



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.06.2022	Pronounced on : 23.06.2022
--------------------------	----------------------------

WEB COPY

Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.A.No.678 of 2010

Union of India,
Rep. by its Enforcement Officer,
Enforcement Directorate,
Chennai.

... Appellant / Complainant

/versus/

1. M/s.New Line Finance Ltd.,
Rep. by A2 and A3,
No.26, First Street,
Sait Colony, Egmore,
Chennai - 600 008.
2. Shri.A.Muthusamy,
S/o.V.S.Ayyappan,
No.44/1, Ayyavoo Street,
Shenoy Nagar,
Chennai - 600 030.
3. Shri.P.V.Krishnamani,
S/o.P.Venkateswaran,
F-3, Sowbhakiya Apartments,
No.15, 4th Main Road,
Kasthuriba Nagar, Adyar,
Chennai - 600 020.

... Respondents / Accused 1 to 3

Prayer: Criminal Appeal is filed under Section 378 of Criminal Procedure Code, against the order passed in E.O.C.C.No.447 of 2002 dated 09.03.2010 on the file of Additional Chief Metropolitan Magistrate, E.O.I., Egmore, Chennai.

For Appellant : Mr.Rajnish Pathiyil,
Special Public Prosecutor (ED)

For Respondents: Mr.B.Satish Sundar



J U D G M E N T

This Criminal Appeal is preferred by the Enforcement Directorate/complainant on being aggrieved by the order of acquittal passed by the Additional Chief Metropolitan Magistrate (Economic Offences Court-I), Egmore, in E.O.C.C No.447/2002, dated 09/03/2010, holding that the complainant failed to prove the charges against the accused beyond doubt.

2. The Brief facts:

M/s.New Line Finance Limited is an authorised Full-Fledged Money Changer (hereinafter referred as 'FFMC'), holding license issued by The Reserve Bank of India (hereinafter referred as 'RBI'), to deal with Foreign Exchange. It had its offices at Chennai and Trichy. At the relevant point of time, Thiru.A.Muthusamy was the Managing Director and Thiru.P.V.Krishnamani was its Vice President of the said FFMC. Tmt.Rita Rajamani was the Manager, administering the affairs of M/s.New Line Finance Limited at it's Trichy Office.

3. Based on specific information that at the Trichy office of M/s.New Line Finance Limited, foreign exchange sold unauthorisedly, the Officials of Enforcement Directorate conducted search of the company premises at Trichy on 09/04/2006. The Enforcement Directorate Officials seized a file containing applications made for release of foreign currency/cheque under 'Basic Travel Quota' (BTQ) by the travellers (12 in numbers) who were proposed to travel abroad. As follow up, the Chennai office of M/s.New Line Finance Ltd was also searched.

4. Based on the documents seized, statement of accused and the statements of witnesses recorded in the course of investigation, the complaint against 1).M/s.New Line Finance Limited, 2). Thiru.A.Muthusamy and 3).Thiru.P.V.Krishnamani was filed for offences under section 7 read with section 6(4), 6(5), 8(1), 49 of Foreign Exchange Regulations Act, 1973 (FERA) read with clause 11 of FLM Memorandum issued under Section 73(3) of FERA, punishable under section 56(1)(i) of the FERA read with sub-section (3) and (4) of section 49 of Foreign Exchange Management Act, (FEMA) 1999.

5. The case of the Enforcement Directorate pegged on the premise that, on 13.02.1996 US \$ 1300 each was sold to 12 persons under Basic Travel Quota by Rita Rajamani at Trichy,



based on Malaysian Airlines Tickets. The license condition mandates the transaction connected with foreign exchange must only be by pay order from the proposed travellers. Whereas, Thiru.A.Muthusamy had admitted to have received a sum of Rs.27 lakhs by cash from G.Ravichandran of M/s.Trichy Air Shine Tours and Travels Pvt. Ltd. Further, on verification of the air tickets, except one, rest of the tickets pertaining to travel prior to 13/02/1996. Further, verification with the Malaysian Airlines, the tickets found to be fictitious. Also the investigation revealed, 11 out of 12 purchasers have gone abroad not as tourist but on employment. BTQ is restricted only to tourist and not for others. Mr.S.Balasubramanian, Proprietor of M/s.SBS International, in his statement has stated that these 11 persons were recruited and sent to Singapore by him for foreign employment.

6. The complaint alleged that the first accused company M/s.New Line Finance Limited failed to comply the conditions of license granted to them by RBI. The accused forged/fabricated the documents to show as if foreign exchange was released under Basic Travel Quota (BTQ) scheme to passengers going abroad, but sold in bulk to third parties/agents.

7. Contrary to the license conditions/guidelines/instructions issued by RBI, the 1st accused/New Line Finance Limited through the 2nd and 3rd accused, who were responsible for the conduct of the business of the Company had sold foreign exchange of U.S \$ 30,00,000/- at Chennai and U.S \$2,23,600/- at Trichy, thereby committed offences punishable under Sections 7 read with Section 6(4), 6 (5), 8(1), 49 of Foreign Exchange Regulation Act, 1973 (FERA) read with clause 11 of FLM Memorandum issued under section 73 of FERA r/w Section 68 of FERA, 1973, punishable under section 56 (1)(i) of the FERA read with sub-section (3) and (4) of section 49 of Foreign Exchange Management Act, (FEMA) 1999.

8. Based on the averments made in the complaint, 10 distinct charges were framed. The complainant examined 6 witnesses and relied on 96 documents which were marked as Ex.P-1 to Ex.P-96. In the course of cross examination of P.W-2, the defence marked 3 documents which were marked as Ex.D-1 to Ex.D-3.

9. On appreciating the evidence and the law, the trial Court acquitted the accused. Hence, the Criminal appeal against the order of acquittal.



10. The Trial Court reasoning for acquitting the accused is on the ground that, the retracted statements of the accused recorded by the Officials of Enforcement Directorate during the course of their investigation are not substantive piece of evidence to convict the accused in the absence of corroboration. Likewise, the statements of witnesses without the maker of the statement been subjected to examining on oath before the Court with opportunity to cross examine by the accused is though admissible but cannot be taken as proof of its content.

11. The trial Court has precisely held that, though the statements recorded during investigation is admissible in evidence under section 72 of FERA, 1973, if at all the prosecution wants to rely upon those statements made by the accused or any person, the same has got to be corroborated by substantive evidence as known to law.

12. The Trial Court, on considering the provisions under which the accused were charged and the evidence placed by the Enforcement Directorate, found that, the Reserve Bank of India has granted license to the accused to deal with foreign exchange. As per FLM Memorandum of instructions issued by RBI, every FFMC licensee should submit particulars regarding their Foreign exchange transactions every month. As per Ex.P-12, FLM Register maintained by the accused company contains the name, passport details and amount released. While so, admittedly the complainant had not enquired with RBI Officials whether they found any violation of the license conditions by the first accused Company or whether the extract of the Register Ex.P-12, pertaining to the 12 purchasers of foreign exchange received by RBI or not. The prosecution document Ex.P-12 reveals that, the licensing authority been duly informed about the subject transactions and the licensing authority had not found any infraction of its guidelines/instruction/conditions. While so, alleging the accused of violating clause 11 of FLM by Enforcement Directorate is untenable. RBI has not found any violation of its conditions by its licensee, hence the Enforcement Directorate cannot presume violation.

13. The above reasoning of the Trial Court is questioned in this appeal.

14. The Learned Counsel for the Appellant/Enforcement Directorate submitted that, Section 59 and 71 of the FERA, cast the burden on the accused to prove his innocence. The Trial



court erred in shifting the burden. The Trial Court failed to consider Ex.P-5 the statement given by Smt.Rita Rajamani, Manager of M/s.New Line Finance Ltd at Trichy, Ex.P-20, Ex.P-21, Ex.P-26. Also, Ex.P-27 the statements of 2nd accused and Ex.P-23 and Ex.P-24 the statements of 3rd accused and the documents seized during search of the accused premises. The trial Court ought to have been taken together these evidence for cumulative assessment of the facts and ought to have come to the conclusion that, the statement of accused/witnesses is corroborated by the content of the documents Ex.P-9, Ex.P. 82 and Ex.P-83.

15. The Malaysian Airlines has issued a letter to the Assistant Director of Enforcement Directorate about the Air tickets based on which, the foreign exchange alleged to have been sold. The said letter clearly states that the said tickets are not genuine. Therefore, the prosecution has clearly proved the fact that the accused had sold foreign exchange to persons who did not travel abroad using the air ticket shown for getting the foreign exchange.

16. It is submitted by the Learned Counsel for the Appellant that, the records maintained by the accused company without any contradiction indicates that the first accused Company has issued with two license by RBI. One for Chennai Office and another for Trichy Office. Evidence prove that, for the foreign exchange sold at Trichy Office, consideration was received at Chennai Office. The licensee cannot receive money on behalf of another licensee. The Trial Court erred in not considering this violation, which needs no corroboration since on the face of the record the violation could be seen.

17. The Learned Counsel for the Appellant comparing the provisions under FEMA, Customs Act, NDPS Act and POTA which is in pari materia to Section 40 of the FERA, 1973 submitted that, under Section 40 of the FERA, Gazetted Officers of Enforcement have power to summon any person whose attendance is necessary either to give evidence or to produce document during the course of any investigation or proceedings under this Act, (FERA). Section 40(3) of the FERA, further say that every such investigation or proceedings shall be deemed to be a judicial proceedings within the meaning of Section 193 and 228 of I.P.C.

18. According to the Learned Counsel for the appellant, in view of Section 40 (3) of the FERA, the statement recorded by the Investigating Officer during the investigation is deemed to be a judicial proceedings, therefore the statements are



admissible in evidence and to be taken as substantive piece of evidence without examining the maker of the statement.

19. Before advertng to the above submission of the evidentiary value of previous statements recorded in the course of investigation under FERA, it is necessary to look at the documents marked as exhibits which alleged to have been overlooked by the Trial Court and the witnesses who have spoken about these exhibits.

20. In this case, the Investigating Officer was one D.Natarajan, Enforcement Officer, Enforcement Directorate. He was examined as P.W-1. His evidence in chief was recorded partly on two days (22/12/2004 and 12/01/2005). However, due to his ill-health, he was not able to continue his testimony, hence his evidence was eschewed. George Vargheese, the complainant in this case was examined as P.W.2, through him Ex.P-1 to Ex.P-84 was marked during the chief-examination. Ex.D-1 to Ex.D-3 marked by the defence during his cross examination. P.W-3, T.Mani Mohan Reddy, Assistant Enforcement Officer had deposed about his role in search of the M/s.New Line Finance Ltd premises along with D.Natarajan, A.K.Pande and Swopan Bose and about the seizure of Ex.P-10 to Ex.P-18. P.W-4, Mr.Samuel, Assistant Enforcement Officer had deposed about the search of the Trichy office along with D.Natarajan and about the seizure of document Ex.P-3.

21. P.W-5 Thiru.Sudheeshkumar, Assistant Director of Enforcement had deposed about the recording of further statements given by Mrs.Rita Rajamani, statement of G.Ravichandran of M/s.Trichy Air shine Tours and Travels Private Limited and statements of the purchasers of the foreign exchange.

22. P.W-6, Mr.S.Vijayachandran speaks about the notice issued to the accused calling for explanation and their reply.

23. In the list of witnesses annexed to the complaint, though 10 witnesses are cited, the complainant examined only 5 witnesses and all the five witnesses are Officials of Enforcement Directorate. In the cross examination P.W.2, admits, he did not verify with RBI about Ex.P.12 before filing the complaint. P.W-5, who has recorded the statements of the passengers in his cross examination has stated that he examined and recorded their statements (Ex.P-60 to Ex.P-73) and they all have stated that, they went to the Trichy Office to collect



foreign exchange before leaving to Colombo. He did not arrest Mrs. Rita Rajamani or the 13 passengers, after recording their statements. P.W-2 neither thought fit that Rita Rajamani, Ravichandran, Dharmalingam (from whom foreign currency alleged to have recovered) or the passengers to whom foreign exchange sold are accomplice in this case and to be arraigned as accused nor thought fit to be witnesses for the prosecution. Therefore, the statements of these persons though fall under the category of prior statement of witnesses recorded in the course of investigation by not marshalling them as witnesses, their prior statements had lost all probative value.

24. Reading Section 40(4) of the Foreign Exchange Regulation Act, 1973 which is a deeming provision, envisages for the purpose of Section 193 and 228 I.P.C, the investigation and proceedings conducted under section 40 of FERA shall be deemed to a judicial proceedings. First of all, the deeming provision is restricted to penal actions under Sections 193 and 228 of the I.P.C. To treated these statements as confession, the maker must have been arraigned as accused also the maker of the statement must be a co-accused in the same trial, to apply Section 30 of the Evidence Act for its admissibility.

25. The Trial Court allowed the prosecution to mark the statements recorded by the Enforcement Officers during the course of investigation since Officers of Enforcement Directorate are not police officers and they are not permitted to file final report under Section 173 of the Code of Criminal Procedure on completion of investigation. They are officers of Revenue Department. They are empowered to investigate offences under the FERA and file complaint, which can be taken cognizance by the competent court following the procedure laid under Chapter XV of the Code of Criminal Procedure (Sections 200 to Sections 203).

26. The Learned Counsel for the appellant relying upon section 80 of the Evidence Act contend that, the statements of Mrs. Rita Rajamani (Manager), S. Balasubramaniam (Travel Agent) and Ethiraj (broker) were recorded by Enforcement officer under Section 40 of the Act., therefore the proceedings deemed to be judicial proceedings under section 40(4) of the Act, hence under section 80 of the Evidence Act, these statements are presumed to be genuine.

27. In support of the above proposition, the Learned counsel for the appellant rely upon the following judgments:-



(i). Reg -vs- Shivya and Others reported in ILR 1876 (1) Bom 219.

(ii). Sheo Raj -vs- State Full Bench of Allahabad reported in AIR (1964) All 290.

WEB COPY

28. As far as the retracted confession statement of the accused persons, the Learned Counsel for the appellant submitted that, the belated retraction on legal advice clearly proves it is an after thought. He submitted that, the voluntary statement of the A-2 and A-3 were recorded in exercise of the power under Section 40 of the Act. When their statement recorded, they were not accused. Only on examination of their statement containing inculpatory and self incriminating statements they were arrested. Therefore, by retracting their prior statement getting legal advise, the evidentiary value of the confession statement is enhanced.

29. In support of this argument, the Learned Counsel for the appellant rely upon the judgment of Hon'ble Supreme Court in K.I.Pavunny -vs- Asstt. Collr.(HQ), C.E reported in 1997 (34) ACC 512.

30. In short, the trial Court has dismissed the complaint holding that the statements recorded in the course of investigation are not substantive evidence and therefore, charges are not proved. Questioning the correctness and legality of the said finding, the Learned Counsel for the complainant pleads that, the statements recorded under Section 40 of FERA is deemed to be recorded in a judicial proceedings. Therefore, those statements are presumed to be genuine as per section 80 of the Evidence Act. The accused who has given confession statement before arrest. By retracting the same belatedly after release cannot be saved against Section 59 of the FERA, which presumes the culpable mental state of the accused and Section 71 of the FERA, which cast the burden of proof on the accused.

Section 59 in The Foreign Exchange Regulation Act, 1973:-

Presumption of culpable mental state.-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act



WEB COPY

charged as an offence in that prosecution.

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

(3) The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation to any prosecution for an offence under this Act.

Section 71(1) of Foreign Exchange Regulation Act, 1973:-

(1) Where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

31. In this case, the specific defence taken by the accused is that, they are duly authorised FFMC holding valid license issued by RBI. To prove the same they have marked Ex.D-1. To show that they are maintaining the register regarding the sale of foreign exchange and are reporting periodically to the licensor i.e., RBI, they rely upon Ex.P.12. From the entries made in the register marked as Ex.P-12 and through cross examination of P.W-2 and none examination of the passengers is fatal to the prosecution since through Ex.D-1 to Ex.D-3, the accused have clearly discharged their burden by preponderance of probability. They have proved, holding of valid license and they have not contravened any direction or order. No action taken against them by the licensing authority (RBI) for any contravention. After lawful selling of the foreign exchange to the passengers based on the Air Ticket and passport of the concern passenger. How they spend is not the duty of the petitioner to record, it is the duty of the prosecution to establish that those passengers did not travel and the petitioners knowingly sold foreign exchange to non-travellers. In the absence of any evidence to show that the foreign exchange was sold to passengers who did not travel and it was sold by the accused knowingly that they will not travel abroad, the



presumption under section 59 of the Act will not get attracted. To draw presumption of culpable mental state, the prosecution should first prove the alleged crime and then seek for presumption that the crime was committed with culpable mental state by the accused who stand trial. Unfortunately, in this case, the prosecution without proving the crime want the court to presume the guilt of the accused persons. For the said purpose, the Learned Counsel for the petitioner harp on Section 80 of the Evidence Act, and plead that the statements recorded during the course of investigation falls under section 80 of the evidence act, therefore, the maker of the statement need not be examined again. According to him the statements are to be presumed to be genuine since the statements were recorded in the judicial proceedings.

32. In K.I.Pavunny case cited supra, while considering whether the retracted confessional statement requires corroboration from any other independent evidence, the three Judges Bench of the Hon'ble Supreme Court at paragraph 16, observed that,

"16.....It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the IPC it is now well-settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculcating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in Bhagwan Singh v. State of Punjab (I) [AIR



WEB COPY

1952 SC 214 : 1952 SCR 812] (AIR para 30). If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seeks corroboration of the retracted confession from other evidence. The confession must be one inculcating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration...."

33. In this case as pointed earlier, the accused have discharged their burden against presumption of culpable mental state envisaged under Section 59 of the Act. The much harped confession statement made soon before arrest and retracted soon after the release from jail. This naturally put the so called confession under cloud of suspicion and not voluntary. In such circumstances, the trial Court has rightly concluded that for want of independent corroboration, the prosecution fails.

34. In the appeal, submission is made that the statements of witnesses recorded under Section 40 of FERA during the investigation are presumed to be genuine and they are substantive piece of evidence as per section 80 of the Evidence Act.

Section 40 of Foreign Exchange Regulation Act, 1973:-

Power to summon persons to give evidence and produce documents.-



WEB COPY

(1) Any gazetted officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under this Act.

(2) A summon to produce documents may be for the production of certain specified documents or for the production of all documents of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required: Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860).

Section 80 in The Indian Evidence Act, 1872

"80. Presumption as to documents produced as record of evidence.—When-ever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such



evidence, statement or confession was duly taken."

35. Admittedly, the statements were recorded under Section 40 of the FERA. The reading of the sub-section (4) say the Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860).

"Section 193 of Indian Penal Code reads as below:-

Punishment for false evidence:-

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

"Section 228 of Indian Penal Code reads as below:-

Intentional insult or interruption to public servant sitting in judicial proceeding.-

Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Judicial proceedings is defined in Section 2(i) of the code of Criminal procedure as below:-



WEB COPY

2. Definitions.— In this Code, unless the context otherwise requires,—

(a).....

(b).....

.

.

(i) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath;

36. Thus, it is clear that usually in a judicial proceedings evidence are recorded on oath. However, in case of statement recorded by any Gazetted Officer of Enforcement empowered under Section 40 of the Act, they record statements san administering oath. (in fact they are not authorised to administer oath under Indian Oaths Act). The person who appear on summon if intentionally gives false statement or produce false or fabricated documents or intentionally insult or interrupt public servant sitting in judicial proceedings, then to prosecute such person/witness, sub-section (4) of the section 40 in the FERA provides for a deeming clause. Therefore even though the Enforcement Officer record statement without administering oath and such proceeding will not fall under the definition of 'Judicial proceeding' as defined under Section 2 (i) of the Cr.P.C., in order to invoke Section 193 and 228 I.P.C for the limited purpose, the deeming provision is incorporated in the statute.

37. The deeming provision for limited purpose cannot be extended to the general rule of evidence, which envisage best evidence must be adduced and wherever there is statutory presumption against the person accused of an offence, he can discharge the burden by preponderance of probability and need not prove his innocence beyond doubt.

38. On looking at Section 80 of Indian Evidence Act, the presumption mentioned in this Section is only about the genuineness of the document and not the content of the document. The proof of the fact found in the document requires corroboration.

39. In Reg -vs- Shivaya and others reported in ILR 1876 (1) Bom 219, the Bombay High Court a century and half ago,



WEB COPY

considering Section 80 of the Evidence Act and the intention of the legislature has observed as under:-

"The law allows certain presumptions as to certain documents, and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. Section 80 of the Evidence Act provides that, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, it shall be presumed that such statement or confession was duly taken. Now it is evident that, as a necessary basis for this presumption, the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence, before the confession could be used against the accused. What are those facts? First, as a matter of course, the Court would have to be satisfied that the confession was accurately taken down or repeated. Next, it would be necessary to prove that the confession had been taken in the immediate presence of a Magistrate; because, otherwise, the accused person having been in the custody of the police, the confession would be legally inadmissible. For the same reason it would be necessary to show that no inducement had been held out to the accused by threat or promise or otherwise. If, then, these three facts--viz., the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession--would otherwise have to be proved by direct evidence, they must all be stated on the face of the document, before the Court can draw a presumption of their having occurred: and these are the very three facts which are stated in the memorandum and certificate mentioned in Sections 122 and 346 respectively. This consideration leads us irresistibly to the conclusion that the Legislature must have intended that both the memorandum and the certificate should be attached to such confessions."



40. In Sheo Raj case cited supra, the question whether the memorandum of identification proceedings held by Magistrate action under Section 164 Cr.P.C., is admissible without proof? was referred to Full Bench. The 'full bench of Allahabad High Court answered in negative.

41. In the above case, the full bench, after considering Section 80 of the Evidence Act and verities of previous statements recorded during the course of investigation by the Police or the Magistrate which are tried to be brought under Section 80 of the evidence Act, held the question in negative. While holding so, it observed that,

"2. In order that the memoranda under consideration may be governed by Section 80 they must fulfil the following three requirements:

- (1). They are memoranda of evidence,
- (2). The evidence was given by a witness, and
- (3). It was given in a judicial proceeding, or before an officer authorised by law to take it.

It is not in dispute that if these requirements are fulfilled the other requirements that the evidence was taken in accordance with law and that the memoranda purport to be signed by a Magistrate or an officer authorised by law to take the evidence are also fulfilled.

3. Generally while the police investigate art offence committed by unknown persons and arrest persons suspected of having committed it they get identification proceedings held so that the eye-witnesses are confronted with them. Only the eye-witnesses can say whether they committed the offence or not and in order to make their statements acceptable as true the suspects are mixed up with other persons and the eye-witnesses are asked whether they can point out any of the offenders among them. These proceedings are known as identification proceedings and the police get them conducted before a Magistrate so that whatever statements are made by the eye-witnesses and are recorded by the Magistrate can be placed before the Court when the



WEB COPY

suspects are placed on trial. Generally identification proceedings are held while the police are still investigating the offence: i.e. before they send a report under Section 173, Cr. P. C. to a Magistrate on the basis of which he can under Section 190 of the Code take cognizance of the offence. A statement made by a person to a police officer in the course of an investigation cannot be used for any purpose at any enquiry or trial in respect of the offence under investigation (except for contradicting him), vide Section 162; it is open to any person to make a statement or confession before a Magistrate (of a certain class) in the course of an investigation, or at any time thereafter, but before the commencement of an enquiry or trial and the statement or confession will be recorded by the Magistrate under Section 164 and is not subject to the bar imposed by Section 162. Such a statement, being a previous statement, may be used only to contradict the person when he appears as a witness at the enquiry or trial of the offence or to corroborate him.

A statement made by a person before a Magistrate of the required class holding an identification proceeding and recorded by him is a statement governed by Section 164: there is no dispute on this point. It is to be noted that Section 164 simply mentions "any statement or confession made to him in the course of an investigation" and not "any statement or confession made to him in the course of art investigation by any witness or accused person". It does not state whose statement or confession is to be recorded by him. Actually at this stage, when the offence is still under investigation, there are no witnesses and no accused persons (except in the sense of persons against whom a charge of having committed the offence is levelled and is under investigation), it is only after the investigation has been completed that the police can decide who is to be the accused of the offence before a Magistrate and who are to be the witnesses in the case. Till then there can be no



WEB COPY

decision about the status of a person as an accused person or as a witness and all persons examined by the police during the investigation are mere interrogatories or informants or statement-makers.

The provisions in the Code relating to investigation do not refer to any person as a witness. Though "witness" is not defined in the Evidence Act, Sections 118, 119 and 120 of it make it clear that a witness is a person, who testifies before a Court. Under Section 59 all facts may be proved by oral evidence and "oral evidence" is defined in Section 3 to mean and include all statements made by witnesses before a Court. The definition of "proved" shows that the question of proof of a fact arises only before a Court, so long as there is no Court there is no question of a fact being proved and consequently no question of oral evidence and witnesses. Evidence can be given only in respect of the existence or non-existence of a fact in issue or a relevant fact, vide Section 5. Which is a fact in issue or a relevant fact is a matter that arises only before a Court because only before a Court there can arise the question whether a certain fact is proved or not. These provisions of the Evidence Act make it clear that no person can claim the status of a witness except in relation to a proceeding before a Court. It follows that while an offence is still under investigation there is nobody who can be called "witness" and there is no statement that can be called "evidence".

42. This Court find that, the statements which the appellant/complainant wants to rely fall under two categories. First category, statements of the accused which later retracted. The second category is the statement of persons who were neither arrayed as accused nor examined as witnesses. To draw presumption under Section 80 of the Evidence Act, such statements must satisfy triple conditions. First, it must have been recorded in a judicial proceedings. Second, the maker of the statements must have been witnesses in the said proceedings and third, the statements must fall within the definition of 'evidence'.



43. Analysing the facts of the case, in the light of wisdom borrowed from the Learned Judges of the Allahabad, this Court hold that, the investigation done by the Enforcement Directorate leading to the launching of criminal prosecution is not a judicial proceedings except for the purpose of invoking Sections 193 and 228 of I.P.C., as against the maker of the statement.

44. Mrs.Rita Rajamani, Mr.Balasubramaniam, Mr.Ravichandran, Dharmalingam or for that matter all other persons whose statements recorded and marked as exhibits, but their names not even included in the list of witnesses filed along with the complaint. They should have been examined before the trial Court to come within the meaning of 'witness'. Therefore, what they have purported to have stated before the Enforcement officer without administering oath and behind the back of the accused persons cannot be taken as evidence unless the maker of the statement appeared before the Court of law and subjected himself for examination on oath. Else, the prosecution ought to have explained in their written complaint why they have not included them in the list of complainant side witnesses or why they are not able to marshal them before the Court to give evidence.

45. Therefore, for the aforesaid reasons, the finding of the Trial Court that the previous statement of persons who were not examined as witnesses by the complainant cannot be relied upon for conviction since they are not substantive piece of evidence is perfectly legal and this Court finds no error to interfere the order of acquittal. Hence, this Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

bsm

To,

The Additional Chief Metropolitan Magistrate,
E.O.I.Egmore, Chennai.



Copy to

The Section Officer,
Criminal Section(Records),
High Court, Madras - 104.

WEB COPY

+1cc to Mr.Rajnish Pathiyil, Advocate, S.R.No.38931
+2ccs to Mr.B.Satish Sundar, Advocate, S.R.No.39581,39599

Crl.A.No.678 of 2010

BR[co]
NSK/06/07/2022