

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

CRIMINAL REVISION APPLICATION NO. 28 OF 2022

Abdul Mohammed Shaikh @ Abdul Thane

Age : 71 Years,

R/o Room No.1,

Jumma Masjid Trust Road,

M.H. School, Thane, 400 601.

...Applicant

Versus

1. Union of India

(Narcotic Control Bureau)

2. State Of Maharashtra

...Respondents

WITH

CRIMINAL REVISION APPLICATION NO. 29 OF 2022

Arif Abdul Shaikh

Age : 31 Years,

R/o Room No.1,

Jumma Masjid Trust Road,

M.H. School, Thane, 400 601.

...Applicant

Versus

1. Union of India

(Narcotic Control Bureau)

2. State Of Maharashtra

...Respondents

....

Mr. Ayaz Khan, Advocate for the applicants.

Mr. Shreeram Shirsat, Special P. P. a/w Mr. Amandeep Singh, for

Respondent No.1 – UOI.

Mr. A. R. Patil, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 14th JUNE 2022.

PER COURT:

1. The applicants in both these applications are prosecuted for

the offences punishable under Section 29 r/w Sections 8(c) and 20(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act'), Section 8(c) r/w Section 20(c) of the NDPS Act and Section 29 and Section 28 of the NDPS Act. The applicants are arraigned as accused No.3 and accused No.4 in NDPS Special Case No.39 of 2017.

2. The brief facts of the prosecution case are as follows :-

- i) The applicants were arrested on 24th December, 2016 in C.R. No.13 of 2016. The respondent received information that on 15th October, 2016, two persons namely Abdul Karim Yunus Karobari @ Lala Bhai (accused No.1) and Mohd. Ayaz Sheikh @ Walla bhai (accused No.2) are likely to come for sale of charas to their customers near Mumra Rickshaw Stand, Kalwa Naka Thane. Based on the information, the officers of respondent arranged a raid and apprehended accused No.1 carrying black colour bag along with accused No.2 at the spot. Search of bag resulted in recovery of 4 parcels wrapped in brown cello tape and upon opening the same, it was found containing dark brown colour sticky substance in the form of globules. On testing the same was found to be charas. The total weight of the balls was 6.5 Kgs.

The contrabands were packed and sealed under panchanama dated 16th October, 2016.

ii) Statements of accused Nos.1 and 2 were recorded on 16th October, 2016 under Section 67 of the NDPS Act. Both were arrested.

iii) During the statement under Section 67, the accused No.1 revealed the name of the applicants. Both were apprehended on 23rd December, 2016. Their statements were recorded. They were involved in other cases i.e. C.R. No.12 of 2016 and C.R. No.17 of 2016. They were arrested in all three cases. Statements of the applicants were recorded under Section 67 of the NDPS Act. During the investigation name of Ashok Kumar Verma (accused No.5) was revealed as original supplier. On completing investigation, charge-sheet was filed against the applicants.

3. The applicants preferred an application for discharge before the Special Court under the NDPS Act. The said applications were rejected by order dated 6th September, 2021.

4. The applicants have preferred these applications challenging the order refusing discharge passed by the trial Court.

5. learned Advocate for the applicants submitted as follows :

- i) The applicants are falsely implicated in this case. No contraband drug was recovered from them.
- ii) The applicants are prosecuted only on the statement of the co-accused which are retracted by them.
- iii) The prosecution is relying on statement under Section 67 of the NDPS Act to prosecute the applicants for the aforesaid offences. Such statement is not admissible in evidence. It has no evidentiary value.
- iv) The contraband was recovered from accused Nos. 1 & 2. According to prosecution, the investigation and interrogation of the co-accused revealed the involvement of the applicants. Merely on such statement or the statement of the applicants purportedly recorded under Section 67 of the NDPS Act, no charge can be framed against the applicants. The Hon'ble Supreme Court in the case of **Tofan Singh V/s. State of Tamilnadu** delivered in Criminal Appeal No.152 of 2013 has held that the statement of accused under Section 67 of the NDPS Act is not admissible in evidence. There is no other evidence against the applicants.
- v) The trial Court while rejecting the application was influenced by the fact that there are criminal antecedents

against the applicants. In the absence of any cogent evidence to proceed against the applicants, merely on the ground of antecedents the applicants cannot be subjected to prosecution.

vi) The statement under Section 67 of the NDPS Act cannot be used for framing charge.

vii) In the absence of cogent evidence, the Court has to discharge the accused under Section 227 of the Criminal Procedure Code.

viii) The impugned orders suffers from illegality and deserves to be set aside.

6. Learned counsel for applicants has relied upon following decisions :-

- i) State of Orissa V/s. Devendra Nath Padhi¹.
- ii) Sanjeev Chandra Agarwal & Anr. V/s. Union of India (Criminal Appeal No. 1273 of 2021 dated 25th October, 2021.)
- iii) Monish H. Bhalla V/s. Staya Parkash Bahi alias S.P. Bahi alias S.P. and others².
- iv) Suresh Budharmal Kalani @ Pappu Kalani V/s. State of Maharashtra³.

¹ 2005(1) SCC 568.

² 2005(1) ALL MR (Cri) 188.

³ 1998 SCC (Cri) 1625

v) Order dated 21st January, 2013 passed by this Court in the case of Salim Babu Shaikh @ Aitun V/s. The State of Maharashtra in Criminal Appeal No.1338 of 2012.

7. learned counsel for Respondent No.1 submitted that, prima facie case is made out against the applicants. At the stage of discharge, the Court is required to consider the material on record. The submissions urged by the applicants are required to be considered during the trial. The offence is of serious nature. The accused were tried for the offences under the NDPS Act. They were also charged for offence of conspiracy. At this stage, the case of the prosecution cannot be discarded. While adjudicating the application under Section 227 of Cr.P.C., the Court is not expected to conduct roving inquiry. During the course of investigation, the involvement of the applicants was revealed. All the accused were acting in conspiracy with each other. The investigation refers to active involvement of the applicants. The applicants are father and son, who acted in connivance with each other and in conspiracy with the co-accused. During the investigation, the applicants had disclosed the involvement of the accused No.5. Learned counsel relied upon the decision of this Court in the case of Govind Sakharam Ubhe V/s. The State of Maharashtra dated 11th June, 2009 delivered in Criminal Appeal No.18 of 2019.

8. It is the case of the prosecution that, on the basis of information, accused Nos. 1 & 2 were apprehended. 6.5 Kgs. charas was recovered from them. Interrogation of the arrested accused revealed the involvement of the applicants. Both of them were apprehended on 23rd December, 2016. The applicants were arrested in three cases registered vide C.R. No.12 of 2016 and C.R. No.17 of 2017. The interrogation of the applicants revealed involvement of the accused No.5 Ashok Kumar Verma as the original supplier. On completing investigation, complaint has been filed before the trial Court. The applicant in Criminal Revision Application No.28 of 2022 was arrested and involved in various other cases numbered as 37/2003, 120/2006, 128/2006, 192/2006, 232/2006, 316/2006, 11/2007, 144/2004, 237/2009 and 11/2013. According to the prosecution, the role of the applicants cannot be isolated from the co-accused. The case is of conspiracy and the accused were charged under Section 29 r/w Section (8)(c) and Section 20(c) of the NDPS Act.

9. It is pertinent to note that the present case is at the stage of framing charge. The charge is also under Section 29 of the NDPS Act which relates to conspiracy. The material collected by the investigating agency urging conspiracy will have to be decided in the event and it cannot be discarded at this stage. The absence of

recovery cannot be a ground for discharge. The learned Sessions Judge has given reasons for the rejection the application for discharge. The trial Court has observed that, it will be very early stage to come to conclusions, without giving chance to the prosecution to place their stand during the trial to prove allegations. From the complaint filed by the prosecution it can be seen that as per the averments in Paragraph – 26 of the said complaint, the accused have entered into and were party to continuing the party to subject criminal conspiracy to possess and sell 6.5 Kgs. charas, narcotic drug and thereby committed offence punishable under Section 29 of the NDPS Act r/w Section 8(c), Section 20(c), Section 29 and Section 28 of the NDPS Act. Paragraph – 24 of the complaint refers to the fact that letters dated 4th April, 2017 were sent to M/s. Reliance Telecommunications Pvt. Ltd. and Ms. Vodafone Essar Ltd. for providing CDR of mobile numbers mentioned therein. The requisite report is yet to be received by NCB and the same will be tendered in the case. The observations made in the order granting bail cannot be considered for discharging the accused from the proceedings.

10. In the case of **Union of India Vs. Prafulla Kumar Samal, 1979 SCR (2) 229** it was observed that, where the material placed before the Court disclose grave suspicion against the accused which has

not been purportedly explained, the Court will be fully justified in framing a charge and proceeding with the trial. In the case of **State of Maharashtra and Others V/s. Som Nath Thapa and Others 1996(4) SCC 659** it was observed that, if there is ground for presuming that the accused has committed the offence, it can be said that the prima facie case has been made out against the accused. Even if the Court finds that the accused might have committed the offence, it can frame charges. At the stage of framing of charge, probative value of the materials on record cannot be gone into. In the case of **Govind Ubhe V/s. State of Maharashtra** it was held that the principles laid down by the Supreme Court need to be summarized. At the stage of Section 227 of the Code, the court has power to sift the materials collected by the prosecution to find out whether there is prima facie case against the accused. The Court has to be satisfied that there is ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him. The Court's inquiry must not be directed to find out whether the case will end in conviction.

11. The learned counsel for the applicants has relied several decisions in support of his submissions. In the case of **State of Orissa V/s. Devendra Nath Padhi** (supra) it was observed that, if

the the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserved to be discharged. In the case of **Sanjeev Chandra Agarwal & Anr. V/s. Union of India** (supra) the apex Court had observed that no narcotic drug or psychotropic substances were recovered from the premises of the appellants. The High Court was not correct in relying on the statements of other accused under Section 67 of the NDPS Act. In the case of **Monish H. Bhalla V/s. Staya Parkash Bahi alias S.P. Bahi alias S.P. and others** (supra) this Court had observed that confession made by the co-accused cannot be treated as substantive evidence, but only as corroborative piece of evidence. In the case of **Suresh Budharmal Kalani @ Pappu Kalani V/s. State of Maharashtra** (supra) the apex Court had observed that the Court is required to confine its attention to only those material collected during investigation which can be legally translated into evidence. This Court in the case of **Salim Babu Shaikh @ Aitun V/s. The State of Maharashtra** (supra) has observed that the trial Court could not have taken into consideration material which would not be admissible in evidence.

12. As stated herein above, the accused are facing serious charges. During the course of investigation, the investigating agency has collected evidence against the applicants. They are

charged for the charge of conspiracy. The prosecution should be given an opportunity to test the evidence during trial. This is not the stage to appreciate the submissions of learned counsel for the applicants. Hence, no case is made out to grant relief in these applications.

ORDER

1. Criminal Revision Application No.28 of 2022 and Criminal Revision Application No.29 of 2022 are rejected and stand disposed of.

(PRAKASH D. NAIK, J.)