



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

WEDNESDAY, THE 29TH DAY OF NOVEMBER 2023 / 8TH AGRAHAYANA, 1945

BAIL APPL. NO. 10241 OF 2023

CRIME NO.2020/2023 OF Thrikkakara Police Station, Ernakulam

AGAINST THE ORDER/JUDGMENT CRMC 3100/2023 OF JMFC, KAKKANAD

(TEMPORARY)

PETITIONER/ACCUSED:

SHIHAD.M.P S/O M.A.PAREED

AGED 46 YEARS

MUKULATH HOUSE, KALAMASSERRY CUSAT, THRIKKAKARA NORTH,
ERANAKULAM DIST., PIN - 682022

BY ADVS.

T.ASAFALI

SMT.LALIZA. T.Y.

RESPONDENTS/STATE & COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA,
PIN - 682031

2 THE STATION HOUSE OFFICER
THRIKKAKARA POLICE STATION, P.O THRIKKAKARA, ERNAKULAM
DIST. KERALA, PIN - 682021

SMT.T.V.NEEMA, SR.PUBLIC PROSECUTOR

SRI.M.C. ASHI, PUBLIC PROSECUTOR ,

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
23.11.2023, ALONG WITH Bail Appl..10348/2023, 10350/2023, THE
COURT ON 29.11.2023 DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

WEDNESDAY, THE 29TH DAY OF NOVEMBER 2023 / 8TH AGRAHAYANA, 1945

BAIL APPL. NO. 10348 OF 2023

CRIME NO.2047/2023 OF Thrikkakara Police Station, Ernakulam
AGAINST THE ORDER/JUDGMENT CRMC 3182/2023 OF DISTRICT COURT &
SESSIONS COURT, ERNAKULAM

PETITIONER/ACCUSED:

SHIHAD.M.P S/O M.A.PAREED
AGED 46 YEARS
MUKULATH HOUSE, KALAMASSERRY CUSAT, THRIKKAKARA NORTH,
ERNAKULAM DIST., PIN - 682022

BY ADVS.
T.ASAFALI
SMT.LALIZA. T.Y.

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031
- 2 STATION HOUSE OFFICER
THRIKKAKARA POLICE STATION, THRIKKAKARA, ERNAKULAM
DIST, KERALAM, PIN - 682021

SMT.T.V.NEEMA, SR.PUBLIC PROSECUTOR
SRI.M.C. ASHI, PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
23.11.2023, ALONG WITH Bail Appl..10241/2023 AND CONNECTED CASES,
THE COURT ON 29.11.2023 DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

WEDNESDAY, THE 29TH DAY OF NOVEMBER 2023 / 8TH AGRAHAYANA, 1945

BAIL APPL. NO. 10350 OF 2023

CRIME NO.2048/2023 OF Thrikkakara Police Station, Ernakulam

PETITIONER/ACCUSED:

SHIHAD.M.P. S/O M.A.PAREED,

AGED 46 YEARS

MUKULATH HOUSE, KALAMASSERRY CUSAT POST, THRIKKAKARA

NORTH, ERNAKULAM DIST., PIN - 682022

BY ADVS.

T.ASAFALI

SMT.LALIZA. T.Y.

RESPONDENTS/STATE & COMPLAINANT:

- 1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KERALA, PIN - 682031
- 2 STATION HOUSE OFFICER,
THRIKKAKAKARA POLICIE STATION, POST THRIKKAKARA,
ERNAKULAM DIST.KERALA, PIN - 682021

SMT.T.V.NEEMA, SR.PUBLIC PROSECUTOR

SRI.M.C. ASHI, PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 23.11.2023,
ALONG WITH Bail Appl..10241/2023 AND CONNECTED CASES, THE COURT ON
29.11.2023 DELIVERED THE FOLLOWING:



"C.R."

MOHAMMED NIAS C.P., J

.....

**Bail Application Nos.10241,
10348 and 10350 of 2023**

.....

Dated this the 29th day of November, 2023

ORDER

These applications are filed under Section 438 of the Code of Criminal Procedure, 1973, seeking pre-arrest bail by the accused in crime Nos.2020/2023, 2047/2023 and 2048/2023 of Thrikkakara police station for the offence under Sections 284 and 308 IPC.

2. The prosecution allegation is that the petitioner, who is running a hotel, with the knowledge that death would be caused, prepared and sold 'shawarma' at his restaurant, which was ordered by the brother of the de facto complainant through Zomatto on 18-10-2023 at 9.30 p.m. The deceased was admitted to the hospital on 22-10-2023 due to some physical ailments due to the consumption of the said foodstuff, and on 25-10-2023, he succumbed to the ailments. The death of the deceased happened due to the consumption of 'shawarma' sold out by the petitioner herein through the restaurant. The petitioner sold the obnoxious and adulterated food, which is not consumable, so as to obtain wrong gain and thus committed the



offences. In the other two crimes, similar food item was consumed, which resulted in the victims being affected with food poisoning.

3. Sri. T. Asaf Ali, learned counsel for the petitioner, submitted that the petitioner operates the well-known restaurant Le Hayath Restaurant at Thrikkakkara, holding requisite licenses. The said establishment has maintained a flawless record for several years. According to the petitioner, the deceased ordered 'shawarma' through Zomatto at 9.38 p.m. on 18-10-2023. The petitioner is running the hotel in a hygienic manner. He prepares the food with abundant caution and care to maintain its quality. Nearly 150 to 200 shawarma is being sold out from his hotel. On the day of the occurrence, around 150 shawarma orders were served. Nobody has raised any complaint. It is learnt that the deceased worked the day after consuming shawarma. He sought medical care on 22-10-2023, showing signs of severe septicemia. The medical bulletin published by the Sun Rise Hospital shows that the deceased was admitted on 22-10-2023 at around 10.30 a.m. with a history of cardiac arrest. He further showed the symptoms of multi-organ dysfunction. He was declared dead by 25-10-2023 at 2.55 p.m. The petitioner did not commit any wrongdoing, which led to the death. He had taken due caution while preparing food. It is also to be noted that if the food supplied by the hotel to the petitioner were adulterated or contaminated, other consumers who consumed food from the petitioner's hotel would have shown the symptoms of food adulteration. Nobody has raised any allegation.

4. The learned counsel, Sri. T. Asaf Ali also raised the following legal contentions. He argued that even if the prosecution allegations are admitted to be true, only Section 284 of the IPC is attracted, and Section 308 of the IPC can never



be said to be applicable. It is his further argument that when the food is being purchased through Apps like Zomato, there is a warning indicated in the bill itself that the food has to be taken within two hours from the preparation. If any complication arises due to a breach of the same, the petitioner cannot be held liable. It is also his argument that going by Section 5 of the Cr.P.C., there is a special law in place dealing with food, namely the Food Safety and Standards Act, 2006 (in short, "FSS Act"). Section 89 also makes it clear that IPC is excluded for acts taken care of by the said Act. According to him, punishment comes under Section 59 of the Act; therefore, the prosecution under the IPC cannot be valid. The Special Act talks about the detailed procedures of the analysis, the qualification of the analysts, defines unsafe food, and the procedure for prosecution and punishment. Under such circumstances, it is his argument that when the offence alleged itself is not maintainable, he prayed for granting anticipatory bail.

5. The learned counsel for the petitioner, to support his contentions, relied on the judgments of the Supreme Court reported in **Centre for Public Interest Litigation v. Union of India and others [2013(4) KHC 383]**, **Union of India v. Ashok Kumar Sharma and others [2020 KHC 6509]** and **Swami Achyutanand Tirth and others v. Union of India and others [WP(C) 159/2012]**, this Court in **Malabar Fuel Corporation and another v. State of Kerala and others[2021(4) KHC 436]** and **Muhammed Siya Ulhakh @ Ziya Ul Huq v. State of Kerala and another [BA No.1120/2023]** and the Gauhati High Court reported in **M/s Silver Drop Food and Beverages Pvt. Ltd. and another v. The State of Assam Rep. by the Commissioner and Secretary of Home Department and others (Crl. Pet. 487/2016)** and prayed to allow the petition.



6. The learned Prosecutor opposing the bail applications has submitted a report. He argues that there is no dispute about the supply of food from the petitioner's hotel and the purchase by the deceased. The government issued specific guidelines regarding the preparation of shawarma, and all of them were violated in the instant case for making illegal gains by the petitioner. Numerous persons were affected by the petitioner's action. The statements of the affected persons were taken. The persons who bought food through the Swiggy App and who consumed from the hotel also had food poisoning, and therefore, it has to be taken that the petitioner had knowingly used substandard raw materials, that too in unhygienic conditions of the hotel, for making illegal gain. He cites the judgment of the Supreme Court **State of Maharashtra v. Sayyed Hassan Sayyed Subhan [2018 (4) KLT OnLine 3044 (SC)]** to substantiate his submission that the instant prosecution is maintainable.

7. Having considered the rival submissions, a few facts remain undisputed: the selling of food by the petitioner to the deceased and other affected persons, that food poisoning happened not only by sale through the APP but also to those customers who consumed food directly from the hotel. Under such circumstances, the argument of the learned counsel for the petitioner that the consumer might have consumed food in violation of the warning issued by them cannot be accepted at all, and I reject the same.

8. Secondly, as regards the contention that only Section 284 of the IPC is applicable and no other section, the same also cannot be accepted, as Section 304 is now incorporated after the death of the person who consumed the food from the petitioner's hotel. Prima facie, section 304 is squarely attracted as the prosecution



allegation is that the petitioner had the knowledge that the supply of food in violation of the guidelines in place for making an illegal gain is likely to cause death or injury. The guidelines issued were also applicable to the petitioner, and it is the prosecution's allegation that they were all violated. Under such circumstances, the inclusion of Section 304 IPC cannot be said to be bad in any manner. The submission of the learned counsel for the petitioner that after coming into force of the FSS Act, an offence under the Indian Penal Code will not lie also cannot be accepted, for the reasons to follow.

9. The Supreme Court in **Sayed Subhan**'s case (supra) interpreting Section 55 of the FSS Act that provides for a penalty to be imposed for non-compliance with the requirements of the Act, Rules or Regulations or orders issued thereunder by the Food Safety Officer held that the non-compliance of the provisions of the Acts or Rules or Regulations or the orders cannot in any manner interdict a prosecution under the Indian Penal Code in the absence of the same being expressly or implicitly barred. The view taken by the High Court that prosecution under the IPC is barred was reversed by the Supreme Court in the above case. The argument that Section 55 of the FSS Act was a specific provision made in a special enactment and, therefore, prosecution could not have been laid under the Indian Penal Code was rejected. The finding of the High Court in that case that Section 55 of the FSS Act is the only provision that can be resorted to for non-compliance with the orders passed under the F.S.S Act, as the same was a special enactment, was also rejected.

10. It is trite that 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 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. In conceivable cases, the same set of facts can constitute offences under two different laws. An act or omission can amount to and constitute an offence under the IPC and, at the same time, an offence under any other law. A perusal of the provisions of the FSS Act shows that there is no bar for prosecution under the Indian Penal Code merely because the provisions in the FSS Act prescribe penalties. In view of the above, the petitioner's contention on the maintainability of the prosecution under the I.P.C has to be rejected. None of the decisions cited on behalf of the petitioner is relevant for the purpose of deciding the issue on hand. The judgment of the Gauhati High Court cited on behalf of the petitioner, holding that the police had no authority or jurisdiction to investigate a matter coming under the FSS Act, is clearly a misstatement of the law and has to be treated as per incurium.

11. The expression 'same offence' appearing in S.300 Cr.P.C. read with Art.20(2) of the Constitution of India means that the offence for which the accused has been tried and the offence for which he is again being tried must be identical. The subsequent trial is barred only if the ingredients of the two offences are identical and not when they are different, even though they may have resulted from the commission or omission arising out of the same set of facts. The initiation of a proceeding for the commission of an offence under a special enactment on the basis of a complaint cannot or shall not debar the police from taking action under the provisions of the Indian Penal Code. As the ingredients that constitute the offence under both Acts are distinct, the bar is only to the punishment of the offender twice for the offence, as is made clear from Section 26 of the General Clauses Act, 1897, as well.



In the above circumstances, taking into account the prosecution allegations and the violation of the mandatory guidelines issued to the hotels, a proper investigation has to be conducted, and the grant of anticipatory bail will adversely affect the same. The menace of supplying adulterated food from restaurants can lead to various health issues, including food-borne illnesses, allergies and long term health issues, besides resulting in food poisoning, digestive problems and in severe cases, pose a threat to life itself. Under such circumstances, I am not inclined to grant anticipatory bail to the petitioner. Accordingly, these applications are dismissed.

Sd/-

**MOHAMMED NIAS C.P.,
JUDGE**

okb/



APPENDIX OF BAIL APPL. 10348/2023

PETITIONER ANNEXURES

Annexure A1

TRUE COPY OF THE FIR NO.2047/2023 OF
THRIKKAKARA POLICE STATION.

Annexure A2

TRUE COPY OF THE ORDER DATED 10/11/2023 MADE
IN CRL.M.C.NO.3182/2023 ON THE FILE OF THE
COURT OF SESSION ERNAKULAM.



APPENDIX OF BAIL APPL. 10350/2023

PETITIONER ANNEXURES

- Annexure A1 TRUE COPY OF THE FIR NO.2048/2023 OF THRIKKAKARA POLICE STATION.
- Annexure A2 A SPECIMEN BILL DATED 18/10/2023 NO.35449 CONTAINING SUCH HEALTH WARNING FOR THE USE OF FOOD ITEMS SOLD FROM THE RESTAURANT
- Annexure A3 TRUE COPY OF THE BAIL ORDER MADE IN CRL.M.C.NO.3183/2023, ON THE FILE OF THE COURT OF SESSION, ERNAKULAM.



APPENDIX OF BAIL APPL. 10241/2023

PETITIONER ANNEXURES

- Annexure A1 TRUE COPY OF THE FIR NO.2020/2023 OF THRIKKAKARA POLICE STATION.
- Annexure A2 TRUE COPY OF THE MEDICAL BULLETIN DATED 25TH OCTOBER 2023 ISSUED BY SUNRISE HOSPITAL, THRIKKAKARA RELATING TO MR. RAHUL.D.NAIR
- Annexure A3 TRUE COPY OF A SPECIMEN BILL DATED 18/10/2023 NO.35449 CONTAINING HEALTH WARNING FOR USE OF FOOD SOLD FROM THE LE HAYAT RESTAURANT, KAKKANAD.
- Annexure A4 TRUE COPY OF THE ORDER DT.10-11-2023 MADE IN CRL.M.C.NO.3100/2023 ON THE FILE OF THE COURT OF SESSIONS,ERNAKULAM