

K.Velu Vs. State Through the Intelligence officer,

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Court : Chennai

Decided On : Jul-31-2015

Judge : S.Nagamuthu

Appellant : K.Velu

Respondent : State Through the Intelligence officer,

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

31. 07.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
CRIMINAL APPEAL (MD).Nos.118 to 122 of 2014 K.Velu .. Appellant(A-1) in
Crl.A(MD)No.118 of 2014 S.Dassan .. Appellant(A-2)in Crl.A(MD)No.119 of 2014
N.Mahalingam .. Appellant(A-3) in Crl.A(MD)No.120 of 2014 M.John Berkman ..
Appellant(A-4) in Crl.A(MD)No.121 of 2014 P.Antony Merchant ..Appellant(A-5) in
Crl.A(MD)No.122 of 2014 Vs. State through the Intelligence Officer, Narcotics
Control Bureau, Regional Intelligence Unit, Trivandrum. ... Respondent in all
Criminal Appeals COMMON PRAYER: Criminal Appeals filed under Section
374(2) of the Code of Criminal Procedure against the judgment in C.C.No.240 of
2009, dated 05.03.2014 passed by the Principal Special Court for EC and NDPS
Act Cases, Madurai. !For Appellant (In Crl.A(MD)Nos.118 of
2014):Mr.S.R.Rajarathinam for :Mr.G.Anbusaravanan ^For Appellant (In
Crl.A(MD)No.119 of 2014):Mr.R.Rajarathinam for :Mr.N.A.Ajmal Sheik For
Appellant (In Crl.A(MD)No.120 of 2014):Mr.B.Kumar, Senior Counsel for

Mr.R.Rajaratnam For Appellant (In CrI.A(MD)No.121 of 2014):Mr.B.Kumar, Senior Counsel for Mr.R.Kannan For Appellant (In CrI.A(MD)No.122 of 2014):Mr.B.Kumar, Senior Counsel for Mr.P.S.Subbaraman For Respondent :Mr.C.Arul Vadivel @ Sekar (In all CrI.As) Special Public Prosecutor for NCB Cases :COMMON

JUDGMENT

All these five Criminal Appeals arise out of the same Judgment of the trial Court and therefore, they were heard together and they are disposed of by means of this Common Judgment.

2. The appellants are the accused Nos.1 to 5 in C.C.No.240 of 2009, on the file of the learned Principal Special Judge, under the Narcotic Drugs and Psychotropic Substances Act, Madurai. By judgment dated, 05.03.2014, the trial Court has convicted the accused Nos.1 to 5 under Section 8(c) r/w Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the Act"), 8(c) r/w Section 21(c) and 8(c) r/w Section 28 of the Act. In addition to the above, the third accused was convicted under Section 8(c) r/w Section 27-A of the Act. For the offence under Section 8(c) r/w Section 29 of the Act, the trial Court sentenced all the five accused to undergo rigorous imprisonment for 14 years and to pay a fine of Rs.1,00,000/- each, in default to undergo simple imprisonment for one year, for the offence under Section 8(c) r/w Section 21(c) of the Act, the trial Court sentenced all the five accused to undergo rigorous imprisonment for 14 years and to pay a fine of Rs.1,00,000/- each, in default to undergo simple imprisonment for one year, for the offence under Section 8(c) r/w Section 28 of the Act, the trial Court sentenced all the five accused to undergo rigorous imprisonment for fourteen years and to pay a fine of Rs.1,00,000/- each, in default to undergo simple imprisonment for one year and the third accused was sentenced to undergo rigorous imprisonment for fourteen years and to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for one year for the offence under Section 8(c) r/w Section 27(A) of the Act. Challenging the said conviction and sentence, the appellants have come up with these Criminal Appeals.

3. The case of the prosecution, in brief, is as follows: PW-9 - Mr.G.Venugopal was working as Superintendent in the Narcotic Control Bureau, Sub-Zone at Chennai, during the year 2009. According to him, on 14.03.2009, he received information over phone from an informant that one Mr.N.Mahalingam, [A-3]., a resident of Vilantha Maavavadi of Nagapattinam District and one Mr.M.John Berkman, [A-4]., a resident of Aasaripallam of Kanniyakumari District, who were the then remand prisoners in Tumkur prison in Karnataka State, were indulging in Heroin smuggling from Tamil Nadu coast to Srilanka via Kanniyakumari sea coast to one M.Jr.Nimmal in Srilanka. The informant further told that they were procuring heroin from Mathyapradesh and Rajasthan with the help of few North Indian co-prisoners in Tumkur prison and despatching the same to Srilanka with the help of Mr.P.Antony Merchant(A-5), a resident of East Manakudi and Mr.S.Daasan(A-2), a resident of Melamidaalam of Kanniyakumari District, who were relatives of Mr.M.John Berkman [A-4].

3.1. In the said process, according to the informant, Mr.N.Mahalingam and Mr.M.John Berkman had procured about 4.5 kgs of Heroin from North Indians and handed over the same to Mr.P.Antony Merchant (A-5) for despatching the same to Srilanka during the last month. The informant further told that due to their internal problems, the said heroin could not be despatched by Mr.P.Antony Merchant [A-5]. Therefore, Mr.N.Mahalingam(A-3) through his wife Radhamani (A-6, now absconding) had arranged her car driver named Velu (A1) to take possession of the heroin from Mr.P.Antony Merchant [A-5]. and hand over the same to Mr.S.Daasan(A2) for despatching the same to Srilanka. The informant further told that Mr.P.Antony Merchant [A-5]. would be handing over 2 kgs of Heroin to the above said Mr.K.Velu (A-1) near Manakudi area in Kanniyakumari District and he, in turn, will deliver the said heroin to Mr.S.Daasan (A-2) at Melamidalam in Kanniyakumari District near the bridge on the road, on 14.03.2009, in the evening, by around 06.30 PM. Mr.K.Velu (A-1) likely to carry the heroin in an auto from Manakudi to Melamidalam and the remaining 2.5 kgs of Heroin in the hands of Antony Merchant (A5) would be handed over later, on the instructions from Mr.N.Mahalingam and Mr.M.John Berkman. The informant further clarified that Mr.K.Velu (A-1) would be wearing a tall black colour shirt and green pant. He would be with curly hair, medium bilt and carrying green colour bag. The informant further told that if the road between Kulachal and Melamidalam

is watched between 05.30 PM and 07.30 PM, for the auto carrying Mr.K.Velu with heroin, A-1 could be arrested and Heroin could be seized. 3.2. P.W.9 reduced the said information into writing as required under Section 42(2) of the Act and forwarded the same to his immediate superior namely Superintendent Mr.C.Radhakrishna Pillai (PW-7) for further action. PW-7 approved it and directed further action. Based on the said information from the informant, action was initiated and a team of NCB RIU Trivandrum was formed. The team left for Melamidalam at about 02.00 PM in an official vehicle, bearing Registration No.KL-01-U-4693. The team reached Melamidalam by 04.00 PM. At that point of time, Mr.K.J.Prakash (PW-8), the Intelligence Officer, NCB at Chennai, also joined them. PW-9 shared information with him and then they proceeded near the bridge on the road. In the meanwhile, they made arrangements for the presence of independent witnesses. Thereafter, the NCB team and two witnesses were keeping surveillance at the spot. At about 06.40 PM, an auto bearing Registration No.TN-74-H-0740 came and halted near the bridge. After sometime, one person emerged out from hide out and approached the auto. By the time, the person sitting in the auto (later identified as A-1) handed over a bag to other person (later on identified as A-2). On seeing the same, the team surrounded them. 3.3. P.W.9 disclosed the identity of himself and the identity of other Officers to those accused. The first accused revealed his name voluntarily as Mr.K.Velu and the name of the other accused A-2 is Mr.S.Daasan, [A-1].. PW- 9 enquired the first accused as to what was there in the green colour bag, which he handed over to A-2. The first accused told him that the bag contained around 2 kgs of heroin. A-2 also made a statement thereby conceding the fact that he received the bag containing 2 kgs of heroin. Then, PW-9 appraised them that he intended to make personal search of both the accused. He also explained to them that they had a right to demand that personal search should be made either in the presence of a Magistrate or in the presence of a Gazetted Officer as provided under Section 50 of the Act. But, both the accused expressed that search could be conducted by PW-9 himself. 3.4. PW-9 received the green colour handbag from A-2 and he opened the same in the presence of the accused and the witnesses. Inside the bag, a polythene cover with a mark as "Subalakshmi Silks" was found. PW-9 removed the said polythene cover and found that there was a polythene packet inside the same. The said

polythene packet was found wrapped with brown colour adhesive tape. PW-9 cut and made opening in a corner of the said bag through which he found a light brown colour powder in it. PW-9 took out a pinch from the said powder and with the field testing kit, he examined the same. The examination revealed that it was heroin. Then, P.W.9 seized the entire recovered light brown colour powder contained in the bag on the reasonable belief that it was Heroin, a Narcotic Drug covered under the provisions of the Act. Then, PW-9 weighed the seized contraband and it was found that it was 1.940 kgs. Then, P.W.9 drew three samples of 5 grams each from the recovered Heroin and placed the same in three transparent polythene packets. He sealed them and placed them in a separate covers with the seal of NCB and marked them as S-1, S-2 and S-3 respectively. The cover containing the remaining of Heroin, weighing 1.925 kgs of heroin was properly sealed and put in a cloth lined brown colour cover and shut pasted and sealed with NCB seal, which was marked as M.O.1 Thereafter, the polythene cover containing the mark 'Subalakshmi Silks' used for concealment was placed in a green colour bag and later on put in a cloth lined brown colour and shut pasted and sealed with NCB seal and marked as M.O.2.

3.5. The personal search conducted on A-1 resulted in recovery of a cell phone (Nokia Model No.1200) with two Sim Cards and Indian currency of Rs.1,220/-. All the recoveries were duly done under a mahazer in the presence of witnesses, vide EX-P3). The Indian currency notes of Rs.1,220/- were put in a brown paper cover, shut pasted, sealed with NCB seal and marked as EXP-4. The documents including the driving licence were all seized. Then, PW-9 conducted personal search on A-2, Mr.S.Daasan. From him, he seized a Nokia Model 1650 Mobile Phone with Vodafone Sim Card and a sum of Rs.110/-. They were also recovered under a mahazer. The auto rickshaw was thoroughly searched. But, no contraband or incriminating document was found in the same.

3.6. The Auto Rickshaw was released to the Auto Driver as neither the driver - Mr.Mahesh [PW-4]. nor the vehicle was found to have involved in the above crime. At the place of occurrence, PW-9 had prepared a spot mahazer under EXP-29 in the presence of the accused and the witnesses. On the spot itself, PW-8 had issued summons to both the accused - Mr.K.Velu [A-1]. and Mr.S.Daasan [A-2]. and also the Auto Driver to appear before him. Accordingly, the accused appeared and during investigation, they gave independent voluntary

statements under Section 67 of the Act. PW-9 recorded the statement of the first accused, vide EXP-34 and then, the statement of the second accused, vide EX.P-36. Mr.Mahesh, the driver of the auto has also given statement, which was marked as EXP-14. Thereafter, he arrested both the accused after informing them the grounds of arrest. Then, PW-9 gave intimation to his official superior as required under Section 57 of the Act. The accused were, then, forwarded to the Court of Judicial Magistrate No.I, Eraniel, Kanniyakumari District, for remand. The properties were produced before the same Court on 26.03.2009. The learned Judicial Magistrate returned the properties to him for safe custody. 3.7. Then, sample packets were sent for analysis at the Customs House Laboratory, Chennai as well as to SFSL, Chennai, for qualitative and quantitative analysis respectively. The analysis report revealed that the contraband was Heroin. PW-9, on completing the investigation, filed the complaint before the trial Court. 3.8. Based on the above materials, the Trial Court framed appropriate charges, as detailed in the first paragraph of this Judgment. When the accused were questioned in respect of the charges, they pleaded innocence. In order to prove the charges, the prosecution examined as many as 9 witnesses and exhibited 93 documents, besides nine Material Objects. Out of the said witnesses, PW-1 is the Chemical Examiner at Customs House Laboratory at Chennai. According to him, he examined the samples of the seized contraband and gave opinion that it was Heroin. PW-2 was the Superintendent in the NCB during the relevant period. He is the immediate superior official of PW-9. He has spoken about the report submitted to him under Section 57 of the Act and his instruction to PW-9 to go ahead with the investigation. PW-3 is the Assistant Director of State Forensic Science Lab at Chennai. The sample packets were sent to him for qualitative and quantitative analysis. According to him, on examination, he found 30.45 w/w amount of Diacetyl morphine in the samples. 3.9. PW-4 -Mr.Mahesh, is the Auto Driver, in whose auto, it is stated that the first accused carried the heroin kept in a green colour bag. He has stated that on 14.03.2009, at about 06.00 PM, when he was in Colachel, the first accused approached him and engaged his auto to go to Melamidalam. According to him, a sum of Rs.120/- was fixed as hire for the auto. Thereafter, he carried the first accused in the auto and proceeded to Melamidalam. He has further stated that at Melamidalam, PW-9 and other team of

Officers arrested the first accused. He has also spoken about the statement made by him under EX-P14. He has further stated that the vehicle was returned to him, as he was not involved in the crime. PW-5, who was an independent witness examined to speak about the recovery and the other details, has turned hostile and he has not supported the case of the prosecution in any manner. P.W.6, was the Superintendent in NCB between 2007 and 2011. According to him, after the contraband, in this case, was returned to the Court, it was handed over to him for being kept safely in the godown. He would further state that he kept the same in the godown. PW-7, Mr.C.Radhakrishna Pillai, was the Superintendent in the NCB RIU, Trivandrum, during the relevant time. According to him, he received the report under Section 57 of the Act from PW-9 and instructed him to proceed further. 3.10. P.W.8 is the Officer, who accompanied P.W.9 throughout the entire operation and he has spoken about the same in a vivid fashion. PW-9 has also spoken about the information received, the recovery of the contraband, statements recorded from the accused and the driver - Mr.Mahesh, arrest of the accused, taking samples and all the other facts relating to the investigation done by him. 3.11. When the Trial Court examined the accused under Section 313 of the Code of Criminal Procedure in respect of the incriminating evidences available against them, they denied the same as false. However, they did not choose to examine any witness nor to exhibit any document in support of their defence. The wife of the third accused - Mrs.Radhamani [A-6]. is absconding. Yet another person one Nimmal, who has got involvement in the crime, is also absconding. Having considered all the above materials, the Trial Court convicted the appellants, as detailed in the first paragraph of this Judgment and punished them accordingly. That is how, the appellants are now before this Court with these Criminal Appeals.

4. I have heard the learned counsel appearing for the appellants, the learned Special Public Prosecutor appearing for the respondent and also perused the records carefully.

5. Mr.B.Kumar, the learned Senior Counsel appearing for the appellant in CrI.A(MD)No.122 of 2014 would submit that so far as the accused Nos.3 to 5 are concerned, absolutely, there is no evidence available against them to sustain the conviction. According to him, the Trial Court has erroneously relied on the

statements said to have been given by the accused Nos.1 and 2, purportedly under Section 67 of the Act as a substantive evidence against the accused Nos.3 to 5. The learned Senior Counsel would further submit that as per the law laid down by the Hon'ble Supreme Court in Kashmira Singh Vs. State of M.P, reported in AIR 1952 SC159:

1952. CrL LJ839 these two statements, being the confessions of the co-accused, cannot be the foundation for convicting the accused Nos.3 to 5. According to the learned Senior Counsel, in this case, there is no other evidence available against the accused Nos.3 to 5, apart from the statements of the accused Nos.1 and 2. That apart, it is alleged that the accused Nos.1 and 2, who were lodged at Thunkur Prison, had spoken to the accused Nos.3 to 5 over phone, which is evident from EX-P58. But, according to the learned Senior Counsel, a perusal of EX-P58 would go to show that there were no such phone calls. According to the learned Senior Counsel, absolutely, there is no evidence against the accused Nos.3 to 5 and therefore, they are entitled for acquittal.

6. Mr.C.Arul Vadivel @ Sekar, the learned Special Public Prosecutor, would submit that the statements of the accused Nos.1 and 2 would fall under Section 10 of the Indian Evidence Act, 1872, [for brevity, the "Evidence Act"]. and thus, it can be used as a substantive evidence against the accused Nos.3 to 5. Therefore, according to the learned Special Public Prosecutor, from and out of these statements and from and out of the phone calls, the prosecution has proved the complicity of the accused Nos.3 to 5.

7. So far as the accused Nos.1 and 2 are concerned, according to the learned counsel, the evidences of PW-8 and PW-9 cannot be believed, as they are officials, who are interested in the case of the prosecution. The learned counsel would further submit that the so-called independent witnesses, who were examined to speak about the recovery of the contraband from the possession of the second accused, have turned hostile and they have not supported the case of the prosecution in any manner. The learned counsel would further submit that the statements made by the accused Nos.1 and 2 to PW-9 cannot be stated as voluntary statements. He would further point out that these statements were

retracted by these accused subsequently. Based on the same, the conviction of the accused Nos.1 and 2 cannot be sustained. Moreover, the mandatory provisions as contained in Section 50 of the Act were not scrupulously followed by PW-9, and therefore, the learned counsel would submit that the accused Nos.1 and 2 are also entitled for acquittal.

8. But, the learned Special Public Prosecutor would submit that though it is true that the independent witness, who witnessed the recovery of the contraband from the possession of the accused No.2, when the same was handed over to A-2, has turned hostile, on that score, the entire case of the prosecution cannot be rejected disbelieving the evidences of PW-8 and PW-9. He would further point out that all the mandatory and directory provisions have been scrupulously followed by PW-9. He would further submit that the qualitative and quantitative examination of the contraband done would go to show that 30.45 w/w amount of Diacetyl morphine was found in the samples. He would further submit that there is no reason to reject the evidences of these two witnesses, viz., PW-8 and PW-9. Their evidences are duly corroborated by the confession statements of the accused Nos.1 and 2 under Section 67 of the Act. Thus, according to him, the prosecution has proved its case beyond reasonable doubts.

9. I have considered the above submissions.

10. So far as the accused Nos.3 to 5 are concerned, no contraband was recovered from them. They were also not found anywhere near the place of occurrence. As rightly pointed out by the learned Senior Counsel, they have been implicated as accused based on the confession statements said to have been made by the accused Nos.1 and 2 under Section 67 of the Act to PW-9. These two statements, being the confessions of the co-accused, could, of course, be used against the accused Nos.3 to 5, as provided in Section 30 of the Evidence Act. But, the question is how to approach these statements given by the accused Nos.1 and 2 as against the accused Nos.3 to 5.

11. In Kashmira Singh's case, cited supra, while dealing with the scope of Section 30 of the Evidence Act, has held as follows:- "The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It

cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the 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".

12. In the instant case, applying the above dictum if we marshal the entire evidences let in by the prosecution, it could be found that absolutely, there is no other evidence against the accused, except the confession statements of the accused Nos.1 and 2. Though it is stated that the accused Nos.1 and 2 had frequent phone calls to the accused Nos.3 to 5, the call details produced under EX-P58 do not reflect the same. There is no evidence that the accused Nos.3 to 5 had used the Cell Phone from Thunkur Prison. Thus, the prosecution has left with the statements made by the accused Nos.1 and 2 alone to prove the offence against the accused Nos.3 to 5. As I have already pointed out, as per the dictum laid down by the Hon'ble Supreme Court in Kashmira Singh's case, these two statements, being the confessions of the co-accused, cannot be the foundation for convicting the accused Nos.3 to 5.

13. But, the learned Special Public Prosecutor would submit that these statements made by the accused 1 and 2 would fall within the ambit of Section 10 of the Evidence Act, which reads as follows:-

"0. Things said or done by conspirator in reference to common design.- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a

relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it".

14. The learned Special Public Prosecutor would submit that in order to seek the help of Section 10 of the Evidence Act, it is enough for the prosecution to place reasonable grounds before the Court to make the Court to believe that two or more persons had conspired together to commit the offence. The learned Special Public Prosecutor would further submit that though, in this case, there is no independent evidence available, making out reasonable grounds for the Court to believe that there was conspiracy between the accused Nos. 1 to 5, such grounds are available in the statements made by the accused Nos.1 and 2 under Section 67 of the Evidence Act.

15. Opposing the said argument, the learned Senior Counsel would submit that to satisfy the judicial conscience of the Court for the purpose of Section 10 of the Evidence Act that there was prima facie case of conspiracy between the accused, the Court cannot look into the statements themselves. In this regard, the learned Senior Counsel would rely on the Judgment of the Hon'ble Supreme Court in State Vs. Nalini, reported in 1999 SCC [CrI].

601. In the said case, the question arose for consideration was as to when Section 10 of the Evidence Act could be invoked for the purpose of relying on any statement made during the existence of the conspiracy between the conspirators. In Paragraph No.581, while dealing with the scope of Section 10 of the Evidence Act, the Hon'ble Supreme Court has held as follows:-

"81. It is true that provision as contained in Section 10 is a departure from the rule of hearsay evidence. There can be two objections to the admissibility of evidence under Section 10 and they are (1) the conspirator whose evidence is sought to be admitted against the co- conspirator is not confronted or cross-examined in court by the co- conspirator and (2) prosecution merely proves the existence of reasonable ground to believe that two or more persons have conspired to commit an offence and that brings into operation the existence of agency relationship to implicate co-conspirator. But, then, precisely under Section 10 of the Evidence

Act, statement of a conspirator is admissible against a co- conspirator on the premise that this relationship exists. Prosecution, no doubt, has to produce independent evidence as to the existence of the conspiracy for Section 10 to operate but it need not prove the same beyond a reasonable doubt. Criminal conspiracy is a partnership in agreement and there is in each conspiracy a joint or mutual agency for the execution of a common object which is an offence or an actionable wrong. When two or more persons enter into a conspiracy any act done by any one of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of or in reference to their common intention is deemed to have been said, done or written by each of them. A conspirator is not, however, responsible for acts done by a conspirator after the termination of the conspiracy as aforesaid. The court is, however, to guard itself against readily accepting the statement of a conspirator against a co-conspirator. Section 10 is a special provision in order to deal with dangerous criminal combinations. Normal rule of evidence that prevents the statement of one co-accused being used against another under Section 30 of the Evidence Act does not apply in the trial of conspiracy in view of Section 10 of that Act. When we say that court has to guard itself against readily accepting the statement of a conspirator against a co-conspirator what we mean is that court looks for some corroboration to be on the safe side. It is not a rule of law but a rule of prudence bordering on law. All said and done, ultimately it is the appreciation of evidence on which the court has to embark".[Emphasis Supplied]..

16. A cursory reading of the above Judgment of the Hon'ble Supreme Court would go to show that a confession statement made by a conspirator is admissible against a co-conspirator under Section 10 of the Evidence Act on the premise that the relationship exists. The prosecution, no doubt, should produce independent evidences as to the existence of conspiracy for Section 10 of the Evidence Act to operate, but it need not prove the same beyond any reasonable doubt. In other words, it is sufficient to make out a prima facie case of conspiracy between the conspirators in reference to their common intention and if once the same is proved, anything stated or done during the period of conspiracy by one of the conspirators could be used against them by operating Section 10 of the Evidence

Act. The Hon'ble Supreme Court has, thus, made it clear that for the purpose of operating Section 10 of the Evidence Act, the pre-condition is that the existence of conspiracy should be proved by the prosecution from the other evidences available.

17. In the instant case, as I have already pointed out, on marshalling of the entire evidences available on record, other than these two confession statements said to have been made by the accused Nos.1 and 2, I find that there is absolutely nothing on record to even prima facie show that there was conspiracy between the accused Nos.1 to 5. In the absence of the proof of existence of the conspiracy, as has been held by the Hon'ble Supreme Court, it is not possible to invoke the aid of Section 10 of the Evidence Act and therefore, the statements made by the accused Nos.1 and 2 under Section 67 of the Act cannot be used against the accused Nos.3 to 5 by invoking Section 10 of the Evidence Act.

18. The learned Senior Counsel would next place reliance on the Judgment of the Hon'ble Supreme Court in State of Maharashtra, Vs. Damu reported in 2000 (6) SCC269 That was a case of conspiracy, where the confession of one of the accused was sought to be used against a co- conspirator. In Paragraph Nos.43 and 44, the Hon'ble Supreme Court has held as follows:-

"3. One of the offences alleged against all the accused is criminal conspiracy under Section 120-B of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with ?.relevancy of facts?.. That section renders anything said, done or written by any one of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in Section 10 is that there must be ?.reasonable ground to believe that two or more persons have conspired together to commit an offence?.. In this context, we may refer to State v. Nalini. In para 107, this Court has stated thus: (SCC pp. 310-11).107. The first condition which is almost the opening lock of that provision is the existence of ?.reasonable ground to believe?. that the conspirators have conspired together. This condition will be

satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement ?in reference to their common intention?.. Under the corresponding provision in the English law the expression used is ?in furtherance of the common object?.. No doubt, the words ?in reference to their common intention?. are wider than the words used in English law (vide *Sardar Sardul Singh Caveeshar v. State of Maharashtra*).?. [Emphasis Supplied]..

44. The basic principle which underlies Section 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy (*State of Gujarat v. Mohd. Atik*). Section 10 permits ?anything said, done or written by any one of such persons in reference to their common intention?. to be recorded as a relevant fact as against each of the persons believed to have so conspired".

19. In *State of Tamil Nadu Vs. Nalini* reported in (1999) 5 SCC253 it has been held as follows: ?A statement made by a conspirator before the commencement of the conspiracy is not admissible against the co-conspirator under Section 10 of the Evidence Act. Similarly, a statement made after the conspiracy has been terminated on achieving its object or it is abandoned or it is frustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Fixing the period of conspiracy is, thus, important as provisions of Section 10 would apply only during the existence of the conspiracy?. (Emphasis added) 20. Referring to the above Judgment, the learned Senior Counsel would submit that in the instant case, absolutely, there is no other evidence to at least infer the existence of the conspiracy for the purpose of invoking the Section 10 of the Evidence Act.

21. I have considered the above submissions. In the said case, the Hon'ble Supreme Court, after having referred to Nalini's case, has held that in order to open the lock of the Section 10 of the Evidence Act, the first condition is proof of the existence of the reasonable ground to believe that the conspirators had

conspired together to commit the offence. As I have already concluded, in the instant case, there is no evidence at all on record to make out a prima facie case to show the existence of such conspiracy so as to unlock Section 10 of the Evidence Act and to operate the same. In such view of the matter, I have to hold that in the instant case, the confession statements said to have been made by the accused Nos.1 and 2 cannot be used against the accused Nos.3 to 5 by operating the Section 10 of the Evidence Act.

22. There is yet another impediment in this case to operate Section 10 of the Evidence Act. The learned Senior Counsel would contend that the confession statements of the accused Nos.1 and 2 under Section 67 of the Act were made subsequent to their arrest. Therefore, according to him, it cannot be construed that these two confession statements were made, when the conspiracy was still going on. In other words, according to the learned Senior Counsel, the confession statements made by one of the conspirators, after his arrest, would not fall within the ambit of Section 10 of the Evidence Act. In this regard, the learned Senior Counsel has relied on the earliest Judgment of the Hon'ble Supreme Court in Sardul Singh Caveeshar vs. State of Bombay, reported in AIR 1957 SC747 where the Hon'ble Supreme Court has held as follows:- 16. A three-Judge Bench of this Court has also said in Sardul Singh Caveeshar v. State of Bombay: ".The principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in Section 10 Evidence Act, confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were ".in reference to their common intention". that is to say, ".things said, done or written, while the conspiracy was on foot". and ".in carrying out the conspiracy".. It would seem to follow that where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence.". [Emphasis Supplied]..

23. The Hon'ble Supreme Court also had the benefit of referring to the Privy Council Judgment in Mirza Akbar Vs. King Emperor, reported in AIR 1940 PC176 where the Privy Council has held as follows:- 15. Privy Council has held so in Mirza Akbar v. King Emperor. The relevant observations of Lord Wright are the

following: ".This being the principle, their Lordships think the words of Section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships'. judgment, the words ".common intention". signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships'. judgment Section 10 embodies this principle. That is the construction which has been rightly applied to Section 10 in decisions in India, for instance, in Emperor v. Ganesh Raghunath Vaishampayan and Emperor v. Abani Bhushan Chuckerbutty. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.".

24. Relying on these two Judgments, the Hon'ble Supreme Court in Paragraph No.17, has held as follows:-

"7. Thus, the principle is no longer res integra that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of Section 10 of the Evidence Act. The corollary of it is that the confessional statement of 4th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use".

25. I have gone through the above Judgments. As has been held by the Hon'ble Supreme Court, the principle is no longer res integra. The Hon'ble Supreme Court has made it crystal clear that the moment a conspirator is arrested, the confession

made thereafter will not fall within the ambit of Section 10 of the Evidence Act, because the conspiracy comes to an end by the arrest of the accused. In the said Judgments, the Hon'ble Supreme Court was concerned with the confession statements made by one of the accused under the TADA Act. As per the provisions of the TADA Act, the said confession is admissible in evidence like a confession, which is admissible in evidence under Section 67 of the Act. In the said case, the person, who made the confession to the police, died during the pendency of the trial. When an attempt was made by the prosecution to make use of Section 10 of the Evidence Act, the Hon'ble Supreme Court has held that after such arrest, the confession made under the provisions of the TADA Act, though is admissible in evidence against the maker of the statement, cannot be made use of against the others by invoking the Section 10 of the Evidence Act. The said principle laid down by the Hon'ble Supreme Court squarely applies to the facts of the present case.

26. In the instant case, though technically, they were arrested after they made the confession statements on appearing before P.W.9 on summons, on that score, it cannot be held that the conspiracy continued when they made the confession statements before P.W.9. As has been held in Nalini's case (cited supra) the conspiracy will continue either until it is accomplished or it is frustrated or abandoned. In this case, assuming that there was a conspiracy hatched between A1 to A5 earlier, when the contraband was seized from A2 at the place of occurrence, the said conspiracy got frustrated as thereafter the accused were not free to take forward the conspiracy to accomplish their common intention. Thus, at the time when these confession statements were made by accused 1 and 2, the conspiracy was not in force and therefore these statements cannot be used under Section 10 of the Evidence Act against the accused 3 and 4 as substantive evidence, and therefore, these statements would not fall within the ambit of Section 10 of the Evidence Act. On this score also, the said statements cannot be made use of against the accused Nos.3 to 5. If these two confession statements of the accused Nos.1 and 2 are excluded from consideration as against the accused Nos.3 to 5, it emerges that absolutely, there is no evidence against the accused Nos.3 to 5 to prove the charges framed against them. Thus, I hold that the prosecution has failed to prove the charges against the accused Nos.3 to 5 and

therefore, they are entitled for acquittal.

27. Now, turning to the case against the accused Nos.1 and 2, they stand in a different footing. As per the secret information received, PW-9, along with the witnesses, had gone to the place of occurrence. The first accused came in the auto and the second accused emerged from the hide out. The first accused, according to the evidence, had just handed over the green colour bag containing the contraband. The second accused had received the same. This fact has been spoken to by all the eye-witnesses including PW-9. There is no reason to reject the evidences of these witnesses. Apart from the above, on summons, they appeared before PW-9 and made voluntary confessions, which were reduced to writing by PW-9. These statements have been proved as EX-P34 and EX-P36. Undoubtedly, these two statements are admissible in evidence under Section 67 of the Act against them.

28. As I have already concluded, EX-P34 could be used as a substantive evidence as against the first accused and the same could be made use of against the second accused under Section 30 of the Evidence the Act. Similarly, EX-P36, the confession statement of the second accused could be made use of against the second accused as substantive evidence and the same could also be used against the first accused under Section 30 of the Evidence Act. Thus, the evidences of eye witnesses that the first accused involved in the crime are duly corroborated by EX-P34 and vis versa. The eye-witness account and the confession statement made by the first accused under EX-P34 themselves are sufficient to hold the first accused guilty. In order to lend assurance to the said conclusion, EX-P36 made by the second accused could also be looked into as provided in Section 30 of the Evidence Act. Thus, EX- P36 lends further assurance to the above conclusion that the first accused had committed the crime.

29. So far as the second accused is concerned, the contraband was found in his possession, i.e., as soon as it was handed over by the first accused to him, it was seized from his possession. The eye witness account is duly corroborated by the confession statement made under EX-P3 and vice versa. Thus, from the eye-witness account and the confession of the second accused, under EX-P36, it can

be safely concluded that the prosecution has proved the charges against the second accused also. In order to lend assurance to the said conclusion, this Court may look into EX-P34, the confession made by the first accused. Thus, EX-P34, which speaks of the conspiracy and the role played by the accused Nos.1 and 2 would lend further assurance to the above said conclusion. Thus, I hold that so far as the accused Nos.1 and 2 are concerned, the prosecution has proved the case beyond reasonable doubts.

30. So far as the provisions, which are directory in nature, as contained in the Act as well as the mandatory provisions like Section 50 of the Act, the learned counsel did not advance any arguments. However, to satisfy my judicial conscience, I perused the relevant records, more particularly, the evidence let in, which would clearly go to show that there has been no violation of either the mandatory provisions or the directory provisions.

31. In view of all the above, I have to hold that the prosecution has proved the case beyond reasonable doubts that the accused Nos.1 and 2 were found in possession of the contraband.

32. The charge No.I is under Section 8(c) r/w Section 29 of the Act. Since I have already held that the conspiracy between the accused has not been proved, the accused Nos.1 and 2 are entitled for acquittal from charge No.I. So far as the charge No.II is concerned, these accused were found in possession of 1.94 kgs of Heroin jointly, which clearly goes to prove the offence under Section 8(c) r/w Section 21(c) of the Act. Therefore, the conviction imposed on the accused Nos.1 and 2 under Section 8(c) r/w Section 21(c) of the Act is liable to be confirmed. The third charge against the accused Nos.1 and 2 is under Section 8(c) r/w Section 28 of the Act. The Trial Court has convicted the accused Nos.1 and 2 under this provision also. Since these accused are convicted under Section 8(c) r/w Section 21(c) of the Act, there is no scope to convict them under Section 8(c) r/w Section 28 of the Act. Therefore, the conviction and sentence imposed on the accused Nos.1 and 2 under Section 8(c) r/w Section 28 of the Act is also liable to be set aside.

33. Now, turning to the quantum of punishment, the learned counsel for the accused Nos.1 and 2 would submit that the Trial Court had not taken into account the mitigating circumstances available for the accused, while deciding the quantum of punishment. The learned counsel would further submit that the accused Nos.1 and 2 are poor people and they have got big families to be taken care of. He would further submit that they did not involve in any other crime either prior to this occurrence or subsequently. Having regard to these mitigating circumstances, the learned counsel would submit that the substantive sentence of imprisonment may be reduced.

34. But, the learned Special Public Prosecutor would submit that the offences committed by the accused Nos.1 and 2 are heinous in nature and therefore, going by the gravity of the offence, the Trial Court imposed appropriate sentence, which need not be reduced.

35. I have considered the above submissions. As rightly pointed out by the learned Special Public Prosecutor, the offence said to have been committed by the accused Nos.1 and 2 is heinous in nature. These kinds of offences are to be construed as offences against the entire society. Heroin, as a matter of fact, spoils mostly the younger generation and makes them as drug addicts leading them to commit several grave crimes, and therefore, the people, who are indulging in such kinds of crimes, cannot be shown any leniency. The circumstances stated before this Court by the learned counsel for the accused Nos.1 and 2 are not at all mitigating circumstances. Having regard to all the above, in my considered view, the substantive sentence of imprisonment as well as the fine imposed by the Trial Court for the offence under Section 8(c) r/w Section 21(c) of the Act are liable to be confirmed. So far as the default sentence is concerned, the Trial Court has imposed default sentence of one year simple imprisonment. In my considered view, this may be reduced to one month. This is done having regard to the economic status of the accused Nos.1 and 2.

36. In the result, CrI.A.[MD]..Nos.118 and 119 of 2014 are partly allowed, in the following terms:- The conviction and sentence imposed on the accused Nos.1 and 2 under Sections 8(c) r/w Section 28 and Section 8(c) r/w Section 29 of the Act are

set aside and they are acquitted of the said charges. Fine amount, if any paid by them for these offences, shall be refunded to the accused Nos.1 and 2. The conviction and sentence imposed on the accused Nos.1 and 2 under Section 8(c) r/w Section 21 of the Act is confirmed and the substantive sentence of rigorous imprisonment for fourteen years and fine amount of Rs.1,00,000/- on each accused is also confirmed. The default sentence imposed on them is reduced to one month. CrI.A.[MD]..Nos.120 to 122 of 2014 are allowed, the conviction and sentence imposed on the appellants/accused Nos.3 to 5, by Judgment dated 05.03.2014, made in C.C.No.240 of 2009, is set aside and they are acquitted of all charges. Fine amount, if any paid by them, shall be refunded to them. To 1.The Principal Special Court for EC and NDPS Act Cases, Madurai. 2.The Intelligence Officer, Narcotics Control Bureau, Regional Intelligence Unit, Trivandrum. 3.The Special Public Prosecutor, Madurai Bench of Madras High Court, Madurai. .

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