

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:22.01.2019

Delivered on:31.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

Crl.R.C.No.1496 of 2018
and
Crl.M.P.Nos.17492 & 17493 of 2018

Prathap Reddy

....Petitioner/A-2

..Vs..

State by:

The Inspector of Police,
Central Crime Branch, Team IX,
Egmore, Chennai.

...Respondent/Complainant

This Criminal Revision Petition is filed under Sections 397 r/w 401 of Cr.P.C. praying to call for records and set aside the order dated 03.12.2018 passed in Crl.M.P.No.3825 of 2017 in CC.No.3284 of 2017 by the CCB & CBCID Metropolitan Magistrate, Egmore, Chennai.

For Petitioner : Mr.R.Rajarithnam

For Respondent : Mr.G.Harihara Arun Soma Sankar
Government Advocate (Crl.Side)

O R D E R

The above criminal revision case has been filed against the order passed by the CCB & CBCID Metropolitan Magistrate, Egmore, Chennai in Crl.M.P.No.3825 of 2017 in CC.No.3284 of 2017, dated 03.12.2018, dismissing the petition filed by the petitioner herein under Section 239 of the Code of Criminal Procedure, seeking to discharging him from the case.

2.The petitioner herein/Accused No.2 was charged for offences under Sections 420, 465, 467, 468 read with Sections 471 & 34 of the Indian Penal Code, along with Accused No.1. The respondent police registered a case against the petitioner and

the other accused in Crime No.80 of 2008, on the basis of the complainant from the defacto complainant that the petitioner/accused colluded together in order to create a forged lease agreement, dated 05.08.2007, and also certain other documents. The police investigated the case and examined witnesses and on the basis of their investigation, a final report was filed. According to the petitioner/second accused, he was charged for the offences only on the basis of the statement given by the Accused No.1 before the police and other than the statement given by the co-accused, there was no other material for charging him for the offences as mentioned by the police.

3.The prosecution case was that the defacto complainant was running a hotel in the name and style of 'Hotel Malabar Hotpots' at Door No.339, Arcot Road, Kodambakkam, Chennai - 24 for many years. Due to old age, he was unable to look after the business and therefore, he had entered into an oral agreement with the first accused to manage the business on 01.06.2007 and they entered into a written agreement on 08.09.2007. According to the agreement, the first accused was to manage the affairs of the hotel and pay a sum of Rs.15,000/- per month as profit. The agreement was only for a period of 11 months from 01.06.2007.

4.After completion of the agreement period, the first accused refused to hand over the hotel to the defacto complainant and he had also committed default in monthly payment towards profit, as per the agreement. In the said circumstances, the defacto complainant had verified and found that the first accused had fabricated the documents as if he had invested a sum of Rs.10 lakhs for running the hotel for a period of 15 years. On the basis of the fabricated documents, the first accused had also opened a bank account and obtained registration certificate etc. Thereafter, a complaint was filed before the jurisdictional police and the same was investigated and a report was filed.

5.According to the present revision petitioner, except the statement of the first accused before the police, there was no other material for charging him for the offences, as reflected in the FIR. Therefore, the petition was filed under Section 239 of Cr.P.C. seeking to discharge him from the offences, as according to him, he was in no way connected with the fabrication or forgery of the documents.

6.In response to the discharge petition, a detailed counter affidavit has also been filed on behalf of the respondent police.

7.In the counter affidavit it was clearly mentioned in paragraph No. 4 that the first accused had confessed that he colluded with the petitioner herein and fabricated a lease deed

dated 05.08.2007. The present petitioner/accused No.2 signed the document as witness No.1. According to Accused No.1, the petitioner herein had also signed in the name of one Mr.Y.Baskar, as witness No.2. In the counter, it is also stated in paragraph No.5 that the petitioner herein also confessed his involvement in the offence as that of Accused No.1.

8.The learned Magistrate, after advertng to the evidence and various other relevant materials, found that there were prima facie materials available to proceed against both the accused and accordingly dismissed the petition for discharge. As against the same, the present revision petition has been filed.

9.Mr.C.Rajarathinam, the learned counsel appearing for the petitioner, would, at the outset, submit that the petitioner herein was only an employee of the hotel, run by the first accused and he was in no way connected with the preparation of the document, viz, the lease deed etc. He was unnecessarily arrayed as an accused, despite his complete innocence in the dealing between the first accused and the defacto complainant. The learned counsel would submit that as per Section 25 of the Indian Evidence Act, 1872 the confession before the police officer is not an admissible piece of evidence. Section 25 of the Evidence Act is extracted hereunder:

"25. Confession to police officer not to be proved. -
No confession made to a police officer, shall be proved as against a person accused of any offence."

10.The learned counsel would submit that except the statement of the first accused before the police, there was no other material mentioned in the report even remotely suggesting the involvement of the petitioner herein. In which case, there was absolutely no material at all for framing charges against the petitioner in respect of the offences pointed out by the respondent. According to the learned counsel, unfortunately the learned Magistrate has relied upon such confession, which was legally not admissible and proceeded to hold that there were prima facie materials available against the revision petitioner herein also.

11.On behalf of the respondent a detailed counter affidavit has been filed. In Paragraph No.7 of the counter, it is stated as follows:

"7. It is submitted that Sec.30 of evidence Act stated that when more persons then one are being tried jointly for the same offence and confession made by one of such person 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 as well as against the person who makes such confession. It is submitted that the confession statement made by A-1 in relating to A-2 his admissible piece of evidence."

12. According to the learned Government Advocate for prosecution under Section 30 of the Indian Evidence Act, 1872 the confession made by the co-accused is an admissible piece of evidence. Section 30 of the Indian Evidence Act is extracted hereunder:

"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. - 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."

13. According to the learned Government Advocate for prosecution there are other materials available and such materials can be tested only during the trial and therefore, the petitioner herein is not entitled to be discharged from the offence, at the very threshold.

14. The learned counsel appearing for the petitioner would submit that the contention of the respondent police regarding Section 30 of the Indian Evidence Act cannot have any application in the present case for the simple reason that the statement to be obtained under Section 30 of the Indian Evidence Act relates to judicial confession and not confession before the police. In this case, as per FIR the confession was made only to the police, which is covered under Section 25 of Evidence Act and not Section 30 of the Act.

15. The learned counsel, while attempting to distinguish the scope and purport of Sections 25 and 30 of the Indian Evidence Act, 1872 would also rely on the following decisions in support of his contentions.

(i) CDJ 2015 MHC 2340-Sugumaran v. State. The learned counsel would rely on Paragraph Nos. 4 & 9 to 11, which are extracted hereunder.

"4. THIRU T. Sudanthiram learned counsel for the petitioner, submitted that there was no legal evidence against the petitioner to warrant an interference of guilt either under S.457 or under S.380 I.P.C. The

only admissible evidence, which, even if true, was the alleged confession made by the petitioner to P.W.17, the admissible portion of which has been marked an Ex. P.7 and which led to the recovery of a coir rope, M.O.4. This piece of evidence, which had been denied by the petitioner, even if it was accepted would not be sufficient to form the sole basis of conviction as against the petitioner. Learned counsel also submitted that both the trial Court as well as the appellate Court had relied upon the alleged confession said to have been made by the first accused to the Investigating Officer, the admissible portion of which had been marked as Ex.P2. The Judgment of the appellate Court, having relied upon the inadmissible piece of evidence, had to be set aside by this Court acting under its revisional jurisdiction?

9. IT is strange that the judgments of the Courts below do not stop with this piece of evidence against the petitioner. Paragraph 16 of the judgment of the learned Sessions Judge deals with the case against the present petitioner. Learned Sessions Judge remarks that though Ex.P2 is the admissible portion the confession of the first accused is in the nature of a confession of the cc- accused against the second accused (the petitioner herein). This proposition of law is patently wrong. The piece of information given by an accused to the Police Officer leading to the discovery of any fact and thereby becoming admissible under S. 27 of the Evidence Act, is not a confession by an accused. The confession made by an accused to be admissible in full, can be recorded only by a Judicial Officer under 5. 164 Cr.P.C. after complying with all the requirements provided under that section. When such a confession is made and the above confession is provided in a Court of law, then that confession could be described as a confession of a co-accused as against the others which could be thrown in the balance of evidence against the others. The confession of one accused is not evidence as against the co-accused. When the rest of the evidence is sufficient for a conviction, this confession could be used to tilt the balance against a co-accused. It cannot form the basis of a conviction and it cannot be taken as a piece of evidence against the cc- accused. In the instant case, the statement that is made under Ex.P2 is only an information given by an accused to a police officer leading to a discovery and admissible under S.27 of the Evidence Act. This is no evidence against

a co-accused. It also unfortunate that the courts below have extracted the gist of the entire statement made by the first accused to the police officer. What is admissible even against the first accused is that particular portion that distinctly relates to discovery of a fact. The rest of the statement is inadmissible even against the maker, viz, the first accused. Learned Magistrate in paragraph II of his judgment has extracted the entire statement of the first accused as spoken to by P.W,8, and summarized it as a piece of evidence not only against the first accused but also against the other accused. No doubt the appellate court had refrained from extracting the entire confession of the first accused. Yet, as already stated by me earlier even the appellate court in paragraph 16 of its judgment has taken Ex.P2 as a piece of evidence against the present petitioner. This is a manifest illegality. Ex.P2 has to be eschewed from consideration so far the present petitioner is concerned.

10. THE first accused and the present petitioner are brothers and the mere fact that there was one counsel to defend both of them and there was one set of cross examination by both of them are certainly not circumstances incriminating anyone of the accused. Bereft of all these prejudices and surmises and the inadmissible evidence what is left against the present petitioner is that on his information M. O 4 was recovered. M.O. 4 is not property involved in the theft. Nor is there anything to indicate that it was used in the commission of the crime. It is just an ordinary rope which anyone could have had access to. Recovery of M. O. 4 by itself will not incriminate this petitioner. I am unable to find any piece of evidence that would lead to the inference that the petitioner is guilty of an offence either under Section 457 or under Section 380 read with section 34, I.P.C. The case of each accused has to be viewed and tested in isolation. Both the courts below have taken the case as a whole and have failed to consider the evidence against each accused separately. There is total lack of evidence against the present petitioner. The judgment of the appellate Court suffers from manifest illegality in relying upon the evidence, which is totally inadmissible. This Court, therefore, acting under its revisional jurisdiction is bound to interfere with and set aside the conviction rendered by the appellate Court.

11. IN the result the revision is allowed the conviction and sentence are set aside and the petitioner is acquitted and shall be set at liberty forthwith unless he is liable to be detained in custody for some other cause."

He would submit that the learned Judge of this Court, in the above case, has discussed the confession by the co-accused elaborately and how the Courts cannot base its conviction on such confession.

(ii)CDJ 2015 MHC 2340-Dharmalingam and another v. State, rep.by Inspector of Police, Namakkal. The learned counsel would draw the attention of this Court to paragraph Nos. 7 to 17, which are extracted hereunder:

"7. Before appreciating the arguments of the learned Senior Counsel and the learned Additional Public Prosecutor, we will have to see the charge levelled against the petitioners and the materials collected during investigation. It is seen from the statement of witnesses and the charge sheet, as rightly submitted by the learned Senior Counsel, except the confession of A.1 and A.4, there is no evidence or material to connect the petitioners with the crime. The only evidence available as per the prosecution case is that A.1 and A.4 gave confession wherein it is admitted by A.1 that he informed A.3 to A.6 about the murder committed by him and all of them decided to screen the evidence and A.1 gave Cell Phone and Sim Card used by the deceased to A.5 and A.5 and A.6 destroyed the Cell Phone and Sim Card. The number of the Sim Card used by the deceased is 9691080593. Admittedly, the Cell Phone and the Sim Card which were alleged to have been handed over to A.5 by A.1 were not recovered. It is the case of the prosecution that A.5 and A.6 caused disappearance of the Cell Phone and the Sim Card given by the first accused with the intention of screening the first accused from legal punishment. The above confession of the prosecution is that the Cell Phone and the Sim Card of the deceased were handed over to A.5 by A.1 and thereafter, A.5 and A.6 caused disappearance of the Cell Phone and the Sim Card on the basis of confession of A.1 and A.4. Except

the confession of A.1 and A.4, there is no other material to connect the petitioners.

8. In this back ground, we will have to see whether the confession of A.1 and A.4 implicating A.5 and A.6 be sufficient to sustain the charge under section 201 r/w 302 IPC.

9. In *Kashmira Singh v. State of Madhya Pradesh* reported in AIR 1952 SC 159, it is held as follows:-

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 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.

10. The same judgment was followed in *Suresh Budharmal Kalani alias Pappu Kalani v. State of Maharashtra* reported in 1998 SUPREME COURT 3258 and it is held by the Hon'ble Supreme Court as follows:-

At that stage the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr.Bansal for framing charges against Kalani.

11. In the judgment reported in 1991-1-L.W. (Cr1.) 358 in the matter of *V.R.Nedunchezian v. State* by Deputy Superintendent of Police, CBCID (Head Quarters), Chennai, His Lordship,

M.KARPAGAVINAYAGAM, as he then was, held as follows:-

46. It is manifest from the reading of the above decisions that the charges can be framed against any accused person only in those discerning few cases where the Court comes to the conclusion that the prosecution has shown a prima facie case against the accused and there is evidence before the Court which is capable of being converted into legal evidence later on during the subsequent proceedings after the framing of the charges. As shown earlier, it is observed in catena of authorities that the prosecution must show a prima facie case against the accused in order to enable the Court to frame a charge against him. If the evidence before the Court is of such type which if unrebutted and unchallenged by way of cross-examination would not be sufficient enough to convict the accused ultimately, then the Court would not be justified in framing the charge against the accused. The Court at that stage is under no obligation to make an elaborate enquiry by sifting and weighing the material to find out a case against the accused beyond a reasonable doubt which is required to do at the time of the final hearing. The trial Court Judge at that preliminary stage is required to find out whether there is any material which may lead to the inference that the accused has committed an offence. Thus, the charge can be framed by the Court against an accused, if the material placed before it raises a strong suspicion that the accused has committed an offence. In other words, the Court would be justified in framing the charges against an accused, if the prosecution has sown the seed in the form of the incriminating material which has got the potential to develop itself into a full-fledged tree during trial.

12. In the judgment reported in 1994-1-LW (Cr1) 208 in the matter of P.Pragasam Vs. State rep.by the Inspector of Police, Karaikal Town Police, Pondicherry, it has been held that when the confession does not lead to recovery, the confession is inadmissible in law and the charge sheet based on the confession which does not lead to recovery has no legal basis and is liable to be quashed.

13. The other cases cited by the learned counsel for the petitioner cannot be applied to the facts of this case.

14. Therefore, as per the judgment of the Hon'ble Supreme Court referred to above and as per the judgment of this Court reported in 1994-1-LW (Crl) 208 supra, the charge sheet cannot be filed against the accused solely on the basis of confession which does not lead to recovery. In this case also, admittedly, except the confession, there is no recovery under section 27 of the Indian Evidence Act. Therefore, the confession cannot be the basis for conviction even accepting the confession as true as the confession is inadmissible in evidence under section 25 of the Indian Evidence Act as the same was made to a police officer and no recovery was made on the basis of confession. It is held in the judgment reported in 1998 SUPREME COURT 3258 supra that the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial.

15. While framing charge the Court has to consider only the evidence which if not rebutted or unchallenged by cross-examination can be sufficient enough to convict the accused. If the evidence before the Court is of such type which if unrebutted and unchallenged by way of cross-examination would not be sufficient enough to convict the accused, then the Court would not be justified in framing the charge against the accused.

16. As stated supra, except the confession of A.1 to A.4, no material has been collected by the prosecution against the petitioners. The only evidence against the petitioners is the confession of A.1 and 4. and those confessions are inadmissible in evidence and therefore, such confession cannot be relied up on by the Court to arrive at prima facie conclusion that a case has been made out against the petitioners. As the confession is inadmissible as no recovery has been made pursuant to the confession, to permit

the prosecution to proceed against the petitioners for offence under Section 201 r/w 302 IPC amounts to abuse of process of Court and there is no legally acceptable evidence against the petitioners and the confession being inadmissible in evidence cannot be relied upon to sustain the conviction and therefore, the prosecution has not produced any material to substantiate the charge sheet filed against the petitioners.

17. In the result, the petition is allowed and the case in P.R.C.No.14 of 2014 pending on the file of the District Munsif cum Judicial Magistrate, Paramathi, is quashed insofar as the petitioners. The connected Miscellaneous Petitions are closed."

16. The learned Judge of this Court in the above decision has quashed the proceedings and allowed the discharge petition filed by the accused therein, since the accused was proceeded against only on the basis of the confession of the co-accused.

(iii) 2007 (1) MLJ (Cr1) 279-Valarmathi and others vs. State rep. by Inspector of Police, Dharmapuri Police Station, Dharmapuri District. The learned counsel relied on Paragraph No.14 which is extracted hereunder.

"14. Section 30 of the Indian Evidence Act empowers the Court, to consider the proved confession given by the co-accused also. It reads:

"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".

In order to enforce the said Section, it should be proved that the confession given by the accused, whether it is extra judicial confession or judicial confession or confession given to other parties, excluding the police, voluntarily, not influenced by extraneous circumstances. In this case, Ex.P1 is the extra judicial confession, given by the second accused, which was spoken by P.W.1. In the cross examination, nothing is elicited to disbelieve his evidence as if Ex.P1 would have obtained from A-2 for the purpose of

this case, whether at the instance of the police or on the threat made by anybody. Therefore, we conclude that Ex.P1 is the voluntary extra-judicial confession given by the second accused, but that alone will not save the case, since there is limitation to rely on the extra judicial confession in toto, in the absence of corroborative evidence, as repeatedly held by the Apex Court of this land."

17. According to the Division Bench of this Court, even the extra judicial confession given by the accused alone cannot be the basis for the conviction, unless the same is corroborated. However, it is to be seen that the Division Bench has ultimately set aside the conviction and sentence passed by the trial in paragraph No.24 of the order.

(iv) AIR 1996 SC 2818-Kashmir Singh and another vs. State of Haryana. The learned counsel would draw the attention of this Court to para No.7 of the judgment, which is extracted hereunder:

"7. Mr. U.R. Lalit learned Senior Counsel appearing for the appellants in Appeal No.297 of 1996, Baba Peer Paras Nath and Baldev Nath has submitted that there is no clinching evidence about the complicity of the appellants in the offence under Section 307 read with Section 34 and Section 109 of the IPC. The said appellants have been convicted simply by relying on the retracted confessional statements made by the other co-accused who were tried with the appellants. Mr. Lalit has submitted that normally confessional statement cannot be recorded by the Police Officer but under Section 15 of the TADA a special provision for recording such confessional statement by specified Police Officer in the manner indicated in the Act and rules framed under TADA has been made. Such confessional statement made before and recorded by the police officer is admissible only in the trial for an offence under TADA. But where an accused is not tried for an offence under TADA, the confessional statement recorded under Section 15 is not admissible. Mr. Lalit has submitted that in the Kartar Singh's case, the vires of Section 15 was challenged before this Court and this Court has upheld the vires of Section 15 after recommending certain safeguards to be followed in the matter of

recording confessional statement under Section 15. This Court was not called upon to decide in the case of Kartar Singh as to whether confessional statement recorded under Section 15 of TADA can be taken into consideration in respect of such of the accused who were jointly tried in a criminal trial even though such of the accused were not charged for any offence under TADA. Mr.Lalit has submitted that Section 15 expressly provides that the confessional statement recorded under Section 15 of the TADA shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules framed thereunder, provided the co-accused abettor or conspirator are tried in the same case together with the accused. He has submitted that the observation made by this Court in Paragraph 277 (of JT): (Para 261 of Cri LJ) of the decision in Kartar Singh's case (1994 (2) JT (SC) 423 : 1994 Cri LJ 3139), as indicated herein before is not the decision of this Court on the question that the confessional statement recorded under Section 15 is also admissible in respect of all the co-accused in the trial even though some of co-accused was not tried for any offence under TADA. Therefore, the learned Designated Court wrongly appreciated the decision of this Court in Kartar Singh's case and relying upon the confessional statements of co-accused recorded under Section 15 of TADA, convicted the appellants Baba Peer Paras Nath and Baldev Nath despite clear provision of Section 15 indicating that such confessional statement is admissible in respect of the co-accused in the same trial only in respect of offences under TADA. Mr. Lalit has submitted that as the case against the appellants cannot be established by any other evidence excepting by relying on the retracted confessional statements recorded under Section 15, which is not admissible in evidence, the conviction against the appellants cannot be sustained in law. He has, therefore, submitted the appeal should be allowed and the conviction and sentences passed against the appellants should be set aside."

18.In the above matter, the Hon'ble Supreme Court of India has ultimately allowed the criminal appeal and set aside the conviction and sentence passed against the appellant/accused, which conviction was based on the confession statement . However, it is to be seen that the above case was in respect of

TADA, where the Hon'ble Supreme Court of India, was to deal with a different set of circumstances.

(vi) (2008) 2 Supreme Court Cases (Cri) 264 - Alope Nath Dutta and Others vs. State of West Bengal. The learned counsel would draw the attention of this Court to Paragraph Nos. 53, 137 to 139, which are extracted hereunder.

"53. It is, however, disturbing to note that a confession has not been brought on record in a manner contemplated by law. Law does not envisage taking on record the entire confession by marking it an exhibit incorporating both the admissible and inadmissible part thereof together. We intend to point out that only that part of confession is admissible, which would be leading to the recovery of dead body and/or recovery of articles of Biswanath; the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the Court."

"137. Judicial confession is admissible in evidence against the maker thereof under Section 26 of the Evidence Act; but against the co-accused, Section 30 will be applicable.

"138. Section 30 of the Evidence Act reads thus:

"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. - 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."

139. The expression "the Court may take into consideration such confession" is significant. It signifies that such confession by the maker as against the co-accused himself should be treated as a piece of corroborative evidence. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a co-accused, be it extra-judicial confession or a judicial confession and least of all on the basis of retracted confession."

19.The Hon'ble Supreme Court of India has held that the conviction on the basis of confession alone of the co-accused cannot be the basis, in the absence of substantive evidence.

(vii)2018 (8) SCC 271 in the case of Surinder Kumar Khanna vs. Intelligence Officer, Directorate of Revenue Intelligence. In this case the Hon'ble Supreme Court of India has held that the conviction on the basis of confession of the co-accused is not permissible, as held in paragraph No.14, which is extracted hereunder

"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 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."

20.The learned counsel would rely on the decision of the learned judge of this Court in Srinivasa Perumal vs. Station House Officer, Gingee Police Station, Gingee-604 202 (Criminal Revision Case No.634 of 2012, dated 30.01.2013). Paragraph Nos.10 to 14 are extracted hereunder.

"10. Per contra, the learned Government Advocate appearing for the respondent/State would vehemently oppose the prayer of the petitioner to discharge him from the purview of the criminal prosecution and contended that the petitioner must be directed to face the trial inasmuch as there are enough materials available to prove his guilt. According to the learned Government Advocate, it is premature on the part of the petitioner to seek for discharge and only during the course of trial, the prosecution will be in a position to prove the complicity of the petitioner in the Criminal case. In support of his contention, the learned Government Advocate relied on the below mentioned decisions

(i) (Ashish Chadha vs. Asha Kumari and another) 2011 (8) Supreme 105 to contend that it is for the trial court to decide whether the evidence on record is sufficient to make out a prima facie

case against the accused and to frame charges against him. This Court, in exercise of its revisionary powers, cannot appreciate or re-appreciate the evidence on record to discharge the accused from the case. In that decision, the Honourable Supreme Court also followed the earlier decision rendered in (Munna Devi vs. State of Rajasthan) (2001) 9 SCC 631 and held that revisionary powers can be exercised only if it is shown that there is a legal bar for continuing the criminal proceedings or framing of charges against an accused or if the evidence on record, if taken on its face value, do not constitute the offence for which the accused has been charged.

(ii) The learned Government Advocate also placed reliance on the unreported decision of the Honourable Supreme Court rendered in Criminal Appeal No. 1803 of 2012 dated 09.11.2012 and submit that the Court trying the case can discharge the accused by recording reasons for such conclusion only if it considers the charge against the accused to be groundless. In that decision, it was held that Section 240 of the Criminal Procedure Code provides for framing of a charge, if, upon consideration of the police report and the documents sent thereon and making such examination, if any, of the accused as the Magistrate thinks necessary, the Magistrate is of the opinion that there is no ground for presuming that the accused has committed an offence triable under Chapter XIX, which such Magistrate is competent to try and which can be adequately punished by him. In the said decision, reference was made to the decision reported in (Onkar Nath Mishra and others vs. State (NCT of Delhi) and another) 2008 2 SCC 561 wherein it was held that at the stage of framing of charges, the Court is not expected to go deep into the probative value of the material on record and what needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground convicting the accused has been made out. At that stage, even strong suspicion, founded on materials on record which leads the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence. In fact, the said decision was

passed by also following the decisions reported in (State of Karnataka vs. L. Muniswamy) 1977 CrLJ 115; (State of Maharashtra and others vs. Som Nath Thapa and others) 1996 CrLJ 2448 and (State of Maharashtra vs. Mohanlal Soni) 2000 CrLJ 3504 wherein it was held by the Honourable Supreme Court that if, on the basis of materials on record, the Court can come to a conclusion that commission of offence is probable consequence, a case for framing of charge exists or in the alternative, if the Court were to think that accused might have committed the offence, it can frame the charge, even though, for conviction, the conclusion is required to be that the accused has committed the offence. The Honourable Supreme Court also stated that the materials brought on record by the prosecution has to be accepted as at that stage the Supreme Court gone to the extent of stating that the charges should be framed if the Court prima facie finds there is sufficient grounds for proceeding against the accused and the Court is not required to appreciate the evidence to determine the materials produced are sufficient to convict the accused.

(iii) Relying on the decision of the Honourable Supreme Court in Union of India vs. Prafulla Kumar Samal and another) 1979 3 SCC 4, the learned Government Advocate would further contend that the Honourable Supreme Court laid down guidelines to be followed in the context of Section 227 of the Code of Criminal Procedure which would indicate that if there is a prima facie evidence to proceed against an accused, the accused is liable to be proceeded with.

11. I heard the counsel for both sides and perused the material records placed. In the present case, the respondent had recorded the statement of Munusamy, Rajendran and Ravi, who have categorically stated that they have also stayed in the occurrence spot namely 'Devi Lodge' and they saw the accused, along with other persons, entering room No.20 and coming out one after the other. They have also identified the petitioner. This piece of evidence recorded by the investigation officer would prima facie raises a suspicion about the involvement of the petitioner and therefore, based on such evidence, the guilt or otherwise of the petitioner/A-4 can be tested only at the time of trial. Further, the recovery

under Section 27 is admissible and the participation of the petitioner in the occurrence is prima facie elicited from the deposition of the witnesses proposed to be adduced by the prosecution. The specific direction given by the petitioner to conceal the murder weapon is also a criteria to be taken into consideration. As rightly pointed out by the court below, the petitioner also was subjected to polygraph test and in the report, it was stated that when the petitioner was subjected to such test, he showed the signs of deception when questions related to the crime were administered to him indicating the non-truthfulness in his statement, which suggest having knowledge of the crime. The findings of the trial court is also justifiable in so far as it relates to DNA test as the trial court held that merely because the swab test does not indicate the presence of the petitioner's semen, it will not entitle the petitioner to seek for discharge. The absence of the petitioner's semen can be attributed due to possible use of condom by the petitioner during intercourse. However, the contrary can be proved only during the course of trial and therefore, the petitioner cannot be discharged at this stage.

12. In the decision relied on by the counsel for the petitioner reported in (Pancho vs. State of Haryana) (2011) 10 SCC 165 the Honourable Supreme Court has held that confession made out of coercion, that too after five months after the incident, cannot be relied on to base a conviction. It was also held that A-1 denied having made such confession before the Court. Further, the Honourable Supreme Court held that in dealing with a case against an accused, the court cannot start with the confession of a co-accused; 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. Thus, it could be evident that the confession of co-accused cannot be said to be unreliable and it can be relied on after recording the evidence of the other witnesses for the purpose of corroboration during trial. Further, in that case, the

Honourable Supreme Court was examining the validity of the judgment of conviction imposed on the accused, on the basis of the confession of co-accused, but in the present case, even charges are yet to be framed and therefore the said decision will not lend any support to the petitioner to seek for discharge. There are lot of distinction between the stage of appreciating the evidence before framing charges and after evidence was let in which formed the basis for imposing conviction and sentence.

13. In (Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra) (2008) 10 SCC 394 relied on by the counsel for the petitioner it was held by the Honourable Supreme Court that the material evidence to prove the criminal conspiracy, even if accepted in their entirety, only create a suspicion of motive, which is not sufficient to bring home an offence of murder. The facts in the said case are different and it cannot be made applicable to this case. This decision is on an appeal against conviction by the trial court and not at the stage of discharge. In this case, even charges are yet to be framed besides that, prima facie, there are enough materials available to proceed against the petitioner.

14. Even the constitutional bench decision relied on by the counsel for the petitioner reported in (Haricharan Kurmi vs. State of Bihar) 1964 (6) SCR 623 cannot lend support to his argument. In that decision, it was categorically held that in dealing with a criminal case where the prosecution relies upon the confession of one accused person against another, 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 accused person, the Court can turn to the confession with a view to ensure itself that the conclusion, which it is inclined to draw from the other evidence, is right. Thus, the contention of the counsel for the petitioner that confession of a co-accused cannot be relied on to base a conviction against the accused is not acceptable inasmuch as the confession of a co-accused cannot be always regarded as untrustworthy. It was further held in the above decision that Section 133 of the Indian Evidence

Act provides that an accomplice shall be a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. It was also held that the stage to consider the confessional statements arrives only after the other evidence is recorded and found to be satisfactory. In the present case, the trial has not commenced and therefore the contention of the counsel for the petitioner that the petitioner was arrayed as an accused based on the confession of the co-accused and therefore he should be discharged cannot be considered at this stage. Para Nos. 13 and 14 of the said decision of the Constitution Bench can usefully be extracted hereunder:-

"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 *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."

21. In the above decision the learned single judge of this Court has ultimately upheld the decision of the trial Court in dismissing

the discharge petition. The relevant portion of the finding of the learned single judge in dismissing the revision petition is extracted hereunder.

"16. As per the statement of witnesses namely Munusamy, Rajendran and Ravi, the petitioner, along with others, was consuming liquor and they have entered into Room No.20, one after the other, where, subsequently, the deceased was found lying in the bathroom with her throat slit. One of the accused Anandan/A-1, in his confessional statement on 02.02.2007 stated that as per his direction, the petitioner/A-4 has concealed the knife used for the murder and the subsequent recovery of the weapon throws much light on the involvement of the petitioner in causing disappearance of the evidence. Even in the Nacro Analysis test conducted on A-1 on 24.10.2007 by the Forensic Sciences Lab, Madival, Bangalore, A-1 has categorically implicated the petitioner in the participation and commission of the offence. Such test conducted on A-1 assumes significance in the case atleast to show that the petitioner/A-4 has some knowledge about the

occurrence or participation in the commission of the offence for which the petitioner/A-4 must be directed to face trial. Only during the course of trial the guilt or otherwise of the petitioner can be brought to light. Therefore, it is premature on the part of the petitioner to file the petition for discharge and the Court below is right in dismissing it."

22.The learned counsel for the petitioner would submit that the confession statement by the co-accused cannot be the sole basis on which the petitioner herein can be proceeded against and the trial Court cannot frame charges against him on that basis alone. It is also not open to the trial Court to rely on any other subsequent documents, at the time of framing of charges. Therefore, the petitioner herein was entitled to be discharged. Unfortunately, the trial Court has dismissed the discharge petition filed by the petitioner mechanically, without due application of mind.

23.This Court has considered the submissions made on behalf of the petitioner as well as the learned Government Advocate for the prosecution. No doubt, confession statement given to the police cannot be relied on as a piece of evidence, as per Section 25 of the Indian Evidence Act. But at the same time, this Court has to see whether the petitioner is entitled to be discharged without facing the trial. Except one, all the decisions, cited by the learned counsel for the petitioner, are relating to the matters where order of conviction was passed only on the basis of confession statement. In such cases, this Court and the Hon'ble Supreme Court of India have interfered with such conclusion by the trial Court and set aside the order of conviction and sentence.

24.As far as the present case on hand is concerned, the petitioner herein has moved the trial Court for his discharge, since according to him, charges cannot be framed against him on the basis of the confession of the co-accused and therefore, he was entitled to be discharged.

25.This Court is unable to appreciate the argument of the learned counsel appearing for the petitioner and the discharge petition filed by the petitioner cannot be allowed and the petitioner herein cannot be left off the hook at the threshold itself, without subjecting him to trial in order to establish the offence charged against him.

26.When commonality of intention is alleged against the petitioner as well as accused No.1, by charging them for offences under Section 34 of IPC, the discharge of one accused,

viz., the revision petitioner herein can completely change the complexion of the charges against the first accused as well. May be the petitioner herein was not actively involved in the offences charged as against the accused No.1, but, he cannot seek to discharge himself from the offences merely on the basis of the contention that he was being implicated only on the basis of confession statement by the co-accused to the police. It is always open to the petitioner herein to come out unscathed in the trial, by proving his innocence vis-a-vis accused No.1, but he cannot expect the trial Court to pronounce his innocence at the preliminary stage of the trial itself. Such a course, if adopted, in order to discharge the petitioner herein, would completely undermine the case as against the first accused as well.

27. In the counter affidavit, filed before the trial Court on behalf of the respondent police, it was clearly mentioned about not only the confession statement of the co-accused but also the confession statement of the petitioner himself about his involvement in the offences. When such is the case, during trial it is also possible that any corroborative materials can be brought forth in support of the case of the prosecution. When such contingency is possible during the course of trial, why would the accused be given the benefit of doubt at the threshold and be discharged from the offences. After all no prejudice is going to be caused to the petitioner herein except subjecting himself to the trial. In any case, the revision petitioner is not unrelated to the case, as he is associated with accused No.1 and to what extent his involvement in the offences can be established only in the trial.

For the above said reasons, the trial Court has rightly dismissed the discharge petition as against this petitioner. This Court does not find any infirmity in the order passed by the trial Court and therefore, the present revision petition is dismissed. Consequently, connected miscellaneous petitions are dismissed.

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

pns/msk

To

1.The CCB & CBCID Metropolitan Magistrate,
Egmore,
Chennai-8.

2.The Inspector of Police,
Central Crime Branch, Team IX,
Egmore, Chennai.

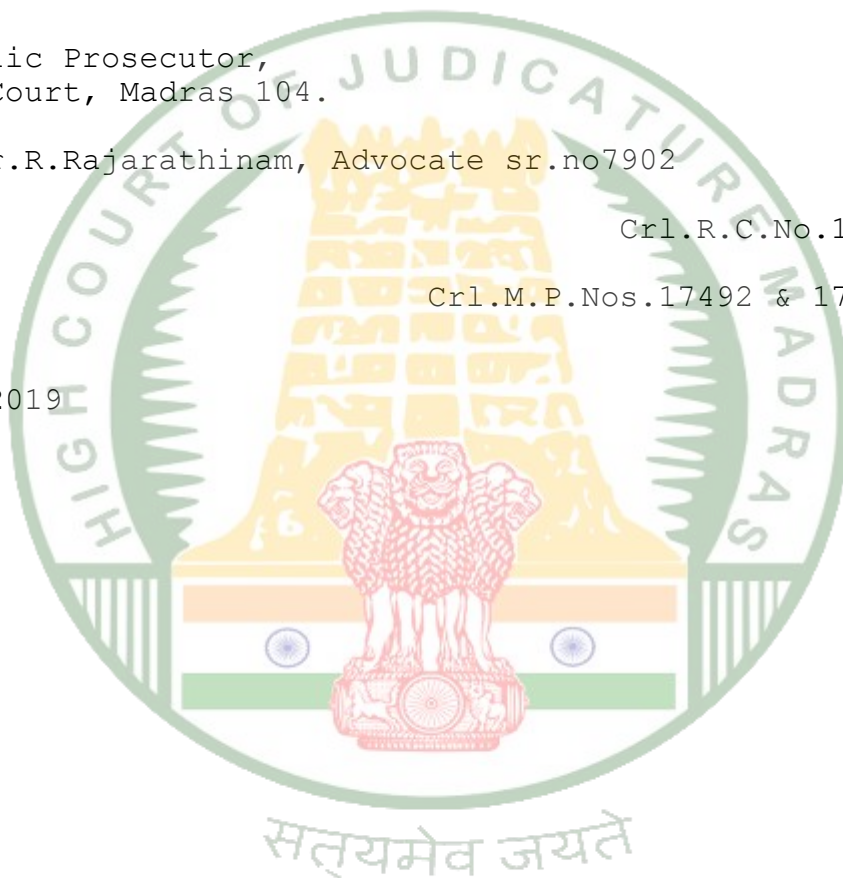
3.The Public Prosecutor,
High Court, Madras 104.

+lcc to Mr.R.Rajarithnam, Advocate sr.no7902

Crl.R.C.No.1496 of 2018
and

Crl.M.P.Nos.17492 & 17493 of 2018

sv(co)
nr 14/03/2019



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