A SURINDER KUMAR KHANNA

v.

INTELLIGENCE OFFICER DIRECTORATE OF REVENUE INTELLIGENCE

B (Criminal Appeal No. 949 of 2018)

JULY 31, 2018

[ABHAY MANOHAR SAPRE AND UDAY UMESH LALIT, JJ.]

C *Narcotic Drugs and Psychotropic Substances Act, 1985 – s.21 r/w. s.29 – Conviction of appellant under, based on confessional statements of co-accused – Propriety of – Held: Confessional statement of co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be* D *used or utilized in order to lend assurance to the Court – In the present case, apart from the statements of co-accused there is no material suggesting involvement of the appellant in the crime in question – In the absence of any substantive evidence, it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused – Orders of conviction and sentence* E *against the appellant set aside – Appellant acquitted – Evidence Act, 1872 – ss.24, 25 and 27 – Terrorist and Disruptive Activities Act, 1987 – s.15.*

Allowing the appeal, the Court

F **HELD: 1.1 Unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. [Para 10] [344-D-E]**

G **1.2 In the present case apart from the statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. On the touchstone of law laid down by Supreme Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of**

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evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. [Para 14] [347-F-H; 348-A]

Hari Charan Kurmi and Jogia Hajam v. State of Bihar **[1964] 6 SCR 623 – followed.**

Kashmira Singh v. State of Madhya Pradesh **[1952] SCR 526 – relied on.**

Kanhaiyalal v. Union of India **(2008) 4 SCC 668 : [2008] 1 SCR 350 ;** *Tofan Singh v. State of Tamil Nadu* **(2013) 16 SCC 31 : [2013] 9 SCR 962 ;** *Bhuboni Sahu v. The King* **(1949) 76 Indian Appeal 147 ;** *State v. Nalini* **(1999) 5 SCC 253 : [1999] 3 SCR 1 – referred to.**

Case Law Reference

[2008] 1 SCR 350	**referred to**	**Para 7**
[2013] 9 SCR 962	**referred to**	**Para 8**
[1952] SCR 526	**relied on**	**Para 11**
[1964] 6 SCR 623	**followed**	**Para 12**
[1999] 3 SCR 1	**referred to**	**Para 13**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 949 of 2018.

From the Judgment and Order dated 21.12.2016 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No.D-798-DB/2014.

Jayant Bhushan, Sr. Adv., Pahlad Singh Sharma, Ms. Kisalaya Shukla, Krishna Kant Shukla, Reeja Varghese, Ketan Pant, Tushar Bhushan, Advs. for the Appellant.

Maninder Singh, ASG, R. Balasubramanian, Rohit Bhatt, Prabhas Bajaj, Sanjay Kumar Tyagi, B. Krishna Prasad, Advs. for the Respondent.

A The Judgment of the Court was delivered by

UDAY UMESH LALIT, J. 1 Special Leave to Appeal granted.

2. This appeal challenges the correctness of Judgment and Order dated 21.12.2016 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No.798 of 2014 by which the High Court affirmed the conviction of the appellant for the offences punishable under Section 21(c) read with Section 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPC Act', for short).

3. According to the Prosecution:-

C a. On a specific information that narcotic drugs were going to be transported from Jammu side to Chandigarh via Hoshiarpur in a white colour Indica car bearing registration no.PB-02AJ-7288, the officers of Directorate of Revenue Intelligence (for short 'DRI') laid picket at toll barrier at Hoshiarpur-Garhshankar road. At 10:35 hours, they intercepted an Indica car of white colour which was coming from Hoshiarpur side bearing registration No.PB-02AJ-7288. The car was being driven by one Raj Kumar @ Raju whereas one Surinder Pal Singh was sitting next to him. To ensure safe search of the car and personal search of occupants, the car was taken to the office of Superintendent, Central Excise Range, Model Town, Hoshiarpur. The officers of DRI served notice under Section 50 of the NDPS Act upon said Raj Kumar @ Raju and Surinder Pal Singh.

b. As desired by said suspects, their personal searches and that of the car were conducted in the presence of independent witnesses and Shri SJS Chugh, Senior Intelligence Officer. Personal searches of the suspects did not result in recovery of any incriminating material. However, when the car was searched, four packets wrapped with yellowish adhesive tapes were found concealed in the door of dickey of the car. The gross weight of those four packets came to 4.300 kg.

c. Each of those packets was containing white colour granules/ powder which gave a very pungent smell. The pinch of each packet was tested, which showed the presence of heroin. The recovered heroin weighing 3.990 kgs was valued at Rs.19,95,000/-. Those four packets were taken into possession. Two representative

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samples of 5 gms each were taken out from each of the packets as per rules. Indica car was also seized by the officers of DRI. Statements of both the suspects were recorded. From their statements, it transpired that four packets of heroin had been taken from one Mr. Goldy r/o Vijaypur, Jammu and those packets were to be delivered to a person of African origin near PGI Chandigarh.

d. Initially a complaint under Sections 21, 22, 23, 28, 29 and 60 of the NDPS Act was lodged against said Raj Kumar @ Raju and Surinder Pal Singh. During investigation, the involvement of the present appellant in the drug racket was said to have been made out. After the appellant was arrested, a supplementary complaint was presented against him and the matter was taken up with the main complaint. After hearing arguments, charges were framed against said Raj Kumar @ Raju and Surinder Pal Singh and the appellant for the offences under Sections 21, 29 and 60 of the NDPS Act.

4. The prosecution, in support of its case examined four witnesses. After hearing submissions, the trial court convicted and sentenced all three accused. The appellant was convicted under Section 21(c) read with Section 29 of the NDPS Act and was sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of Rs.1 lakh, in default whereof to undergo further rigorous imprisonment for three years. Similar orders for conviction and sentence were recorded against other two accused namely Raj Kumar @ Raju and Surinder Pal Singh. All three convicted accused preferred appeals; namely Criminal Appeal No.D-955-DB-2013 was filed by Raj Kumar @ Raju and Surinder Pal Singh while Criminal Appeal No.D-798-DB-2014 was preferred by the appellant. Both these appeals were heard together by the High Court.

5. As regards the appellant, it was observed by the High Court that he was specifically named by co-accused Raj Kumar @ Raju and Surinder Pal Singh in their statements. Apart from such statements nothing was produced on record to indicate the involvement of the appellant. The High Court however found that the case against the appellant was made out. It was observed:

"Offence of abetment under Section 29 of NDPS Act stood established against accused Surinder Kumar Khanna, showing that he was involved in drug trafficking. He was specifically

named by accused Raj Kumar @ Raju and Surinder Pal Singh in their statements. Such statements of accused Raj Kumar @ Raju and Surinder Pal Singh recorded under Section 67 of the NDPS Act are admissible in evidence and are not hit by Section 25 of the Evidence Act because the officers of DRI, who had apprehended Raj Kumar @ Raju and Surinder Pal Singh, traveling in an Indica car and effecting recovery from them do not come within the definition of police officers.".

The High Court thus affirmed the order of conviction as recorded against the appellant but reduced the sentence to rigorous imprisonment for a period of 10 years and to pay fine of Rs.1 lakh, in default whereof to undergo further rigorous imprisonment for 1½ years. Similar orders of sentence were passed in respect of other co-accused namely Raj Kumar @ Raju and Surinder Pal Singh.

6. In this appeal challenging the correctness of the conviction and sentence rendered as against the appellant, it was submitted by Mr. Jayant Bhushan, learned Senior Advocate that apart from the so called statements of co-accused Raj Kumar @ Raju and Surinder Pal Singh there was nothing against the appellant and that he was neither arrested at the site nor was the contraband material in any way associated with him. Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent however supported the judgment of conviction and sentence rendered against the appellant. He placed on record call data reports showing that around the time when the co-accused was arrested, the appellant was in touch with a person named Chaudhary from Dubai. The learned Additional Solicitor General however fairly accepted that apart from the statements of the co-accused there was nothing to link the appellant with said convicted accused. The call data reports also did not indicate that around the time when co-accused were apprehended, the appellant was in touch with either of them.

7. For the present purposes, we will proceed on the footing that the statements of co-accused were recorded under and in terms of Section 67 of the NDPS Act. As regards such statements, a bench of two Judges of this Court after referring to and relying upon the earlier Judgments, observed in ***Kanhaiyalal*** v. ***Union of India***[1], as under:

"**45.** Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in ***Raj Kumar Karwal***

[1] (2008) 4 SCC 668

case[2] with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act."

8. Later, another bench of two Judges of this Court in ***Tofan Singh*** v. ***State of Tamil Nadu***[3] was of the view that the matter required reconsideration and therefore, directed that the matter be placed before a larger bench. It was observed in ***Tofan Singh*** (supra) as under:

"40. In our view the aforesaid discussion necessitates a re-look into the ratio of ***Kanhaiyalal*** *case*. It is more so when this Court has already doubted the dicta in ***Kanhaiyalal*** in ***Nirmal Singh Pehlwan***[4] wherein after noticing both ***Kanhaiyalal*** as well as ***Noor Aga***[5], this Court observed thus: (***Nirmal Singh Pehlwan*** *case*, SCC p. 302, para 15)

"*15*. We also see that the Division Bench in ***Kanhaiyalal*** *case* had not examined the principles and the concepts underlying Section 25 of the Evidence Act, 1872 vis-à-vis Section 108 of the Customs Act and the powers of a Customs Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in ***Raj Kumar*** *case*. The latest judgment in point of time is ***Noor Aga*** *case* which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in ***Noor Aga*** *case* particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with."

41. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.

[2] (1990) 2 SCC 409
[3] (2013) 16 SCC 31
[4] (2011) 12 SCC 298
[5] (2008) 16 SCC 417

A **42.** In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code."

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9. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger Bench.

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10. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987[6] which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused.

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11. In ***Kashmira Singh*** v. ***State of Madhya Pradesh***[7], this Court relied upon the decision of the Privy Council in ***Bhuboni Sahu*** v. ***The King***[8] and laid down as under:

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"Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in ***Bhuboni Sahu*** v. ***The King*** "It does not indeed come within the definition of" 'evidence' contained in section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of

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[6] Similarly: Section 18 of Maharashtra Control of Organised Crime Act, 1999

[7] (1952) SCR 526

[8] (1949) 76 Indian Appeal 147 at 155

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the accused, and it cannot be tested by cross-examination." Their Lordships also point out that it is "obviously evidence of a very weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made tile foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the judge refuses to believe him except in so far as he is corroborated ?

In our opinion, the matter was put succinctly by Sir 'Lawrence Jenkins in ***Emperor*** v. ***Lalit Mohan Chuckerbutty***[9] where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused "or, to put it in another way, as Reilly J. did in In ***re Periyaswami Moopan***[10]

> "the provision goes no further than this—where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession de- scribed in section 30 may be thrown into the scale as an additional reason for believing that evidence."

Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a

[9] [1911] I.L.R. 38 CAl. 559 at 588
[10] [1931] I.L.R. 54 Mad. 75 at 77.

A conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

12. The law laid down in ***Kashmira Singh*** *(supra)* was approved B by a Constitution Bench of this Court in ***Hari Charan Kurmi and Jogia Hajam*** v. ***State of Bihar***[11] wherein it was observed:

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as C evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to D hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in ***Emperor*** v. ***Lalit Mohan Chuckerburty*** a E confession can only be used to "lend assurance to other evidence against a co-accused". In ***re Periyaswami Moopan*** **Reilly**. J., observed that the provision of Section 30 goes not further than this: "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an F additional reason for believing that evidence". In ***Bhuboni Sahu*** v. ***King*** the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained G in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take

H [11](1964) 6 SCR 623 at 631-633

the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence". It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in ***Kashmira Singh*** v. ***State of Madhya Pradesh*** where the decision of the Privy Council in ***Bhuboni Sahu*** *case* has been cited with approval."

13. The law so laid down has always been followed by this Court except in cases where there is a specific provision in law making such confession of a co-accused admissible against another accused.[12]

14. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the

[12] For example: State vs. Nalini, (1999) 5 SCC 253, paras 424 and 704

A absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any
B other offence.

Divya Pandey Appeal allowed.