

MOHAMMED FASRIN

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v.

STATE REP. BY THE INTELLIGENCE OFFICER

(Criminal Appeal No. 296 of 2014)

SEPTEMBER 04, 2019

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[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.8(c) r/w ss.29, 21, 23(c), 27(A) and s.67 – Intelligence Officer, Narcotic Department received information that at the instance of the appellant 7.4 kgs of heroin would be carried in a Toyota Qualis vehicle – Vehicle apprehended – In terms of the statement of the accused no.2 (co-accused), he met one ‘M’ from Bombay who told him that after taking delivery of the contraband from him, the co-accused was to take the heroin and hand it over to one ‘N’, who was to further hand over the heroin to the appellant – Confessional statement of the appellant recorded by PW-1 – Appellant convicted u/s. 8(c) r/w ss.29, 21, 23(c) and 27(A) – Held: Allegation with regard to the appellant is only in the nature of hearsay that ‘M’ had told the co-accused that he had to deliver the contraband to the appellant – Neither the said ‘M’ from Bombay nor ‘N’ have been examined in the case nor they have been arrayed as accused – Therefore, the link evidence is totally missing– Further, admittedly the confession of the appellant was recorded after he was arrested– Issue, whether statement recorded u/s.67 of the NDPS Act can be construed as confessional statement even if the officer who recorded such statement was not to be treated as a police officer, has been referred to larger Bench in Tofan Singh v. State of Tamil Nadu – Present case is proceeded on the premise that the confession is admissible – Even if it is admissible, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession – No such material has been brought on record – Confession, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence –Other than the two confessional statements,

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- A *one of the co-accused and the other of the appellant, the prosecution has gathered no evidence to link the appellant with the commission of the offence – Confession of the co-accused, which was said to be a corroborative piece of evidence is of no material value – Evidence not sufficient to convict the appellant – Both the Trial*
 B *Court and the High Court wrongly convicted the appellant – Judgment of both the Courts below, set aside.*

Evidence – Confession – Admissibility of – Discussed.

Allowing the appeal, the Court

- C **HELD: 1.1 As far as the present appellant is concerned, the only evidence, if it can be called that, is the statement of a co-accused (accused no.2) and his own alleged confession. The only allegation with regard to appellant is that after taking delivery of the contraband from ‘M’ of Bombay, the co-accused was to take the heroin and hand it over to one ‘N’. The said ‘N’ was to further**
 D **hand over the heroin to the appellant. Neither the said ‘M’ from Bombay nor ‘N’ have been examined in the case nor they have been arrayed as accused. Therefore, the link evidence is totally missing. Furthermore, the allegation is only in the nature of hearsay that ‘M’ had told the co-accused that he had to deliver the contraband to the present appellant. Even if the confession**
 E **of the co-accused, A-2 is taken into consideration, it would only prove that ‘M’ (from Bombay) had told the co-accused that ‘N’ would handover the contraband to the present appellant. This evidence of a co-accused is a very weak type of evidence which needed to be corroborated by some other evidence. The**
 F **confession of a co-accused gives a clue to the investigating authorities as to how to investigate the matter and against whom to investigate the matter. Thereafter, it is for the investigating officers to collect evidence against the said person who has been named by the co-accused. In the present case no such corroborative evidence has been led. Admittedly, the confessional**
 G **statement of the appellant recorded by PW-1 was recorded after he was arrested. The issue, whether a statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who has recorded such statement was not to be treated as a police officer, has been referred to a**

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larger Bench in the case of *Tofan Singh v. State of Tamil Nadu*. The decision of this case is therefore proceeded on the premise that the confession is admissible. Even if it is admissible, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before recording the confession. No such material has been brought on the record of this case. A confession, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence. The confession of the co-accused, which was said to be a corroborative piece of evidence, has been discussed above and is of no material value. Therefore, other than the two confessional statements – one of the co-accused and the other of the accused, the prosecution has gathered no evidence to link the appellant with the commission of the offence. As such, without going into the legality of the admissibility of the confession, it is held that even if these confessions are admissible then also the evidence is not sufficient to convict the accused. [Paras 5-7] [469-H; 470-A-H; 471-A-C]

Tofan Singh v. State of Tamil Nadu (2013) 16 SCC 31 :
[2013] 9 SCR 962 – referred to.

Case Law Reference

[2013] 9 SCR 962 referred to Para 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 296 of 2014.

From the Judgment and Order dated 19.02.2008 of the Madurai Bench of Madras High Court in Criminal Appeal No. 204 of 2007.

Shikhil Suri, Shiv Kumar Suri, Shilpa Saini, Advs. for the Appellant.

Ajit Kumar Sinha, Sanjay Kumar Tyagi, Rajan Kumar Chaurasia, Mrs. Rekha Pandey, T.A. Khan, Divyansh Rai, B.V. Balaram Das, B. Krishna Prasad, Advs. for the Respondent.

The Judgment of the Court was delivered by

DEEPAK GUPTA, J.

1. This appeal by the accused is directed against the judgment dated 19.02.2008 of the Madras High Court whereby it upheld the

- A judgment dated 16.12.2005 of the District and Sessions Judge, Madurai acting as the Special Court for Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) cases and convicted the accused along with three others for having committed offences under the NDPS Act. As far as the appellant is concerned, he was convicted for having committed offences under Section 8(c) read with 29, 21 and 23(c) and 27(A) of the NDPS Act and apart from that appellant had committed the offence punishable under Section 8(c) read with 27(A) of the Act and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay fine of Rs.1,50,000/- and in default of payment to undergo simple imprisonment for one year. Offence under Section 27A of the Act relates to punishment for financing illicit traffic and harbouring offenders and reads as follows:

- 27A. Punishment for financing illicit traffic and harbouring offenders.- Whoever indulges in financing, directly or indirectly, any of the activities specified in sub-clauses (i) to (v) of clause (viiiia) of section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

- E Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees”

2. The essential ingredient of this offence is that the prosecution must prove that the accused has financed directly or indirectly any of the activities falling in sub-clause (i) to (v) of Clause (viiiia) of Section 2 of the Act or has harbored any person engaged for the aforesaid activities. As far as the case of the prosecution is concerned, it is only of financing and not of harboring.

Section 8(c) of the NDPS Act reads as follows:

- G 8. Prohibition of certain operations.- No person shall-

(a)

(b)

- (c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State,
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import into India, export from India or tranship any narcotic drug or psychotropic substance, A

except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation: B

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf: C

[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]” D

3. This is basically an offence for exporting or importing into India or exporting from India contraband substance. Though, the charges against the appellant were of financing and of indulging in international smuggling of contraband, virtually no evidence in this regard has been found. E

4. We now may refer to the facts necessary for disposal of this case. On 04.01.2003, the Intelligence Officer, Narcotic Department received information that at the instance of the present appellant 7.4 kgs. of heroin would be carried in a Toyota Qualis vehicle bearing No.TN 31 C 9117. This vehicle was apprehended when it was parked at Tamil Nadu Hotel of Madurai - Alagar Koil road and 7.4 kgs. of heroin was recovered from it. At that time accused no.2 to 6 were sitting in the car. Accused nos.2 to 4 have been convicted under various provisions of the NDPS Act. We are not concerned with them since, to our knowledge, no appeal has been filed by them. F G

5. As far as the present appellant is concerned, the only evidence, if it can be called that, is the statement of a co-accused (accused no.2) and his own alleged confession. As far as statement of co-accused (Ext.P41) is concerned, in that the co-accused states in great detail as to H

A how he came into contact with one other person also called Mohammed in Bombay who had instructed him to go to Manglapuram from Bombay. There he was again asked to come to Hotel Airline at Manglapuram where he met the said Mohammed of Bombay. It was that Mohammed of Bombay, who handed over the vehicle to him and told him that 7.4 kgs of heroin is kept hidden in 7 packets in a false compartment beneath the front seat of the car. The only allegation with regard to appellant is that after taking delivery of the contraband from Mohammed of Bombay, the co-accused was to take the heroin and hand it over to one Nalliappan. The said Nalliappan was to further hand over the heroin to the appellant. Neither the said Mohammed from Bombay nor Nalliappan have been examined in the case nor they have been arrayed as accused. Therefore, the link evidence is totally missing. Furthermore, the allegation is only in the nature of hearsay that Mohammed had told the co-accused that he had to deliver the contraband to the present appellant. Even if we take the confession of the co-accused Hasan Mohamed (A-2) into consideration, it would only prove that Mohammed (from Bombay) had told the co-accused that Nalliappan would handover the contraband to the present appellant. This evidence of a co-accused is a very weak type of evidence which needed to be corroborated by some other evidence. The confession of a co-accused gives a clue to the investigating authorities as to how to investigate the matter and against whom to investigate the matter. Thereafter, it is for the investigating officers to collect evidence against the said person who has been named by the co-accused. In the present case no such corroborative evidence has been led.

6. That brings us to the confessional statement of the appellant recorded by PW-1. Admittedly, this confession was recorded after the appellant was arrested. It is true that the issue, whether a statement recorded under Section 67 of the NDPS Act can be construed as a confessional statement even if the officer who has recorded such statement was not to be treated as a police officer, has been referred to a larger Bench in the case of *Tofan Singh v. State of Tamil Nadu*¹.

7. We, for the decision of this case, therefore, proceed on the premise that the confession is admissible. Even if it is admissible, the Court has to be satisfied that it is a voluntary statement, free from any pressure and also that the accused was apprised of his rights before

¹ (2013) 16 SCC 31

recording the confession. No such material has been brought on the record of this case. It is also well settled that a confession, especially a confession recorded when the accused is in custody, is a weak piece of evidence and there must be some corroborative evidence. The confession of the co-accused, which was said to be a corroborative piece of evidence, has been discussed above and is of no material value. Therefore, other than the two confessional statements – one of the co-accused and the other of the accused, the prosecution has gathered no evidence to link the appellant with the commission of the offence. As such, without going into the legality of the admissibility of the confession, we hold that even if these confessions are admissible then also the evidence is not sufficient to convict the accused.

8. We, accordingly, find force in the appeal. We hold that both the Trial Court and the High Court wrongly convicted the accused. We set aside the judgment of both the Courts below. Appeal is accordingly allowed. The accused is already on bail. His bail bonds are discharged.

Divya Pandey

Appeal allowed.