

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.3826 of 2019

Durgalal

... Petitioner / Accused

Vs.

The Intelligence Officer,
Narcotics Control Bureau,
Chennai Zonal Unit, Chennai. ... Respondent / Complainant

Prayer : Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records in split C.C.No.137 of 2004 in C.C.No.320 of 2002 in N.C.B.F.No.48/1/6/2002-NCB/MDS pending trial on the file of the I Additional Special Judge, under EC and NDPS Act cases at Chennai and quash the same.

For Petitioner : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.N.P.Kumar
Special Public Prosecutor

O R D E R

This Criminal Original Petition has been filed seeking to quash the complaint filed by the respondent and taken on file by the I Additional Special Court for NDPS and EC Act Cases, Chennai in Split C.C. No. 198 of 2018 in LPC No. 422 of 2014 in Split C.C. No. 137 of 2014 in C.C. No. 320 of 2002 in NCB F. No. 48/1/6/2002-NCB-MDS.

2.The respondent filed a complaint in C.C.No.320 of 2002, as against four accused persons for an offence under Section 8(C) r/w Sections 21, 23, 25 27A, 28 and 29 of the N.D.P.S.Act, 1985 as amended in 2001. The case was split up as against this petitioner and the petitioner was arrayed as A&7 in C.C.No.137 of 2004. NBW was issued against the absconding accused in Split C.C.No. 137 of 2004 and was kept pending in LPC No. 42 of 2014 dated 27.02.2014. On execution of NBW the petitioner was arrested and was produced before the I Additional Special Court for NDPS Act Cases at Chennai.

3. The case of the prosecution is that based on information the respondent on 24.04.2002 at 10 a.m mounted surveillance at 166/112, G.N.T.Road, Mahdavam, Chennai int he presence of independent witnesses had seized lorry bearing No.MP 09 KA 6161, Blue Colour Ford Car bearing No. TN02 E 4298 and 43.105 kgs of heroin from the possession of Ajay Ramu Patel @ Ajay Bhai, Govardan Goswamy @ Raju, Bairav Sigh and Shiyam Bhiari. The Officers Based on the information given by Ajay Ramu Patel @ Ajay Bhai proceeded to May Fair Apartment, 1st Floor No.2, Mandapam Street, Kilpauk, Chennai-10 and seized 6.365 kgs of heroin in the presence and possession of Mohamed Fazily Razik @ Faily. These Four persons were arrested by the respondent and under went trial in C.C.No.320 of 2002, and they were convicted by a judgment dated 31.10.2008 The conviction was later confirmed by this Court in C.A. No. 743 of 2014. The respondent based on the confession statement of the accused arrested, implicated 5 others including the petitioner after completing the investigation filed the complaint against 10 accused showing 6 to 10 accused as absconding accused.

4.This petitioner was implicated in this case only based on the confession given by the said Accused and arrayed as A7.

5. The learned counsel for the petitioner submitted that the only material that is available as against this petitioner is the confession statement of the co-accused. The learned counsel submitted that if this confession statement is to be used against this petitioner, the same can be done only in line with Section 30 of the Evidence Act. The learned counsel submitted that the sine qua non for using the confession of the co-accused is that the accused persons must be tried jointly for the same offence. Since this accused person is not tried jointly with other accused, the learned counsel submitted that the confession of the co-accused cannot be used against this petitioner. It is further submitted that the respondent by mistaken identify had wrongly executed the NBW and had put the petitioner behind the bars and he is nothing to do with the arrested accused in C.C. No. 320 of 2002.

6. Mr.N.P.Kumar, learned Special Public Prosecutor appearing for the Department submitted that this petitioner played a major role along with the other accused persons and a huge quantity of Heroin was also seized from A1 to A4 and therefore, the petitioner must be made to undergo trial and prove his innocence.

7. This Court has carefully considered the submissions made on either side and also the materials available on record.

8. It is an admitted case that the only material that is available against this petitioner is the confession given by the co-accused. If this confession is to be used against this petitioner, the same has to satisfy the requirements of Section 30 of the Evidence Act.

9. The essential ingredients of the Section 30 of the Evidence Act is as follows:

- (i) there must be joint trial for the same offence;
- (ii) it must be a confession;
- (iii) the confession of guilt must affect himself and others, i.e., implicate the maker substantially to the same extent as the other accused.
- (iv) the confession of guilt must be duly proved.

10. The object of this Section is that where an accused person unreservedly confesses his own guilt and at the same time implicates another person, who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction, which, to some extent, takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one. There is a caveat to this proposition. This evidence is a very weak piece of evidence and the confession may be true so far as its maker is concerned, but may be false insofar as it affects others.

11. One important requirement in order to apply this provision is that there should be a joint trial of the accused. If this requirement is not satisfied, the confession of the co-accused cannot be used in terms of Section 30 of the Evidence Act.

12. In the present case, admittedly the trial of Alto A4 is already over and they have been convicted by the trial Court, confirmed by this Court. Therefore on the face of it the requirements of Section 30 of the Evidence Act, is not satisfied in this case. Therefore the confession of A 4 cannot be used against this petitioner.

13. The learned counsel for the petitioner brought to the notice of this Court, the judgment of this Court in Mayil Vahanan .vs. Intelligence Officer, Narcotic Control Bureau reported in CDJ 2006 MHC 1161. The relevant portions of the judgment is extracted hereunder:

"13. A bare reading of the Section would reveal that joint trial is a pre-requisite

to bank on Section 30 of the Indian Evidence Act to draw inspiration from the confession statement of the co-accused.

14. Straightaway, let me refer to an authority, which applies squarely to the facts and circumstances of this case, in Suresh Budharmal Kalani v. State of Maharashtra 1998 SCC (Cri) 1625 wherein the Hon'ble Supreme Court has categorically held that the confession of an accused, who has been discharged, is not at all admissible as against a co-accused. It has been further observed that the trial Court is not justified in taking into consideration such confession of the discharged accused for framing charges against the co-accused on the ground that the prosecution could examine him as a witness for establishing the facts disclosed in his confession.

15. There is no dispute to the well settled position of law that the confession statement of an accused implicating the co-accused can be used only when the trial is being conducted jointly with the co-accused. The plea of the respondent that the respondent is toying with the proposal to examine the fifth accused, who has already been acquitted in this case, has to be rejected outright in view of the above ratio laid down by the Hon'ble Supreme Court".

14. It will also be relevant to rely upon the judgment of the Hon'ble Supreme Court in Haricharan Kurmi, Jogia Hajam . Vs. State of Bihar reported in AIR 1964 SC 1184. The relevant portions of the judgment is extracted hereunder:

"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, Section 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 Section 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 Section 30 is not evidence under Section 30 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.

13. 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*(1) a confession can only be used to "lend assurance to other evidence against a co-accused". In *In re. Peryaswami Noopan*, (2) Reilly J. observed that the provision of s. 30 goes not 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 s. 30 may be thrown into the scale as an additional reason for believing that evidence." In *Bhuboni Sahu v. King*(1) the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board observed that 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 s. 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 s. 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 s. 30, the fact remains that it is not evidence as defined by s. 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 s. 30. The same view has been expressed by this Court in *Kashmira Singh v. State of Madhya Pradesh*(1) where the decision of the Privy Council in *Bhuboni Sahu's* (2) case has been cited with approval.

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.

15. The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against an accused person, the Court cannot begin with the examination of the said statements. The stage to consider (1) [1952] S.C.R. 526.

(2) (1949) 76 I.A. 147 at p. 155.

the said confessional statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the Court has to adopt in dealing with these two types of evidence is thus clear well-understood and well-established. It, however, appears that in Ram Prakash's case (1), some observations have been made which do not seem to recognize the distinction between the evidence of an accomplice and the statements contained in the confession made by an accused person. "An examination of the reported decisions of the various High Courts in India," said Imam J., who spoke for the Court in that case, "indicates that the preponderance of opinion is in favour of the view that the retracted confession of an accused person may be taken into consideration against a co-accused by virtue of the provisions of s. 30 of the Act, its value was, extremely weak and there could be no conviction without the fullest and strongest corroboration on material particulars." The last portion of this observation has been

interpreted by the High Court in the present case as supporting the view that like the evidence of an accomplice, a confessional statement of a co-accused person can be acted upon if it is corroborated in material particulars.

In our opinion, the context in which the said observation was made by this Court shows that this Court did not intend to lay down any such proposition. In fact, the other evidence against the appellant Ram Prakash was of such a strong character that this Court agreed with the conclusion of the High Court and held that the said evidence was satisfactory and in that connection, the confessional statement of the co-accused person was considered. We are, therefore, satisfied that the High Court was in error in this case in taking the view that the decision in Ram Prakash's (1) case was intended to strike a discordant note from the well-established principles in regard to the admissibility and the effect of confessional statements made by co-accused persons".

15. It is clear from the above judgments, that the confession of a co-accused is a very weak piece of evidence and the Court should not start with the confession of a co-accused in a case and it must begin with the other evidence available on record, and the Court must then form its opinion with regard to the quality and effect of the said evidence and thereafter, the Court can turn to the confession, in order to receive assurances to the conclusion of guilt. Eventually the accused persons must have been tried jointly.

16. No useful purpose will be served by keeping the proceedings as against this petitioner pending in the absence of any other material, except the confession of the co-accused.

In the result, the proceedings in Split C.c. No. 198 of 2018 in LPC No. 42 of 2014 in Split C.c. No. 137 of 2004 in C.c. No. 320 of 2002, pending trial on the file of the I Additional Special Court for NDPS and EC Act Cases, Chennai is quashed. Accordingly, this Criminal Original Petition is allowed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

dh

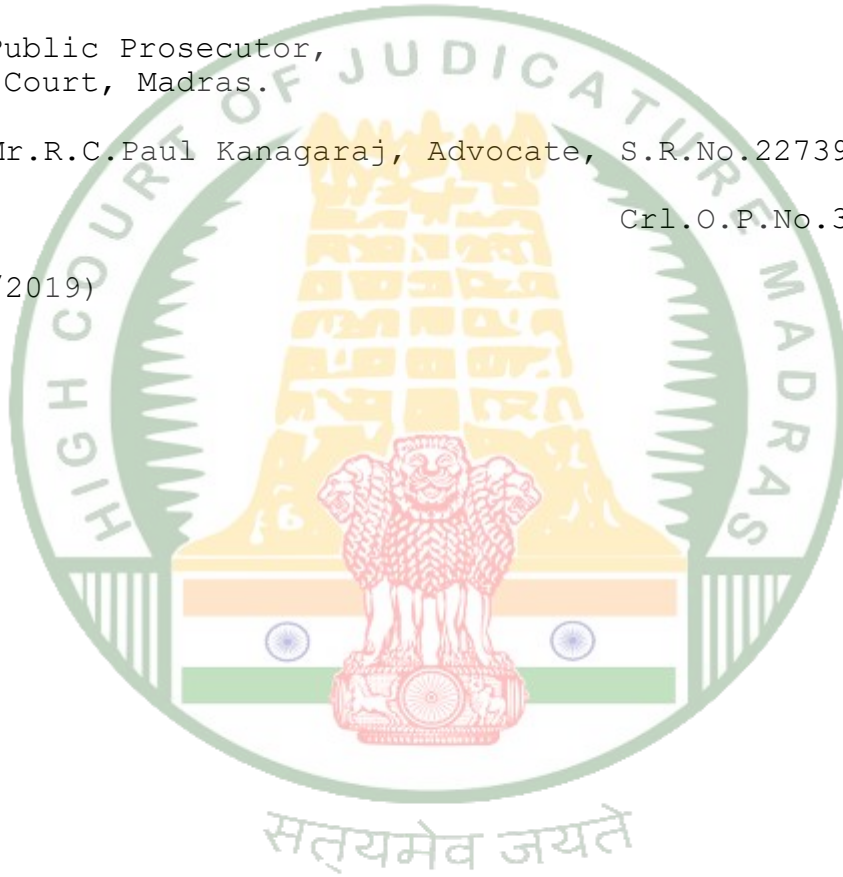
To

- 1) The I Additional Special Judge,
EC & NDPS Act cases,
Chennai.
- 2) The Intelligence Officer,
Narcotics Control Bureau,
Chennai Zonal Unit, Chennai.
- 3) The Superintendent,
Central Prison, Puzhal, Chennai
- 4) The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.R.C.Paul Kanagaraj, Advocate, S.R.No.22739

Crl.O.P.No.3826 of 2019

EV(CO)
SSM(18/03/2019)



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