



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.183 OF 2024

Dhruv Dalip Tahil

.. Applicant

Versus

State of Maharashtra

.. Respondent

WITH

INTERIM APPLICATION No.1074 OF 2024

IN

CRIMINAL REVISION APPLICATION NO.183 OF 2024

Dhruv Dalip Tahil

.. Applicant

Versus

State of Maharashtra

.. Respondent

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- Mr. Ayaz Khan a/w Mr. Dilip Mishra, Ms. Zehra Charania, Ms. Serena Jethmalani and Ms. Mallika Sharma, Advocates for Applicant.
 - Mr. Hitendra J. Dedhia, APP for State.
 - PSI Phalke, ANC Bandra Unit – Present.
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CORAM : MILIND N. JADHAV, J.

DATE : JUNE 9, 2025.

JUDGMENT:

1. Interim Application No.1074 OF 2024 was filed for condonation of delay in filing Criminal Revision Application No.183 of 2024. This Court, by an order dated 20.03.2024 (Coram : S. M. MODAK, J.) has condoned the delay.

2. This is a Revision Application filed under Section 397 r/w

Section 401 of Cr.P.C.¹ challenging orders dated 04.07.2023 and 07.10.2023 passed by the Special Judge rejecting the Discharge Application and a subsequent Clarification Application preferred by Applicant – Accused No.2 below *Exhibit 16* and *Exhibit 20* respectively in N.D.P.S. Special case No.711 of 2021.

3. According to prosecution case, while on patrolling duty, Police team intercepted Accused No. 1 - Muzammil Shaikh because of his suspicious movement in the parking ground in front of Madina Building, Ahmed Zakaria Nagar, Opp. HDIL Tower, Bandra (E), Mumbai. He was apprehended with 35 grams of alleged contraband Mephedrone (MD). His mobile phone was confiscated. On enquiry, he disclosed to prosecution officers that in the past he had supplied alleged contraband to various persons including Accused No. 2 who is the Revision Applicant.

3.1. From the mobile phone of Accused No. 1, prosecution recovered various WhatsApp messages exchanged between Accused Nos. 1 and 2 which according to prosecution's case, *inter alia*, pertain to procurement of alleged contraband in the past. According to prosecution case between 02.07.2019 to January 2021 (18 months), Applicant procured the alleged contraband MD from Accused No. 1 weighing 1 or 2 grams on multiple occasions for which he made payments by 15 different transactions in the denomination of

¹ The Code of Criminal Procedure, 1973.

Rs.1,000/- to Rs. 4,000/- totaling to Rs.24,700/-.

3.2. Prosecution case primarily relies on WhatsApp messages in support of its case against Applicant under Section 8(c), 22(b), 27-A and 29 of NDPS Act². It is prosecution case that Applicant conspired with Accused No. 1 in trafficking of alleged contraband and liable under the aforesaid 4 provisions of the NDPS Act. Apart from WhatsApp chats depicting messages, it is prosecution case that that over a period of 18 months, Applicant procured 44 grams of alleged contraband and in lieu thereof paid Rs. 24,700/- to Accused No. 1 and in conspiracy with him trafficked the alleged contraband.

4. Mr. Dedhia, Learned APP would submit that Applicant's name came up in WhatsApp chats of Accused No.1 where it was discovered that Applicant was procuring small quantities of contraband MD on a regular basis. He would submit that Applicant made payments to Accused No.1 in 15 tranches equating to Rs.24,700/- for procuring the contraband. He would submit that although procurement of such small quantity in itself would not constitute an offence but would urge the court to consider recurring nature of transactions of contraband along with WhatsApp chats to assert that Applicant was involved in illicit dealing of contraband also. He would submit that even if no contraband is recovered from possession of Applicant, he aided Accused No.1 to carryout his trade and acting as a

² The Narcotic Drug and Psychotropic Substances Act, 1985

channel for transactions and this act would constitute an offence under the NDPS Act. To further his submission, he would submit that Applicant was also instructing Accused No.1, supplier of contraband to deliver contraband to different addresses on recurring basis. To add to this hypothesis, he would point out message dated 17.07.2020 sent on 19:00 hrs where Applicant is seen insisting Accused No.2 to deliver contraband at the earliest as some of his acquaintances were depicting lack of patience. He would submit that chats further reveal that Applicant shared Accused No.1's contact with his friends for which he received certain incentives in the form of discount or commission for himself. He would submit that this is not a case where palpable error, non-compliance with provisions of law or a case where Court has palpably erred in passing the impugned order, but on the contrary a case depicting *prima facie* involvement of Applicant in the offence of trafficking. He would pray for the Application be rejected.

5. Mr. Khan appearing on behalf of Applicant would submit that charges attracted against Applicant are done without complete application of mind with a *mala fide* intention to implicate him. He would deal with the charges categorically in *seriatim* and would submit that even if the case of prosecution is proved to the extent of he having procured contraband from Accused No.1, the same cannot constitute any offences under the NDPS Act as procurement of small quantity cannot attracting the alleged charges. He would refer to

Section 218(1) of Cr.P.C. to submit that there should be a separate charge sheet for each distinct offence and a separate trial for each different offence barring the exceptions listed in Section 218(2). He would submit that only one such exception relevant to application of Section 218 is Section 219 which allows three charges of three offences committed within twelve months to be tried together; However the prosecution, as per their own admission have asserted that 15 offences in the present case span over 18 months and thereafter no case whatsoever is made out by prosecution. He would thereafter pray for the impugned orders to be set aside and Discharge Application to be allowed by Court.

6. I have heard Mr. Khan, learned Advocate for the Applicant and Mr. Dedhia, learned APP for Respondent – State and with their able assistance, perused the record of the case.

7. At the outset, it may be apposite to list out the contours and scope of powers of High Court under Section 397 of Cr.P.C. In the decision of *Amit Kapoor v. Ramesh Chander*³, the Supreme Court has discussed the ambit and scope of the power which the courts including the High Court can exercise under Section 397 and Section 482 of the Code. The relevant paragraphs read thus:-

“12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of

³ (2012) 9 SCC 460

any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim¹³. Another well-accepted norm is that the revisional jurisdiction or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the CrPC.”

8. From the above, it can be understood that the object of this provision is to set right a patent defect or an error of jurisdiction or law. It may not be appropriate for the Court to scrutinize the impugned order if it contains a token of careful consideration and appear to be in accordance with law.

9. In the present case, Mr. Khan has *inter alia* argued on the facet of joinder of charges. This is the main crux of the argument to which prosecution has no reply. Prosecution case is that the Applicant used to regularly purchase contraband MD from Accused No.2 who was intercepted with commercial quantity of the same contraband

much later. Case of prosecution with regards to Applicant hinges on his WhatsApp messages exchanged with Accused No.1. In those WhatsApp chats, Applicant is seen to be allegedly procuring small quantities (1 or 2 grams) of contraband MD from Accused No.1. This alleged act as asserted by prosecution constitutes an offence under Section 8(c) r/w Section 22(a) of the NDPS Act. However charges attracted against the Applicant are *inter alia* under Section 8(c), 22(b) of the NDPS Act. The point of distinction between charges mentioned herein above is the quantity of contraband. Other facet where these two offences differentiate themselves are *inter alia* the term of imprisonment i.e. 1 year juxtaposed with 10 years along with the rigors of bail provisions⁴.

10. From the above, it is amply clear that the quantity of contraband is the point of distinction to determine the charge to be attracted against an Accused apart from the multitude of charges. Even if prosecution version is believed as asserted by prosecution, it *prima facie* appears to me that Applicant Accused No.2 has committed an offence under Section 8(c) r/w 22(a) on multiple occasions but charge is not levied for each abberation. When prosecution is questioned about indicting Applicant under Section 22(b), their reasoning is based on the theory that Applicant has in total over a period of 18 months procured contraband equating to 44 grams. *Prima facie* when Section 218 is read, such charge by prosecution on the face of record appears

⁴ See Section 37 of the NDPS Act.

to be preposterous. The only exception would be Section 219, but that has also not been done by Prosecution.

11. Mr. Khan has vehemently countered this reasoning of the learned prosecutor and has drawn attention to Section 218(1). The said section reads thus:-

Section 218 – Separate charges for distinct offences: For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately'

Sub-section (2) is an exception to Section 218(1). It reads thus:-

(2) Nothing in Sub-Section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

12. From the above, it is lucid and clear that apart from exception enumerated in Sub-section (2), joinder of charges is impermissible in law. For the sake of brevity I shall refrain from listing out all the exceptions and shall list out only one relevant exceptions which is in close proximity to the instant case but has not been applied. Section 219 deals provides an exception to Section 218(1) and allows three charges of three distinct offences of the same kind committed within a time span of one year to be tied together. The said Section reads thus:-

“Section 219 – Three offences of same kind within year may be charged together

- 1. When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.*

2. Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local laws”

13. In the decision of *MP Srivastava V. Sqn Ldr. KV Vashist*⁵, where the accused was tried on charges of extortion for over forty acts spanning over two years, the Privy Council ruled that it is illegal under Section 219 to charge a person at one trial with more than three acts, these acts extending over a period of more than a year. In the decision of *Reg vs Hanmanta*⁶ it was held that 3 offences of the same kind committed within one year only can be tried at one trial. In the decision of *Mangal Khan vs. Salim-Ullah Khan*⁷ it was held that accused can be only be tried for three separate offences committed within a span of 12 months.

14. Perusal of the chargesheet depicts that prosecution has charged Applicant for similar offences under Section 22(a) committed on multiple occasions which are more than 3 counts over the course of more than 18 months. The details of Bank Account and WhatsApp conversation of Applicant – Accused No.2 with Accused No.1 spans from 02.07.2019 - January 2021. Thus, I am of the opinion that the prosecution agency has clearly erred while levying charges on Applicant.

15. Based on the above discussion, I am of the opinion that the

⁵ 1991 CrLJ 12 (Del)

⁶ (1877) ILR 1 Bom 610

⁷ (1909) 32 All 26

prosecution has failed to comply with provisions of Chapter XVII – B of Cr.P.C. more particularly, Sections 218 and 219 of the Code. This has led to Applicant being charged with an offence of a higher magnitude. It is to be noted that offences alleged are under NDPS Act. NDPS Act being a special legislation contains certain stringent provisions which include higher term for imprisonment, higher amount of fine and stringent conditions for bail. Where such stringent conditions are imposed upon the accused by virtue of a Special Act, the reciprocating duty is implicitly cast upon Investigating Agency to strictly comply with provisions of the said Act and ensure that strict compliance of each aspect which may have a negative impact on the Accused, *sans* any ambiguity, to a point of proof beyond reasonable doubt, is made which the prosecution has failed to do in the present case.

16. Insofar as the charges under Section 27A and 29 are concerned, they are alleged to span over a period of one year and thus joinder of such charges into one singular offence is *prima facie* bad in law. Case of prosecution to assimilate procurement of the alleged contraband on several multiple occasions over a period of more than 18 months and alleged the same to be charged in one singular crime is impermissible in law in view of applicability of the provisions of Section 218 of Cr.P.C. The only exception being Section 219 but that also needs to be charged with respect to three specific acts of procurement over a period of 12 months which is not the case here.

Prosecution cannot be permitted to decipher and follow its own procedure for levying of charge of such a serious nature which is impermissible under the provisions of the statute. *Prima facie* it is an admitted position that procurement of alleged contraband of 1 gram or 2 grams at a time by Applicant over a period of 18 months is by itself a separate act for which separate charge is leviable if at all prosecution desires to proceed against the Applicant. The procedural law does not permit the prosecution to assimilate more than 3 charges into a singular charge over a period of 18 months to be tried together and invoke a singular precipitative action.

17. It is seen that allegation of conspiracy between Accused Nos. 1 and 2 from the the alleged WhatsApp chats is not proved when the said chats are specifically read. Neither said WhatsApp chats refer to name of any alleged contraband or even MD which is alleged to have been trafficked nor any of the amounts paid reflect payment against any alleged contraband when read. That apart case of prosecution *qua* Applicant is merely based on hearsay primarily because of WhatsApp conversation chats appended to the Application which do not mention name of any contraband or the alleged contraband in any of the said chats. Therefore *prima facie* no live link or nexus whatsoever is established by prosecution to proceed against Applicant. Neither there is any live link established by prosecution with respect to monetary transactions limited to procurement of alleged contraband referred to

and relied upon from the WhatsApp chats. Provisions of Section 27-A of NDPS Act pertain to financing either directly or indirectly for trafficking of alleged contraband. None of the ingredients of Section 27-A are *prima facie* present in the present case *qua* Applicant. Neither any *prima facie* incriminating material is shown to Court to believe the case of prosecution.

18. In this regard, attention is drawn to the Judgement of the Supreme Court in the case of *Karan Talwar Vs. State of Tamil Nadu*⁸ where in paragraph No.10, the Supreme Court has held as under:-

"10.Certainly, in the absence of any other material on record to connect the appellant with the crime, the confession statement of the co-accused by itself cannot be the reason for his implication in the crime. This view has been fortified by the law laid down in Suresh Budharmal Kalani v. State of Maharashtra, wherein it was stated that a co-accused's confession containing incriminating matter against a person would not by itself suffice to frame charge against him..."

...There is absolutely no case that any recovery of contraband was recovered from the appellant. As regards the confession statement of the appellant in view of Section 25 of the Indian Evidence Act, 1872 there can be no doubt with respect to the fact that it is inadmissible in evidence. In this context it is worthy to refer to the decision of this Court in Ram Singh v. Central Bureau of Narcotics⁴. In the said decision, this Court held that Section 25 of the Indian Evidence Act would make confessional statement of accused before police inadmissible in evidence and it could not be brought on record by prosecution to obtain conviction. Shortly stated, except the confessional statement of co-accused No.1 there is absolutely no material available on record against the appellant....."

19. From a reading of prosecution case, it is *prima facie* seen that invocation of provisions of Section 8(c), 22(b), 27 and 29 of the NDPS Act against Applicant in the facts which delineated herein above

⁸ SLP (Cri.) No.10736 of 2022

and which are *prima facie* undisputed is impermissible in law. Prosecution is primarily aware of the fact that if it proceeds against a singular act of procurement by Applicant considering the said procurement being below small quantity, Applicant may get benefit of doubt under the NDPS Act. That apart, Applicant is not apprehended with any contraband. It appears that prosecution has combined procurements by Applicant over a period of 18 months of 1 or 2 grams at a time for invoking the provisions of NDPS Act against Applicant on basis of confessional statement of Accused No.1. However, while doing so, the tenet and principle of law envisaged under Section 218 of Cr.P.C. read with Section 219 to 223 which are exceptions thereto are not complied with for invocation of prosecution case against Applicant.

20. From the material available on record and invocations of charge against Applicant, no case is made out for the Applicant to stand trial. Further as held by the Supreme Court in the case of ***Suresh Budharmal Kalani v. State of Maharashtra (1998) 7 SCC 377***, mere confession by a co-accused containing incriminating matter against a person would not by itself suffice to frame charge against him. The alleged material in the form of WhatsApp chats when read *prima facie* in my opinion cannot translate into admissible evidence of the stage of trial against the Applicant.

21. In the light of the foregoing observation and findings clearly

emanating from the prosecution case, I am of the opinion that this is a fit case for exercising the powers conferred upon this Court under Sections 397 r/w 401 of Cr.P.C. to set aside the impugned Judgement as it clearly suffers from an error of application of law. Invocation of charge against Applicant in the present crime is therefore not sustainable. Hence the Application succeeds.

22. Orders dated 04.07.2023 and 07.10.2023 passed under Exhibit 16 and Exhibit 20 respectively in NDPS Special Case No.711 of 2021 are quashed and set aside. Discharge Application of Applicant below Exhibit 16 is allowed.

23. Applicant is discharged under Section 8(c) r/w 22(b), 27A and 29 of NDPS Act in NDPS Special Case No.711 of 2021.

24. Criminal Revision Application No.183 of 2024 is allowed and disposed in the above terms.

[MILIND N. JADHAV, J.]

Ajay

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