

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

+ Crl.L.P. 107/2007

% Date of reserve : 10.11.2009
Date of decision : 04.12.2009

NCB

...PETITIONER

Through: Mr.Satish Aggarwala and Ms.Krishika
Pandit, Advocates

Versus

AZIZ AHMAD

...RESPONDENT

Through: Mr.Yogesh Saxena, 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 order shall dispose of the criminal leave petition filed by the petitioner against the judgment delivered by the Trial Judge in Sessions Case No. 13A/06 which was committed to the Sessions by the Additional Chief Metropolitan Magistrate, where a complaint was filed by the petitioner against the respondent-Aziz Ahmad and one Surender Mehta, who is no more, under Section 29 r/w Section 21 and 23 of the NDPS Act.

2. The aforesaid complaint was based upon the statements allegedly recorded by the petitioner of the respondent and one Surender Mehta under Section 67 of the NDPS Act where reference was made to an earlier

transaction about delivery of some consignment by Surender Mehta to one Sardar ji through the respondent which consignment was consisting of heroin and was sent to USA and was apprehended by the Customs Authorities from a person to whom the delivery was effected in early 1987. The statement of the Surender Mehta was stated to have been recorded on 5.7.1988 while the statement of the present respondent is stated to have been recorded on 22.11.1987 and on 23.11.1987 vide Ex.PW1/A, B and C. It was also their case that in those statements the respondent admitted the factum of receiving delivery of 2.4 kgms of heroin from Surender Mehta for delivering the same to one Sardar ji near Nanakpura and that the said Sardarji was caught red handed along with the aforesaid heroin.

3. After the committal, charges were framed by the Additional Sessions Judge against the respondent to which he pleaded not guilty and claimed trial. During the course of trial, the complainant examined only two witnesses, namely, PW-1 R.D. Gupta and PW-2 Surinder Gupta, Assistant Commissioner at IGI Airport, New Delhi. During the cross-examination of these witnesses specific suggestion was given by the respondent that the statements relied upon by the petitioner were not made by the respondent voluntarily and in fact it was got procured under duress in some other case for which a complaint was filed by the brother of the respondent to the concerned MM at the relevant time and that the said statement was also retracted immediately.

4. The trial court after taking note of the cross-examination of the two

witnesses relied upon by the petitioner and the defence witnesses produced on behalf of the respondent opined that it is a case where the statement relied upon by the prosecution was not given by the respondent voluntarily and further that the said statement had been retracted and there was no other evidence led by the petitioner to corroborate that statement. It has been categorically stated by the Additional Sessions Judge that from the statement of the two defence witnesses it is clear that the respondent, Aziz Ahmad was subjected to maltreatment and coercion and therefore, in these circumstances, the charges against him were not made out and he acquitted the respondent. It is also a matter of record that no rebuttal to the allegation of torture or to substantiate the statement of the respondent under Section 67 of the NDPS Act was led. Similarly, there is no evidence on record regarding apprehension of Dolly Batra, who alleged to have received contraband from Sardar ji, who was caught red handed.

5. It is this order which the petitioner wants to assail by seeking leave to file appeal. The grounds on which the leave to file appeal is filed are that there is sufficient evidence to convict the respondent inasmuch as the statement recorded under Section 67 of the NDPS Act was sufficient to convict him. It was also submitted that there is no law which requires corroboration of statement tendered under Section 67 of the NDPS Act. It was also stated that the evidence which has come on record establishes that the respondent was a party to criminal conspiracy to possess and sell 2.4 kgms of heroin. It has been submitted that there are a number of judgments

which hold that the statement tendered under Section 67 of the NDPS Act is admissible and can be the basis of conviction of the petitioner. Reference has been made to the following judgments:-

(i) Order dated 14.01.2009 passed by three Judges Bench in *Crl.Appeal No. 101/2005* titled as *Abas Khan Vs. Central Bureau of Narcotics*.

(ii) *Ravinder Singh Vs. State of Maharashtra*, 2002(2) JCC 1059.

(iii) *Hem Raj Vs. State*, AIR 1964 SC.

(iv) *Crl.Appeal No. 90/2005* titled as *Rehamtullah Vs. Narcotics Control Bureau* decided on 18.07.2008.

(v) *Raj Kumar Karwal Vs. Union of India*, 1991 Crl.L.J. 97 (SC).

(vi) *Kanhiya Lal Vs. Union of India*, AIR 2008 (SC) 1044.

(vii) *A.K. Mehmood Vs. Intelligence Officer, NCB*, (2001) 10 SCC 203.

(viii) *M. Prabhu Lal Vs. The Assistant Director, DRI*, JT 2003 Suppl. (2) SC 459.

(ix) *Ramesh Chander Mehta Vs. The State of West Bengal*, AIR 1970 SC 940.

(x) *K.I. Pavunny Vs. Assistant Collector*, (1997) 3 SCC 721.

(xi) *Poolpandi Vs. Superintendent, Central Excise*, 1992 Crl.L.J.2761 SC.

6. It has also been stated that in addition to the statement of the accused/respondent under Section 67 of the NDPS Act, there is a statement of his co-accused Surender Mehta recorded under Section 67 of the NDPS Act, where role of the present respondent has also been mentioned. The statement of Surender Mehta is also admissible and legally acceptable and

the same corroborates the statement of the respondent under Section 67 of the NDPS Act.

7. It has also been submitted that the retraction of the statement was immaterial inasmuch as the respondent had not entered into the witness box to say that the statement was involuntary.

8. On behalf of the respondent, it has been submitted that the respondent was illegally lifted on 21.11.1987 by the NCB officials and kept in their illegal custody till 24.11.1987. His brother Akhlaq Ahmad sent a telegram to Commissioner of Police and Lt.Governor on 23.11.1987. His lawyer filed an application before the Court of Sh. Bharat Bhushan, the then ACMM, New Delhi and notice of the said application was issued to NCB for 24.11.1987, it was only thereafter the respondent was arrested and was produced before the Court. The respondent retracted his statement immediately when he was produced for the first time before the concerned court. Respondent was arrested in the case titled as *NCB Vs. Narender Vishnoyi and Ors.* His statement was not recorded in the present case and photocopy of the statement recorded in the case of *Narender Vishnoyi (supra)* was placed in the present case. Respondent has examined his brother Akhlaq Ahmad as DW-2 and Kamal Kant Sharma, Ahlmad, in the Court of Ms. Swaran Kanta, ASJ, Special Judge, NDPS, New Delhi as DW-1 to prove the aforesaid facts. It has also been submitted that in the present case, no recovery was effected from the respondent and that the respondent was implicated on the basis of the statement of one Surender Mehta which

was recorded on 05.07.1988, after about eight and a half months of the arrest of the respondent. Prosecution has examined only two witnesses i.e. PW-1 R.D.Gupta who has recorded the statement of the respondent in the case of *NCB Vs. Narender Vishnoui*. It has been submitted that the Id. Trial Court in a detailed order has come to a conclusion that the prosecution has failed to prove the charge against the accused and he was acquitted. It is pertinent to mention here that the other accused Surender Mehta was expired. The acquittal order has been passed by taking into consideration that there was no recovery and that the respondent was illegally lifted from his house and his statement was not voluntary. It is settled proposition of law that the statement purported to have been recorded under Section 67 of the NDPS Act is not sufficient in its individual characteristic to record conviction and that the same is required to be corroborated by independent testimony. It has also been submitted that the statement once retracted means no confession. Respondent relies upon the following judgments:

(a) NCB Vs. Shyam Lal & Anr., 2009(2) Crimes 736 (Delhi).

(b) Union of India Vs. Bal Mukund & Ors, 2009(2) Crimes 171 SC.

(c) Raju Premji Vs. Customs, 2009(3) Crimes 109 SC.

9. It may be observed here that despite the orders dated 6.9.2007 when time was sought by counsel for the petitioner to file some more documents, no document has been filed by the petitioner. Written arguments have been preferred by the petitioner which is in the nature of making reference to various judgments delivered by the Hon'ble Supreme Court on the question

of admissibility of statements recorded under Section 67 of the NDPS Act. The crux of the judgments which have been cited by the petitioner is three fold:-

(i) The statement tendered under Section 67 of the NDPS Act is an admissible evidence against the maker thereof.

(ii) The said statement alone can be the basis of conviction of the maker if they were tendered voluntarily.

(iii) If the statements were tendered voluntarily then there is no need of corroboration such statements.

10. I have gone through the record of the case including the deposition of witnesses. I have also perused the written submissions filed on behalf of both the sides.

11. Perusal of the order passed by the learned Additional Sessions Judge shows that the witnesses who appeared on behalf of the prosecution have not been able to prove that the statement under Section 67 of the NDPS Act allegedly made by the respondent had been tendered voluntarily. In this regard, some of the observations made by the trial court on the cross-examination of PW1 R.D. Gupta is reproduced hereunder:-

“In the cross-examination he deposed that he did not remember whether the case was filed on the statement of accused Surender Kumar Mehta. The summons were issued to Shri Aziz Ahmad but he did not remember by whom it was issued either by him or Intelligence Officer. He could not tell the answer to the question whether he can tell after perusing the judicial record that who issued the summons. He replied that since there are no summons on the judicial record so he can't say anything in this regard. He did not remember who was the Investigation Officer in the year 1987 in the case of NCB Vs.

Narender Vishnloyi and Ors. He say that he was not the Investigation Officer of that case. He also did not remember if the statement exhibit Ex.PW1/A, B and C were recorded in the case of NCB Vs. Narender Vishloyi and Ors. He also did not remember who directed him to record the statement of Aziz Ahmad. Again said nobody had given him direction to record the statement Aziz Ahmad. The accused appeared before him at 10.00 am and he left at about 5.00 pm. Again said might have left at 5/6 pm on 21/11/1987. He did not remember if any summon was given to accused for his appearance for the next two days. He did not know whether the accused was ever arrested by NCB Officer after of before the recording of his statement. He did not make any inquiry regarding any fact mentioned in his statement. He denied the suggestion that accused was in custody of NCB from 21.11.1987 to 23.11.1987. He further denied the suggestion that after taking his family history under pressure, threat and coercion, the statement was dictated to him and he was forced to write all the dictation. He did not state to him and was forced to write all the dictation. He did not state to the accused that he was not compelled to give his statement. He voluntary says that he did not apply any force before recording the statement. He did not remember if the accused had immediately given the retraction statement.

12. Similarly, the observations made by the trial court on the cross-examination of PW-2 Surender Gupta is reproduced hereunder:-

“In the cross-examination this witness depose that he has no personal knowledge regarding the complaint but the same was filed on the basis of the documents in the official capacity. He has no idea that whether Mr.A.S.Vohra had made any confirmation of the statement made by Mr.Surender Mehta which is dated 5-7-1988 and 6-7-1988 and is Ex.PW2/B and Ex.PW2/B-1. He has not knowledge whether there was any other case again Mr.Aziz Ahmad. He voluntarily says that he had filed the complaint on the basis of the documents placed before him. He did not have any knowledge that Aziz Ahmad was kept in the office of NCB on 21-11-87 , 22-11-87 and 23-11-87. He further deposed that he had no knowledge that on 24-11-87 whether Aziz Ahmad was produced in the court by the NCB or not. He also did not have any knowledge that he was produced and he retracted his statement. He had no knowledge that the statement of Aziz Ahmad was voluntarily or obtained under force as he had not recorded the statement. He cannot say whether there is any statement of Aziz Ahmad recorded in this case or not without seeing the judicial file. He has no idea if Surender Mehta was detained under NDPS Act. He denied the suggestion that the accused Aziz Ahmad falsely involved in this case.

13. As far as the statement of the respondent recorded under Section 313

Cr.P.C. is concerned, it is the case of the respondent that:-

“He has been falsely implicated in the present case. Present complaint has been filed mala fide by the NCB officials. He has not tendered any statement in the present case. The above statement Ex.PW1/A, B and C were extorted from him in another case titled as NCB Vs. Narender Vishnoi and Ors. under pressure, threat, beatings, coercion. He was illegally lifted on 21-11-87 by the NCB Officials. He was illegally kept in their custody till 24-11-87. His brother Akhlaq Ahmad sent a telegram to Commissioner of Police and Lt. Governor on 23-11-87. His lawyer filed an application before the Court of Sh.Bharat Bhushan, the then ACMM, New Delhi. Notice of the said application was issued to NCB for 24-11-1987 only thereafter he was shown arrested in the said matter and was produced before the said court. He retracted his statements immediately when he was produced for the first time before the concerned court. He tendered copy of his retraction, bail application with affidavit, telegram sent to Lt.Governor and Commissioner for kind perusal of this court which are mark as A to E.

14. It is a matter of record that the respondent produced two defence witnesses. DW-1 Kamal Kant Sharma, Ahlmad, from the court of Ms. Swaran Kanta, ASJ, Special Judge, NDPS, New Delhi who produced the record of the case NCB Vs. Jasbir Singh and others earlier known as NCB Vs. Narender Vishnoi and Ors. The said judicial record contains the original application for bail and retraction dated 23-11-87 of Aziz Ahmad, which is just after recording of the statement of the respondent. The relevant observations made by the trial court with regard to defence witnesses, are reproduced hereunder:-

8. He adduced defence evidence and produced 2 defence evidence in support of his contention. DW 1 is Kamal Kant Sharma, Ahlmad in the court of Ms.Swarn Kanta, ASJ, Special Judge, NDPS Courts, New Delhi. He deposed that he has brought the summoned file of the case titled as NCB Vs. Jasbir Singh and others earlier known as NCB Vs. Narender Vishnoi and others. The said judicial record contains the original application for bail and retraction dated 23-11-87 of Aziz Ahmad and the same is Ex.DW1/A, Application for bail of

Aziz Ahmad dated 24-11-87 is Ex.DW1/B, original affidavit of Sayed Akhlaq Ahmad dated 24-11-87 is Ex.DW1/C. In the cross-examination this witness deposed that he has no personal knowledge about the present case. He further says that during the year 1987 he was not posted in the District Court.

9. DW 2 is Sayed Akhlaq Ahmad s/o Late Sh. Saeed Ahmad. He deposed that he is a summoned witness. On 21-11-87 when he returned home at about 9.00 PM he was informed by his mother that Aziz Ahmad had been taken away by the NCB officials without any order of summon. On 22-11-87 after making inquiry he came to know that Narcotics Control Bureau had their office at Ranjit Hotel, near Turkmaan Gate. He went there and made inquiries about his brother Aziz Ahmad. The NCB officials did not allow him to meet his brother Aziz Ahmad. He requested them to disclose the particulars of the case. However, he has not informed anything and was told that Aziz Ahmad would be produced in the court on 23-11-87. He saw his brother in NCB office in a bad shape. On 23-11-87 he came to Patiala House, however, his brother Aziz Ahmad was not produced in the court. He sent a telegram to the Commissioner of Police and Lt. Governor on 23-11-87 the same is mark C. The receipt is mark D. On 24-11-87 he tendered an affidavit before the court of Sh. Bharat Bhushan, ACMM, New Delhi as then he was. The said affidavit is Ex.DW1/C which bears his signatures at point A and A-1. He can identify the signatures of his brother Aziz Ahmad. He has seen application for release on bail and retraction of Aziz Ahmad dated 23-11-87 filed on 24-11-87 bear the signatures of his brother at point X on Ex.DW1/A. In the cross-examination this witness deposed that he is doing the business of Handicraft i.e. Silver, brass. On 21-11-87 he was present at his shop. He denied the suggestion that there was no case titled as NCB Vs. Narender Vishnoi where the recovery of heroin from the accused persons. He further denied the suggestion that Aziz Ahmad is one of the accused in the said matter. No summons were given to Aziz Ahmad neither he tendered his voluntary statement. He further denied the suggestion that the application for bail and retraction Ex.DW1/A was filed at the advice of the counsel. He admitted that the said application bears the signatures of an advocate. He further denied that no telegram mark C was ever sent to the Commissioner of Police, PHQ Delhi and copy to Lt. Governor, Delhi. He also denied the suggestion that the receipt mark B is not for telegram Mark C as it is not clarified from that the receipt. He also denied the suggestion that he was not given the affidavit Ex.DW1/C. He further denied the suggestion that he is deposing in favor of his brother falsely to save him. He denied the suggestion that accused Aziz Ahmad was not kept illegally in the office of NCB. No entry was made in the register maintained by NCB to show his visit to NCB. He further denied the suggestion that the contents of his affidavit Ex.DW1/C are false. He also denied the suggestion that his brother Aziz Ahmad was not beaten by the NCB officials or his

brother Aziz Ahmad was not detained illegally. He had not cross checked as to mark C was actually received by the Commissioner of Police/Lt. Governor of Delhi. He denied the suggestion that no telegram was ever sent to the concerned authorities.

15. The Hon'ble Supreme Court in the case of UOI & Ors. Vs. Bal

Mukund JT 2009 (5) SC 45, has been pleased to observe as under:

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 inculpates 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. This court in *Bail Application No. 2211/2008* titled as *Harpreet Singh Bahad Vs. DRI* decided on 23.09.2009 has considered the scope of Section 67 of the NDPS Act and has detailed the circumstances which may be appropriate for recording the statement of a person under Section 67 of the NDPS Act. While laying down those guidelines, this Court has gone through all the judgments cited by the petitioner and has also dealt with the judgment in the case of *Francis Stanly @ Stalin Vs. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram*, AIR 2007 SC 794 and *Bal Mukund (supra)*. It has been concluded by this Court in that case that :-

- (i) The DRI officials/custom officials can record statement under Section 67 of the NDPS Act or under Section 108 of the Customs Act during the course of enquiry with a view to elucidate information about the

commission of offence in those acts, which may be permissible despite the bar created by Section 25/26 of the Evidence Act. However, such power is not to cut short the process of investigation by recording confessional statement instead of collecting independent evidence.

- (ii) If the statements are in the nature of confession, prudence requires that such statement shall be corroborated by an independent evidence. However, if those statements are retracted and it is alleged that they were not voluntary then the onus to prove that there was no retraction or the statements were voluntary would be on the prosecution.
- (iii) Moreover, the purpose of recording statement under Section 67 of the NDPS Act is not to record confession but only to elucidate information. Thus if the prosecution is already in possession of evidence about the involvement of the accused, then recording a statement under Section 67 in the nature of confession would certainly become doubtful and if such a statement is retracted, then the said statement cannot be used in evidence against the accused without any independent corroboration.
- (iv) The statement of co-accused persons recorded under Section 67 of the NDPS Act also cannot be used unless they are corroborated by the independent evidence.

17. In the present case, the statement of Surender Mehta was recorded in 1988. Thus, there was no occasion for recording the statement of present respondent in 1987 and therefore, it cannot be said to have been recorded for the reasons stated above.

18. The aforesaid view is consistently taken by this court in the case of *Vinod Kumar Sahdev Vs. Union of India* 2009 (4) JCC 2636; in the case of *Abid Malik Vs. U.O.I.* 2009 (5) AD (Delhi) 749; as well as in the case of *Vikas Mohan Singhal Vs. D.R.I. Crl.M.C. 1815/2005* decided on 12.08.2009. In that view of the matter, I find that the view taken by the Additional Sessions Judge does not suffer from any infirmity.

19. Moreover, it is now well settled that when two views are possible, the one which favours the accused is required to be adopted. However, in this case even it is not possible to take the other view that is to subject the

respondent for prosecution as the petitioners want by pressing their appeal.
Thus, I do not find any reason to grant leave to file appeal in this case.
Accordingly, the Crl.L.P.107/2007 is dismissed.

MOOL CHAND GARG, J.

December 04, 2009
dc