

29. Furthermore, Section 195(1)(a)(i) of the CrPC provides that no court shall take cognizance of any offence under Section 172 to 188 of the code

except on complaint in writing of the public servant concerned or some other public servant to whom he is administratively subordinate.

30. After an elaborate discussions over the issue, in the matter of Praveen Amanullah (supra), this Court placing reliance on precedents in this regard

has categorically held that there is an express legal bar against institution of FIR and summoning of an accused on the basis of police report under

Section 188 of the Code.

31. In that view of the matter, I am of the considered opinion that even if the offence punishable under Section 188 of the Code is classified as a

cognizable offence, the prosecution can not be launched on the basis of an FIR.

32. Regard being had to the discussions made above, the FIR of Vaishali Town P.S. Case No.451 of 2019 dated 20.05.2019 can not be sustained.

Accordingly, the same is set aside.

33. The application stands allowed.