

HON'BLE Dr. JUSTICE CHILLAKUR SUMALATHA

CRIMINAL PETITION No.861 of 2023

ORDER:

Heard Sri M.P.Kashyap, learned counsel for the petitioner, as well as learned Additional Public Prosecutor who is representing the respondent-State.

2. Seeking pre-arrest bail, this Criminal Petition is filed under Section 438 Cr.P.C. on behalf of the petitioner, who is arrayed as accused No.3 in Crime No.650 of 2022 of Panjagutta Police Station, Hyderabad.

3. Stating that the petitioner has not committed any offence whatsoever, learned counsel for the petitioner submits that the petitioner is arrayed as accused No.3, only basing on the confessional statements of accused Nos.1 and 2 and no contraband whatsoever is seized from the possession of the petitioner. Learned counsel further submits that basing on the contact numbers that were present in the mobile phones of accused Nos.1 and 2, more than 80 accused were implicated in this case and the petitioner is one among them and considering these aspects, anticipatory bail may be granted.

4. On the other hand, the submission of the learned Additional Public Prosecutor is that the petitioner is a peddler, who was transporting and was assisting accused Nos.1 and 2 in sale of ganja to the needy customers. Learned Additional Public Prosecutor states that his submission is based on the confessional statement given by accused No.1. On that, submitting that the confessional statement of co-accused is not valid in the eye of law, learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court in the case between **Surinder Kumar Khanna Vs. Intelligence Officer, Directorate of Revenue Intelligence**¹, wherein discussing the evidentiary value of the confessional statement of the co-accused, their Lordships at paras 8 to 13 of the judgment held as follows:-

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

9. Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional

¹ (2018) 8 SCC 271

features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of the Terrorist and Disruptive Activities Act, 1987, which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter, therefore, has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused.

10. In *Kashmira Singh v. State of M.P.* {(1952) 1 SCC 275}, this Court relied upon the decision of the Privy Council in *Bhuboni Sahu v. R.* {1949 SCC OnLine PC 12} and laid down as under:

“8. 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. R.* {1949 SCC OnLine PC 12}

‘...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 insofar as he is corroborated?

9. In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerbutty* {ILR (1911) 38 Cal 559}, 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 Periaswami Moopan, {1930 SCC OnLine Mad 86}.

‘...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.’

10. 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.”

11. The law laid down in *Kashmira Singh* [*Kashmira Singh v. State of M.P.*, {(1952) 1 SCC 275}] was approved by a Constitution Bench of this Court in *Haricharan Kurmi v. State of Bihar* {(1964) 6 SCR 623}, wherein it was observed:

“12. 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* {ILR (1911) 38 Cal 559}, a confession can only be used to “lend assurance to other evidence against a co-accused”. In

Periaswami Moopan {1930 SCC OnLine Mad 86}, observed that the provision of Section 30 goes not further than this: (SCC OnLine Mad)

‘...where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence.’

In Bhuboni Sahu v. R. {1949 SCC OnLine PC 12}, the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that:

‘... a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of “evidence” contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the

facts proved 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 Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of M.P.* {(1952) 1 SCC 275}, where the decision of the Privy Council in *Bhuboni Sahu* case {1949 SCC OnLine PC 12} has been cited with approval.”

12. The law so laid down has always been followed by this Court except in cases where there is a specific

provision in law making such confession of a co-accused admissible against another accused.

13. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court, such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilised in order to lend assurance to the Court.”

5. Learned Additional Public Prosecutor did not bring any other material to the notice of this Court except the alleged confessional statement of the co-accused to hold that the petitioner is involved in the alleged offence. However, as the case, as submitted by the learned Additional Public Prosecutor, is still under investigation, no definite conclusion can be arrived at. Also, such a definite conclusion should not be arrived at by this Court while dealing with an application for grant of bail. As of now, since no other incriminating material except the alleged confessional statement of co-accused is on record against the petitioner, this Court is of

the view that the request of the petitioner can be honoured, however conditionally.

6. Resultantly, this Criminal Petition is allowed with the following conditions:-

(i) The petitioner/accused No.3 is directed to surrender before the Court concerned within ten (10) days. On such surrender, he shall be enlarged on bail on his executing a personal bond for Rs.50,000/- (Rupees Fifty thousand only) with two sureties for the like sum each to the satisfaction of the Court concerned. The sureties are directed to submit their two latest passport size photographs at the time of furnishing solvency. One such photograph is ordered to be pasted in the Surety Register against the name of the surety. The other photograph shall be kept in the case record concerned.

(ii) In case, the petitioner/accused No.3 holds a passport, he is directed to surrender the same.

(iii) The petitioner/accused No.3 should not involve in any unlawful activity.

(iv) The petitioner/accused No.3 should afford all assistance for proper investigation of the case.

(v) The petitioner/accused No.3 should not cause the evidence of the offence disappear.

(vi) The petitioner/accused No.3 should not tamper with the evidence in any manner.

(vii) The petitioner/accused No.3 should not by way of inducement, threat or promise, dissuade any person who is acquainted with the facts of the case, from disclosing such facts to the Court or to the Police Officer.

(viii) The petitioner/accused No.3 should ensure his presence whenever required by the Court or Police.

(ix) The petitioner/accused No.3 shall not leave India without previous permission of the court concerned.

(x) The petitioner/accused No.3 shall report before the Station House Officer, Panjagutta Police Station, Hyderabad, on every Monday between 10.30 a.m. and 12.00 p.m. till filing of the final report.

(xi) The petitioner/accused No.3 shall file an affidavit before the court concerned disclosing the following particulars:-

- (1) Contact number
- (2) Mail address
- (3) Residential particulars.

In case, there is any change in the aforementioned details, the petitioner shall intimate the court concerned by giving a fresh affidavit duly mentioning the change. He shall continue to do so till filing of the final report.

Any deviation of the above conditions would entitle the respondent to take appropriate steps for cancellation of the bail granted.

7. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

Dr. JUSTICE CHILLAKUR SUMALATHA

14.02.2023
DR