

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

CRIMINAL APPLICATION (APL) NO.318 OF 2021

Kayum Ahmad s/o Aminuddin Malik
Aged 38 years, Occu: Fruit Seller,
R/o Taj Nagar Tekka, Panchsheel Nagar
Road, Nagpur – 440 017. **APPLICANT**

...V E R S U S...

State of Maharashtra through
PS.O. Ramnagar, Chandrapur. **NON-APPLICANT**

Mr. M.M.H. Siddiqui, Advocate for Applicant.
Mr. S.A. Ashirgade, APP for Non-Applicant/State.

CORAM: **ROHIT B. DEO, J.**
DATE: **3rd MARCH, 2021.**

ORAL JUDGMENT:

The applicant is arraigned as accused three in Crime
1527/2017 registered with Police Station Ramnagar, Chandrapur
for offences punishable under Section 21 and 22 of the Narcotic
Drugs and Psychotropic Substances Act, 1985 (N.D.PS. Act)

2. Culmination of investigation led to submission of the
final report under Section 173(2) of the Criminal Procedure Code,
1973 (Code).

3. The applicant, who shall be referred to as the accused hereinafter, preferred application dated 03.05.2018 seeking discharge. The learned Judge invited the prosecution to respond. The prosecution contended that there is *prima facie* evidence against the accused and that, the co-accused have confessed that the contraband is purchased from accused – 3, the applicant herein.

4. The short submission of the accused in support of the discharge application, and which submission is reiterated before me, is that other than the confessional statements, which are not admissible, there is no material in the charge-sheet as would warrant a trial.

5. The learned Judge referred to the decision of the Supreme Court in *Kanhaiyalal v. Union of India, Appeal (Cri.) No.788/2005, D.O. 09/01/2008* and observed thus:

So, observations of the Hon'ble Apex Court in the authority referred to supra suggest that the police officer on whom the powers to be exercised by the authorized officer under section 42 of the N.D.P.S. Act have been conferred, can record the confessional statement of the accused or co-accused and it doesn't hit by the provisions of Section 25 of the Evidence Act and such confessional statements of accused persons

recorded in the present case cannot be equated with the statements recorded under section 161 of the Code of Criminal Procedure. So, having regard to the aforesaid aspect, I am of the view that no case is made out by accused No.3 for discharging him. In the present case, not only the confessional statements of co-accused i.e. accused Nos. 1 and 2 are there, but the confessional statement of accused No.3 is also on record and therefore, I am of the view that there are prima-facie sufficient materials to frame the charges and to put up accused No.3 on trial. Hence, application for discharging accused No.3 is hereby rejected.

6. I called upon the learned APP Mr. Ashirgade to point out the incriminating material as would be sufficient to presume that the accused is guilty of the offence.

7. The learned APP Mr. Ashirgade points out that the only incriminating material is the statements of the co-accused recorded under Section 67 of the N.D.P.S. Act. The issue involved is not *res integra* and is covered by the decision of the Supreme Court in *Tofan Singh v. State of Tamil Nadu AIR 2020 SC 5592*.

8. *Tofan Singh* specifically overrules the decision in *Kanhaiyalal v. Union of India* on which the learned Judge heavily relied, in rejecting the discharge application. In *Tofan Singh*, the Supreme Court has clearly held that a statement recorded under

Section 67 of the N.D.P.S. Act cannot be used as confessional statement.

9. In my considered view, even if the material on record translate into evidence, the evidence would be in admissible, and the trial would be an empty ritualistic formality.

10. The applicant – accused is entitled to discharge.

11. The application (Exh.49) in Special Cri.NDPS Case 16/2017 is allowed and the accused is discharge.

12. The instant application is allowed.

JUDGE