

Smt. Jahida Bi and Others Vs. Central Narcotics Bureau

Smt. Jahida Bi and Others Vs. Central Narcotics Bureau

SooperKanoon Citation : sooperkanoon.com/502721

Court : Madhya Pradesh

Decided On : Sep-19-2000

Reported in : 2001CriLJ1882; 2001(2)MPHT56

Judge : Mr. S.B. Sakrikar, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 20, 21, 24, 29, 42, 50 and 67; [Evidence Act, 1872](#) - Sections 25; [Constitution of India](#) - Article 20(3); [Customs Act, 1962](#) - Sections 108

Appeal No. : Criminal Appeal Nos. 964, 1008, 1025 and 1124 of 1999

Appellant : Smt. Jahida Bi and Others

Respondent : Central Narcotics Bureau

Advocate for Def. : Shri Girish Desai, Adv.

Advocate for Pet/Ap. : Shri Z.A. Khan, ;Shri Amitabh Upadhyaya and ;Shri V.S. Kotwal, Advs.

Disposition : Criminal appeals partly allowed

Judgement :

S.B. Sakrikar, J.

1. This judgment shall dispose of the aforesaid Criminal Appeals filed on behalf of the accused/appellants against the judgment dated 8th July, 99 rendered by Special Judge, Indore in Special Case No. 46/98, thereby convicting the appellants Mohd., Umar and Mohd. Rauf of the offence punishable under Sections 8/21 NDPS Act and sentencing each of the appellants to undergo 10 years RI and one lac rupees fine, in default of payment of fine, further imprisonment for three years. Appellants Jahida Bi and Ramesh Galani by the impugned judgment stand convicted of the offence punishable under Section 8/29 of the NDPS Act and each of the appellants sentenced to undergo 10 years RI and one lac rupees fine, in default of payment of fine, further imprisonment for three years.

2. Briefly stated the facts of the case are that on 28th Sept., 98 at about 10.00 p.m. officers of the CBN Department, Indore were patrolling in the area in search of the transportation of illicit contraband articles from the State, intercepted the Passenger Bus of MPSRTC at about 2.00 a.m. near Nawadapanth. The passenger bus bearing registration No. MP 14-2423 coming from Mandsaur and going towards Bhopal, was searched by the officers of the Raid Party. During search, Inspector Murli Dhankani (P.W. 1) suspected two passengers travelling in the alleged bus on Seat Nos. 45 and 46. One of the passengers travelling on the said seats, was having black coloured rexin airbag in his lap was asked to give search of the alleged air-bag. He was given an option for giving search before the gazetted officer or the Magistrate as required under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (for short 'the Act') and on giving consent, accused Mohd. Rauf who was having the said bag, was searched before Mr. P.K. Sinha (P.W. 9) Superintendent, CBN, Indore. On search of the air-bag carried by accused Mohd. Rauf, 1.350 Kg. heroin was seized from the air bag kept in the polythene bag. At the same time, accused/appellant Mohd. Umar was also searched and two passenger tickets from Mandsaur to Indore of the alleged passenger bus were recovered from the possession of the said accused. Accused/appellants Mohd. Rauf and Mohd. Umar were interrogated and their statements were recorded by Inspector Mr. Dhankani under Section 67 of the Act. A joint seizure memo of the alleged heroin recovered from the possession of the appellants Mohd. Rauf and Mohd. Umar was prepared and two samples of 0.05 gms. each were taken from the seized article and the seized heroin as also the

sample packets were separately sealed. Accused Mohd. Rauf and Mohd. Umar were arrested and alongwith the seized article, they were taken to the office of the CBN Indore. On the basis of the statements of accused. Mohd. Rauf and Mohd. Umar recorded under Section 67 of the Act, Inspector Dhankani alongwith the members of the Raid Party went to Mandsaur and accused/appellant Jahida Bi was noticed and on interrogation, her statement was also recorded under Section 67 of the Act. On the basis of the alleged confessional statement of the appellant Jahida Bi confessing the fact that contraband article recovered from the possession of the appellants Mohd. Rauf and Mohd. Umar, was given by the said appellant to be handed over to appellant Ramesh Galani at Dhulia appellant Jahida Bi was also arrested and taken to the office of the CBN Indore. Thereafter, further investigation in the case was entrusted to Mr. Mukesh Khatri (P.W. 10) Inspector CBN Indore, who alongwith other members of the Raid Party, proceeded for Dhulia (Maha.) and recorded the statement of appellant Ramesh Galani under Section 67 of the Act. In the said statement, appellant Ramesh Galani admitted that he is dealing with purchase and sale of the contraband article and on telephone received from accused/appellant Mohd. Rauf, he contracted to purchase heroin from the said accused at Dhulia. Inspector Mukesh Khatri took search of the house of accused Ramesh Galani at Dhulia and recovered some utensils used in the preparation of heroin. It is also stated that during search of accused Ramesh Galani, a small packet containing 1 gm. of heroin was also recovered from his possession. Accused/appellant Ramesh Galani alongwith seized article was taken to the office of the CBN at Indore. The offence was registered against the aforesaid appellants under the Provisions of the Act. Sample packets of the alleged heroin were sent for chemical analysis and on receipt of the report of analyst and on completion of investigations, a complaint was filed in the Trial Court against the aforesaid appellants. The Trial Court registered criminal case against the appellants and they were charged and tried for the alleged offences punishable under Sections 8/21 and 8/29 of the Act. On completion of the trial, all accused/appellants were convicted and sentenced by the impugned judgment as indicated above. Aggrieved the appellants have filed the aforesaid appeals against the impugned judgment of the Trial Court.

3. I have heard Mr. Z.A. Khan, Mr. Amitabh Upadhyaya and Mr. V.S.Kotwal appearing for the respective appellants and Mr. Girish Desai counsel for the Department.

4. Counsel for the appellant Mohd. Umar, contended that no contraband article was found in his possession during the alleged search. The contraband article was recovered from the air-bag carried by appellant Mohd. Rauf and the Trial Court has committed an error in convicting him under Section 8/21 of the Act on the basis of seizure panchnama Exh. P-3 alleging joint seizure of the said heroin from his possession as also from the possession of co-accused Mohd. Rauf. Counsel appearing for appellant Mohd. Rauf contended that the Investigation Officer failed to comply with the mandatory provisions of Section 50 of the Act before taking the search of the air-bag alleged to be carried by the appellant Mohd. Rauf. Counsel also submitted that material contradictions are found in the statements of Mr. Murali Dhankani (P.W. 1) on the point who was carrying the said air-bag at the time of alleged seizure. The counsel also submitted that due to non-compliance of the mandatory provisions of the Act, accused/appellant Mohd. Rauf deserves to be acquitted.

5. Counsel appearing for the appellant Jahida Bi and Ramesh Galani submitted that they are convicted only on the alleged statements of the co-accused persons as also their statements recorded under Section 67 of the Act alleged to have admitted that contraband article seized from the possession of accused Mohd. Rauf and Mohd. Umar was supplied by Jahida Bi to be delivered to accused Ramesh Galani at Dhulia. The counsel submitted that except the statements recorded under Section 67 of the Act, no iota of independent corroborative evidence was available on record indicating that the said appellants are involved in the activities of sale, purchase or transportation of the contraband article and the seized heroin belongs to the said appellants. The contention of the counsel for the appellants is that the appellants cannot be convicted only on the basis of the statements recorded under Section 67 of the Act.

6. As against this, the counsel appearing for the respondent/Department supported the judgment of the Trial Court and submitted that in view of the

evidence of the prosecution available on record as also on the facts and circumstances of the case on hand, the Trial Court has committed no error in convicting the appellants under Sections 8/21 and 8/29 of the Act.

7. I have considered rival submissions of the counsel for the parties and carefully perused the record as also the impugned judgment of the Trial Court.

8. On perusal, it emerged that appellants Mohd. Umar, Jahida Bi and Ramesh Galani are mainly convicted on the basis of the statements recorded under Section 67 of the Act in which they are alleged to have confessed that they are dealing in purchase, sale and transportation of contraband article and the heroin seized at the time of the incident was given to accused/appellants Mohd. Rauf and Mohd. Umar by Jahida Bi to be delivered to Ramesh Galani at Dhulia. In view of the aforesaid facts, I think it proper to consider legal aspect of the matter and evidentiary value of the statements recorded under Section 67 of the Act. For convenience and consideration of the legal aspect of Section 67 of the Act it is extracted as under :--

'Power to call for information etc.-- Any officer referred to in Section 42 is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with contravention of any provision of this Act-

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provision of this Act or any rule or order made thereunder.

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry.

(c) examine any person acquainted with the facts and circumstances of the case.'

9. On plain reading of Section 67 of the Act it emerged that this section empowers the authorised officers of the department of Narcotics, Customs, Central Excise or Revenue Intelligence, etc. mentioned in Section 42 of the Act to interrogate any person to furnish information for the purpose of satisfying whether any provisions

of the Act or Rules have been contravened or require any person to produce or deliver any document or thing which may be useful or relevant for the enquiry or to examine or record statement of any person supposed to be acquainted with the facts and circumstances of the case. The law is well settled on the point that if the statement is recorded by a police officer authorised under Section 42 of the Act is an incriminating or confessional it will not be admissible in evidence due to bar contained under Section 25 of the Evidence Act.

10. In the present case accused/appellants Mohd. Umar, Jahida Bi and Ramesh Galani are convicted for the alleged offences only on the basis of statement recorded under Section 67 of the Act. On perusal it emerged that the alleged statements confessing the said offence were denied by the appellants at the subsequent stage of the trial. As such the statements recorded under Section 67 of the Act were retracted by the appellants at the subsequent stage.

11. In case of K.I. Paunniy v. Asstt. Collector CE Cochin, 1997 (3) SCC 721, while considering the evidentiary value of the retracted confession the Apex Court has held as under :--

'There is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there were any other facts and circumstances to corroborate the recorded confession, retracted confession. It is not confession. It is not necessary that there should be corroboration from corroborate each detail contained in the confessional statement. The Court is required to examine whether the confessional statement was voluntary, in other words whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution.

12. In case of *Shrishail Nageshi Pare v. State of Maharashtra*, AIR 1985 SC 866, the Apex Court while considering the probative value of the retracted confession recorded under Section 24 of the Evidence Act has held as under:--

'A retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration from other independent sources. It cannot, however, be form the basis for convicting co-accused though it may be taken into consideration against co-accused also.'

13. On the point of purpose and use of statement recorded under Section 108 of the [Customs Act, 1962](#) an analogous Provisions of Section 67 of the Act in case of *K.I. Paunny v. Assistant Collector, Cochin* (supra) the Apex Court has held as under :--

'The object of the Act in empowering Customs Officers to record the evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise so as to enable them to collect evidence of proof of contravention of provisions of the act for initiating proceedings for inclusion of contraband or imposition of penalty under the Act. By virtue of authority of law the officers are exercising the powers under the Act is an authority within meaning of Section 24 of the Act.'

14. On the point of evidentiary value of the retracted confessional statement recorded under Section 67 of the Act or under Section 108 of the Customs Act this High Court in case of *Premchand v. Central Investigation Bureau*, 1997 (1) EFR 374, has observed that 'no doubt the statement recorded by the officers of Central Excise and Customs Department and NCB can be used against the accused in trial as substantive evidence. However, the texture, tone of the said statement has to be understood. The tendency is growing to record the statement of the accused in view of the provisions of Section 67 of the Act so as to include confession in it. Some of the Investigating Officers are cleverly recording the said statement for giving go- bye to the legal provisions meant for recording the confession of the accused. The tone, texture and tune of such statement has to be ascertained by a careful scrutiny. That may reveal the purpose of recording the said statement. A careful scrutiny would reveal whether said statement is meant for gathering the

information as meant for Section 67 of the Act or whether it was meant for the purpose of recording the confession of the accused. Coaching language used in said statement, for the purpose of using it as the sole piece of evidence for conviction, has to be considered by a careful examination. The Court should also make the search in the papers of investigation for ascertaining whether there is other material to lend the corroboration to the sentences used in the said statement.'

The Bombay High Court has also considered the evidentiary value of confessional statement recorded during investigations and in case of *State of Maharashtra v. Hasmukh Hargovind Shah*, 1993 Cr.LJ 1953, held that-

'whether a statement under Section 108 Customs Act has been made voluntarily by the accused, needs careful scrutiny, the Court must also consider the possibility of coercion or inducement, and that corroboration required for basing conviction on such a statement recorded under Section 108 Customs Act must necessarily be distinct and separate from the statement and admissions of the accused.

Similar view was also expressed by the High Court of Bombay in case of *Ashok Hussain Allah Detah @ Siddique and another v. Asstt. Collector of Customs*, 1990 Cr.LJ 2201, the Bombay High Court has also ruled that in cases under the NDPS Act and Customs Act the prosecution is, no doubt, entitled to rely upon the statements of the accused recorded during investigation. But they are not entitled to procure statements by coercion, assault or illegal detention and in such circumstances such a statement cannot be termed as voluntary. A retracted confession may form one of the legal basis for conviction if the Court is satisfied that it was true and was made voluntarily, but rule of prudence requires that such a confessional statement cannot be made the sole basis for conviction without any corroboration from independent and distinct evidence.'

16. In case of *Kishansingh v. State of Rajasthan*, 1995 Cr.LJ (Raj.) 176, Rajasthan High Court has held that-

'confession by an accused is not a substantive piece of evidence against co-accused. Confession of an accused can only be used against co-accused for

lending assurance to any substantive evidence, if there be any, to be utilized or acted upon. The confessional statement under Section 67 of the Act can be admissible only as against the person who has made such confession but same cannot be the sole basis even for framing charge against other accused persons in absence of any independent affirmative evidence.'

17. In case of *Kingsley and another v. State of Rajasthan*, 1996 (3) Crimes 370, the Rajasthan High Court has held that-

'if the statement under Section 67 of the Act is recorded after the person is named as an accused or he is arrested, such statement cannot be read against that person because of bar created by Art. 20(3) of the [Constitution of India](#).'

18. In the light of the aforesaid decisions of different High Courts and Apex Court, the scope and evidentiary value of the statement recorded under Section 67 of the Act can be summarised as under:--

(i) Statements in the form of confession if recorded by a police officer conducting investigation, cannot be used against the accused as evidence in view of the bar contained in Section 25 of the Evidence Act.

(ii) Confessional statement recorded of one accused cannot be used for basing the conviction of the other co-accused of the same case.

(iii) Confessional statement, though retracted at the subsequent stage of the trial, can be used against the person making it if the Court is satisfied that it was not obtained by threat, duress or promise. However, prudence and practice require that the Court would seek assurance getting corroboration from other evidence adduced by the prosecution.

(iv) Retracted confession may form the basis of conviction if it receives some general corroboration from other independent sources.

(v) The statement recorded under provisions cannot be read against the person after the person is arrested and named as an accused.

(vi) The statement recorded under the aforesaid provisions cannot be considered voluntary if it is recorded after keeping the accused in detention for a sufficient long period.

19. In the light of the aforesaid legal position on examining the statement of appellants Mohd. Rauf and Mohd. Umar respectively Exs. P-8 and P-9 recorded during investigations under Section 67 of the Act, it emerged that the said statements were recorded after taking arrest of the said appellants. In this respect, on perusal of seizure memo Ex. P-3 and the report Ex. P-10 it emerged that the said seizure memo was prepared at 3.00 a.m. on the date of the incident just after the alleged search of passenger bus and search of appellant Mohd. Umar and Mohd. Rauf. In Exhs. P-3 and P-10, it is clearly mentioned that after the alleged search and seizure, both the accused persons were arrested. In the statements Exs. P-8 and P-9, time and place of recording such statement are not mentioned. As such from the facts available on record, it appeared that the said statements of appellants Mohd. Rauf and Mohd. Umar were recorded after procuring their arrest at the time of incident. As such the statements Exhs. P-9 and P-10 alleged to be recorded under Section 67 of the Act cannot be used against the said appellant for basing conviction.

20. On considering the case of appellant Mohd. Umar, I do not find any other evidence available on record for convicting him for keeping in possession or transporting any contraband article under Section 8/20 of the Act and the impugned judgment of the Trial Court convicting appellants Mohd. Umar for the said offence on the basis of the statement Ex. P-10 cannot be sustained and deserves to be set aside. With regard to Mohd. Rauf even if the statement Ex. P-9 recorded under Section 67 of the NDPS Act is not considered in evidence, the other evidence available on record in my opinion is sufficient to convict him for the offence under Section 8/21 of the Act. From the statement of Inspector Murli Dhankani (P.W. 1) and Superintendent, Mr. P.K. Sinha as also from the facts stated in the consent memo Exh. P-1 and seizure memo Exh. P-3, it is established beyond doubt that at the time of incident before taking the search of the rexin air-bag, carried by appellant Mohd. Rauf mandatory provisions of Section 50 of the Act was complied. From the evidence it is established that on taking search of the rexin air-bag

carried by appellant Mohd. Rauf, 1.350 Kgs. of heroin was recovered from the said bag. From the statements of Mr. N.K. Mohan Kumaran Asst. Chemical Examiner, Opium & Alkalite Factory, Neemuch and Analyst report Ex. F-24, it is also established that article seized from the bag carried by appellant Mohd. Rauf, was heroin.

21. In view of the aforesaid substantive evidence available on record, against appellant Mohd. Rauf, I do not find that the Trial Court has committed any error in convicting the said appellants under Section 8/21 of the Act. The impugned judgment of the Trial Court convicting and sentencing appellant Mohd. Rauf under Section 8/21 of the Act in my considered opinion is well founded and deserves affirmation.

22. With regard to accused/appellant Smt. Jahida Bi and Ramesh Galani, holding them guilty for the offence under Section 8/29 of the Act is totally based on the statements Exh. P-30 and Ex. P-31 recorded by the Investigating Officer during investigation under Section 67 of the Act. No other independent or corroborative evidence is adduced by the department for basing the conviction of the appellants for the alleged offences. The statement Exhs. P-30 and P-31 are in the form of confession retracted by the respective appellants at the subsequent stage during trial. On perusal of the record, it emerged that while recording the said statement, due precautions were not taken by the concerned officers necessary for recording of confessional statements so as to consider them voluntary or obtained without any threat, duress or promise.

23. In the light of the decisions of the Apex Court and different High Courts as discussed above, the said statements recorded under Section 67 of the Act cannot form the basis for convicting the appellants Jahida Bi and Ramesh Galani for the alleged offences in absence of some corroborative evidence available on record. As such in my considered opinion, conviction of appellants Jahida Bi and Ramesh Galani solely based on the statements Exhs. P-30 and P-31 recorded under Section 67 of the Act cannot be sustained under the law and deserves to be set aside.

24. As a result of the foregoing discussions as also the facts and circumstances of the case on hand and the law applicable, the impugned judgment convicting accused/appellants Mohd. Umar, Smt. Jahida Bi and Ramesh Galani deserves to be set aside whereas the judgment of the Trial Court convicting the accused/appellant Mohd. Rauf appears to be well founded and deserves affirmation.

25. Consequently, Criminal Appeal No. 964/99 filed by accused/appellant Jahida Bi; Criminal Appeal No. 1008/99 filed by Ramesh Galani; and Criminal Appeal No. 1025/99 filed by Mohd. Umar are allowed and the impugned judgment convicting the aforesaid appellants, is set aside and the aforesaid appellants are acquitted of the offence punishable under Sections 8/21 and 8/29 of the Act respectively.

Criminal Appeal No. 1124/99 filed by accused/appellant Rauf is devoid of any merit and substance and the same is, accordingly, dismissed affirming the judgment of the Trial Court convicting and sentencing the said appellant Mohd. Rauf for the offence punishable under Section 8/21 of the Act.

26. Accused/appellant Jahida Bi and Mohd. Umar and Mohd. Rauf are in jail. As the appellants Jahida Bi and Mohd. Umar are acquitted of the offence, they are directed to be released forthwith if their presence is not required in any other case. Appellant Ramesh Galani is on temporary bail his bail bonds stand cancelled and he is set at liberty. Appellant Mohd. Rauf is in jail and undergoing the sentence, he be informed about the decision of the judgment.

27. Copy of the judgment be placed in the record of connected Criminal Appeals 1008/99; 1025/99 and 1124/99.

28. Criminal Appeal Nos. 964, 1008, 1025 of 1999 allowed. Criminal Appeal No. 1124/99 dismissed.