

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 2306/2003**

Date of Reserve: 14.09.2009

Date of Decision: 06.10.2009

GOPALCHAND KHANDELWAL Petitioner

Through: Mr. R.M. Bagai, Advocate

Versus

D.R.I. Respondent

Through: Mr. Satish Aggarwala, Advocate

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

MOOL CHAND GARG,J

1. This judgment shall dispose of a petition filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India by the petitioner, who has been asked to face trial in a complaint case filed by the respondents under Section 135 (1)(b) of the Customs Act 1962 on the allegations that he along with other co-accused persons was also involved in the smuggling of gold as stated by the co-accused, Mahavir Prasad Khandelwal in his statement recorded under Section 108 of the Customs Act. It is stated that there is no other evidence collected by the respondents to substantiate the allegations against the petitioner of his involvement in this case. As far as the statement made by co-accused under Section 108 of the Customs Act is

concerned, it is submitted that the said statement was involuntary and was soon retracted by the co-accused. In fact, the said co-accused has also relied upon the medical report to substantiate his plea that the statement was extracted under duress.

2. The ACMM framed charges under Section 135 (1)(b) of the Customs Act on 15.10.2001 against the petitioner even though initially he was also sought to be tried under Section 85(1) of the Gold (Control) Act, 1968 and Section 120-B IPC. The aforesaid order of framing charges was challenged by the petitioner by way of a revision petition before an Additional Sessions Judge under Section 397 Cr.P.C. but the same has been dismissed vide order dated 28.10.2002 and it is against the said order, the present petition has been filed.

3. The petitioner to support his petition and to assail the order of the Addl. Sessions Judge has submitted that the impugned order suffers from material infirmity and is liable to be set aside, inter alia, on the following grounds:

- a. Ld. ASJ failed to take into consideration the case of the petitioner properly because his case was entirely different from that of other three accused. That there was neither any incriminating statement of petitioner under Sec.108 of Customs Act despite the fact that petitioner was available and willing to give a statement.

- b. There is neither any recovery of gold from the person nor from the residence of the petitioner. The Scooter from which the alleged recovery was made also not belongs to the petitioner. That petitioner has been victimized only because he is the brother of the Mahavir Prasad Khandelwal.
- c. The involuntary statements made by all the three accused persons were soon retracted when they were produced before the ACMM. Neither the ACMM nor the Sessions judge has look into the medical examination reports of the accused persons where it is clearly written 'the multiple injuries within 48-64 hours' before they brought to jail.
- d. The petitioner has also suffered incarnation on account of an order of detention passed under section 3(1) of the COFEPOSA by the Central Government at the behest of the officials of the respondent. It is pertinent to submit that the advisory board comprising of three sitting judges gave the opinion that no sufficient cause for detention of petitioner and the detention orders were revoked by the Central Government on the advice of the board and therefore, acquits him of those charges.
- e. that the trial court proceeded to frame the charges on the basis of an assumption that the statement of the petitioner was also recorded as observed in paragraph 16 of the order framing charge, which is reproduced for the sake of reference:-

“16. Accused Mahavir Prasad and Gopal Chand both in their statement stated that they are living in the house from where the scooter was recovered and from the dicky of that

scooter the recovery has been effected. It is correct that complainant has not proved the ownership of scooter in question. However it is a common experience in this part of country that people are in a habit of purchasing vehicle without getting the same transferred in their name. In these circumstances non proving of ownership of scooter in question is not fatal to the case of the complainant.”

This is despite the fact that admittedly the statement of the present petitioner was not recorded under Section 108 of the Customs Act.

- f. that the Additional Sessions Judge while deciding the revision ignored the aforesaid facts which was specifically pleaded and blindly accepted the arguments of learned counsel for the respondent that it was only inadvertent observation and makes no difference. The observation made in paragraph Nos. 5 and 6 of the order of the Additional Sessions Judge are reproduced hereunder:-

5. Next ground pleaded in the revision is that ld. ACMM in para 16 of his order observed that accused Mahavir Prasad and Gopal Chand both in their statement u/s 108 Customs Act have stated that they were living in the house from where scooter was recovered and contraband gold biscuits were taken out of dicky of that scooter. It is argued that in fact statement of Gopal Chand Khandelwal had never been recorded u/s 108 Customs Act. Counsel argued that accused Gopal Chand Khandelwal was being prosecuted only on the basis of confessional statement given by co-accused Mahavir Prasad Khandelwal and statement of other co-accused namely Dharam Pal and Surinder Khanna.

6. On the other hand counsel Sh. Satish Aggarwal argued that the impugned order makes inadvertent observations that statement of accused Gopal Chand

Khandelwal had also been recorded u/s 108 Customs Act, then that is not a serious matter to call for an order of discharge once other evidence and material is there on record to put this accused also on trial for the offence he has been charged with.

4. The petitioner has relied upon the following judgments:

- i. Chonampara Chellappan Vs. state of Kerala AIR 1979 SC 1761
- ii. Zandu Pharmaceutical Works Ltd. & Ors. Vs. Mohd. Sharaful Haque & Anr. (2005) 1 SCC 122
- iii. Ravindran @ John Vs. The Superintendent of Customs JT 2007 (7) SC 47
- iv. Pradeep Kumar Vs. State 1994 RLR 117

5. On the other hand, the respondents while opposing the petition have submitted that the statement of co-accused person recorded by the D.R.I. officials under Section 108 of the Customs Act is admissible in evidence against the petitioner and as such that evidence can be used against the petitioner. It is submitted that the statement made by the co-accused person directly implicate the petitioner in respect of the crime for which the co-accused persons has been charged.

6. It is also the case of the respondents that on information received by the officers of the Directorate of Revenue Intelligence, New Delhi on 14.10.1988 they searched the residential premises of accused no. 1, Mahavir Prasad Khandelwal, situated at 199/9, Than Singh Nagar, Anand Parbat, New Delhi 110005 in the presence of two independent witnesses. During the search of the premises Mahavir Prasad (accused no. 1) was present in the above-said premises, which was conducted on the basis of a search warrant

issued under Section 105 of the Customs Act, 1962. It is also the case of the DRI that as a result of search one "ECHOLAC" black color brief case was recovered from the premises and further on opening it Indian currency amounting to Rs.3,45,660 was recovered. One Sky blue color Bajaj Chetak Scooter bearing registration number. DDK-5692 which Accused no. 1 stated that he had just bought was found parked within the above said premises. The officers of the DRI further searched the Dickies of the scooter, from the front dickey of the said scooter one green color canvas bag having yellow strips was recovered. In this canvas bag some dirty and soiled cloth belts were found to contain foreign marked gold biscuits numbering 325 of total 10 tolas each and in all weighing 37.911gms. and valued at Rs.1,21,31,520/-. The gold was then seized in the reasonable belief that the same was smuggled and was therefore, liable to confiscation under the provisions of the Customs Act and the Gold Control Act, 1968. The Indian Currency was seized in the belief that the same was the sale proceeds of smuggled gold and was therefore liable to confiscation under the provisions of Customs Act, 1962.

7. It is also the case of DRI officials that the statement of said Mahavir Prasad Khandelwal (accused no. 1) was recorded under section 108 of the Customs Act on the same day on the basis of which petitioner was summoned. An English translation of the said statement filed along with reply by the respondents is as under:

“that he is residing at the first floor of the house no. 199/9
than Singh Nagar, Ananad parbat, New Delhi -5 alongwith
his elder brother Gopal Chand Kahandelwal (petitioner

herein) that his telephone number is 5712353, that his house was searched the officers of the DRI, New Delhi on 14.10.1988, that Indian currency amounting to Rs. 3,45,660/- was recovered from his house , and 325 foreign marked gold biscuits of 10 tolas each were recovered from the front dickey of blue Bajaj Chetak Scooter DDK-5692 which was parked inside his house , that he did not know the owner of the scooters that this scooter was given to him that day at haldipur village by a person named Shri Surinder Khanna(accused no.3) who also told him that its front dickey contained 325 foreign marked gold Biscuits that the officers seized the Indian Currency and the gold biscuits alongwith the scooter DDK -5692 as detailed in Panchnama dated 14.10.1988, that the Indian currency amounting to Rs. 3,45,660/- seized from his house was the balance sale proceeds of the foreign marked gold sold by him prior to 14.10.1988 and was given to him on 14.10.1988 by one Ramesh at his residence. **He further admitted that he and his brother Gopal (accused No. 4) used to receive smuggled gold from one Dharam Pal Narang (accused No.2) (whom he later on identified and gave his address as BH-36) (East) Shalimar Bagh, Delhi) with whom he and his brother Gopal (accused No.4) had developed acquaintance about one and half year back and who had suggested to him and his brother to sell the smuggled gold sent to him (Dharampal) (accused No.2) by one Dubai based smuggler 'Ashraf' who was known to Dharam Pal and the price received after selling the smuggled gold was also to be sent to Dubai through Hawala. Both of them agreed on partnership basis to Dharam Pal's offer after finding the waysand means to sell the smuggled gold as he has a shop at 1164, Kucha Mahajini, Chandini Chowk Delhi, with Tel. Nos. 2528308 and 232411. After that he received small quantities of gold through Dharam Pal which were sold by both of them and the sale proceeds were sent to Dubai on the address given by Dharam Pal. Then for a long time his business of contraband gold remained in abeyance and again started in Sept., 1988. This time he used to take delivery of smuggled gold near Haiderpur village from Shri Surinder Khanna @ Ustad, (accused No.3) **Dharam Pal Narang's man, that he and his brother Gopal (accused No.4) used to sell this gold in the market and send the sale proceeds to Dubai at the address given by Dharam Pal Narang, (accused No.2) that money was sent to Dubai through Hawala Agent whose names were given to both of them by Narang. In Sept., 1988 he received 1500 foreign marked gold biscuits of 10 tolas each from Narang and sold the same in the market, that in October, 1988 upto 14.10.1988 he had received four deliveries of smuggled gold consisting of 447, 279, 276 and 325 gold biscuits from Dharam Pal Narang, that except the last 325 gold biscuits he had sold all the gold biscuits in the market, that they two brothers and Dharam Pal Narang (accused****

No.2) received a commission of Rs. 100/- per gold biscuit which they used to distribute among themselves, though Narang's share was a little more.”

8. However, the perusal of the original statement does not show that the present petitioner was having any knowledge or involvement about the currency or gold recovered from the house or dickey of scooter of accused no.1. The statement only narrates the alleged previous transactions.

9. The respondents have also submitted that even the petitioner was summoned under section 108 of the Customs Act, on 26.10.88 to appear before the Asstt. Director, DRI on 7.11.1988 at 11:00 am but he did not appear. However, it is not a case where he has been tried for non-appearing as a witness.

10. The respondents have also relied upon the following judgments:

- a. Naresh J. Sukhwani Vs. UOI
- b. UOI and Anr. Vs. Prakash Chand Lunia and Anr.
- c. Yogendra rai Vs. NCB
- d. OM Praksh bakshi Vs. State.
- e. Paramjit Singh Vs. Commr. Of Customs & Ors.

11. I have gone through the record of the case and find that the only evidence relied upon by the respondents against the petitioner comprises of the statement made by co-accused Mahavir prasad Khandelwal the brother of the accused, which statement has been retracted by Shri Mahavir prasad Khandelwal as per the retraction letter dated 18.10.1988. In the said letter he has stated as under:

Sir,

It is most respectfully submitted as under:

1. That I was produced in the court of duty Magistrate on 16.10.1988.
2. That I have been falsely implicated by the officers of D.R.I.
3. That I have no connection with the scooter from which gold was allegedly recovered nor I had any connection with the gold seized but the officers tortured me to write involuntary statement. They also forced me to implicate my brother Gopal and other persons who have no connection with me.
4. That I hereby retract the statement made under pressure.
5. That I am innocent and I have never before come to the adverse notice of my law enforcing authority.
6. That the statements produced by the D.R.I. officers may not be relied.
7. That the Indian currency seized is all accountable.

It is prayed accordingly.

Accused/Applicant
(Mahavir Parshad
S/o Shri Govind Ram Khandelwal)

12. It is also appropriate to take note of the medical report of accused Mahavir Prasad Khandelwal, which reads as under:

Medical examination of accused Mahavir Prasad lodged in central Jail Tihar as per the Court order of Sh. Kamlesh Kumar, Duty Magistrate, N.D.

Date of examination 17.10.88

Patient name Mahavir Prasad 30 years Male

M.I: scar mark on Right elbow. Time of exam 9.45 AM
B.P. 140/90 mm Hg Pulse 84/mt.

Following external injuries were noted on the body of accused Mahavir Prasad

Injuries

- i. at interseafular region
- ii. Seven linear abrasion with seab varing person 8” to 10” on the whole back
- iii. Contusion 1” X Y2” below Left eye (puple colour)
- iv. Contusion 6” X 6” on both hips (purple colour)

Besides this C/o pain in all over body and severe

pain in left knee joint.

Impression Injuries no. 1, 2, 3, 4 have been caused by blunt object, simple in nature, duration of injury between 48 to 72 hours approximaly.

To reach the court of
ACMM New Delhi
Through Supdt. Central Jail-1

Medical Officer
Central Jail Tihar
New Delhi

13. It is not disputed by the respondents that nothing has been recovered either at the instance of the petitioner or from his person or from his premises where he is residing separately other than his brother i.e. premises no. CU/11 Pitam Pura, Delhi.

14. As observed above, the ACMM in the present case has proceeded on a wrong presumption that the statement of the present petitioner has been recorded under Section 108 of the Customs Act which fact has also not been looked into by the Ld. ASJ while dealing with the revision petition who simply dittoed the order passed by ACMM. That neither the ACMM while framing the charges nor the Ld. ASJ while dealing with the revision petition dealt with the medical examination report of Mahavir Khandelwal (accused no.1) given by the Govt. Doctors which says that the injuries found on the person of Mahavir within 48 to 72 hours before he has been brought to the Central Jail Tihar which, prima facie, support the version of petitioner that the statement has been recorded involuntary.

15. The legal position with regard to the admissibility of the statement of co-accused persons recorded under Section 108 of the Customs Act and

under Section 67 of the NDPS Act is well settled. The Hon'ble Supreme Court has taken note of the aforesaid provisions in the case of UOI & Ors. Vs. Bal Mukund JT 2009 (5) SC 45 and has been pleased to observe:

19. The prosecution case principally hinges on the purported confessions made by the respondents. The learned Special Judge failed and/ or neglected to notice that the respondent No. 3 had retracted his confession at the earliest possible opportunity. He could have, therefore, been convicted only if independent corroboration thereof was available. Admittedly, no contraband was found from his possession. He was prosecuted for entering into a conspiracy in regard to commission of the offences under Section [8/18](#) of the Act with the respondent Nos. 1 and 2. Such conspiracy was not proved by the prosecution. No evidence whatsoever was brought on record in that behalf. The High Court, in our opinion, therefore, rightly accepted the contention of the said respondent, stating:

12. As far as appellant Amritlal is concerned, he was apprehended only on the basis of the statement made by the appellants Bal Mukund and Basantlal. The only evidence available against him is his confessional statement recorded under Section [67](#) of the Act. M.R. Narvale (PW-7) has stated in his statement that statement of Amritlal Anjana Ex. P/24 was recorded by him. The contents of Ex. P/24 have not been duly proved by the prosecution. The so called confession has been retracted by the appellant Amritlal. He cannot be convicted only on the basis of Ex. P/24. Even the confessional statements of co-accused cannot form the basis of his conviction. His conviction is not based on the evidence and cannot be sustained.

20. For recording his conviction, confession of the respondent Nos. 1 and 2 had been taken into consideration.

21. Mr. B.B. Singh would urge that the statements made by the respondent Nos. 1 and 2 purported to be in terms of Section [67](#) of the Act were admissible against the co-accused. Strong reliance in this behalf has been placed on Naresh J. Sukhawani v. Union of India AIR 1996 SC 522 wherein it was held:

4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section [161](#) of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section [108](#) of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to

connect the petitioner in the contravention inasmuch as Mr Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.

22. No legal principle has been laid down therein. No reason has been assigned in support of the conclusions arrived at. If a statement made by an accused while responding to a summons issued to him for obtaining information can be applied against a co-accused, Section 30 of the Evidence Act being not applicable, we have not been shown as to under which other provision thereof, such a confession would be admissible for making the statement of a co-accused relevant against another co-accused. If an accused makes a confession in terms of the provisions of the Code of Criminal Procedure or otherwise, his confession may be held to be admissible in evidence only in terms of Section 30 of the Evidence Act and not otherwise. If it is merely a statement before any authority, the maker may be bound thereby but not those who had been implicated therein. If such a legal principle can be culled out, the logical corollary thereof would be that the co-accused would be entitled to cross-examine the accused as such a statement made by him would be prejudicial to his interest.

23. We may notice that in State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru AIR 2005 SC 3820, this Court has laid down the law in the following terms:

38. The use of retracted confession against the co-accused however stands on a different footing from the use of such confession against the maker. To come to grips with the law on the subject, we do no more than quoting the apt observations of Vivian Bose, J., speaking for a three-Judge Bench in Kashmira Singh v. State of M.P. Before clarifying the law, the learned Judge noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co-accused.

The legal position was then stated thus: (SCR p. 530)

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 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.

39. The crucial expression used in Section 30 is "the Court may take into consideration such confession" (emphasis supplied). These words imply that the confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. The import of this expression was succinctly explained by the Privy Council in *Bhuboni Sahu v. R* in the following words: (AIR p. 260)

The court may take the confession into consideration and thereby, no doubt, makes its evidence on which the court may act; but the section does not say that the confession amounts to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.

16. In so far as the judgment cited on behalf of the respondents are concerned, it may be observed that these judgments have also been taken note of by Hon'ble Supreme Court. Yet for the sake of reference the relevant observations made in those judgments are reproduced hereunder. In the case of *Naresh J. Sukhwani vs. U.O.I.(Supra)* the only thing said by the Hon'ble Supreme Court was:

4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign

currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.

17. In the case of Paramjit Singh Vs. Commissioner of Customs & Ors.(Supra), it has been observed:

6. As per the allegations the petitioner was the owner of truck No. DEL 1885; from a secret cavity in this truck 27.17 kgs. of gold worth more than Rs.57.0 lacs was recovered; the driver and the cleaner in their statement recorded under Section 108 of Customs Act named the petitioner; and after the seizure petitioner absconded. All these circumstances show, prima facie, case for framing of the charge. At the stage of framing of charge, evidence is not required to be appreciated, even grave suspicion is enough. Reference in this regard can be made to Supreme Court decisions in (i) Munna Devi vs. State of Rajasthan and Anr. 2001 (8) SC 172, (ii) State of M.P. v. S.B. Johari & Ors., 2000 (1) Crimes 165 (SC), (iii) Ram kumar Laharia v. State of Madhya Pradesh and Anr., 2001 1 AD S.C. 54, (iv) Om Wati v. State 2001 SCC 685.

18. The judgment delivered in the case of Rehmatullah Vs. N.C.B. (Supra) is a judgment in respect of a case under the NDPS Act. In para 16 of the said judgment, it has been observed:

16. In order to examine the contention that successive statements cannot be recorded under Section 67 NDPS Act, the provision itself requires some detailed examination. It reads as under:

Section 67 - Power to call for information, etc. Any officer referred to in Section 42 who is authorized in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,--

- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;
- (b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;
- (c) examine any person acquainted with the facts and circumstances of the case.

The words during the course of any enquiry in connection with the contravention of any provisions of this Act indicate that the statements could be recorded at any stage of the enquiry. There is nothing in the wording of Section [67](#) that forbids the recording of the successive statements. The words examine any person acquainted with the facts and circumstances of the case in Clause (c), by no means can be interpreted as permitting only a single examination of a person. A comparison could be drawn with Section [91](#) of the Code of Criminal Procedure, (CrPC) 1973 which empowers the officer-in-charge of a Police Station to require any person to produce a document or thing. Likewise, under Section [161](#) CrPC, the power to examine persons who may be acquainted with the facts and circumstances of the case, by no means indicates that such statements of a person can be recorded only once and not on successive occasions.

17. A reference may be made to the judgments concerning the interpretation of Section [67](#) NDPS Act. In *Raj Kumar Karwal v. Union of India*, the Supreme Court was examining whether officers of the Department of Revenue Intelligence were police officers within the meaning of Section [25](#) of the Evidence Act, 1872 and, therefore, whether the confessional statement recorded by such officers in the course of the investigation of a person accused of an offence under the revenue laws was admissible in evidence against him. The question was answered in the negative and it was held that such statements made to the officers of the Department of Revenue Intelligence were not hit by Section [25](#) of the Evidence Act.

18. Still the twin tests of voluntariness and truthfulness will have to be satisfied. As far as the statement not being voluntary is concerned, there is no evidence to substantiate the plea of the accused that they were subjected to physical torture by the officers of the Respondent. The other circumstance relied upon is that both the accused have retracted their confessions on the ground that they were compelled to give statements earlier. In *Kanhaiyalal v. Union of India*, the Supreme Court was dealing with a case where, after making a statement under Section [67](#) NDPS Act, an application was filed by the accused for retracting the confession. However, no order was passed on that application. The Supreme Court then held (AIR, p.1052): 40. It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant under Section [67](#) of the NDPS Act. Since it

has been held by this Court that an officer for the purposes of Section [67](#) of the NDPS Act read with Section [42](#) thereof, is not a police officer, the bar under Sections [24](#) and [27](#) of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section [67](#) of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.

19. It is true that a second revision is not maintainable ordinarily but in appropriate case where it is shown by the accused that the proceedings if allowed to be continued would tantamount to mis-carriage of justice and would cause substantial injustice to the case of the petitioner or continuation of proceeding was contrary to law, it would be proper for this Court to interfere under Section 482 Cr.P.C. In this regard reference can also be made to judgment delivered by the Apex Court in the case of Zandu Pharmaceutical Works Ltd & Ors. Vs. Mohd. Sharaful Hazue and Anr. (2005) 1 SCC 122 which view has been reiterated by the Supreme Court in its subsequent judgment delivered in the case of State of A.P. Vs. Bajjori Kantian & Anr. AIR 2009 SC 671 where it has been observed:

5. Exercise of power under Section [482](#) of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties

imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid aliunde concedit, conceditur et id sine quo res ipsa esse non potest* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

6. In R.P. Kapur v.State of Punjab AIR 1960 SC 866, this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

- (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
- (ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
- (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section [482](#) of the Code, the High Court would not

ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section [482](#) of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335. A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

- (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
- (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section [156\(1\)](#) of the Code except under an order of a Magistrate within the purview of Section [155\(2\)](#) of the Code.
- (3) Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
- (4) Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a Police Officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.
- (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
- (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the

aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

8. As noted above, the powers possessed by the High Court under Section [482](#) of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: The Janata Dal etc. v. H.S. Chowdhary and Ors., AIR 1993 SC 892 Dr. Raghubir Saran v. State of Bihar & Anr. AIR 1964 SC 1. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section [482](#) of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint/F.I.R. has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant or disclosed in the F.I.R. that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint/F.I.R. is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led

in Court which decides the fate of the accused person.

20. In view of the aforesaid and the principles enunciated in the case of *Bhajan Lal (supra)*, the question as to whether the statement was retracted by Mahavir Prasad Khandelwal has to be seen while recording the evidence by the Trial Court but in view of the facts stated above, this is a fit case to set aside the order framing charges and the charges framed by the ACMM against the petitioner as also to set aside the order dated 28.10.2002 of the Ld. ASJ and to remand back this matter to Ld. ACMM to decide this case afresh by taking into consideration the two factors:-

- i. The statement of present petitioner has not been recorded under Section 108 of Customs Act.
- ii. The allegations of Mahavir Prasad Khandelwal that the statement made by him was retracted and it was obtained under duress.

It is ordered accordingly.

21. The petition stands disposed of. Pending applications, if any, also stand disposed of. The parties to appear before the Trial Court on 20.10.2009. TCR, if any, be sent back forthwith along with a copy of this judgment for compliance to the learned ACMM, who shall try to dispose of the matter within one year from the date of appearance of the parties as it is an old case.

MOOL CHAND GARG, J.

OCTOBER 06, 2009/ag