

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

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Judgment Reserved on: 14th August, 2018
Judgment delivered on: 16th November, 2018

+ BAIL APPLN. 1590/2018

RAJESH SHARMA

..... Petitioner

versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Vikram Chaudhary Senior Advocate with Mr. Janender Kumar Chumbak, Ms. Radhika and Mr. Akash Saini, Advocates.

For the Respondent: Mr. Satish Agrawal, Spl. PP for DRI

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. Petitioner seeks regular bail in Case SC No. 118/2013, titled as 'DRI Versus Rajesh Sharma & Ors.' under Sections 22(C)/25(A)/29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. Subject complaint was filed by the Director of Revenue Intelligence contending that specific intelligence was received that one Kiran Bhandari, one Rajesh Sharma - petitioner herein, one Somnath

Pal and one Surender Kumar were engaged in trafficking of contraband/psychotropic substances viz. Ketamine, Ephedrine, Methaqualone etc. Premises situated at 35/5, G.T. Karnal Road, Industrial Area, Phase-B, Near Telephone Exchange, Derawal - Model Town Gurudwara, Delhi was being used for storage purpose. Specific inputs were received that two consignments were likely to be carried in one Honda City car.

3. Acting on the said information, on 23.05.2013, officers of DRI reached the spot and found the car parked in the parking area in which one person was sitting. Subsequently another person approached the said car and sat on the front passenger seat. At that moment, officers intercepted the two persons. One of the two was the petitioner. Both persons along with the car were searched. However, nothing was recovered from their possession.

4. It is alleged that a search was carried out at BF-35, Shalimar Bagh, (E), Delhi – the premises of co-accused Som Nath Pal. During search, Indian currency besides other documents was seized by the DRI. On 23rd and 24th May, 2013 premises bearing No. B-35/5, (G.T. Karnal Road, industrial Area, Shakti Nagar, Delhi was also searched. White coloured HDPE bags, black polythene bags, one blue plastic drum, one corrugated carton and blue coloured plastic bottles each having markings “Manhar” pure coconut oil were found. They were found to contain white coloured powdery and off-white colour crystalline powdery substances. Field test was conducted which gave

positive result for ephedrine/pseudoephedrine and 3, 4-Methylenedioxyphenyl – 2 – Propanone. Said articles were seized.

5. It is the case of the prosecution is that Somnath Pal had given a statement that he had taken the premises on rent for storing, re-packing and concealing the contraband, purchased from various sources including the petitioner. Petitioner is alleged to have confirmed that ephedrine/pseudoephedrine found from the said premises was supplied by him. Ephedrine/pseudoephedrine which was found weighed 54.740 kgs. and 3, 4-Methylenedioxyphenyl-2-Propanone weighed 136.840 kgs.

6. The case of the petitioner is that the petitioner has been falsely implicated. It is contended that the petitioner was arrested from Kirti Nagar Market and nothing incriminating was recovered from him. Nothing was also recovered from the residence of the petitioner, which had been searched.

7. It is contended by learned counsel for the petitioner that the entire case of the prosecution is based on self-incriminating statement of the petitioner as well as of the co-accused. Learned Senior Counsel submits that the statements have been duly retracted.

8. He further submits that the statements were extracted from the petitioner and the co-accused after using third degree methods and this is substantiated from the medical report of the Medical Officer (Jail). When petitioner was admitted in jail, he had complained of backache

and pain over both feet with increased watering from the left eye. There was sub-conjunctival congestion over left eye, tenderness over mid back & both soles and bruises over gluteal region were also found, which established that third degree methods were used by the officers of DRI to extract a confession.

9. It is contended that there is no independent incriminating evidence or corroboration from any material to connect the petitioner with the commission of the subject offence. The recovery of the contraband is from a godown belonging to someone else. It is contended that since nothing was recovered from the petitioner and the involvement of the petitioner could not be established, Section 29 and Section 37 NDPS Act could not be invoked in the present case.

10. Prosecution has sought to rely on the statement of Surender Kumar Verma, co-accused wherein he is alleged to have stated that he was introduced to the petitioner by Somnath Pal, who stated that in the absence of Somnath Pal, he could take delivery of Narcotic drugs from the petitioner and this was done by Somnath Pal on asking of co-accused Kiran Bhandari. He is further alleged to have stated that, the petitioner, after the meeting, delivered Narcotic Drugs on behalf of Kiran Bhandari and Somnath Pal. He is further alleged to have stated that he took delivery of Narcotic articles from the petitioner and thereafter used to supply the same through the car kept at the godown of Somnath Pal.

11. Prosecution has also relied on the statement of Somnath Pal co-accused who stated that he was having contact with Mohan Lal Bhandari @ Kiran Bhandari in Mumbai for last several years and was involved in trafficking of psychotropic substances. He is further alleged to have stated that he used to purchase ephedrine/pseudoephedrine powder from the petitioner. Whenever he had a requirement of ephedrine/pseudoephedrine powder he would call the petitioner. He is further alleged to have stated that the petitioner used to keep ephedrine/pseudoephedrine powder in his car and he used to give advance payment to petitioner for ephedrine/pseudoephedrine powder.

12. Prosecution has also sought to rely on the statement of the petitioner where he is alleged to have stated that he was satisfied in the manner in which the proceedings were conducted at the godown of Somnath Pal and further that he had gone through the statements of Surender Kumar Verma and Somnath Pal and had put his signatures on the same, in token of agreeing with the same.

13. Learned Special Public Prosecutor for DRI stated that the case was also based on recovery of incriminating documents from the residence of the petitioner as also the statements of Surender Kumar Verma and Somnath Pal.

14. CRCL, New Delhi in its report answered '*positive*' for Ephedrine/ Pseudoephedrine Hydrochloride qua 54.740 Kgs white

powder and the remaining substance could not be analyzed as reference standard was not available. The samples were sent to CFSL Hyderabad for testing. The CFSL report showed that eleven exhibits tested positive for *Methamphetamine* which is a psychotropic substance.

15. Petitioner was initially granted bail on 09.09.2013, however, after the report was received from CFSL Hyderabad, bail of the petitioner was cancelled by the High Court by order dated 24.03.2015 and he was directed to surrender and the trial court was directed to reconsider the application for grant of bail. The Trial Court has rejected the bail application of the petitioner and accordingly, petitioner has approached this court seeking bail.

16. The Supreme Court of India in *Surinder Kumar Khanna v. Directorate of Revenue Intelligence*, (2018) 8 SCC 271 while considering the evidentiary value of a statement under section 67 of NDPS Act and possibility of basing conviction solely on the confessional statement of a co-accused has held as under:

“9. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of the Terrorist and Disruptive Activities Act, 1987 [Similarly: Section 18 of the Maharashtra Control of Organised Crime Act, 1999.] which specifically makes confession of a co-

accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter, therefore, has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused.

10. *In Kashmira Singh v. State of M.P. [Kashmira Singh v. State of M.P., 1952 SCR 526 : AIR 1952 SC 159 : 1952 Cri LJ 839] , this Court relied upon the decision of the Privy Council in BhuboniSahu v. R. [BhuboniSahu v. R., 1949 SCC OnLine PC 12 : (1948-49) 76 IA 147 at p. 155.] and laid down as under: (AIR p. 160, paras 8-10)*

“8. Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in BhuboniSahu v. R. [BhuboniSahu v. R., 1949 SCC OnLine PC 12 : (1948-49) 76 IA 147 at p. 155.] : (SCC OnLine PC)

‘...It does not indeed come within the definition of “evidence” contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination.’

Their Lordships also point out that it is

‘obviously evidence of a very weak type. ... It is a much weaker type of evidence than the evidence of

an approver, which is not subject to any of those infirmities’.

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

9. *In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerbutty [Emperor v. Lalit Mohan Chuckerbutty, ILR (1911) 38 Cal 559 at p. 588.] where he said that such a confession can only be used to “lend assurance to other evidence against a co-accused” “or, to put it in another way, as Reilly, J. did in Periaswami Moopan, In re [Periaswami Moopan, In re, 1930 SCC OnLine Mad 86 : ILR (1931) 54 Mad 75 at p. 77.] : (SCC OnLine Mad)*

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

10. *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.”

11. The law laid down in *Kashmira Singh* [*Kashmira Singh v. State of M.P.*, 1952 SCR 526 : AIR 1952 SC 159 : 1952 Cri LJ 839] was approved by a Constitution Bench of this Court in *HaricharanKurmi v. State of Bihar* [*HaricharanKurmi v. State of Bihar*, (1964) 6 SCR 623 at pp. 631-633 : AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] wherein it was observed: (*Haricharan case* [*HaricharanKurmi v. State of Bihar*, (1964) 6 SCR 623 at pp. 631-633 : AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] , AIR p. 1188, para 12)

“12. As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against

the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerbutty [Emperor v. Lalit Mohan Chuckerbutty, ILR (1911) 38 Cal 559 at p. 588.] a confession can only be used to “lend assurance to other evidence against a co-accused”. In Periaswami Moopan, In re [Periaswami Moopan, In re, 1930 SCC OnLine Mad 86 :ILR (1931) 54 Mad 75 at p. 77.] Reilly, J., observed that the provision of Section 30 goes not further than this: (SCC OnLine Mad)

‘...where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence.’

In Bhuboni Sahu v. R. [Bhuboni Sahu v. R., 1949 SCC OnLine PC 12 : (1948-49) 76 IA 147 at p. 155.] the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that: (SCC OnLine PC)

‘... a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of “evidence” contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the

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

*It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of M.P.* [*Kashmira Singh v. State of M.P.*, 1952 SCR 526 : AIR 1952 SC 159 : 1952 Cri LJ 839] where the decision of the Privy Council in *BhuboniSahu case* [*BhuboniSahu v. R.*, 1949 SCC OnLine PC 12 : (1948-49) 76 IA 147 at p. 155.] has been cited with approval."*

12. *The law so laid down has always been followed by this Court except in cases where there is a specific provision in law making such confession of a co-accused admissible against another accused. [For example: State v. Nalini, (1999) 5 SCC 253, paras 424 and 704 : 1999 SCC (Cri) 691]*

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

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

(underlining supplied)

17. In terms of the judgment of the Supreme Court, a person cannot be convicted solely on the basis of confessional statement of the co-accused. Supreme Court has categorically held that a confessional statement of a co-accused is to be used for corroborating the view formed by the court based on other material. In dealing with a case

against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. Conviction cannot be based solely on the statement of the co-accused. Only if the Court is of the view that there is substantive evidence available to base a conviction upon, the court is to look at the statement of the co-accused for the purposes of corroboration. In the absence of substantive evidence, court cannot base a conviction solely upon the statement of the co-accused.

18. In the present case, the petitioner was arrested on 23.05.2013. Admittedly at the time of arrest of the petitioner nothing was recovered from his residence or the vehicle he was travelling in. The contention of learned Special PP is that incriminating documents were recovered from the house of the petitioner as also independent evidence substantiated the involvement of the petitioner. However, learned Special PP did not point out to any incriminating material or document recovered from the house of the petitioner, except to rely upon the statement of the co-accused.

19. The petitioner is alleged to be dealing in Ephedrine/ Pseudoephedrine powder, which is a controlled substance and not a psychotropic substance. Controlled as well as psychotropic substance

is alleged to have been recovered from the godown alleged to be under the tenancy of Somnath Pal. Prosecution has not found any connection of the petitioner with the said godown. Further material against the petitioner relied on by the prosecution is only the incriminating statement given by the co-accused as well as alleged confession of the petitioner.

20. Petitioner has retracted the statements given by him and contended that force, coercion and third degree methods were used to extract the confession. Medical report of the medical officer (jail) dated 15.07.2013 alongwith the prescription dated 27.05.2013 shows that the petitioner was admitted as an inmate on 26.05.2013. There was tenderness over mid back & both soles and bruises over gluteal region. He had swelling over both ankles. The injuries indicated towards use of force against the petitioner. Petitioner has further retracted the statement.

21. The petitioner had been in custody since 13.05.2013. Petitioner had been granted bail on 09.09.2013 and thereafter surrendered on 16.05.2015. It is not the case of the prosecution that while the petitioner was on bail, during the period 09.09.2013 till 16.05.2015 he committed any offence.

22. On perusal of record, I am satisfied that there are reasonable grounds for believing that petitioner is not guilty of the offence under Section 22 (C)/25(A)/29 of the NDPS Act, 1985.

23. Further, there is nothing on record to show that the petitioner, was earlier involved in any similar offence or during the period that he was enlarged on bail, he was involved in any offence. Accordingly, it cannot be said that the petitioner, if released on bail, is likely to commit any offence.

24. In view of the above, the petition is allowed. Petitioner is directed to be released on bail, on his furnishing a bail bond in the sum of Rs. 1,00,000/- with one surety of the like amount to the satisfaction of the concerned trial court, if not required in any other case. The petitioner shall not do anything that would prejudice the trial or the prosecution witnesses. Petitioner shall deposit his Passport with the trial court at the time of furnishing his bail bond, if not already done. Petitioner shall not leave the country without permissions of the trial court.

25. Petition is disposed of in the above terms.

26. Order *dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

NOVEMBER 16, 2018

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