A. T. Mydeen vs The Assistant Commissioner Customs ... on 29 October, 2021

Author: Vikram Nath

Bench: B.V. Nagarathna, D.Y. Chandrachud, Vikram Nath

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1306 OF 2021
@ SPECIAL LEAVE PETITION (CRL.) No. 374 of 2020

A.T. MYDEEN AND ANOTHER ...APPELLANT(S)

VERSUS

THE ASSISTANT COMMISSIONER,
CUSTOMS DEPARTMENT ...RESPONDENT(S)

WITH

CRIMINAL APPEAL NOS. 1307-1308 OF 2021 @
SPECIAL LEAVE PETITION (CRL.) Nos. 372-373 of 2020

A. DHANAPAL ...APPELLANT(S)

VERSUS

THE ASSISTANT COMMISSIONER ...RESPONDENT(S)

AND WITH

CRIMINAL APPEAL NOS. 1309-1310 OF 2021 @
SPECIAL LEAVE PETITION (CRL). Nos. 833-834 of 2020

JANARTHANAN ...APPELLANT(S)

VERSUS

THE ASSISTANT COMMISSIONER,
CUSTOMS DEPARTMENT, TUTICORIN ...RESPONDENT(S)

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JUDGMENT

VIKRAM NATH, J.

Leave granted.

2. Present set of appeals assail the correctness of the judgment and order dated 19.10.2019 passed by the learned Single Judge of the Madras High Court, Madurai Bench in Criminal Appeal Nos. (MD) 58 and 59 of 2009, titled as The Assistant Commissioner, Customs Department, Tuticorin Vs. A. Dhanapal and four others as respondents in Crl.A.(MD) No. 58 of 2009 and K.M.A. Alexander as sole respondent in Crl.A.(MD) No. 59 of 2009.

3. Trial Court vide separate judgments and orders dated 23.05.2008 passed in C.C. No. 2 of 2003 and C.C. No.4 of 2004 under sections 132, 135(1)(a)(ii) read with 135A of the Customs Act 1962, had acquitted all the six accused. However, the High Court, vide impugned judgment, proceeded to record conviction of all the six accused and awarded sentence to undergo imprisonment of one year and fine of Rs. 50,000/- each and in default to undergo further six months rigorous imprisonment. It accordingly allowed both the appeals.

4. Anti-Smuggling Wing of the Customs department at Tuticorin, raided a warehouse situated at Door No. 111, Etayapuram Road, Tuticorin town on 10.03.1998 upon receipt of some specific information. In the raid, large quantities of cardboard boxes were recovered. Three persons were also present there, who identified themselves as Rahman Sait alias Nathan, Selvaraj and Sullan. Upon questioning, Nathan admitted that 419 cardboard boxes contained sandalwood billet/sticks and 57 cardboard boxes contained Mangalore tiles. All the above cardboard boxes were kept for export from Tuticorin to Singapore clandestinely and to be delivered to one RN Contractors Enterprise Company, Singapore.

5. All the above 476 cartons, plastic strips, packing materials, loose Mangalore tiles, marking stencil plates were seized before two witnesses and separate memos (Mahazars) were prepared. On searching Mr. Nathan, one key chain of Room No. 212, Chitra Lodge was also seized. Seized material was transported to Customs Office. Sandalwood was valued at Rs. 96,52,800/- and Mangalore tiles were valued at Rs. 10,000/-. The total value thus being Rs. 96,62,800/-.

6. After completing the inquiry, the Assistant Commissioner of Customs filed criminal complaint against five accused namely A. Dhanapal, A.T. Mydeen, Janarthanan, N. Ramesh and Rahman Sait for offence punishable under sections 132, 132(1)

(a)(ii) and 135A of the Customs Act. It was registered as Calendar Case No. 2 of 2003 in the Court of Additional Chief Judicial Magistrate, Madurai. The prosecution examined seven witnesses and filed 13 documents which were duly proved by the witnesses and marked as exhibits.

7. The sixth accused K.M.A. Alexander was absconding and was later on arrested, as such separate complaint was filed by Assistant Commissioner against him which was registered as Calendar Case No. 4 of 2004 in the Court of Additional Chief Judicial Magistrate, Madurai. In this case also the prosecution examined seven witnesses and filed 13 documents as exhibits duly proved.

8. The Trial Court on 23.05.2008 delivered two separate judgments in both the cases i.e. C.C. Nos. 2 of 2003 and 4 of 2004 and recorded acquittal of all the accused on the following findings:

> a) No evidence was shown to prove that the accused are Customs House Agents and they packed and kept the boxes and had an intention to attempt to export Sandal Wood, illegally to Singapore.
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> b) It was proved that the sandalwood had arrived at Tuticorin two months before and arrangements were made to cancel the shipping bill. Accordingly, it cannot be said that accused had an intention to evade the customs duty levied by the customs department by crossing the green gate and having escaped by wrong declaration contravening section 135 of the Customs Act.
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> c) With regard to section 132 of Customs Act, there are no documents on record to show that the accused forged the documents and produced the same before anybody.
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> d) It was not proved beyond reasonable doubt that the accused, with the intention of evading customs duty under section 135 (1)(a)(ii) of the Customs Act, had attempted to export carton containing prohibited sandalwood by means of forged documents thereby causing revenue loss to the customs department and contravention of section 135A of the Customs Act.
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> e) The case is pending before the Forest Department officials and hence this court cannot pass any order permitting customs officials under Section 126 of Customs Act either for sale or for auction. Further, the sandalwood not been deposited in the Trial Court under section 95 CrPC, therefore, it was not in the custody of the Trial Court.

9. Aggrieved by the acquittal, the Customs Department preferred two appeals before the High Court. The learned Single Judge, Madurai Bench of the Madras High Court, by judgment dated 19.10.2019 recorded conviction of all six accused under section 135(1)(a)(ii) read with 135A of the Customs Act. However, it confirmed the acquittal under Section 132 of the Customs Act. Later on, by order dated 23.11.2019, it awarded sentence as already mentioned in paragraph No.3. The judgment of the High Court is a common judgment in both the appeals.

10. Aggrieved by the above conviction and sentence, the six accused have separately approached this Court and have filed three separate appeals (@ special leave petitions). Appellant No.1, Janarthanan in appeals @ SLP (Crl.) Nos 833-34/2020 is reported to have died on 28.09.2021, as such the appeal stands dismissed as abated against him.

11. We have heard Mr. R. Basant and Mr. S. Nagamuthu, learned senior counsel and Mr. K.K. Mani, learned counsel for the appellants and Mr. Vikramjit Banerjee, learned Additional Solicitor General for the respondent.

12. Mr. S. Nagamuthu, learned senior counsel for the appellants raised a purely legal argument. He submitted that if this point, without going into the merits, appeals to this Court it would entail an order of remand to the High Court. He also reserved his other arguments on merit in case he fails on the preliminary legal ground.

13. The submission is that the High Court proceeded to pass one common judgment in both the appeals arising out of the two separate trials and two separate judgments but considered the evidence of only one case and that too without disclosing of which case so as to record conviction of all the six accused in both the appeals. The High Court, thus, committed a serious error of law in recording conviction at least in one of the cases without considering the evidence recorded in the trial of that case. According to Mr. Nagamuthu, this would be not only contrary to settled principles of criminal jurisprudence, as also criminal justice delivery system but also contrary to the statutory provisions contained in the Code of Criminal Procedure1, the Indian Evidence Act and settled law on the point. He has drawn our attention to various provisions of the Cr.P.C.

1 Cr.P.C. for short

14. Mr. Nagamuthu, learned senior counsel, in support of the above proposition, has placed reliance on the following judgments:

(i)State of Kerala and Ors. vs. Joseph Alias Baby and Ors.2; and

(ii)Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel and Ors.3

15. On the other hand, Mr. Vikramjit Banerjee, learned Additional Solicitor General for the Customs Department although could not dispute the submission that evidence of only one case has been considered while deciding both the appeals, however, submitted that as the evidence in both the cases were identical, no serious error could be alleged by the appellants. He further submitted that no prejudice has been caused to the appellants inasmuch as the evidence was same in both the trials. The appellants, having failed to show any prejudice on account of the above procedure adopted by the High Court, cannot claim any benefit on technicalities. Mr. 2 (2014) 16 SCC 385 3 (2018) 7 SCC 743 Banerjee relied upon the following judgments in support of his submission:

(i) Doat Ali and Ors. vs. Mahammad Sayadali and Anr. 4 and

(ii) Pedda Venkatapathi and Ors. vs. State 5

16. In rejoinder, learned counsel for appellants submitted that it is true that the witnesses examined in both the cases were same and the documents filed were also the same but nevertheless the witnesses have not been examined in the same

> sequence and nor the documents have been proved and exhibited in the same order. In any case, the High Court ought to have discussed the evidence of both the cases separately.

Maybe by a common judgement, it could have been decided but not without independently dealing the evidence in both the trials.

17. We are, thus, proceeding to consider the preliminary issue.

18. The issue which thus falls for our consideration at this stage is whether the evidence recorded in a separate trial of co- accused can be read and considered by the appellate court in a criminal appeal arising out of another separate trial conducted 4 AIR 1928 Cal 230 5 AIR 1956 AP 96 against another accused, though for the commission of the same offence.

19. To consider and dissect this issue, we have to bear in mind that fair trial is the foundation of the criminal justice delivery system and there are certain guiding principles to ensure a fair trial against an accused. The statutory arrangement of our criminal justice delivery system encompasses few provisions in that regard under the Cr.P.C. and the Evidence Act, 1872.

20. Section 273 of Cr.P.C. provides that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his attendance is dispensed with, in the presence of his pleader. It would be appropriate to reproduce the provision of section 273, which reads as follows: -

> 273. Evidence to be taken in presence of accused. –– Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation— In this section "accused" "includes a person in relation to whom any proceeding under Chapter Viii has been commenced under this Code.

21. The exception of this provision finds place in section 205 of Cr.P.C. wherein personal attendance of accused is dispensed with and he is permitted to appear by his pleader and also in section 299 of Cr.P.C., which provides for recording of evidence in the absence of the accused under certain eventualities like absconding of accused or commission of an offence punishable with death or imprisonment for life by some person or persons unknown. However, this exception has few conditions to be strictly followed by the trial court and prosecution. Besides such an exception, the basic principle of recording evidence in presence of the accused is imperative. For ready reference, sections 205 and 299 Cr.P.C. are reproduced below: -

> 205. Magistrate may dispense with personal attendance of accused.

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

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299. Record of evidence in absence of accused. -

(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try [, or commit for trial] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of- delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. (2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

22. Like-wise, section 278 of Cr.P.C. provides that as soon as the evidence of each witness in a criminal trial is taken under section 275 or 276, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. Section 279 of the Cr.P.C. also provides for interpretation of evidence to the accused in open court, in case he is present and such evidence is given in a language not understood by him. For ready reference, sections 275, 276, 278 and 279 are reproduced hereunder: -

275. Record in warrant- cases.

(1) In all warrant- cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

[Provided that evidence of a witness under this sub- section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.] (2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that, the evidence could not be taken down by himself for the reasons referred to in sub- section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

276. Record in trial before Court of Session. (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) 1 Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.] (3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

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278. Procedure in regard to such evidence when completed.

(1) As the evidence of each witness taken under section 275 or section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. (2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary. (3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

279. Interpretation of evidence to accused or his pleader.

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. (3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

23. In the Evidence Act, 1872, section 33 provides relevancy of certain evidence for proving, the truth of facts stated therein, in any subsequent proceeding, according to which evidence given by a witness is treated to be relevant in a subsequent proceeding or at a later stage in the same proceeding under certain eventualities. It would be appropriate to reproduce section 33, which reads as follows: -

> 33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. –– Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
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> Provided –– that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.
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> Explanation. –– A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

24. In light of the statutory provisions discussed above, we now proceed to deal with position in law concerning the issue.

25. So far as the law for trial of the cross cases is concerned, it is fairly well settled that each case has to be decided on its own merit and the evidence recorded in one case cannot be used in its cross case. Whatever evidence is available on the record of the case only that has to be considered. The only caution is that both the trials should be conducted simultaneously or in case of the appeal, they should be heard simultaneously. However, we are not concerned with cross-cases but are concerned with an eventuality of two separate trials for the commission of the same offence (two complaints for the same offence) for two sets of accused, on account of one of them absconding.

26. A three-Judge Bench of this court in the case of Karan Singh vs State of Madhya Pradesh 6 was confronted with the question, as to, whether, in view of the acquittal of the absconding co-accused in a separate trial from which there had been no appeal, it was open to the High Court to hold that the accused appellant was guilty of murder under section 302 read 6 AIR 1965 SC 1037 with section 34 IPC. After considering the position of law in that regard, A.K. Sarkar,J., speaking for the Bench, answered the question in the following terms: -

> “4. The only question argued in this appeal is whether in view of the acquittal of Ramhans by the learned Sessions Judge from which there had been no appeal, it was open to the High Court to hold that the appellant was guilty of murder under S. 302

read with S. 34 by finding on the evidence that Ramhans who shared a common intention with him, shot the deceased dead and attempted to murder Ramchandra. In the High Court reliance had been placed on behalf of the appellant on the judgment of this Court in Pritam Singh v. State of Punjab, (S) AIR 1956 SC 415 . That case referred with approval to the judgment of the Judicial Committee in Sambasivan v. Public Prosecutor, Federation of Malaya, 1950 AC 458 at p. 479, where it was observed that "the effect of a verdict of acquittal... is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication." As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ramhans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ramhans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ramhans' case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case. We may add here that Mr. Misra appearing for the appellant did not in this Court rely on Pritam Singh's case, (S) AIR 1956 SC 415 .

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..... We are, therefore, of opinion that the judgment in Krishna Govind Patil’s case does not assist the appellant at all. On the other hand we think that the judgments earlier referred to on which the High Court relied, clearly justify the view that in spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis--of course if the evidence warrants it that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the later case that the person tried in it was guilty of an offence under S. 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of Sambasivam's case has no application here because the two cases we are concerned with are against two different persons though for the commission of the same offence.

Furthermore, as we have already said, each case has to be decided on the evidence led in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case.” (Emphasis added)

27. In the case of Nirmal Singh vs State of Haryana7, this Court discussed the scope and requirements of section 33 of the Evidence Act, 1972 and section 299 of the Cr.P.C. and observed as follows: -

“On a mere perusal of Section 299 of the Code of Criminal Procedure as well as Section 33 of the Evidence Act, we have no hesitation to come to the conclusion that

> the pre- conditions in both the Sections must be established by the prosecution and it is only then, the statements of witnesses recorded under Section 299 Cr.P.C. before the arrest of the accused can be utilised in evidence in trial after the arrest of such accused only if the persons are dead or would not be available or any other condition

7 (2000) 4 SCC 41 enumerated in the second part of Section 299(1) of the Code of Criminal Procedure is established..”

28. Apart from above, we may usefully quote the opinion recorded by S.B. Sinha, J., in the case of Jayendra Vishnu Thakur vs State of Maharashtra8, which reads as follows: -

> “18. The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is a valuable right.
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> .....
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> .....
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> 23. An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum. The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.
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> 24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination- in- chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be curved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication.

There are statutes like the Extradition Act, 1962 which excludes taking of evidence viz-a-viz opinion. 8 (2009) 7 SCC 104 (See - Sarabjit Rick Singh v. Union of India, [(2008) 2 SCC 417].

25. It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus, scrupulous compliance thereof is imperative in character. It is a well-known principle of interpretation of statute that any word defined in the statutory provision

should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character."

29. In this regard, another instance of requirement of joint trial for admissibility of confession as provided under section 30 of Evidence Act, 1872 may be noted. According to which when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person making such confession. Section 30 of the Evidence Act is reproduced below:

> "30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. -
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> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

30. In the case of Raja @ Ayyappan vs. State of Tamil Nadu9, this court was dealing with a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987 and was confronted with the issue in respect of admissibility of confession of co- accused against another co-accused in a separate trial, when a joint trial could not be held on account of him absconding. Abdul Nazeer, J., concluded the issue in the following terms: -

> "31. In the instant case, no doubt, the appellant was absconding. That is why, joint trial of the appellant with the other two accused persons could not be held. As noticed above, Section 15 of the TADA Act specifically provides that the confession recorded shall be admissible in trial of a coaccused for offence committed and tried in the same case together with the accused who makes the confession. We are of the view, that if for any reason, a joint trial is not held, the confession of a coaccused cannot be held to be admissible in evidence against another accused who would face trial at a later point of time in the same case. We are of the further opinion that if we are to accept the argument of the learned counsel for the respondent State, it is as good as re-writing the scope of Section 15 of the TADA Act as amended in the year 1993.
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> 32. In Ananta Dixit v. The State reported in 1984 Crl.

L.J. 1126, the Orissa High Court was considering a similar case under Section 30 of he Evidence Act. The 9 (2020) 5 SCC 118 appellant, in this case, was absconding. The question for consideration was

whether a confession of one of the accused persons who was tried earlier, is admissible in evidence against the appellant. The Court held that the confession of the co-accused 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 co-accused 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 co-accused person, the confession of Narendra Behera was not to be admitted under Section 30 of the Evidence Act against the present appellant and the co-accused Baina Das." We are in complete agreement with the view of the High Court.
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> 33. We are of the view that since the trial of the other two accused persons was separate, their confession statements (Ex.P26 and P27) are not admissible in evidence and the same cannot be taken as evidence against the appellant." (Emphasis added)
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> 31. Mr. S. Nagamuthu, relied upon the judgment of this Court in the case of State of Kerala and Others vs. Joseph Alias Baby and Others (supra). In the said case, the High Court had considered the evidence of one Sessions case which tried some of the accused in another Sessions case which was trying another set of co-accused arising out of same offence and acquitted all the accused. This Court, in paragraph 7 of the report, was of the view that the High Court was not right in considering the evidence of one case for another case and accordingly set aside the judgment of the High Court and remanded the matter to the High Court for fresh disposal.

Relevant portion of Paragraph 7 is reproduced below: -

> "7.....The High Court ought to have considered the facts of each case and decided the appeals in accordance with law and in the absence of such consideration by the High Court, it will not be proper for us to decide on the culpability of each of the respondent-accused in these appeals. We therefore, set aside the impugned common judgment of the High Court and remand the matters back to the High Court for fresh disposal in accordance with law."
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> 32. The other judgment relied upon by Mr. Nagamuthu is Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel and Others, (supra). In the above case also, two accused namely, accused Nos.16 and 17 were tried separately as they were absconding. Their trial was registered as Case No.58 of 1998. The Trial Court had

recorded the acquittal of both the accused. Interestingly, in Sessions Case No.58 of 1998, no evidence was recorded independently. The Trial Court had proceeded to record acquittal relying upon the evidence recorded in the earlier Sessions Case No.11 of 1992 which was trying separate set of co-accused. Recording the above fact, Chelameswar, J., observed in paragraphs 47 and 48, regarding impermissibility of the procedure adopted by the Trial Court with respect to judgment in Sessions Case No. 58 of 1998. The said paragraphs are reproduced hereinafter: -

"47. In Sessions Case No. 58 of 1998 against A-16 and A-17, no evidence was recorded independently. On the other hand, the evidence recorded in Sessions Case No.118 of 1992 was marked as evidence in Sessions Case No.58 of 1998. The Evidence Act, 1872 does not permit such a mode of proof of any fact barring in exceptional situations contemplated in Section 33 of the Evidence Act.

48. There is no material on record to warrant the procedure adopted by the Sessions Court. On that single ground, the entire trial of Sessions Case NO.58 of 1998 is vitiated and is not in accordance with procedures established by law. It is a different matter that both the accused put to trial in Sessions Case No.58 of 1998 were acquitted by the Fast Track Court and the High Court did not interfere with the conclusions recorded by the Fast Track Court."

33. Mr. Vikramjit Banerjee, learned Additional Solicitor General, as an officer of the Court, has referred to two judgments.

According to him, in both the said cases, the evidence considered of another case was different and not part of the other case. He, therefore, submitted that in such a situation prejudice could be alleged by the suffering party that he had no opportunity, for that, such evidence was impermissible. The first judgment is in case of Doat Ali and Others vs. Mahammad Sayadali and Another, (supra). In this case also, there were two separate trials and the accused were convicted by the Trial Court in both the cases. The Additional Sessions Judge heard both the appeals together as one case and made up his mind that there were two contradictory stories and, on that basis, he allowed one appeal and dismissed the other. Rankin, C.J., in his judgment observed that the duty of the learned Judge was to keep each appeal absolutely separate and to deal with it on its own merits confining himself to the evidence given in that case and in that alone and accordingly remanded the matter to the Appellate Court for a fresh decision in both the cases.

34. The other judgment relied upon by Mr. Banerjee is Pedda Venkatapathi and Others vs. State, (supra). This case also had similar facts where the Appellate Court i.e. Sessions Judge had used the evidence recorded in one case against the other accused in other case and vice-versa. Relying upon Doat Ali and Ors. vs. Mahammad Sayadali and Another (supra), learned single Judge of the Andhra Pradesh High Court, set aside the judgment of the Sessions Court and directed for re- hearing of the two appeals.

35. The submission of Mr. Banerjee is that in these two judgments as the evidences were different and it had been read and relied upon, the accused could allege prejudice but in the present case, as the evidence is the same in both the cases, no prejudice can be alleged. Whether prejudice or not, the fact remains that the High Court committed an error of law in dealing with the evidence of one trial for deciding both the appeals arising out of two separate trials.

36. Further, it would be worthwhile to mention here that the prosecution in both the trials produced seven witnesses and filed 13 documents which were proved and exhibited. The witnesses in the second case were not examined in the same sequence as the first case and consequently, the 13 documents filed were also not given the same exhibit numbers in the second case as in the first case. The following chart will show the specific sequence numbers of the witnesses in both the trials as well as the exhibit numbers of the documents filed and proved in both the trials. The chart reads as follows: -

> "LIST OF WITNESSES CC No.2/2003 Name of Witness CC 4/2004 (Dhanapal and (Alexander) others) PW1 Selvaraj PW1 PW2 Kalaimani PW4 PW3 Shree Ram PW5 PW4 Sankaralingam PW2 PW5 Sundararajan PW3 PW6 Mylerum Perumal PW6 PW7 Balraj PW7 LIST OF DOCUMENTS CC No.2/2003 Documents Marked CC 4/2004 (Dhanapal and (Alexander) others) Ext. P1 Sanction Order Ext. P5 Ext. P2 Mahazar (Seizure-Godown) Ext. P2 Ext. P3 Statement of Rahman Sait Ext. P7 Ext. P4 Statement of Janarthanan Ext. P8 Ext. P5 Statement of Ramesh Ext. P9 Ext. P6 Statement of Mydeen Ext. P11 Ext. P7 Mahazar (Search – Godown) Ext. P12 Ext. P8 Statement of Hari Gangaram Ext. P1 Ext. P9 Identity Card of Rajan Ext. P2 Ext. P10 Mahazar (Seizure – Room) Ext. P3 Ext. P11 Statement of Mahadevan Ext. P4 Ext. P12 Adjudication Order Ext. P13 Ext. P13 Shipping Bill Ext. P10 Judicial Exhibits Marked Judicial Report Not marked "

37. Now, merely because the seven witnesses produced by the prosecution were the same in both the cases would not mean that the evidence was identical and similar because in the oral testimony, not only the examination-in-chief but also the cross- examination is equally important and relevant, if not more. Even if the examination-in-chief of all the seven witnesses in both the cases, although examined in different sequence, was the same, there could have been an element of some benefit accruing to the accused in each case depending upon the cross-examination which could have been conducted maybe by the same counsel or a different counsel. The role of each accused cannot be said to be the same. The same witnesses could have deposed differently in different trials against different accused differently depending upon the complicity or/and culpability of such accused. All these aspects were to be examined and scrutinised by the Appellate Court while dealing with both the appeals separately and the evidence recorded in the respective trials giving rise to the appeals.

38. We cannot proceed on presumption and assume that everything was identical word to word. We are therefore, not inclined to accept the submission of Mr. Banerjee and in fact both the judgments relied upon by Mr. Banerjee having similar facts as the present case lay down the same proposition of law that evidence of one trial can be read only for the purposes of the accused tried in that trial and cannot be used for any accused tried in a separate trial. The view taken by the Calcutta High

Court in 1928, expressed by Rankin, C.J., has been appropriately followed and accepted and is the correct view.

39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.

40. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.

41. It is also an undisputed proposition of law that in a criminal appeal against conviction, the appellate court examines the evidence recorded by the trial court and takes a call upon the issue of guilt and innocence of the accused. Hence, the scope of the appellate court's power does not go beyond the evidence available before it in the form of a trial court record of a particular case, unless section 367 or section 391 of Cr.P.C. comes into play in a given case, which are meant for further inquiry or additional evidence while dealing with any criminal appeal.

42. In the present controversy, two different criminal appeals were being heard and decided against two different judgments based upon evidence recorded in separate trials, though for the commission of the same offence. As such, the High Court fell into an error while passing a common judgement, based on evidence recorded in only one trial, against two sets of accused persons having been subjected to separate trials. The High Court ought to have distinctly considered and dealt with the evidence of both the trials and then to decide the culpability of the accused persons.

43. There is one more angle to be considered i.e. whether to remand one case to the High Court for fresh decision i.e. the case in which the evidence was not considered and we may proceed to decide the other case here. We find, if we adopt such a procedure, then no fruitful purpose would be served and in fact, it would be an exercise resulting in complications and contradictions and even conflicts. If we proceed to hear one appeal wherein the evidence has been considered by the High Court and we agree with the same, then it would influence the High Court in deciding the other matter on remand. Further, even if we could hold back this appeal and await decision of the High Court in the matter which we remand, then also the High Court would not be able to take an independent decision and would be influenced by the judgment as we would be entertaining one appeal. Moreover, if we allow one of the appeals which we are holding back, then, nothing may remain for the High Court to decide.

44. There is another reason why we are inclined to send back both the matters to the High Court which is fundamental. We find that the learned single Judge of the High Court has apparently not adopted the correct procedure prescribed under law and therefore, the judgment of the High Court needs to be set aside. Once a common judgment is set aside for one appeal, it cannot be upheld for another appeal. There cannot be a severance of the judgment particularly when it arises in a criminal case, where the rights of the accused are as important as the rights of a victim. Therefore, it would be in the fitness of things and in the interest of the parties that the matters are remanded to the High Court for a fresh decision in accordance with law and in light of the discussion and observations made above.

45. We make it clear that all the questions of law and fact would remain open before the High Court and the parties would be free to address the High Court on all issues both on law and facts.

46. Accordingly, the appeals are allowed. Judgment of the High Court passed on 19.10.2019 is set aside. The appeals shall be heard by the High Court afresh in the light of the observations made above.

.....J. [Dr. D.Y. CHANDRACHUD] .....J. [VIKRAM NATH] .....J. [B.V. NAGARATHNA] NEW DELHI OCTOBER 29,2021.