

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Friday, the Seventeenth day of May Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice N. ANAND VENKATESH

CRIMINAL ORIGINAL PETITION Nos.9260 and 9903 of 2019

IN

C.C.NO.18 OF 2019

[ON THE FILE OF THE SPECIAL COURT FOR EC ACT CASES, COIMBATORE

IN CRL.OP.NO.9260 OF 2019]

KUMAR @ RANJITHKUMAR

[PETITIONER/ACCUSED NO.1
IN CRL.O.P.NO.9260 OF 2019]

N.BALAJI

[PETITIONER/ACCUSED NO.2
IN CRL.O.P.NO.9903 OF 2019]

-VS-

STATE REP. BY

THE INSPECTOR OF POLICE,
D-1 RAMANATHAPURAM POLICE STATION,
COIMBATORE DISTRICT.

[RESPONDENT/COMPLAINANT
IN BOTH THE PETITIONS]

For Petitioner : MR.A.SATHISH KUMAR Advocate
[IN CRL.O.P.NO.9260 OF 2019]

: MR.V.PURUSHOTHAMAN Advocate
[IN CRL.O.P.NO.9903 OF 2019]

For Respondent : MRS.M.PRABHAVATHI ADDITIONAL PUBLIC PROSECUTOR
[IN BOTH PETITIONS]

PETITION FOR BAIL 439 Cr.P.C.

ORDER : The Court Made the following order :-

The petitioners/Accused Nos.1 and 2, who were arrested and remanded to judicial custody on 15.02.2019 for an offence under Section 8(c) r/w. 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "NDPS Act"), in Crime No.438 of 2018 on the file of the respondent police, seek bail.

2.The case of the prosecution is that the Sub-Inspector of Police of D-1 Ramanathapuram Law and Order Police Station, Coimbatore, received an information that a person was in possession of Ganja near KTM showroom at Sungam Bypass Road, Coimbatore. After compliance of the statutory provisions under Section 41 of the NDPS Act, the police officer, along with the team, went to the spot at

09.30 a.m. and surrounded the person and came to know his name as Rajesh Kumar. This accused person was found in possession of 35 kg of ganja, kept in a nylon bag. After compliance of the mandatory provisions, the same was seized under mahazar in the presence of independent witnesses. Thereafter, his confession statement was also recorded. Based on his confession, the petitioners herein, who are ranked as A1 and A2, were added as accused persons. The petitioner in CrI.O.P.No.9903 of 2019 was already a remand prisoner in Crime No.789 of 2018 and he was arrested under P.T. Warrant. The petitioner in CrI.O.P.No.9260 of 2019 was already a remand prisoner in Crime No.275 of 2018 and he was arrested under P.T. Warrant and both the accused persons were remanded to judicial custody on 15.02.2019. There are totally three accused persons in this case and the petitioners are A1 and A2.

3.The learned counsel for the petitioners submitted that the petitioners have been falsely implicated in this case by the respondent police. The learned counsel submitted that, except the alleged confession by the co-accused, there is absolutely no other material available as against the petitioners. The learned counsel submitted that, admittedly, no seizure was effected from the petitioners and the petitioners were already remand prisoners in the above said crime numbers and in order to add one more case against the petitioners, they have been falsely implicated in this case. The learned counsel submitted that the confession of the co-accused cannot be treated to be a statement under Section 67 of the NDPS Act insofar as these petitioners are concerned and it can be relied upon, at the best, only under Section 30 of the Indian Evidence Act. The learned counsel, in order to substantiate the same, relied upon the following judgments.

(i)Mohammed Umar @ Mohammed Salim v. Intelligence Officer, Narcotics Control Bureau, South Zonal Unit (Madras) reported in **2010 (3) MLJ (Criminal) 603**

(ii)K.Velu v. State reported in **2015 SCC OnLine Mad 13893**

(iii)Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence in **Criminal Appeal No.949 of 2018** dated 31.07.2018

The learned counsel for the petitioners concluded the arguments, saying that the petitioners have already suffered incarceration for a substantial period and A3 has already been granted bail by the Special Court for EC Cases, Coimbatore, by an order dated 12.11.2018.

4.The respondent has filed a detailed counter affidavit, explaining the entire facts right from the stage of receiving information till the recording of the statement of the accused persons under Section 67 of the NDPS Act.

5.The learned Additional Public Prosecutor appearing on behalf of the respondent, apart from reiterating the stand taken by the respondent police in the counter affidavit, submitted that the investigation has already been completed and a final report has also been filed before the Special Court. The learned Additional Public Prosecutor submitted that the petitioners have been implicated in this case based on the confession of the co-accused and there are two previous cases pending against the petitioners apart from the present case.

6.This Court has carefully considered the submissions made on either side.

7.In this case, admittedly, seizure was not effected from the petitioners and the petitioners have been added as accused persons, based on the confession of the co-accused. Even on the date of effecting arrest through P.T. warrant, the petitioners were remand prisoners in some other case.

8.At this stage, it will be relevant to take note of the judgments relied upon by the learned counsel for the petitioners.

9.The first judgment relied upon by the learned counsel for the petitioner is **Mohammed Umar @ Mohammed Salim v. Intelligence Officer, Narcotics Control Bureau, South Zonal Unit (Madras) [2010 (3) MLJ (Criminal) 603]** and the relevant portion of the judgment is extracted hereunder.

"8.In so far as the appeal filed by the 2nd accused in C.A.No.716 of 2008 is concerned, he has been convicted based on the confession said to have been given by the other accused. Indisputably, the 2nd accused did not confess. Thus, there is no statement relevant under Section 67 of the Act which could be used as a substantive evidence against the 2nd accused. What is available against him is only the confessions said to have been given by the rest of the accused falling under Section 67 of the Act. There can be no doubt that these confessions are admissible in evidence under Section 67 of the Act. The bar contained in Section 25 of the Indian Evidence Act has been taken away by Section 67 of the NDPS Act. It has been well settled that such a confession recorded under Section 67 of the Act is a substantive evidence as against the maker of the statement. But in respect of the co-accused, the said statement can never be treated as a substantive evidence. At the most, it can be considered as a relevant evidence under Section 30 of the Indian Evidence Act. It has been well settled in a

catena of judgments by the Honourable Supreme Court that the proper way to consider the confession of the co-accused is to keep the co-accused confession aside, to marshal all the other evidences available against the accused at first, and in the event of the court coming to the conclusion that the prosecution has proved the case against the particular accused, then to strengthen the said conclusion, the court will be at liberty to look into the co-accused confession also. In this regard, reference may be made to the judgment of the Honourable Supreme Court in *Kashmira Singh Vs. State of Madhya Pradesh* reported in AIR 1952 SC 159. The said judgment has been consistently followed by the Supreme Court in several judgments. In this regard, yet another judgment of the Honourable Supreme Court in *Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar* reported in AIR 1964 SC 1184. Applying the above well settled principles of law to the facts and circumstances of the case, if the evidences available on record are taken into consideration, indisputably, it is only the confession of the co-accused on which basis the lower court has convicted the 2nd accused which in my considered opinion is not sustainable. Apart from that, there is no other evidence available as against the 2nd accused."

10. The second judgment relied upon by the learned counsel for the petitioner is **K.Velu v. State [2015 SCC OnLine Mad 13893]** and the relevant portion of the judgment is extracted hereunder.

"20. So far as the accused Nos. 3 to 5 are concerned, no contraband was recovered from them. They were also not found anywhere near the place of occurrence. As rightly pointed out by the learned Senior Counsel, they have been implicated as accused based on the confession statements said to have been made by the accused Nos. 1 and 2 under Section 67 of the Act to PW-9. These two statements, being the confessions of the co-accused, could, of course, be used against the accused Nos. 3 to 5, as provided in Section 30 of the Evidence Act. But, the question is how to approach these statements given by the accused Nos. 1 and 2 as against the accused Nos. 3 to 5.

21. In *Kashmira Singh's* case, cited supra, while dealing with the scope of Section 30 of the Evidence Act, has held as follows:-

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the

accused excluding the 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".

...

27. In the instant case, as I have already pointed out, on marshalling of the entire evidences available on record, other than these two confession statements said to have been made by the accused Nos.1 and 2, I find that there is absolutely nothing on record to even prima facie show that there was conspiracy between the accused Nos.1 to 5. In the absence of the proof of existence of the conspiracy, as has been held by the Hon'ble Supreme Court, it is not possible to invoke the aid of Section 10 of the Evidence Act and therefore, the statements made by the accused Nos.1 and 2 under Section 67 of the Act cannot be used against the accused Nos.3 to 5 by invoking Section 10 of the Evidence Act."

11. The third judgment relied upon by the learned counsel for the petitioner is **Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence [Criminal Appeal No.949 of 2018]** dated 31.07.2018, and the relevant portion of the judgment is extracted hereunder.

"6. In this appeal challenging the correctness of the conviction and sentence rendered as against the appellant, it was submitted by Mr. Jayant Bhushan, learned Senior Advocate that apart from the so called statements of co-accused Raj Kumar @ Raju and Surinder Pal Singh there was nothing against the appellant and that he was neither arrested at the site nor was the contraband material in any way associated with him. Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent however supported the judgment of conviction and sentence rendered against the appellant. He placed on record call data reports showing that around the time when the co-accused was arrested, the appellant was in touch with a person named Chaudhary

from Dubai. The learned Additional Solicitor General however fairly accepted that apart from the statements of the co-accused there was nothing to link the appellant with said convicted accused. The call data reports also did not indicate that around the time when co-accused were apprehended, the appellant was in touch with either of them.

7. For the present purposes, we will proceed on the footing that the statements of co-accused were recorded under and in terms of Section 67 of the NDPS Act. As regards such statements, a bench of two Judges of this Court after referring to and relying upon the earlier Judgments, observed in *Kanhaiyalal v. Union of India*¹, as under:

"45. Considering the provisions of Section 67 of the NDPS Act and the views expressed by this Court in *Raj Kumar Karwal* case² with which we agree, that an officer vested with the powers of an officer in charge of a police station under Section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the (2008) 4 SCC 668 (1990) 2 SCC 409 Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act."

8. Later, another bench of two Judges of this Court in *Tofan Singh v. State of Tamil Nadu*³ was of the view that the matter required reconsideration and therefore, directed that the matter be placed before a larger bench. It was observed in *Tofan Singh* (supra) as under:

"40. In our view the aforesaid discussion necessitates a re-look into the ratio of *Kanhaiyalal* case. It is more so when this Court has already doubted the dicta in *Kanhaiyalal* in *Nirmal Singh Pehlwan*⁴ wherein after noticing both *Kanhaiyalal* as well as *Noor Aga*⁵, this Court observed thus: (*Nirmal Singh Pehlwan* case, SCC p. 302, para 15) "15. We also see that the Division Bench in *Kanhaiyalal* case had not examined the principles and the concepts underlying Section 25

of the Evidence Act, 1872 vis-à-vis Section 108 of the Customs Act and the powers of a Customs Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar case. The latest judgment in point of time is Noor Aga case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with." (2013) 16 SCC 31 (2011) 12 SCC 298 (2008) 16 SCC 417

41. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for reconsideration of the issue as to whether the officer investigating the matter under the NDPS Act would qualify as police officer or not.

42. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code."

9. Thus the issue whether statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has now been referred to a larger Bench.

10. 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 Terrorist and Disruptive Activities Act, 1987 6 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-

Similarly: Section 18 of Maharashtra Control of Organised Crime Act, 1999 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.

11. In *Kashmira Singh v. State of Madhya Pradesh*⁷, this Court relied upon the decision of the Privy Council in *Bhuboni Sahu v. The King*⁸ and laid down as under:

"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 *Bhuboni Sahu v. The King* "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 in so far as he is corroborated?

(1952) SCR 526 (1949) 76 Indian Appeal 147 at 155 In our opinion, the matter was put succinctly by Sir 'Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerbutty*⁹ 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 *In re Periyaswami Moopan*¹⁰ "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."

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."

12. The law laid down in *Kashmira Singh* (supra) was approved by a Constitution Bench of this Court in *Hari Charan Kurmi and Jogia Hajam v. State of Bihar*¹¹ wherein it was observed:

"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, [1911] I.L.R. 38 Cal. 559 at 588 [1931] I.L.R. 54 Mad. 75 at 77.

(1964) 6 SCR 623 at 631-633 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 Chuckerburty a confession can only be used to "lend assurance to other evidence against a co-accused". In *re Periyaswami Moopan Reilly. J.*, observed that the provision of Section 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 Section 30 may be thrown into the scale as an additional reason for believing that evidence". In *Bhuboni Sahu v. King* 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 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 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 Madhya Pradesh* where the decision of the Privy Council in *Bhuboni Sahu* case has been cited with approval."

13.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.¹²

14.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 utilized in order to lend assurance to the Court. 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 leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence For example: *State vs. Nalini*, (1999) 5 SCC 253, paras 424 and 704 and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any other offence."

12.A careful reading of the above judgments makes it very clear that a confession can be made admissible in evidence under Section 67 of the Act as a substantive evidence as against the maker of the statement. But, in respect of the co-accused, the said statement can never be treated as a substantive evidence. At the most, it can be considered as a relevant evidence under Section 30 of the Indian Evidence Act. On the touch stone of the law laid down by the Hon'ble Supreme Court, the confession of the co-accused can, at the best, be used or utilized in order to lend assurance to the Court. In the absence of a substantive evidence, the Court cannot proceed to convict the accused, purely on the statement of co-accused. In the instant case, the investigation has been completed and a final report has also been filed and the only material that is available against the petitioners is the statement of the co-accused and there is no other material. Under such circumstances, this Court is able to satisfy itself that there are reasonable grounds for believing that the petitioners are not guilty of the offence. That apart, there is no material to show that the petitioners will commit any offence, while on bail.

13. Therefore, this Court is satisfied that the petitioners have fulfilled the twin requirements of Section 37 of the NDPS Act and are therefore, entitled to be granted bail. This is apart from the fact that the investigation has already been completed and the petitioners have already suffered incarceration for quite a long time. Therefore, this Court is inclined to grant bail to the petitioners.

14. Accordingly, the petitioners are ordered to be released on bail on they executing a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties, out of which one surety shall be a blood relative, each for a like sum to the satisfaction of the learned Additional District Judge/Presiding Officer, Special Court for EC Act Cases, Coimbatore, and on further conditions that:-

[a] the petitioners shall report before the Special Court for EC Act Cases, Coimbatore, daily at 10.30 a.m. until further orders.

[b] the Special Court for EC Act Cases, Coimbatore, is directed to complete the entire proceedings within a period of four months from the date of receipt of copy of this order and the trial shall be conducted on a day-to-day basis, without granting any unnecessary adjournments. The guidelines given by the Hon'ble Supreme Court in **Vinod Kumar Vs. State of Punjab** reported in [(2015) 1 MLJ (Cr1) 288 (SC)], shall be strictly followed.

[c] if the petitioners adopt any dilatory tactics, it is open to the Special Court to insist upon their presence and remand them to custody as per the judgment of the Hon'ble Supreme Court in **State of Uttar Pradesh Vs. Shambhu Nath Singh [JT 2001 (4) SC 319]**.

[d] the petitioners shall not tamper with evidence or witness either during investigation or trial.

[e] the petitioners shall not abscond either during investigation or trial.

[f] on breach of any of the aforesaid conditions, the Special Court is entitled to take appropriate action against the petitioners in accordance with law, as if the conditions have been imposed and the petitioners are released on bail by the Special Court themselves, as laid down by the Hon'ble Supreme Court in **P.K.Shaji vs. State of Kerala [(2005) AIR SCW 5560]**.

[g] if the accused/petitioners thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

-sd/-
17/05/2019

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE ADDITIONAL DISTRICT JUDGE
PRESIDING OFFICER,
SPECIAL COURT FOR EC ACT CASES,
COIMBATORE.

2 THE SUPERINTENDENT,
CENTRAL PRISON, COIMBATORE.

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 THE INSPECTOR OF POLICE
D-1 RAMANATHAPURAM POLICE STATION,
COIMBATORE DISTRICT.

+1CC to M/S.A.SATHISHKUMAR Advocate on payment of necessary charges SR NOS.10019

+1CC to M/S.v.V.PURUSHOTHAMAN Advocate on payment of necessary charges SR NOS.10025

CRL OP.9260 & 9903 OF 2019

Date :17/05/2019

MK:17/05/2019