

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 172 of 2020

Sariful Ahmed @ Saribul Ahmed

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Ayan Basu,
Mr. Iqbal Kabir,
Mr. Sourav Bera,
Mr. Sumit Routh.

For the Opposite Party no. 2 : Mr. Dipanjan Datta,
Ms. Sonia Ojha,
Ms. Sonia Nandi.

For the State : Mr. S.G. Mukerji, Ld. P.P.,
Mr. Arijit Ganguly,
Mr. Sanjib Kumar Dan.

Heard on : 18.01.2023

Judgment on : 09.02.2023

Shampa Dutt (Paul), J.:

The present revision has been preferred praying for quashing the impugned proceeding arising out of Lake Police Station Case No. 63 dated 04.03.2016 under Sections 364A/386/34 of the Indian Penal Code and Section 25 (1B)(a) of Arms Act; now pending before the Court of Learned Chief Judicial Magistrate, Alipore, 24 Parganas(s), (corresponding to C.G.R. Case No. 984/2016.

The petitioner's case is that the prosecution story as it has been alleged is that a complaint was made by one Pradeep Baid before the Lake Police Station stating inter alia that on 29.02.2016 at about 3.00 – 3.30 P.M. the complainant had an appointment with the landlady of P-450, Keyatala Lane, near Vivekananda Park, South Kolkata for joint venture development of her said property through a middle man "Subho Da" alias Sourav Dey. Before that day complainant had visited that house twice and met the landlord but never met the landlady. On both the occasion the person "Subho Da" took the complainant there. As per him (Subho Da) knows the entire family since long. On 27.02.2016 at about 1.30 -2.00 P.M. complainant along with Subho Da and his (Complainant's) friend Mr. Deepak Chandak met the landlord at Filler's Café near Vivekananda Park for nearly one hour. In course of discussion they came to know that the landlady is asking for some extra money for herself and Subho Da was to co-ordinate with the landlady. Subho Da

called the complainant on Saturday evening and on Sunday and told that on Monday, the 29th the landlord would visit his daughter's house at Saltlake from 2.00 -4.00 P.M. In between they can meet the landlady and clinch the deal. As per the above appointment, complainant reached the place approx at 3.30P.M. and called up Subho Da, who told the complainant to park the car a little away and walked down to the gate of the property. Complainant as per the guidance of Subho Da walked down to the gate where Subho Da escorted him to the waiting hall on the ground floor of the G+2 storied building and the complainant was sitting on a sofa and waited for the landlady to come down. Then Subho Da asked the guard to call the "Boudi" alias landlady and also asked him to get some cold water. Just one minute later Subho Da went out and 2(two) more persons (new to complainant) entered into the waiting hall and stood in front of the complainant. Next moment Subho Da came running with the revolver in one hand and razor in another and asked the complainant to get into his scorpio car. When the complainant objected and wanted to raise an alarm, Subho Da hit the face (left side) of the complainant, with the razor sharp object and blood started pouring and all three accused persons pushed the complainant into their car. Another person was at the driving seat and the car started moving. Complainant was bleeding badly. Then they gave him a T-Shirt to cover the blood stain on complainant's shirt and also gave him a red cloth to keep pressed on the wounds on his face, to stop the bleeding and so that

the bleeding would not be visible. They then kicked/punched the head, shoulder and face of the complainant, whenever the complainant was crying. Subho Da showed a revolver to the complainant and also showed One Daw, Small Bhojali and told him that he (Subho Da) will take revenge and will kill the complainant. The car went up to New Barrackpur crossing on Jessore Road ferrying through Golpark, Gariahat Flyover, Park Circus, Suhawardy Avenue, Biswakarma, Bypass, Newtown, Chinar Park, V.I.P. Road, and Jessore Road and then took a “U” turn and reached Charnock Hospital, where Subho Da got down and bought Soframycin cream and micro tape for the complainant’s wound dressing and applied the same to the complainant’s wound. In between Subho Da took out the hand bala (gold), gold chain, two rings, wrist watch, wallet and both mobile phones of the complainant, and switched off the mobile phones. The car stopped at Baguihati bus stand and the accused took the HDFC ATM card ending 9688 of the complainant and asked the complainant, the ‘pin number’ for withdrawal of cash. Complainant gave the ‘pin number’ to the accused. The accused person then withdrew a sum of Rupees 95,000/-. The car then reached Kankulia Road after a brief stop at Topsia, near a hospital and a Temple. After nearly four hours of negotiation Subho Da settled for Rs. 60 Lakhs to be payable by 04.02.2016 in order to save the complainant’s life. Finally the accused persons dropped the complainant opposite Lady Brabourne College at Park Circus at 10.30 P.M. and returned the wallet, two gold

rings and wrist watch. Then the complainant took a yellow taxi and returned home. On the way home, the accused person called the complainant again and told him not to inform the police and not to block the ATM card and also told the complainant that his hand bala, and gold chain would be returned to him and to remember the date deadline.

The investigating agency after completion of investigation submitted the Charge Sheet being no. 111 of 2016 on 21.06.2016 against the present petitioner and 3(three) other accused persons for the offence punishable under section 364A/386/307/120B of the Indian Penal Code.

The petitioner states that the petitioner is not named in the First Information Report and the complicity of the petitioner arises from the statement of a co-accused which is not admissible in law, and except this alleged statement of co-accused there is no other incriminating material what so ever against the present petitioner.

The First Information Report suffers from intrinsic hollowness and antagonistic contradictions. The allegations made in the First Information Report are so absurd and inherently improbable on the basis of which no prudent person can ever reach just conclusion that there is sufficient ground for proceeding against the present petitioner.

Mr. Ayan Basu learned counsel for the petitioner has submitted that the Learned Court ought to have considered that

confession of a co-accused is not substantive evidence against and other co-accused persons in the same trial.

That though confession may be regarded as evidence in that generic sense because of provisions of Section 30 of Evidence Act, the fact remains that it is not evidence as defined by Section 3 of Evidence Act.

The Learned court should have appreciated the fact that in dealing with a case against an accused, the Court cannot start with a confession of co-accused, it must begin with other evidence adduced by prosecution and after it has formed its opinion with regard to quality, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt.

The Learned Court did not consider the fact that except confessional statement there is no other material on record to connect the petitioner with the alleged crime, so putting the petitioner to the test of trial is absolutely unwarranted and that will be a sheer abuse of process of Law.

The petitioner is completely innocent and in no way connected with the commission of any offence far less the offences alleged herein and he bears clean antecedents having no tint of blemish and the complaint herein has been initiated the instant proceedings which is palpably frivolous and was initiated only with a view to harass and

intimidate the petitioner herein, which would be evident from the nature of allegations as ventilated through the First Information Report as well as the materials collected in investigation and its consequent results.

The instant proceeding is attended with manifest mala fide and the same was instituted for oblique purpose and in order to spite the petitioner illegally.

The impugned proceeding is otherwise bad in law.

The allegations in the First Information Report as well as in the Charge Sheet are vague in as much as the allegations do not show or reflect any ingredient of the offences as alleged qua the petitioner herein.

The action of the police authority is mala fide, arbitrary and illegal.

The continuation of any kind of proceedings is an abuse of process of law. And thereby bad in law, inoperative and baseless, and as such liable to be quashed and/or dropped.

Mr. Dipanjan Dutta, learned counsel for the opposite party no. 2 has submitted that the Learned Magistrate's order is in accordance with law based on the prima facie materials in the case diary clearly making out the commission of a cognizable offence by the petitioner/accused person. And as such the revisional application is liable to be dismissed.

Mr. S.G. Mukherjee, learned public prosecutor has placed the case diary and submitted that there are sufficient material making out a case against the petitioner of committing a cognizable offence and as such the petitioner's revisional application should not be considered as the same is an abuse of the process of court/law.

Heard the learned counsel for both the parties and the learned public prosecutor. Perused the materials on record. Considered.

From the written complaint it is evident that there were four persons including the driver accompanying the principle accused Subho Da at the time when the complainant was allegedly forcibly taken in the Scorpio vehicle.

Four persons were charge sheeted.

Accused Akbar Ali who has been identified in the test identification parade has stated the name of the present petitioner as a co-accused in his statement during investigation. A seizure list dated 13.03.2016 shows seizure of Rs. 60,000/- in cash from the premises belonging to accused Akbar Ali. The Scorpio vehicle along with a mobile and sim card with connection and other documents of the vehicle were also seized from the said premises. The said recovery and seizure has been made on the statement of accused Akbar Ali.

Several documents showing that the complainant had undergone medical treatment for the assault allegedly caused by the petitioner is part of the records though he stated before the doctor that he sustained the injury as the result of a fall.

Relevant CCTV footage has also been collected by the investigating team with necessary certificate as required under the law.

The complainant has also filed the relevant Bank documents and passbook in support of the statements in his complaint.

There are also several statements recorded under Section 161 Cr.P.C. in support of the complainant.

Overall there are sufficient materials in the Case Diary making out a prima facie case against the petitioner. The other accuseds have been identified in the T.I. parade.

Mr. Basu has relied upon the following judgments of the Supreme Court in support of his case for the petitioner.

(a) Dipakbhai Jagdishchandra Patel vs. State of Gujarat and Anr., 2019 SCC Online SC 588, Criminal Appeal No. 714 of 2019, on April 24, 2019.

“13. Appellant would submit that as regards the extrajudicial confessional statement relied

upon by the State dated 11-4-1996 made by the appellant that it was not the basis on which the charge-sheet had been framed. It is secondly the case of the appellant that the statement has been subsequently retracted.

17. *It is the case of the State that the appellant had knowledge that the notes were counterfeit and fake notes and was in conscious possession of the fake notes for 15 days. For framing charges, what is required is prima facie satisfaction. Offence relating to counterfeit notes is a grave offence and not to be viewed lightly.*

18. *In the statement by the first accused, he has stated that he had come to Ahmedabad 15 days earlier. At that time, he had told the appellant that the fake notes are to be sold at cheap price and at present he may keep those notes with him. He further states that he had brought these notes from the residence of the appellant and that he had been caught while he was selling the notes at cheap price.*

19. *In the first statement given by the appellant dated 11-4-1996 relied upon by the State, the appellant is credited with knowledge of the fact that the bag containing counterfeit notes was left by the first accused at the appellant's residence and they were to be sold at cheap price and it was kept at his residence for some days.*

20. *Subsequently, his statement was again recorded on 10-7-1996. Therein, he inter alia states that the first accused told him that the bag contains files relating to land deals and it contained valuables.*

21. *In further questioning on 30-8-1996, he inter alia states that because of his*

acquaintance with Ravi, he became acquainted with the first accused and that he had left the bag at his residence saying that the bag contained important documents.

22. *These are the materials, in short, which were relied on by the State to sustain the order framing the charge against the appellant. That is to say, the statements given by the appellant under Section 161 and the statement also given by the co-accused.*

23. *The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.”*

(b) Sushila Aggarwal and Ors. vs. State (NCT of Delhi) and Anr., (2020) 5 SCC 1, SLPs (Crl.) Nos. 7281-82 of 2017, on January 29, 2020.

“61. *A fuller consideration of the various decisions cited earlier, especially those which emphasised the need to limit the life of an order of anticipatory bail, are premised on the understanding that the grant of an unconditional order of bail would thwart investigation. In the first place, this premise is unfounded, given that Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] stated (in para 13, SCC reports) that such an order would be “contrary to the terms” of Section 438; and furthermore,*

that conditions mentioned in Section 438(2) could be imposed while granting anticipatory bail. Here, one is conscious of the fact that the requirement of imposing conditions is not compulsive (noticing the use of the term “may” which precedes the requirement of imposing conditions). Nevertheless, an unconditional order, in the sense of an order not even imposing conditions mentioned in Section 438(2) can impede or hamper investigation, *Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465]* held that the conditions mentioned in that provision should be imposed. This requirement is more a matter of prudence, while granting relief.

62. This Court cannot lose sight of the fact that the Law Commission's 41st and 48th Reports focused on the need to introduce the provision (for anticipatory bail) as a preventive, or curative measure, to deal with a particular problem i.e. unwarranted arrests. *Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465]* noticed this fact, and also that significantly, Section 438 is not hedged with any obligation on the court's power, to impose conditions. That situation remains unchanged : the provision remains unaltered — at least substantially (barring an amendment in 2005 which obliged the issuance of notice to the Public Prosecutor before issuing any order for anticipatory bail) [The amendment i.e. the Criminal Procedure Code (Amendment) Act, 2005 — which has till now, not been brought into force, reads as follows: “**438. Direction for grant of bail to person apprehending arrest.**—(1) Where any person has reason to believe that he may

be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; that in the event of such arrest, he shall be released on bail and the Court may after taking into consideration inter alia the following factors, namely—(i) the nature and gravity of the accusation;(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;(iii) the possibility of the applicant to flee from justice; and(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail. Provided that where the High Court or as the case may be the Court of Session has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail it shall be open to an officer in charge of police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application.(I-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days' notice, together with the copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.(I-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an

application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.”] . The 203rd Report of the Law Commission, which reviewed the entire law on the subject and noticed later decisions, such as *Salauddin [Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 : 1996 SCC (Cri) 198]* , *Adri Dharan Das [Adri Dharan Das v. State of W.B., (2005) 4 SCC 303 : 2005 SCC (Cri) 933]* , etc. recommended no change in law on this aspect relating to conditions. In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376(3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438(4)] reads as follows:

“438. (4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code.”

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so

in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon — that would amount to judicial legislation.

68. *The imposition of conditions under Section 438(2) with reference to Section 437(3), in the opinion of this Court, is enough safeguard for the authorities — including the police and other investigating agencies, who have to investigate into crimes and the possible complicity of the applicants who seek such relief. Taking each concern i.e. the addition of more serious offences; presence of a large number of individuals or complainants; possibility of non-cooperation — non-cooperation in the investigation or the requirement of the accused's statement to aid the recovery of articles and incriminating articles in the course of statements made during investigations — it is noticeable, significantly, that each of these is contemplated as a condition and is invariably included in every order granting anticipatory bail. In the event of violation or alleged violation of these, the authority concerned is not remediless : recourse can be had to Section 438(2) read with Section 437(3). Any violation of these terms would attract a direction to arrest him. This power or direction to arrest is found in Section 437(5). However, that provision has no textual application to regular bail granted by the Court of Session or High Courts under Section 439 or directions*

not to arrest i.e. order of anticipatory bail under Section 438. Secondly, Section 439(2) which is cast in wide terms, adequately covers situations when an accused does not cooperate during the investigation or threatens to, or intimidates witness[es] or tries to tamper with other evidence.

73. *As regards the concern expressed on behalf of the State and the Union — that unconditional orders (i.e. those unrelated to a particular time-frame) would result in non-cooperation of the accused, with the investigating officer or authority, or that there would be reluctance to make statements to the prosecution, to assist in the recovery of articles that incriminate the accused (and therefore can be used under Section 27, Evidence Act), this Court perceives such views to be vague and based apparently on preconceived notions. If there is non-cooperation by an accused — in the course of investigation, the remedy of seeking assistance of the court exists. Moreover, on this aspect too, Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had envisioned the situation; the Court had cited State of U.P. v. Deoman Upadhyaya [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] , wherein this Court had observed as follows : (Deoman Upadhyaya case [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] , AIR p. 1131, para 12)*

“12. ... When a person not in custody approaches a police officer investigating an

offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Evidence Act : Legal Remembrancer v. Lalit Mohan Singh Roy [Legal Remembrancer v. Lalit Mohan Singh Roy, 1921 SCC OnLine Cal 61 : ILR (1922) 49 Cal 167] , Santokhi Beldar v. King Emperor [Santokhi Beldar v. King Emperor, 1932 SCC OnLine Pat 82 : ILR (1933) 12 Pat 241] . Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer."

This view was reiterated and applied in Soni Vallabhdas Liladhar v. Collector of Customs [Soni Vallabhdas Liladhar v. Collector of Customs, (1965) 3 SCR 854 : AIR 1965 SC 481 : (1965) 1 Cri LJ 490] . The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] are relevant, and are

*reproduced again, for facility of reference :
(SCC p. 584, para 19)*

“19. ... One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] .”

Therefore, the “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.”

It is thus the case of the petitioner that he has been falsely implicated in this case by a co-accused and he is protected by the judgments he has relied upon.

This Court relies upon the decision of the Supreme Court in:-

(i) In Kalyan Chandra Sarkar vs. Rajesh Ranjan Alias

Pappu Yadav and Anr., January 18, 2005.

“21. Next question in this case is: whether in the earlier proceedings, Courts including this Court, had given a finding in regard to the existence of prima facie case against the respondent or not ?. If so, has the respondent brought on record any fresh material either factual or legal so as to empower the High Court to reconsider the earlier orders ?

23. Therefore, we will examine whether the two issues namely (A) the existence of the prima facie case against the accused and (B) the evidentiary value of retracted confession ; have been considered by the High Court as well as by this Court in the previous proceedings or not.

25. In the order of the High Court dated 5th November, 2001 in Crl. Misc. No. 22243 of 2001, it is seen that an argument was addressed on behalf of the respondent that except the statement of Rajan Tiwari, a co-accused, there is no other material against him and since the confession of co-accused cannot be used as substantive evidence and there being no other material on record there is no possibility of his conviction in the case. Therefore, he should be enlarged on bail. It was also argued by the counsel for the respondent that confessional statement made before the Metropolitan Magistrate, Delhi was later retracted and while recording the confessional statement the concerned Magistrate did not observe the required formalities envisaged in Section 164 of the Criminal Procedure Code. It was also argued that the maker of the confession Rajan Tiwari was brought from custody, hence the Magistrate erred in recording the confessional statement without observing the necessary

formalities. Therefore, the so called confessional statement must be ignored for the purpose of finding out the existence of a prima facie case. The said learned counsel also argued that, at any rate, confession of co-accused not being a substantive piece of evidence, it can only be used in aid of other evidence and there being no such other evidence the confessional statement by itself cannot lead to conviction. The learned counsel for the respondent-accused in that proceedings had relied upon on number of judgments of this Court in support of his contention as could be seen from the said order of the High Court. Having noticed the said argument, the High Court recorded its findings as follows :-

"None of the abovesaid decisions, in my opinion, is of any help to the petitioner for the simple reason that all of them were rendered after trial. In the instant case the evidence is yet to see the light of the day. While the principles laid down in those cases about the nature of the confessional statement and the safeguards contained in section 164 Cr.P.C. are unexceptionable, for the purpose of section 437 (1)(i) of the Code what the court has to see is whether there are reasonable grounds to believe that the accused has been guilty of an offence punishable with death and imprisonment for life. Where circumstances exist which provide grounds to believe the guilt of the person the Court is not required to speculate as to quantum and nature of the evidence which would be led by the prosecution at the stage of trial".

26. *Bearing in mind the above principle and some judgments of this Court the High Court in that petition held :-*

"The confession which Rajan Tiwari made is no doubt a statement of a co-accused but it is an inculpatory statement and cannot be ignored for the purpose of bail. In fact, as per

his statement he is one of the assailants. There is nothing on the record to suggest that he made the confessional statement under Section 164 Cr.P.C. before the Metropolitan magistrate under any threat or coercion. Whether the safeguards envisaged in section 164 Cr. P.C. were observed or not is a matter of evidence which is still to come".

27. From the above it is also noticed that apart from discussing prima facie case, the court also noted that the confession was retracted. The court also noticed the material available on record indicating the motive for the crime and the proximity of the first respondent-accused with one of the accused Rajan Tiwari who made the confessional statement. After considering all the above material the court recorded a finding as follows :-

"I have little doubt in my mind that the materials on record in the case diary do constitute prima facie case. In fact, after the framing of charges, which has not been challenged by the petitioner, there can be little doubt about prima facie case against and, therefore, considering the matter from the angle of **Section 437(1)(i) of the Criminal Procedure Code** the petitioner does not deserve bail".

(Emphasis supplied)

28. From the above facts recorded in the said judgment of the High Court, it is clear that that court took into consideration the evidentiary value of the retracted confession and the existence of prima facie case. Therefore, in our opinion, the learned counsel for the first respondent was factually in error in contending that the High Court in any of the previous proceedings did not go into the question of the existence of prima facie case or the legality and the evidentiary value of the retracted confession of Rajan Tiwari.

29. Apart from the observations made by the High Court in the above said petition even this Court in its judgment reported in **Kalyan Chandra Sarkar vs. Rajesh Ranjan** had observed in regard to the existence of prima facie case as follows:-

"19. The next argument of the learned counsel for the respondent is that prima facie the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard he submitted that most of the witnesses have already turned hostile. The only other evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contends that the High Court was justified in granting bail since the prosecution has failed to establish even a prima facie case against the respondent. From the High Court order we do not find this as a ground for granting bail. Be that as it may, we think that this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of the evidence that may be adduced hereinafter including that of the witnesses sought to be recalled are all matters to be considered at the stage of the trial."

(ii) **In Surinder Kumar Khanna v. Intelligence Officer, Directorate of Revenue Intelligence, Criminal Appeal No. 949 of 2018, July 31, 2018.**

"11. In **Kashmira Singh v. State of Madhya Pradesh, (1952) SCR 526**, this Court relied upon the decision of the Privy Council in **Bhuboni Sahu v. The King**,

(1949) 76 Indian Appeal 147 at 155 and laid down as under:

"Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in **Bhuboni Sahu v. The King** "It does not indeed come within the definition of" 'evidence' contained in section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross- examination." Their Lordships also point out that it is

"obviously evidence of a very weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

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

In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in **Emperor v. Lalit Mohan Chuckerbutty, (1911) I.L.R. 38 Cal. 559 at 558**, where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused "or, to put it in another way, as Reilly

J. did in In re Periyaswami Moopan, (1931) I.L.R. 54 Mad. 75 at 77.

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

Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

(iii) In Union of India v. Bal Mukund and Ors., Criminal Appeal No. 1397 of 2007, on March 31, 2009.

"21. We may notice that in State (NCT of Delhi) v. Navjot Sandhu [(2005) 11 SCC 600], 2005 SCC (Cri) 1715 this Court has laid down the law in the following terms:

"38. The use of retracted confession against the co-accused however stands on a different footing from the use of such confession against the maker. To come to

*grips with the law on the subject, we do no more than quoting the apt observations of Vivian Bose, J., speaking for a three-Judge Bench in **Kashmira Singh v. State of M.P. AIR 1952 SC 159** Before clarifying the law, the learned Judge noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co-accused".*

(iv) In Raja @ Ayyappan vs State of Tamil Nadu, Criminal Appeal No. 1120 of 2010, on April 1, 2020.

*“28. Section 30 of the Indian Evidence Act mandates that to make the confession of a coaccused admissible in evidence, there has to be a joint trial. If there is no joint trial, the confession of a co accused is not at all admissible in evidence and, therefore, the same cannot be taken as evidence against the other coaccused. The Constitution Bench of this Court in **Kartar Singh** (supra), while considering the interplay between Section 30 of the Indian Evidence Act and Section 15 of the TADA Act held that as per Section 15 of the TADA Act, after the amendment of the year 1993, the confession of the co-accused, is also a substantive piece of evidence provided that there is a joint trial.*

32. In Ananta Dixit v. The State, 1984 CrL. L.J. 1126, the Orissa High Court was considering a similar case under Section 30 of the Evidence Act. The appellant, in this case, was absconding. The question for consideration was whether a confession of one of the accused 1984 CrL. L.J. 1126 persons who was tried earlier, is admissible in evidence against the appellant. The Court held that the confession of the coaccused was not admissible in evidence against the present appellant. The Court held:

“7. As recorded by the learned trial Judge, the accused Narendra Bahera, whose confessional statement had been relied upon, had been tried earlier and not jointly with the appellant and the co accused person Baina Das. A confession of the accused may be admissible and used not only against him but also against a coaccused person tried jointly with him for the same offence. Section 30 applies to a case in which the confession is made by accused tried at the same time with the accused person against whom the confession is used. The confession of an accused tried previously would be rendered inadmissible. Therefore, apart from the evidentiary value of the confession of a coaccused person, the confession of Narendra Behera was not to be admitted under Section 30 of the Evidence Act against the present appellant and the coaccused Baina Das.”

We are in complete agreement with the view of the High Court.

33. *We are of the view that since the trial of the other two accused persons was separate, their confession statements (Ex.P-26 and P27) are not admissible in evidence and the same cannot be taken as evidence against the appellant.”*

(v) In Parveen @ Sonu vs The State of Haryana, Criminal Appeal No. 1571 of 2021 arising out of SLP (Crl.) No. 5438 of 2020, on December 07, 2021.

“12. It is fairly well settled, to prove the charge of conspiracy, within the ambit of Section 120-B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. At the same time, it is to be noted that it is difficult to establish conspiracy by direct evidence at all, but at the same time, in absence of any evidence to show meeting of minds between the conspirators for the intended object of committing an illegal act, it is not safe to hold a person guilty for offences under Section 120-B of IPC. A few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy. Even the alleged confessional statements of the co-accused, in absence of other acceptable corroborative evidence, is not safe to convict the accused. In the case of Indra Dalal v. State Of Haryana¹, this Court has considered the conviction based only on confessional statement and recovery of vehicle used in the crime.....”

In the present case there is sufficient evidence and materials in the case diary as discussed earlier against the petitioner/accused for him to face **a joint trial** with the other accused persons including the persons who have been identified during test identification parade. The petitioner/accused obviously could not be placed in the test identification parade.

From the materials in the case diary it is seen that there were 4 to 5 accused persons in the commission of the alleged crime. Two of the accuseds have been identified in the test identification parade. On the basis of a statement recorded of accused Akbar Ali, the cash, the vehicle, the mobile with sim card and other documents have been seized from the premises belonging to accused Akbar Ali. It is this witness who has named the present petitioner as a person who was part of the team who allegedly committed the crime.

Apart from the statement of the co accused the test identification parade, the articles recovered, other statements under Section 161 Cr.P.C., medical reports, Bank documents, CCTV footage with certificate under Section 65B of Evidence Act are all additional evidence collected by the investigating team which prima facie make out a case of commission of a cognizable offence by the petitioner and the other accused persons, for the case to proceed towards trial, also in respect of the present petitioner.

Without the petitioner going into joint trial along with the other accused persons, there shall be miscarriage of Justice and quashing the proceedings as prayed for, will be a clear abuse of the process of the court /law, considering the materials/evidence in the case diary against the petitioner and the other accused persons.

Thus the investigation and the proceedings in the present case being in accordance with law needs no interference by this court.

CRR 172 of 2020 is dismissed.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)