

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

CRIMINAL REVISION APPLICATION NO.14 OF 2023

Suraj Bhanudas Shelar

...Applicant

Versus

The State of Maharashtra

...Respondent

Mr. Ayaz Khan, Advocate for Applicant.

Mr. Arfan Sait, APP for State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 20th SEPTEMBER 2023

PC :

1. The Applicant has challenged the order dated 13th September 2022 passed by the NDPS Act Special Judge, Sessions Court, Greater Bombay rejecting the Applicant's Application for discharge preferred at Exhibit-8 in NDPS Special Case No.691/2021. In effect, the Applicant is seeking discharge in the said case.

2. Heard Mr. Ayaz Khan, learned counsel for the Applicant and Mr. Arfan Sait, learned APP for the State.

3. The prosecution case is that on 31st December 2020, at

about 9:30 am, Police Constable- Pawar, who is the first Informant in this case, received a secret information that one person was to come at Maheshnagar S.V. Road, Goregaon (West), Mumbai to sell Charas. The first Informant, in turn, informed this to his seniors. Preparation was made for conducting the raid. The panchas were called. At about 1:45 pm, the raiding party saw the person referred to in the information. He was apprehended and searched after following the due procedure. It was found that he was carrying Charas weighing 24 grams. Two samples of five grams each were removed and kept in two separate plastic bags. They were sealed. The remaining 14 grams of contraband was kept in another plastic bag and sealed. It was revealed that name of that person was Vivekkumar Rajeshwar Singh. On this basis, FIR was lodged.

4. During investigation, the said Accused Vivekkumar made a statement showing his willingness to show the place where he had kept Charas which he intended to sell. He led the investigating agency to the house of the present Applicant at Goregaon. Vivekkumar Singh went inside and took out a red coloured bag

from the refrigerator in the house. That bag contained 540 grams of Charas. Two samples of each 25 grams were removed from the contraband. They were separately sealed and the remaining contraband was also sealed. It is the prosecution case that the Applicant was aware and had requisite knowledge that Vivekkumar Singh had kept Charas in his house. On this ground, the Applicant was also made an Accused. The investigation was carried out. The CA report shows that the samples were of the contraband Charas. The Applicant preferred an Application for discharge. As mentioned earlier, it was rejected.

5. Learned Counsel for the Applicant submitted that from the statements of the prosecution witnesses, it is clear that the Applicant was not having knowledge that Vivekkumar Singh had kept Charas in his refrigerator. Even at this stage, the statements of those witnesses can be considered in favour of the present Applicant. He relied on a judgment of the Hon'ble Supreme Court in the case of **Abdul Rashid Ibrahim Mansuri v. State of Gujarat** as reported in **2000(2)SCC 513** to contend that the burden of proof cast on the Accused under Section 35 of the Narcotic Drugs and

Psychotropic Substances Act, 1985 Act (hereinafter referred as “NDPS Act”) can be discharged by relying on the materials available in the prosecution evidence. He also relied on the order passed by a Single Judge Bench of this Court (Coram: A.R. Joshi, J.) on 31st March 2009 in Criminal Revision Application No.569/2008 with Criminal Application No.570/2008 to support his contention. He specifically relied on the statements of Akshata Rane and Dipti Honaji to contend that the Applicant was not having knowledge that Vivekkumar Singh had kept Charas in his refrigerator.

6. Learned APP opposed these submissions. He strongly relied on the presumption under Section 35 of the NDPS Act. He also relied on the same judgment of the Hon’ble Supreme Court in the case of **Abdul Rashid Mansuri** (supra) as relied by Mr. Khan. Learned APP relied on the same judgment to contend that the presumption can be rebutted only during trial after evidence is led and not at the stage of consideration of discharge Application. He submitted that at this stage, it cannot be observed that there was no material against the Applicant.

7. I have considered these submissions. Mr. Khan has relied on statements of Akshata Rane and Dipti Honaji. Akshata is Applicant's wife. Akshata has stated that on 30th December 2020 her friend Dipti had come to her house at around 6:00 pm. At around 10:15 pm when Dipti was about to leave, the Applicant got a phone call from Vivekkumar Singh. The Applicant told her that Vivekkumar was facing difficulty as his landlord was asking him to vacate the room because the building was to be redeveloped. After that, the Applicant left to bring Vivekkumar's luggage. After about ten minutes, the Applicant and Vivekkumar came to their house carrying eight plastic bags. She has stated that Vivekkumar told them that there were dry fruits in those plastic bags and they have to be kept in the refrigerator. Stating so, the packets were kept in the refrigerator by Vivekkumar. It is her case that since Vivekkumar knew the Applicant for about ten years, they did not examine the packets. On 1st January 2021, Vivekkumar brought police to their house and then took out the packet containing Charas from the refrigerator.

8. Dipti Honaji has stated that when she was about to

leave, the Applicant and Vivekkumar came back to their house carrying plastic bags. Vivekkumar put some luggage in the home and again went to bring his articles. In the meantime, as she was getting late, she left the house.

9. Mr. Khan heavily relied on both these statements to contend that the Applicant was not aware of the contents of the packets. As far as Dipti's statement is concerned, it is hardly of any consequence because she had only seen Vivekkumar with his plastic bags in the house.

10. The other witness Akshata Rane is the Applicant's wife. Therefore, her statement will have to be looked at with caution. She was told by the Applicant that Vivekkumar was asked to vacate his room and, therefore, some articles were to be kept in his house. She was not aware of anything else. Therefore, at this stage, it is difficult to observe that the Akshata's statement exonerates the Applicant completely.

11. Apart from these two statements, there is a statement of one Rahul Pai. It is recorded on 12th January 2021. He has stated

about the close friendship between himself, the Applicant and Vivekkumar. He has categorically stated that they used to consume Charas regularly in two to three months. Vivekkumar was supplying Charas to them. This statement shows that the Applicant was aware of Vivekkumar's involvement in such activities and therefore, at this stage, since the Charas was found in possession of the present Applicant, there is strong material against him. In this context, Section 35 of the NDPS Act is important which reads thus:

“35. Presumption of culpable mental state. — (1)

In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.— In this section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

This section was considered by the Hon'ble Supreme

Court in **Abdul Rashid Mansuri** (supra) case. The relevant observations can be found in paragraphs 23 and 24 of the said judgment, which read thus:

“ 23. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub- section (2) as "beyond a reasonable doubt". If the Court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the Court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.

24. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in

the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.”

12. The aforesaid observations show that the burden on the Accused under Section 35 of the NDPS Act can be discharged by relying on the material available in the prosecution evidence or by eliciting answers from prosecution witnesses through cross-examination or by adducing his own evidence. All these modes necessarily refer to the material brought on record during trial as evidence. This presumption can be rebutted only on the basis of the evidence laid during the trial. The Applicant has approached the trial Court and this Court at the stage of framing of charge. At this stage, the presumption can not be rebutted.

13. Mr. Khan’s reliance on the order passed by a Single Judge Bench of this Court, referred to hereinabove, is not correct in the present facts of the case. The fact of those Revision Applications was regarding finding of the contraband in a hotel

room. There were four Accused. By the order passed by the Single Judge, two of them i.e., Accused Nos.3 and 4 were discharged. It was observed that it was difficult to ascertain their involvement regarding their conspiracy with the other two Accused i.e., Accused Nos.1 and 2. These facts are completely different. In the present case, the contraband was found from the house of the Applicant. He was aware of the activities of the co-accused Vivekkumar Singh which is clear from the statement of Rahul Pai.

14. As rightly submitted by learned APP, this is not a case where there is no material against the Applicant. From the discussion above, it can be seen that there is sufficient material for framing charge against the Applicant.

15. Considering all these aspects, I do not find that the learned trial Judge has committed any error in rejecting the Applicant's Application for discharge. Consequently, even the present Application does not have any merit. Accordingly, the Application is dismissed.

(SARANG V. KOTWAL, J.)