

A.F.R.

Neutral Citation No. - 2024:AHC:185277

Court No. - 86

Case :- CRIMINAL REVISION No. - 5881 of 2024

Revisionist :- Ajay Kumar Kashyap And Another

Opposite Party :- State of U.P.

Counsel for Revisionist :- Abhishek Kumar Mishra, Chandrakesh Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra, J.

1. Supplementary affidavit filed today is taken on record.
2. Heard Sri Daya Shanker Mishra, Senior Counsel, assisted by Sri Abhishek Kumar Mishra and Sri Chandrakesh Mishra, learned counsel for the revisionists, learned A.G.A. for the State-respondent and perused the material available on record.
3. The instant criminal revision has been directed against the impugned order dated 17.10.2024, passed by learned Ist Additional Sessions Judge, Ghazipur in Criminal Case No.182 of 2024 (State vs. Bhagchand Tanwar and others), under Section 8/21 of NDPS Act, whereby the application 24-B, moved by the revisionists with prayer to discharge them from charge under Section 8/21 of NDPS Act has been dismissed.
4. The prosecution case in brief is that S.O. Amit Kumar Pandey, Police Station Jangipur, District Ghazipur accompanied with police team was present on 12.12.2023 at Lava turn trisection where he was informed by S.O.G. Incharge that he had got secret information to the effect that a person had come to purchase some narcotic (illegal heroin) at the culvert on Beso River at Highway No.31 and some persons are coming to sell it. He laid a trap placing reliance on this information and three persons namely, Bagchand Tanwar alias Bhagchand, Rajkamal alias Kamal Sahni

and Shivam Pratap Singh riding two motorcycles were intercepted whereas one person succeeded in making good his retreat from the place of arrest of these accused persons. The arrested persons disclosed the name of absconded persons as Abhay Kashyap, son of Ajay Kashyap. From personal search of arrested accused persons, 250 grams illegal heroin was recovered from each of them and from the search of hand bag carried by Bhagchand, Rs.14 lacs cash was also recovered. One packet containing 250 gms. heroin was recovered from spot which was allegedly thrown by the revisionist No.2. Thus, total 1 kg heroin was recovered in the incident. On interrogation, they stated that Bhagchand come from Rajasthan to purchase the contraband and for that purpose a deal was made from Ajay Kashyap, who has sent his son Abhay Kashyap to sell the contraband, who has escaped from the place of incident by motorcycle bearing Registration No.UP61 BC 3225. Three persons who had been caught on the spot alongwith cash and contraband recovered in the incident were arrested and on the basis of arrest and recovery memo, a case under Section 8/21 of NDPS Act was registered. The police recorded statement of arrested accused persons and on the basis of their statement, the complicity of accused Ajay Kumar Kashyap and Abhay Kashyap was also found. Arrested accused persons disclosed that Bhagchand Tanwar had come from Rajasthan to Ghazipur to purchase heroin/smack pursuant to a deal with Ajay Kashyap, who had sent his son Abhay Kashyap and two other arrested accused to supply the heroin for money. The police submitted the chargesheet against five accused persons after concluding the evidence for said offence. On commencement of trial, an application 24-B was moved by the revisionist with prayer to discharge them from the charge on the ground that they have been falsely implicated in the case. Nothing incriminating has been recovered from their possession. They have only been implicated on the basis of confessional statement of co-accused persons, which is not a valid piece of evidence and cannot be used during trial. However, learned trial court citing certain judgements

on discharge under Section 227 Cr.P.C. cited as **Ram Narayan Singh vs. State of UP and others, Application U/S 482 No.24164 of 2021, State of Bihar vs. Ramesh Singh (1977) 4 SCC 39, Union of India vs. Prafulla Kumar Samal and others (1979) 3 SCC 4, Niranjana Singh Karam Singh Panjabi vs. Jitendra Bhimraj Bijaya and others (1990) 4 SCC 76, Soma Chakravarti vs. State through CBI (2007) 5 SCC 403, Asim Sharif vs. National Investigation Agency, (2019) 7 SCC 148**, concluded that at the stage of framing of charge, the Court is not expected to embark on a mini trial and the court is only to see whether a prima facie case is made out on the basis of material collected during investigation. The police has submitted chargesheet against accused persons alongwith co-accused after investigation finding complicity of the applicants. Therefore, a prima facie case is made out to put up them on trial and no good grounds are made out to discharge the applicants. Accordingly, the application was dismissed.

5. Learned counsel for the revisionists submitted that the law is well settled on the basis of provisions of Section 25 and 26 of Evidence Act as well as catena of decisions of High Courts and Hon'ble Supreme Court that confession of co-accused before police is not a valid piece of evidence that can be used during trial. This is admitted fact that the revisionists were neither arrested on spot nor any contraband was recovered after their surrender before the Court. Inasmuch as the police had not sought any police custody remand to effect any recovery from them. The only material collected during investigation against the revisionists is the confessional statement of co-accused persons, who were arrested from the spot and from whom recovery of contraband and cash was effected. The revisionists cannot be tried on the basis of confessional statement of co-accused against the revisionists before police. Even the relevant judicial precedents cited and discussed before court below while releasing the accused on bail were not discussed in impugned order. They are father and son.

6. Learned counsel for the revisionists placed reliance a judgement of Hon'ble Apex Court in **Roy V.D. vs. State of Kerala, 2000 (7) Supreme 430**, wherein Hon'ble Court in paragraph Nos.18, 19 and 20 observed a sunder:-

"18. It is well settled that the power under [Section 482](#) of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under [Section 482](#) of the Cr.P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.

19. The learned Additional Solicitor General, however, relying upon conclusion No.3 in para 57 of [State of Punjab Vs. Baldev Singh](#) [1999 (6) SCC 172], contends that a search and seizure in violation of [Sections 41](#) & [42](#) of the NDPS Act does not vitiate the trial but would render the recovery of illicit article suspect and would only vitiate the conviction and sentence of the accused if the conviction has been recorded solely on the basis of such illicit article, so the High Court was right in not quashing the proceedings. We are afraid, we cannot accede to the contention of the learned Additional Solicitor General. The conclusion, [referred to above](#), may be extracted here:

"That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of [Section 50](#) of the Act."

20. It may be noticed that that conclusion was reached by the Constitution Bench in the context of non-compliance of [Section 50](#) of the NDPS Act. While emphasising that it is imperative on the officer who is making search of a person to inform him of his right under sub-section (1) of [Section 50](#) of the NDPS Act, it was held that the recovery of the illicit article in violation of [Section 50](#) of the NDPS Act would render the recovery of illicit article suspect and use of such material would vitiate the conviction and sentence of an accused. It is manifest that the recovery of illicit article [in that case](#) was by a competent officer but was

in violation of [Section 50](#) of the NDPS Act. In the instant case, however, the search and recovery were by an officer who was not empowered so to do. Further in [Balbir Singhs](#) case (supra) this Court took the view that arrest and search in violation of [Sections 41](#) and [42](#) of the NDPS Act being per se illegal would vitiate the trial. Therefore, the said conclusion cannot be called in aid to support the order under challenge. If the proceedings in the instant case are not quashed, the illegality will be perpetuated resulting in grave hardship to the appellant by making him to undergo the ordeal of trial which is vitiated by the illegality and which cannot result in conviction and sentence. It is, in our view, a fit case to exercise power under [Section 482](#) of Cr.P.C. to quash the impugned proceedings."

7. Learned counsel for the revisionists further placed reliance on **Sanjeev Chandra Agarwal & Another vs. Union of India, 2021 0 Supreme (SC) 1117**, wherein Hon'ble Apex court in paragraph No.5 observed as under:-

*"5. The factual position is that no narcotic drugs or psychotropic substances were recovered from the premises of the two appellants. As per the prosecution, 4 kilograms of Acetic Anhydride (Controlled Substance) was allegedly found from the premises of the appellants located at Gyan Scientific Agency, Varanasi. **The High Court was not correct in relying on the statements made by other accused under [Section 67](#) of the NDPS Act, in light of the judgment of this Court in [Tofan Singh Vs. State of Tamil Nadu](#), (2021) 4 SCC 1. It is pointed out that the charges under [Sections 9-A](#) and [25](#) of the NDPS Act have been framed and to this extent there is no challenge and dispute."***

8. Learned counsel for the revisionists next placed reliance on an order of this Court in **Criminal Appeal No.1347 of 2023, Amarjeet Kumar Yadav vs. Union of India and Another**, whereby the appellant Amarjeet Kumar Yadav was granted bail by this Court vide order dated 31.5.2024.

9. Learned counsel for the revisionists lastly placed reliance on judgements of Apex Court in cases of **Jayendra Saraswathy Swamigal vs State Of Tamil Nadu And Others, AIR 2005 SC 716** and **Hari Charan Kurmi and Another vs. State of Bihar, 1964 AIR 1184** in support of his contention.

10. Per contra, learned AGA submitted that there is no illegality, irregularity or perversity in the impugned order passed by the court below.

At the stage of framing of charge, the trial court has only to see as to whether a prima facie case is made out against the accused to put him on trial and for that purpose, there is sufficient material on record. The trial court is not required to embark on a mini trial at the stage of framing of charge.

11. In **Hari Charan Kurmi and Another vs. State of Bihar, 1964 AIR 1184**, in an appeal against conviction and sentence, Hon'ble Supreme Court considered the scope and application of Section 30 of Evidence Act. Hon'ble court observed as under:-

"11. The question about the part which a confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of [s. 30](#) of the Act. [Section 30](#) provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is found is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts to 'a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untrue, and so, s. 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession Particularly if it has been retracted. With that aspect of the problem. however, we are not concerned in the present appeals. When [s. 30](#) provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in [s. 30](#) is not evidence under [s. 3](#) of the Act. [Sec. 3](#) defines "evidence" as meaning and including-

- (1) all statements' which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;*
- (2) all documents produced for the inspection of the Court; Such documents are called documentary evidence.*

12. *Technically construed. this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the court permits or requires to be made before it; and clearly, a confession made by an accused person is not such a statement. it is not made or permitted to be made before the court that tries the criminal case. Part (2) of the definition refers to documents produced for the inspection of the court; and a confession cannot be said to fall even under this part. Even so, s. 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by [s. 3](#) of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non- technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because [s. 30](#) merely enables the Court to take the confession into account.*

14. *In appreciating the full effect of the provisions contained ,in [s. 30](#), it may be useful to refer to the position of the evidence given by an accomplice under [s. 133](#) of the Act. [Section 133](#) provides that an accomplice shall be a competent witness against an accused person; and that conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) to [s. 114](#) of the Act brings out the legal position that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Reading these two provisions together, it follows that though an accomplice is a competent witness, prudence requires that his evidence should not be acted upon unless it is materially corroborated; and that is the effect of judicial decisions dealing with this point. The point of significance is that when the Court deals with the evidence by an accomplice, the Court may treat the said evidence as substantive evidence and enquire whether it is materially corroborated or not. The testimony of the accomplice is evidence under [s. 3](#) of the Act and has to be dealt with as such. It is no doubt evidence of a tainted character and' as such, is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars."*

12. In Jayendra Saraswathy Swamigal vs State Of Tamil Nadu And Others, (supra), Hon'ble Supreme Court observed in paragraph No.10 as under:-

"10. Shri Nariman has submitted that in view of [Section 30](#) of the Evidence Act confession of a co-accused is a very weak type of evidence which can at best be taken into consideration to lend assurance to the prosecution case. He has referred to the decision of the Privy Council in [Bhuboni Sahu v. The King](#) AIR 1949 PC 257, wherein it was observed that confession of a co-accused is obviously evidence of a very weak type and it does not come within the definition of evidence contained in [Section 3](#) as it is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. Learned counsel has also referred to [Kashmira Singh v. State of M.P.](#) AIR 1952 SC 159 where it was held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in [Section 3](#) and it cannot be made the foundation of a conviction and can only be used in support of other evidence. It was further observed that the proper way is, first to marshall 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 such evidence which without the aid of the confession he would not be prepared to rely on for basing a finding of guilty. Reliance has also been placed upon the Constitution Bench decision in *Haricharan Kurmi v. State of Bihar* AIR 1964 SC 1184, where it was held that the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. It was further observed that the 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 its conclusion deducible from the said evidence. It has thus been urged that the confession of A-4 which was retracted by him subsequently and also that of A-2 have very little evidentiary value in order to sustain the charge against the petitioner."

13. However, the above stated case related to grant of bail in a case under section 302, 120-B IPC and Hon'ble court observed in concluding para that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as

expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial court seized of the trial.

14. Section 227 Cr.P.C. provides for discharge in a case triable by the Court of Session as the Special Court empowered to hold trial of a case under NDPS Act is essentially a court of Session, the provisions of Section 227 Cr.P.C. are applicable in such case. Section 227 Cr.P.C. is reproduced as under:-

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

15. In **Union of India vs. Prafulla Kumar Samal (1979) 3 SCC 4**, the scope of Section 227 was considered. After adaverting to various decisions the court enumerated the following principles:

"(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

16. Hon'ble Supreme Court placed reliance on above judgement of Union of India vs. Prafulla Kumar Samal (supra) in **Dilwar vs. State (2002) 2 SCC 135** and observed as under:-

"In exercising powers under [Section 227](#) of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under [Section 227](#) of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

17. Hon'ble Supreme Court in **State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru, (2005) 11 SCC 600**, while considering the scope of Sections 25, 26 and 30 of the Evidence Act observed as under:-

"We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not be brought within the sweep of [Section 32\(1\)](#). As a corollary, it follows that the confessions of the 1st and 2nd accused in this case recorded by the police officer under [Section 32\(1\)](#), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under [Section 30](#) of the Indian Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of [Sections 25](#) and [26](#) of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of [Evidence Act](#), then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here. For these reasons, the

contention of the learned senior counsel for the State that even if the confession of co-accused is not covered by [Section 32\(1\)](#), it can still be taken into account by the Court under [Section 30](#) for the limited purpose of corroborating or lending assurance to the other evidence on record cannot be accepted.”

18. Be that it may, the legal position is well settled on the basis of above stated judicial pronouncements and also in view of statutory provisions of Sections 25, 26 and 30 of Evidence Act that the confession of a co-accused before police is not a valid piece of evidence which can be used against accused in a criminal trial. The position of extra judicial confession made before some person other than a police officer will hold different field. Similar is the position with a confession made before a Magistrate and it may also be taken into consideration against a co-accused but in present case, the only material to connect the revisionists with the offence is confession of co-accused recorded by a police officer during police custody and no other evidence could be pointed out by prosecution against the revisionists. Therefore, a case of discharge from charge under Section 8/21 of NDPS Act is made out in present case and the accused revisionists deserve to be discharge from charge under Section 8/21 of NDPS Act.

19. Consequently, present revision is allowed and the revisionists are discharged under Section 227 of Cr.P.C. for reasons shown hereinabove before.

Order Date :- 26.11.2024

Kamarjahan