

(2010) 08 SC CK 0026

In the Supreme Court Of India

Case No : Criminal Appeal No's. 419-421 of 2008, Writ Petition (Criminal) No. 128 of 2008 and Special Leave Petition (Criminal) No. ... of 2010, (D. No. 17899 of 2008)

Saquib Abdul Hameed Nachan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 11-08-2010

Acts Referred:

Constitution of India, 1950 — Article 32
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 163, 164
Evidence Act, 1872 — Section 10, 145, 162(2), 17, 18
Prevention of Terrorism Act, 2002 — Section

Citation : (2010) CriLJ 4435 : (2010) 8 JT 355 : (2010) 9 SCC 93 : (2010) 9 SCR 833

Hon'ble Judges : P. Sathasivam, J;B. S. Chauhan, J

Bench : Division Bench

Advocate : Akhil Sibal, Salim Inamdar, Sanjay Jain, Abhay Kumar, Ranzing Tsering, Madhusmita Singh, Mushtaq Ahmad, Shaikh Chandsaheb, Sanjay Kharde, Chinmoy A. Khaladkar and Asha Gopalan Nair, for the Appellant;

Final Decision : Allowed

Judgement

P. Sathasivam, J.

Criminal Appeal Nos. 419-421 of 2008

1. Aggrieved by the decision of the Full Bench of the High Court of Bombay dated 05.11.2004, the appellant has filed these appeals.

2. In view of the limited issue, being the same covered by a subsequent decision of this Court and the course which we are going to adopt, we feel that there is no need to traverse the factual details. After reference by a Division Bench, the Full Bench of the High Court of Bombay re-framed the following questions for adjudication which read as under:

Q.1 Whether Section 32 of the Prevention of Terrorism Act, 2002 so provides that

a confession/statement made under that section by an accused person can be used as a substantive piece of evidence against the other co-accused also?

Q.2 In the event the answer to the question No. 1 is in negative, i.e. to say evidence is not substantive evidence in nature, to what extent such statement can be used in the trial?

After deliberations, the Full Bench answered the above questions as under:

Ans. to Question No. 1: In view of the discussion made above, in our considered view, the confessional statement recorded u/s 32 of POTA cannot be used as a substantive piece of evidence against other co-accused.

Ans. to Question No. 2: In our view, the statement recorded u/s 32 of POTA is undoubtedly a statement made by a person and it can be used for any purpose to the extent a statement under Sections 161-164 of Cr.P.C. can be used.

3. After answering the reframed questions, the Full Bench considered the claim of the parties on merits and remitted the matter back to the Designated Court for deciding the application of the original accused No. 1 for discharge, on the ground mentioned therein and in the light of the observations made in the judgment. The conclusion of the Full Bench as well the ultimate direction is under challenge in the above appeals.

Writ Petition (Crl.) No. 128 of 2008

4. Gulam Akbar Abdul Sattar Khotal, Accused No. 4 and five others filed this writ petition under Article 32 of the Constitution of India seeking to issue a writ of mandamus to the Special POTA Court to start the trial of the POTA Case No. 2 of 2003 in respect of the petitioners herein and for that purpose to modify the order of this Court dated 18.10.2005 passed in Criminal Appeal Nos. 419-421 of 2008 entitled Saquib Abdul Hameed Nachan v. State of Maharashtra. In addition to the same, they also prayed for certain other directions to the Special Court dealing with the case under POTA Act.

S.L.P. (Crl.) ... (D. No. 17899/2008)

5. Muzzamil Akhtar Abdul Raheem Ansari, Accused No. 12 filed this petition from the Jail complaining that because of the stay order granted by this Court on 18.10.2005 in Crl. Appeal Nos. 419-421 of 2008 staying the trial pending before the Special POTA Court, Mumbai, he has been prevented from proceeding further in the trial, hence, prayed for appropriate direction for vacating the stay order.

6. Since the prayer in the 'writ petition' as well as the 'jail petition' depends upon the disposal of the Crl. Appeal Nos. 419-421 of 2008, it is sufficient if we pass an order considering the claim of the appellant in these appeals.

7. Heard the respective counsel.

8. Mr. Akhil Sibal, learned Counsel appearing for the appellants in Crl. Appeal Nos. 419-421 of 2008, submitted that in view of the subsequent decision of this

Court rendered in State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, the conclusion of the Full Bench cannot be sustained. He also submitted that in view of the same, the consequential direction to the POTA Court is also liable to be vacated.

9. We have already noted the questions framed by the Full Bench of the High Court and the answers made therein. Subsequent to the decision of the Full Bench of the Bombay High Court, which is impugned in these appeals, the very same issue, viz., use of confessional statement made u/s 32 of POTA by an accused person as a substantive piece of evidence against other co-accused and if the evidence is not a substantive evidence in nature, to what extent the statement can be used against other co-accused in the trial were considered by this Court in Navjot Sandhu's case (supra). The relevant portion of the judgment read as under:

Law regarding confessions

27. We start with the confessions. Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be proved against an accused. "Confessions" which is a terminology used in criminal law is a species of "admissions" as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression "appears" connotes that the court need not go to the extent of holding that the threat, etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer. Confessions leading to discovery of a fact which is dealt with u/s 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence vis-à-vis confessions. The allied provision which needs to be noticed at this

juncture is Section 162 CrPC. It prohibits the use of any statement made by any person to a police officer in the course of investigation for any purpose at any enquiry or trial in respect of any offence under investigation. However, it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it explicit that the embargo laid down in the section shall not be deemed to apply to any statement falling within Clause (1) of Section 32 or to affect the provisions of Section 27 of the Evidence Act.

28. In the Privy Council decision of *Pakala Narayana Swami v. Emperor* Lord Atkin elucidated the meaning and purport of the expression "confession" in the following words: (AIR p. 52)

[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession....

29. Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law." (Vide Taylor's Treatise on the Law of Evidence, Vol. I.) However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of the confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.

30. Section 164 CrPC is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police.

31. Before we turn our attention to the more specific aspects of confessions under POTA, we should have a conspectus of the law on the evidentiary value of confessions which are retracted, which is a general feature in our country and elsewhere.

41. What is the legal position relating to CONFESSIONS UNDER POTA is the next important aspect.

42. Following the path shown by its predecessor, namely, the TADA Act, POTA marks a notable departure from the general law of evidence in that it makes the confession to a high-ranking police officer admissible in evidence in the trial of such person for the offence under POTA. As regards the confession to the police officer, the TADA regime is continued subject to certain refinements.

43. Now, let us take stock of the provisions contained in Section 32 of POTA. Sub-section (1) of this section starts with a non obstante provision with the words: "Notwithstanding anything in the Code [of Criminal Procedure] or in the Indian Evidence Act...." Then it says:

subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device...shall be admissible in the trial of such person for an offence under this Act or the rules.

By this provision, the ban against the reception of confessional statements made to the police is lifted. That is why the non obstante clause. This Sub-section is almost identical to Section 15(1) of TADA excepting that the words "or co-accused, abettor or conspirator" occurring after the expression "in the trial of such person" were omitted. The other four Sub-sections (2) to (5) of Section 32 are meant to provide certain safeguards to the accused in order to ensure that the confession is not extracted by threat or inducement. Sub-section (2) says that the police officer, before recording a confession should explain in writing to the person concerned that he is not bound to make a confession and that the confession if made by him can be used against him. The right of the person to remain silent before the police officer called upon to record the confession is recognised by the proviso to Sub-section (2). Sub-section (3) enjoins that the confession shall be recorded in a threat-free atmosphere. Moreover, it should be recorded in the same language as that used by the maker of the confession. The most important safeguard provided in Sub-sections (4) and (5) is that the person from whom the confession was recorded is required to be produced before a Chief Metropolitan Magistrate or Chief Judicial Magistrate, within 48 hours, together with the original statement of confession in whatever manner it was recorded. The CMM or the CJM shall then record the statement made by the person so produced. If there is any complaint of torture, the police shall be directed to produce the person for medical examination and thereafter he shall be sent to judicial custody.

Use of confession under POTA against a co-accused

49. Now, let us examine the question whether Section 32(1) of POTA takes within its sweep the confession of a co-accused. Section 32(1) of POTA which makes the confession made to a high-ranking police officer admissible in the trial does not

say anything explicitly about the use of confession made by a co-accused. The words in the concluding portion of Section 32(1) are:

shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

It is, however, the contention of the learned Senior Counsel Shri Gopal Subramaniam that Section 32(1) can be so construed as to include the admissibility of confessions of the co-accused as well. The omission of the words in POTA "or co-accused, abettor or conspirator" following the expression "in the trial of such person" which are the words contained in Section 15(1) of TADA does not make material difference, according to him. It is his submission that the words "co-accused", etc. were included by the 1993 Amendment of TADA by way of abundant caution and not because the unamended section of TADA did not cover the confession of the co-accused. According to the learned Senior Counsel, the phrase "shall be admissible in the trial of such person" does not restrict the admissibility only against the maker of the confession. It extends to all those who are being tried jointly along with the maker of the confession provided they are also affected by the confession. The learned Senior Counsel highlights the crucial words "in the trial of such person" and argues that the confession would not merely be admissible against the maker but would be admissible in the trial of the maker which may be a trial jointly with the other accused persons. Our attention has been drawn to the provisions of CrPC and POTA providing for a joint trial in which the accused could be tried not only for the offences under POTA but also for the offences under IPC. We find no difficulty in accepting the proposition that there could be a joint trial and the expression "the trial of such person" may encompass a trial in which the accused who made the confession is tried jointly with the other accused. From that, does it follow that the confession made by one accused is equally admissible against others, in the absence of specific words? The answer, in our view, should be in the negative. On a plain reading of Section 32(1), the confession made by an accused before a police officer shall be admissible against the maker of the confession in the course of his trial. It may be a joint trial along with some other accused; but, we cannot stretch the language of the section so as to bring the confession of the co-accused within the fold of admissibility. Such stretching of the language of law is not at all warranted especially in the case of a law which visits a person with serious penal consequences [vide the observations of Ahmadi, J. (as he then was) in *Niranjan Singh v. Jitendra* SCC at p. 86, which were cited with approval in *Kartar Singh* case. We would expect a more explicit and transparent wording to be employed in the section to rope in the confession of the co-accused within the net of admissibility on a par with the confession of the maker. An evidentiary rule of such importance and grave consequence to the accused could not have been conveyed in a deficient language. It seems to us that a conscious departure was made by the framers of POTA on a consideration of the pros and cons, by dropping the words "co-accused", etc. These specific words consciously added to Section 15(1) by the 1993 Amendment of TADA so as to cover the confessions of

the co-accused would not have escaped the notice of Parliament when POTA was enacted. Apparently, Parliament in its wisdom would have thought that the law relating to confession of the co-accused, under the ordinary law of evidence, should be allowed to have its sway, taking a cue from the observations in Kartar Singh case at para 255. The confession recorded by the police officer was, therefore, allowed to be used against the maker of the confession without going further and transposing the legal position that was obtained under TADA. We cannot countenance the contention that the words "co-accused", etc. were added in Section 15(1) of TADA, *ex majore cautela*.

50. We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not to be brought within the sweep of Section 32(1). As a corollary, it follows that the confessions of the first and second accused in this case recorded by the police officer u/s 32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court u/s 30 of the Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of the Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here.

Section 10 of the Evidence Act

66. The next question is whether the confession of the accused which cannot be proved against a co-accused either u/s 32(1) of POTA or u/s 30 of the Evidence Act, would be relevant evidence against the co-accused involved in the conspiracy by reason of Section 10 of the Evidence Act. The section reads thus:

10. 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.

67. In *Kehar Singh v. State (Delhi Admn.)*; *Jagannatha Shetty, J.*, has analysed the section as follows: (SCC p. 734, para 278)

278. From an analysis of the section, it will be seen that Section 10 will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a *prima facie* evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator.

Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not, only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it.

68. Section 10 of the Evidence Act is based on the principle of agency operating between the parties to the conspiracy inter se and it is an exception to the rule against hearsay testimony. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co-conspirators (vide *Sardul Singh Caveeshar v. State of Maharashtra*).

10. After advertng to various decisions including the State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, finally this Court concluded as under:

In the light of the foregoing discussion, we have no option but to reject the contention of Mr. Gopal Subramaniam on the interpretation of Section 10, though not without hesitation. However, in view of the fact that the confessional statement is not being relied on, the question of applicability of Section 10 fades into insignificance.

The decision in *Navjot Sandhu's case* (supra) makes it clear that a confession / statement made u/s 32 of POTA by an accused person cannot be used as a piece of evidence for any purpose against the other co-accused. [Emphasis supplied]. We reiterate the same. In view of the said conclusion, the decision of the Full Bench is liable to be set aside insofar as the applicability of confessional statement of an accused u/s 32 of POTA against the other co-accused is concerned.

11. Mr. Akhil Sibal strenuously contended that after answering the reference, the Full Bench, without giving notice to the counsel, without affording any opportunity to the parties and without considering the merits of the matter disposed of the main matter which is not warranted and permissible. Generally, there is no bar in deciding and considering the merits of the matter referred to the Full Bench. Normally, after answering the reference by the larger Bench, it is for the reference Court to decide the issue on merits on the basis of the answers given by the larger Bench. In the case on hand, such recourse has not been followed by the Full Bench. Counsel for other respondents have not seriously disputed the grievance of the counsel for appellants herein. In the light of the assertion by the counsel and not seriously disputed by other parties, we are of the view that now it is for the Division Bench to consider the claim of the parties on merits on the basis of the ratio in *Navjot Sandhu's case* (supra).

12. Inasmuch as we are disposing of the Crl. Appeal Nos. 419-421 of 2008, we vacate the interim stay order granted by this Court on 18.10.2005 staying the trial pending before the Special POTA Court, Mumbai. In view of the same, no separate orders are required in Writ Petition (Crl.) No. 128 of 2008 and S.L.P.

(Crl.) ... (D. No. 17899 of 2008). However, in the light of the above discussion, we pass the following order:

(i) The impugned judgment of the Full Bench of the Bombay High Court dated 05.11.2004 is set aside and we clarify that the decision of this Court in Navjot Sandhu's case (supra) shall govern the issue raised by the appellant.

(ii) Criminal Writ Petition No. 1742 of 2004 with Criminal Application Nos. 4260-4263 of 2004, Criminal Writ Petition Nos. 1650, 1992, 2001 and 983 of 2004 be heard by a Division Bench on merits in the light of the decision in Navjot Sandhu's case (supra) as expeditiously as possible.

(iii) In view of the vacation of the interim order passed by this Court on 18.10.2005, the petitioners in Writ Petition (Crl.) No. 128 of 2008 and S.L.P. (Crl.) ... (D. No. 17899/2008) are free to move the POTA Court for appropriate relief and it is for the concerned court to decide as per law applicable.

13. We have not expressed anything on the merits of the claim made by the parties except pointing out the legal position.

14. In view of the foregoing reasons, Criminal Appeal Nos. 419-421 of 2008 are allowed on the above terms. Writ Petition (Crl.) No. 128 of 2008 and S.L.P. (Crl.) ... (D. No. 17899 of 2008) are disposed of as indicted above.