

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

+ **Bail.Appn. 2211/2008**

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Date of reserve : 01.09.2009
Date of decision : 23.09.2009

HARPREET SINGH BAHAD ...PETITIONER
Through: Mr. KTS Tulsi, Sr. Advocate with
Mr. S. S. Das and Mr. Maheen Pradhan,
Advocates

Versus

D.R.I. ...RESPONDENT
Through: Mr. Satish Aggarwal and Mr. Shirish
Aggarwal, Advocates

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 bail application filed by the petitioner, who is in judicial custody since 20.8.2004 in a complaint case filed by the respondents under Section 21 of the NDPS Act pending before the Additional Chief Metropolitan Magistrate, New Delhi, on the allegations that a huge quantity of contraband i.e. 22.855 kg of heroin was seized from a Maruti Zen car bearing registration No. DL-9CJ-5397, which was parked outside the Hotel Sangam Palace, Meera Bagh, New Delhi on 18.08.2004.

The said car was found to be in the possession of two persons viz. Ravinder Singh Mann and Roshan Lal, both co-accused of the petitioner. It is alleged that the recovered contraband were supplied by the present petitioner to the co-accused persons.

2. It is submitted by the petitioner, that the evidence relied upon by the respondent against him is inadmissible as the said evidence comprises of the statement of co-accused persons recorded under Section 67 of the NDPS Act, which cannot be used against him unless it is corroborated by other independent evidence. As far as his own statement is concerned, it is submitted that the same was not a voluntary statement but was taken under duress and in this regard he made an application before the ACMM concerned after he was produced before the ACMM along with medical report which was prepared by the Jail Doctor and which shows that he was tortured by the respondents. As regards the statement of Ravi Bhatia, who appeared as PW-4 before the trial court, it is submitted that the said witness has not supported the case of the prosecution. It is also submitted that even if his statement under Section 67 of the NDPS Act is taken into consideration, the same does not involve the petitioner with the crime. He only said that the vehicle in question was left at his premises for repairs. The vehicle does not belong to the petitioner.

3. It is further submitted by the petitioner that he is in custody for a period of more than five years. The case of the prosecution is not proceeding with pace and so far they have examined only twelve witnesses

and at least 10 witnesses still remains to be examined. Despite the directions given by this Court in the case of co-accused being CrI.M.C.No. 3317/2007 to expedite the proceedings in this case and to conclude the proceedings within a period of six months vide order dated 25.10.2007, the trial has not been expedited. In fact, the report of the Additional Sessions Judge, South District, shows that as on 14.09.2009 only eight witnesses had been examined and despite detailed directions issued to the DRI for producing the witnesses by fixing the case from 4th March, 2009 to 6th March, 2009, only two witnesses were examined.

4. The petitioner has also submitted that in the absence of any corroborating evidence, the continued detention of the petitioner solely on the statement of co-accused and the statement of the petitioner recorded under Section 67 of the NDPS Act, which is retracted and is not a voluntary statement, the petitioner cannot be convicted in this case and therefore, it is a case where the petitioner is entitled to be released on bail despite rigor of Section 37 of the NDPS Act. Reliance has been placed on the following judgments:

- i. *Union of India Vs. Bal Mukund & Ors. JT 2009 (5) SC 45.*
- ii. *Francis Stanly @ Stalin Vs. Intelligence officer, Narcotic Control Bureau, Thiruvananthapuram AIR 2007 SC 794.*
- iii. *Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569.*
- iv. *Raju Premji Vs. Customs NER Shillong Unit, 2009 (7) SCC 569.*

- v. *State of Uttranchal Vs. R.K.Gupta, (2007) 1 SCC 355.*
- vi. *Ranjit Singh Brahmjeet Singh Sharma Vs. State of Maharashtra & Anr., 2005 II AD (Crl) SC 193.*
- vii. *Supreme Court Legal Aid Committee Representing Undertrial Prisoners Vs. UOI & Ors. – (1994) 6 SCC 731.*
- viii. *Noor Aga Vs. State of Punjab & Anr. 2008 VIII AD (SC) 435.*
- ix. *Kashmir Singh Vs. NCB, Bail Application No. 2314/2006 decided on 18.08.2006.*
- x. *Suresh Kumar Sharma Vs. DRI, Bail Application No. 1087/2009 decided on 07.07.2009.*

5. The respondents on the other hand have submitted that the statements recorded by the DRI officials, who are not the police officials, under Section 67 of the NDPS Act are admissible in evidence against the maker of those statements as well as against the others also, which means that it is admissible against the petitioner as well as against the co-accused persons. Regarding non-voluntary nature of the statement made by the petitioner, it is submitted that the retraction was not done immediately but was made only after two days. The medical examination has been done by the Medical Superintendent as per the procedure and the injuries which were found to be on the person of the petitioner are not of such a nature which might be inflicted upon a person after subjecting him to torture. The respondents have relied upon the following judgments:-

- (i) *Abbas Khan Vs. Central Bureau of Narcotics, Criminal Appeal No. 101 of 2005 decided on 14th January, 2009.*

- (ii) *Ravinder Singh Vs. State of Maharashtra*, 2002 (2) JCC 1059.
- (iii) *Rehamtullah Vs. Narcotics Control Bureau*, Criminal Appeal No.90 of 2005 decided on 18th July, 2009.
- (iv) *Raj Kumar Karwal Vs. Kirpal Mohan Virmani*, 1991 Cri. L.J. 97.
- (v) *Kanhaiyalal Vs. Union of India*, 2008 IAD (Cr.) (S.C.) 277.
- (vi) *Ramesh Chandra Mehta Vs. State of W.B.*, AIR 1970 SC 940.

6. It is also submitted that the respondents are not to be blamed for the delay in the disposal of the matter inasmuch as on each and every hearing the respondents have been prosecuting the matter with due diligence. It is also submitted that even if the case of the petitioner is accepted that it is the case of no evidence, yet the second condition under Section 37 of the NDPS Act is required to be fulfilled, that is to say, the Court has to be satisfied that the petitioner will not be involved in future in similar nature of crime.

7. I have considered the submissions made on behalf of the parties and have perused the judgments cited by them. In the case of *Bal Mukund (supra)* relied upon by the petitioner, it has been held:-

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.

8. It would also be relevant to take note of some of the observations made in the aforesaid judgment, which deals with the purport and reasoning as to what Section 67 of the NDPS Act means. The relevant paragraphs are reproduced hereunder:-

25. Section [67](#) of the Act reads as under:

67 - Power to call for information, etc.

Any officer referred to in Section [42](#) who is authorised 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.

26. How and at what point of time the said provision was invoked is not known.

The situation in which such purported statements have been made cannot also be lost sight of. The purported raid was conducted early in the morning. A large number of police officers including high ranking officers were present. Search and seizure had been effected. According to the prosecution, each of the respondent Nos. 1 and 2 were found to be in possession of 10 Kg. of narcotics. No information was sought for from them. It is doubtful whether they had made such statements on the road itself.

27. Exhibits 20 and 21 categorically show that they were interrogated. If they were interrogated while they were in custody, it cannot be said that they had made a voluntary statement which satisfies the conditions precedent laid down under Section [67](#) of the Act. We, in the backdrop of the aforementioned events, find it difficult to accept that such statements had been made by them although they had not been put under arrest. As the authorities under the Act

can always show that they had not formally been arrested before such statements were recorded, a holistic approach for the aforementioned purpose is necessary to be taken.

28. This Court in D.K. Basu v. State of West Bengal AIR 1997 SC 610 laid down the law that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. This rule was also invoked by a Constitution Bench of this Court in State of Punjab v. Baldev Singh AIR 1999 SC 2378, wherein it was held:

28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As Page 2956 already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve dual purpose - to protect a person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must think itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.

See also Noor Aga v. State of Punjab and Anr. 2008 (9) SCALE 681.

29. The court while weighing the evidentiary value of such a statement cannot lose sight of ground realities. Circumstances attendant to making of such statements should, in our considered opinion, be taken into consideration.

30. Concededly, the Act provides for a stringent punishment. We, for the purpose of this case, shall proceed on the assumption, as has been contended by Mr. Singh, that the prosecution need not examine any independent witness although requirements therefor cannot be minimized. See Ritesh Chakeravarty v. State of Madhya Pradesh [JT 2006 \(12\) SC 416](#) and Noor Aga (supra).

31. Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance of the statutory provisions must be insisted upon. While considering a case of present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, in our opinion, should not be based merely on the basis of a statement made under Section [67](#) of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted.

32. Mr. Singh placed strong reliance upon a decision of this Court in A.K. Mehaboob v. Intelligence Officer, Narcotics Control Bureau [2001 \(10\) SCC 203](#). The Bench repelling the arguments that (i) the statement made by the accused had been retracted; (ii) the appellant informed the Magistrate that the said statement had been coaxed out from him; and (iii) the said statement was not corroborated, opined:

5. There is nothing to indicate that Exhibit P-8 had been elicited from A-2 by any coercion, threat or force and, therefore, the learned Single Judge of the High Court had spurned down that contention. Regarding the complaint alleged to have been made by the appellant Naushad on 11-3-1994, we have perused it. His case therein was that he offered himself to be a witness in the case and some reward was offered for it. It was on the said offer that he agreed to sign the said statement....

There exists a distinction between a case where the accused himself had stated that he had made the statement on the belief that he would be rewarded and a case where such purported confession had been obtained upon interrogation by High ranking police officials.

33. Yet again in M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence [AIR 2003 SC 4311](#), the retraction was made only when the accused was being examined under Section [313](#) of the Code of Criminal Procedure. No credence was given to such a retraction made after such a long time. This Court taking into consideration the entire factual matrix involved in the case opined that the confessional statement could not be held to be involuntary and they were voluntarily made. Such is not the case here.

We have pointed out several circumstances to show that the accused had been put under interrogation.

34. Reliance has also been placed on Kanhaiyalal v. Union of India [AIR](#) 2008 SC 1044. In that case, no question was put in cross-examination to the police officer (PW-9) whose evidence had been relied upon by the High Court and, thus, his evidence was stated to be corroborative of the statement made by the accused.

However, it is interesting to note that in Francis Stanly Alias Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram (2006) 13 SCC 210, this Court opined:

15. We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section [25](#) in view of the aforesaid decisions, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required.

16. We have carefully perused the facts of the present case, and we are of the opinion that on the evidence of this particular case it would not be safe to maintain the conviction of the appellant, and he must be given the benefit of reasonable doubt.

35. In Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Anr. [2007](#) (8) SCC 254, in a case involving the Foreign Exchange Regulation Act, this Court held:

19. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well-settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom...

36. In Ravindran Alias John v. Superintendent of Customs [2007](#) (6) SCC 410, this Court opined:

19...The confessional statement of a co-accused could not be used as substantive evidence against the co-accused.

37. In Noor Aga (supra), this Court held that whether the confession was made under duress or coercion and/ or voluntary in nature should be considered having regard to the facts and circumstances of each case. It was opined:

102. Section [25](#) of the Evidence Act was enacted in the words of Mehmood J in Queen Empress v. Babulal ILR (1884) All. 509 to put a stop to the extortion of confession, by taking away from the police officers as the advantage of proving such

extorted confession during the trial of accused persons. It was, therefore, enacted to subserve a high purpose.

113. Even otherwise Section [138B](#) of the 1962 Act must be read as a provision containing certain important features, namely:

(a) There should be in the first instance statement made and signed by a person before a competent custom official.

(b) It must have been made during the course of enquiry and proceedings under the Customs Act.

114. Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section [138B](#) deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section [108](#) of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section [138B](#) of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

It was also held that sanctity of the recovery should be ensured.

38. We, therefore, in the facts and circumstances of this case, are clearly of the view that the purported confessions made by the respondent Nos. 1 and 2 could not in absence of other corroboration form the basis of conviction.

9. Similar view is taken in the case of *Francis Stanly (supra)*, wherein it

has been held:

4. A perusal of the facts of the case would show that there is no allegation that the appellant himself was found in possession of any narcotics. The allegation was only that he handed over some narcotics to accused No. 1. The only evidence against the appellant is the retracted statement of accused No. 1 and the appellant's own retracted confession.

5. In *Chonampara Chellappan v. State of Kerala*, AIR 1979 SC 1761 it has been held (in paragraph 4) that "it is equally well settled that one tainted evidence cannot corroborate another tainted evidence because if this is allowed to be done then the very necessity of corroboration is frustrated"

In paragraph 5 of the same judgment this Court relied on a decision in *Piara Singh v. State of Punjab*, AIR 1969 SC 961 in which it was observed:

An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious taint in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence.

Thus, it appears from the above decision that there is some taint in the evidence of an accomplice, and the reason for this obviously is that an accomplice's evidence is looked upon with suspicion because to protect himself he may be inclined to implicate the co-accused.

6. We make it clear that we are not of the opinion that the evidence of the accomplice can never be relied upon, since such evidence is admissible under Section [133](#) of the Evidence Act. However, Section [133](#) has to be read along with Section [114\(b\)](#) of the Evidence Act, and reading them together the law is well settled that the rule of prudence requires that the evidence of an accomplice should ordinarily be corroborated by some other evidence vide *Suresh Chandra Bahri v. State of Bihar* AIR 1994 SC 2420.

7. Learned Counsel for the respondent relied upon a decision of this Court in *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence* AIR 2003 SC 4311, wherein it has been held that if the confessional statement is found to be voluntary and free from pressure, it can be accepted. This is no doubt true, but it all depends on the facts and circumstances of each case and no hard and fast rule can be laid down in this connection whether a particular alleged confessional statement should be accepted.

8. Learned Counsel for the respondent then relied upon a decision of this Court in *T. Thomson v. State of Kerala*

and Anr. 2002 (9) SCC 618, wherein it was held that the confession in question was voluntary. In this connection we reiterate that it all depends on the facts and circumstances of each case, and no hard and fast rule can be laid down as to when a confession can be regarded as voluntary and when it should not.

9. In *State (NCT of Delhi) v. Navjot Sandhu @ Afasan Guru* AIR 2005 SC 3820 this Court observed :

A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence that under no circumstances can such a conviction be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.

It is true that in the present case the confession was made by the accused not before an ordinary police officer, but before an officer, under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') who is an officer of the Department of Revenue Intelligence, and it is held by this Court in *Raj Kumar Karwal v. Union of India and Ors.* AIR 1991 SC 45, that such a confession is not hit by Section [25](#) of the Evidence Act.

10. We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section [25](#) in view of the aforesaid decisions, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required.

11. We have carefully perused the facts of the present case, and we are of the opinion that on the evidence of this particular case it would not be safe to maintain the conviction of the appellant, and he must be given the benefit of reasonable doubt. We make it clear that we are not laying down any general principle in this case, and are deciding it only on the particular facts and circumstances of this case. Hence, this case cannot be a precedent for other cases which may be on their own facts. We are informed that the appellant has already undergone more than six years' imprisonment.

12. On the facts and circumstances of the case, we allow this appeal and set aside the orders of the courts below. The appellant who is in jail shall be set free forthwith unless required in connection with some other case.

10. Insofar as the judgments cited on behalf of the respondents are concerned, these have been taken note of by the Apex Court in the cases of *Bal Mukund* and *Francis Stanly (supra)*. Insofar as the other judgments cited by the respondents are concerned, it may be observed that:

- (i) In the case of *Ravinder Singh Vs. State of Maharashtra, 2002 (2) JCC 1059*, the only thing which has been held is that if the confessional statement of the accused is voluntary and truthful, it would not require any corroboration for conviction.
- (ii) In the case of *Hem Raj Vs. State, AIR 1964 SC* it is held that mere bald assertion by the prisoner that he was threatened, tortured or that inducement was offered to him, cannot be accepted as true without something more.
- (iii) In the case of *Ramesh Chander Mehta Vs. State of West Bengal, AIR 1970 SC 940* it has only been stated that the Customs Officials are not the member of police force.
- (iv) In the case of *K.I. Pavunny Vs. Assistant Collector (1997) 3 SCC 721* it has been held that the confessional statement subsequently retracted, if on facts found to be voluntary and truthful, can form the exclusive basis for conviction. However in that case the Apex Court was pleased to further observe that

if the court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the court on examination of the evidence find that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice requires that the Court would seek assurance in getting corroboration from other evidence adduced by the prosecution.

11. Thus, the following conclusions can be drawn on the basis of the observations made by the Apex Court in different judgments (supra) :-

- (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.

12. In the present case it has been fairly conceded by learned counsel for the respondents that except for the statement made by the petitioner under Section 67 of the NDPS Act, the only other evidence is the statement of co-accused and the statement of one Ravi Bhatia, who appeared as PW-4 and has not supported the case of the petitioner. Even if his statement recorded under Section 67 of the NDPS Act is taken into consideration, the said statement only goes to show that the vehicle in question was left with him for repairs and not for using the same for any illegal purpose. Thus, this

statement will not corroborate the statement of petitioner under Section 67 of the NDPS Act which, as stated above, was retracted and was not a voluntary statement as also the statements of the co-accused persons. In this regard, it would also be appropriate to take note of the contents of the application moved by the petitioner before the Additional Sessions Judge, Patiala House Courts, New Delhi, which for the sake of reference is reproduced hereunder:-

In the Hon'ble Court of Shri Lal Singh, ASJ Patiala House Courts, New Delhi

Sub: Retraction of statement before DRI on 20 August 2004

DRI Vs. Ravinder Singh, Roshan Lal & Others

I am innocent and I have been falsely implicated by the DRI in a NDPS case.

I was moved from the place of my posting i.e. Gurdaspur on 18 Aug. 2004. During the transit period from 18 Aug. 2004 to 20 Aug. 2004 i.e. from SHO BSF Gurdaspur to DRI office, New Delhi. Nothing was informed to me i.e. purpose of journey, duration of stay etc. and I was not allowed to make any phone call nor I was allowed to speak to anybody.

I was tortured physically as well as mentally by the officers of DRI in their office and they also compelled me to write a statement of their choice. The said statement was written as per the dictation by the officers of DRI and one of the officer was Mrs. Sanyogita Mishra. It was not my voluntary statement. I am having torture injuries on my body. I do not know anything with regard to the drugs. Nor I have handled the same at any point of time.

It is a false case and I have been implicated falsely due to some conspiracy of a bigger magnitude to save some real culprits. The DRI officers also obtained my signatures on many blank sheets of paper.

I wanted to plead my innocence before the Hon'ble ACMM, before whom I was produced on 21st August, 2004 but the DRI officers threatened to implicate my family members if I speak to the judge regarding torture and my innocence, so I could not communicate the same to the Hon'ble Judge fearing my life and further false implication of my family members.

Now, I request the Hon'ble Magistrate to kindly look into the matter and save me from the false case.

The said statement before the DRI may specifically be treated as retracted.

Date : 04

Harpreet Singh Bahad

S/o S.Trilochan Singh Bahad

Jail No. 3, Tihar, New Delhi

LTI of Harpreet Singh Bahad

True copy

This statement has been made before the Visiting Advocate, Legal Aid Service Authority, Central Jail No. 3, Tihar, New Delhi.

13. It would also be appropriate to take note of the MLC of the petitioner detailing the injuries found on the person of the petitioner when he was medically examined:-

“With due respect I want to state that above-mentioned individual entered in Central Jail No.3 on 21.8.2004.

As per murtaza record (first medication examination in jail) dated 21.8.2004. There was “Bruise dislocation of back with swelling on scartal region with tendernous and patient has difficulty in sitting”. (photocopy enclosed) This is for your information please.”

The above-quoted application and MLC were then forwarded to the ACMM concerned.

14. It would also be important to take note of the complaint made by the petitioner to the Chairman, National Human Rights Commission, Sardar Patel Bhawan, New Delhi, the relevant portion of which is reproduced hereunder:-

On reaching the DRI HQ, I was produced before an officer who without any foreword; threatened me to co-operate with them or face torture.

Immediately after that, I was taken to another room where four persons were present. On entering the room I was asked to sit on the

floor, as I hesitated I was suddenly slapped, abused and pushed down to the floor. I was shocked as I had no idea as to what was happening and why?

Then, one of the interrogators said that, you are drug trafficker and you should confess this and write a statement as per their dictation. I was shell-shocked and requested them that I am innocent and do not know anything about drugs etc. Hearing this, all get berserk and started kicking me. I started screaming in pain and fear. Then one of them proposed, “IS KE MUH MEIN KUCH DALO”. My handkerchief was put in my mouth and I was asked to take-off my clothes. I was naked, they tied my hands behind and made me to sit on the floor, then they called two more men and mercilessly started out stretching my thighs, I was screaming and sweating in pain. I was kicked in my groin, my hair was pulled and I was punched everywhere on my body. I started crying; seeing this they took the handkerchief out of my mouth. I begged before them to leave me. Hearing this one of them said “ PEHLE HAMARA KEHNA MAAN” I asked them what shall I do? Then they brought few blank papers and asked me to sign on them, now I could not afford to say “no”. I signed on the blank papers.

One of them, who appeared to be the senior said, “GOOD AB JO LIKHVATE HAIN CHUP-CHAP LIKH DO, NAHIN TO CASE TO HUM BANA HI LENGE AUR TERE MAA-BAAP AUR BIWI-BACHON KO SADAK PAR LA DENGE”.

I had no courage to face further torture and ridicule. So, I agreed under duress. I was asked to put on my clothes and then I was taken to lady officer, who initially asked me to write details of my family, education, career etc. and then dictated an episode regarding some drug carriage from Kathua to Delhi.

After dictation was over, I was given an arrest memo; I was told that I am arrested on charges of drug trafficking. I started crying and begging them to have mercy and do not implicate an innocent in fabricated false case.

15. There is another aspect of the matter that the summons issued under Section 67 of the NDPS Act goes to show that the first summon was directed to be issued to the petitioner and the two other summons were issued to accused Nos. 1 and 2 but the petitioner was examined later on, and obviously he was in the custody of the DRI officials right from the time he was asked to come and make the statement. The so-called information about

the involvement of the petitioner was available with the DRI even before his examination as it is the case of the respondents that accused Nos. 1 and 2 in their statements under Section 67 of the NDPS Act implicated the petitioner also and therefore, it cannot be said that he was not in the custody of the DRI officials till his statement was recorded under Section 67 of the NDPS Act. More so, the case of the prosecution rests upon the statements of accused Nos. 1 and 2, who have admitted before the trial court that they have come to know about the implication of the petitioner in this case only after their statements were recorded. The question of issuing summons to the petitioner earlier to accused No.1 and 2 falsifies this assertion of officials of DRI and proves the contention of learned counsel for the petitioner that the petitioner was throughout in detention and the so-called confessional statement, which is something more than what is the purport of Section 67 of the NDPS Act is not voluntary. Therefore, the statement of the petitioner cannot be said to have been recorded voluntarily. Thus, if a statement is recorded under Section 67 of the NDPS Act and is thereafter retracted, the said statement unless corroborated by any independent evidence, it cannot become the basis of conviction and it is to take note that at what stage the statement has been recorded. It is to be further seen whether such statement is merely a formality for recording a confession that is to say for calling an information when the same is already available with them. It appears that the DRI/Custom Authorities decided to cut short the process of investigation by invoking Section 67 of the NDPS Act inasmuch as instead of collecting

evidence, they wish to rely upon the statement of the accused person, who obviously might have been compelled to make such a statement as is the allegation made by the petitioner in this case. Thus, the question as to whether the statement was recorded voluntarily or was recorded under duress also becomes a matter of evidence and therefore, whenever such an allegation is made, the authorities cannot simply sit back and rely upon the so-called confessional statement instead of collecting independent evidence.

16. Insofar as the submissions made by counsel for the respondents that Section 37 has two requirements, that question will arise only if the first requirement is substantiated i.e. there is evidence against the petitioner that he committed the crime which for the reasons stated above is extremely doubtful in view of the inadmissibility of statement of co-accused in the absence of corroboration and in view of the retraction of petitioner of the statement made under Section 67. The said statement has not been recorded to get a new information but it is recorded solely for the purpose of recording confession which, as stated above, is the purpose of Section 67. Moreover, there is nothing on record which may go to show that there is likelihood of the petitioner involving himself in a similar crime in future after remaining in jail for a period of more than five years. In any event, there is no procedure available with this Court to ensure that the petitioner may or may not indulge in similar crime. There is no material placed on record by the respondents to show that there is likelihood of the petitioner being involved in similar case or the petitioner may commit a similar crime

on the basis of intelligence available with them but no such intelligence has been shared by the respondents with this Court. The only thing available with this Court is that it can direct the petitioner not to involve himself in a similar crime in future and in case any violation takes place, the respondents will naturally be at liberty to move an application for cancellation of the bail of the petitioner immediately.

17. It will also be important to take note of the judgment of this Court in the case of *Kamaljeet Singh Vs. H.K.Pandey (Intelligence Officer, NCB)*, Bail Application No. 2338/2004 decided on 04.03.2005, where similar objections were raised by the respondent. In that case by relying upon Section 37 of the NDPS Act, the following observations were made:-

11. The sum total of the arguments of the learned counsel for the State based upon the aforesaid decisions is that once possession is established, the presumption under Section [35](#) and Section [54](#) would come into play and the Court ought not to overlook the confessional statement of the petitioner, nor should the underlying object of Section [37](#) as indicated in the case of Babua alias Tazmul Hossain (supra), be ignored. Accordingly, he submitted that the petitioner, who had made a confessional statement and admitted the recovery of the heroin and opium ought not to be released on bail. The learned counsel for the State made a further argument which only needs to be stated to be rejected. This argument was that once a charge is framed, in view of Section [37](#) of the NDPS Act, bail should not be granted. In fact, since he was adamant about this submission, I had asked the learned counsel to produce one precedent which supported his contention. He was unable to do so.

15. Of course, these are all materials which will have to be gone into at the stage of trial. However, when an application for bail is under the consideration of this court and the rigours of Section [37](#) of the NDPS Act are attracted, it is incumbent upon this court to examine as to whether there exist or do no

exist reasonable grounds for believing that the petitioner is guilty of the offence charged. This consideration has to be on the basis of the materials available on the date on which the application for bail is considered. Moreover, the satisfaction recorded by the court at this stage is only a prima facie view and would not affect the consideration of the case by the trial court.

16. Looking at the entire factual material, as indicated above, it does appear that apart from the so-called confessional statement and the admission that one packet was recovered from under the seat on which the petitioner was seated in the said Maruti 800 vehicle, there is no other evidence available with the prosecution. The so-called confessional statement, at this stage, does not appear to me to be a confession at all. In fact, the statement discloses that the petitioner did not know of the contents of the packet.

17. This being the case, it does appear that the petitioner was not in conscious possession of the said contraband. therefore, I am satisfied that there are reasonable grounds for believing that the petitioner is not guilty of the offences for which he has been charged. As regards the question as to whether he is likely to commit any offence while on bail, no circumstance has been brought to my notice which would indicate that there is such a likelihood. It is also not the case of the State that the petitioner has been involved in any other NDPS related cases. In this view of the matter, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs.50,000/- with two sureties of the like amount to the satisfaction of the concerned trial court.

The application stands disposed of.

18. In the case in hand, the situation is worse because nothing has been recovered from the petitioner. The recovery of contraband is from accused Nos. 1 and 2. It is only on the basis of their statements that the petitioner is sought to be implicated. Insofar as the statement of petitioner under Section 67 of the NDPS Act is concerned, as stated above, he has already retracted the said statement and in these circumstances, unless and until the statement is corroborated the conviction may or may not take place. Thus, the

petitioner is entitled to be released on bail. Accordingly, I direct that the petitioner be released on bail on his furnishing bail bond in the sum of Rs. 1 lakh (rupees one lakh only) with two sureties of the like amount to the satisfaction of the trial court subject to the condition that he will not hamper the progress of the case and would not involve himself in similar activities and would deposit his passport with the respondents and will report to the local office of the DRI once in every month.

19. The petition stands disposed of. Pending applications, if any, shall also stand disposed of.

20. However, nothing stated herein would cause any aspersions on the merits of the case pending before the ACMM.

MOOL CHAND GARG, J.

September 23, 2009
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