
(2002) 07 MAD CK 0146

In the Madras High Court

Case No : Criminal Appeal No's. 461 to 467 of 1989 and Criminal R.C. 134 to 136, 138 to 140 and 153 of 1986

State

APPELLANT

Vs

C. Vijayan, T. Shanmugham, V. Sathiamurthi, S. Ramar, P. Ramakrishnan, Subbammal, Subbarayulu, S.N. Sukumar, Balasubramanian @ Balan, Sathiyarayanan @ Sathiyar and S. Jayabalan
K. Ganesan, Thiagarajan, V.T. Murthy, Venugopala Rao, Subbaroyalu, P.G. Radhakrishnan and E. Murugaiah Vs State

RESPONDENT

Date of Decision : 12-07-2002

Acts Referred:

Dangerous Drugs Act, 1930 — Section 14A, 20, 21, 8(1)
Penal Code, 1860 (IPC) — Section 109, 120B, 381, 409, 411

Citation : (2002) 07 MAD CK 0146

Hon'ble Judges : A.K. Rajan, J

Bench : Single Bench

Advocate : O. Srinath, APP in C.A. Nos. 461 to 467 of 1989, Gopinath, S.C. for K. Jegannathan, in Criminal R.C. Nos. 134 to 136, 138 to 140 and 153 of 1986, R. Karunakaran, in Criminal R.C. Nos. 134, 135, 136 and 140 of 1986 and M. Venkatraman, in Criminal R.C. Nos. 138, 139 and 153 of 1986, for the Appellant; O. Srinath, Assistant Public Prosecutor in Crl. R.C. Nos. 134 to 136, 138 to 140 and 153 of 1986, Gopinath, S.C. for K. Jegannathan in C.A. Nos. 461 to 467 of 1989 and M. Venkatraman in C.A. Nos. 463, 465 and 467 of 1989, for the Respondent

Judgement

A.K. Rajan, J.—The Appeals are filed against the acquittal of the accused Nos.1, 2, 3, 5, 12, 14, 15, 16, 17 to 19 and the Revision Petitions are filed against the conviction of the accused Nos.3,4,7,8,9,10 and 13.

2. The brief facts are as follows: In and about the year 1981, A.1 was working as a Dispensing Chemist in Chennai Corporation; A.2 is his wife; A.3 is the brother of A.2; A.5 was the owner of a medical shop at Guntur, Andhra Pradesh; A.7 was a postal employee in Chennai; A.6 is the wife of A.7. A.8 was working as a

pharmacist in Government Royapettah Hospital; A.11 was the owner of medical shop at Nellore, Andhra Pradesh; A.12 to A.15 were working as pharmacist in E.S.I. Hospital, Tiruvottiyur; A.16 and A.17 were working as male nurses and A.18 was working as a pharmacist in Government Royapettah Hospital, Chennai.

3. Pursuant to criminal conspiracy between the accused-A.1, A.4 and A.8, A.12 to A.15, A.17, A.18 (who were employed as pharmacists, male nurses in Chennai corporation and Government Stanley Hospital, Government Royapettah Hospital and E.S.I. Hospital, Tiruvottiyur) during the period 1980-81, clandestinely removed the medicines supplied by the Government of Tamil Nadu to the hospitals, run by governmental agencies, for the purpose of supplying to the patients freely, and sold them to medical shops of A.5 and A.11 at Guntur and Nellore, and in turn, they received by way of exchange the Dangerous Drugs, Pethidine and Morphine, supplied to those medical shops. The drugs were brought to Chennai by A.19 and they were sold to public through A.2, A.3, A.6, A.7, A.9 and A.10. Thus, A.1 to A.19 were parties to the criminal conspiracy. The accused were charged for the offences punishable under various provisions of I.P.C. and also under the Dangerous Drugs Act, 1930.

4. The XIV Metropolitan Magistrate, Chennai framed the following charges. A.1 was charged under Sections 120B, 409, 411 I.P.C. read with Section 8(1)(a) read with Section 14(a) and Sections 20 and 21 of the Dangerous Drugs Act. A.2 and A.3 were charged for the offences under Sections 120B, 411 I.P.C. read with Sections 8(1)(a) and 14(a) and 20 and 21 of the Dangerous Drugs Act. A.4 to A.14 were charged u/s 120B. A.4 was charged u/s 411 read with Section 109 and 381 I.P.C. A.5, A.9, A.20 were charged for the offences u/s 8(1)(a) read with Sections 14-A, 20 and 21 of the Dangerous Drugs Act. A.6, A.7, A.9 and A.10, A.11, A.19 were charged for the offence u/s 411 I.P.C. A.8 was charged for the offence u/s 381 I.P.C. A.12 to A.15 were also charged for the offence u/s 409 I.P.C. A.16 and A.17 were charged for the offence u/s 381 I.P.C. read with Section 109 I.P.C. To prove the charges, the prosecution examined P.Ws.1 to 34 and Exs.P.1 to P.196 and M.Os.1 to 367 were marked. On the side of the accused, Ex.D.1 was marked.

5. The trial Court acquitted A.6 of all the charges; it convicted all the other accused of all the charges. The trial Court against A.1 and A.3 imposed a sentence of one year R.I. for each of the offences under Sections 120B and 411 I.P.C., and two years R.I. for the offence u/s 8(1) (a) read with Sections 14(a) and 21 of the Dangerous Drugs Act and also imposed a fine of Rs.500/-, in default to undergo six months R.I.; no separate sentence was imposed u/s 20 of the Dangerous Drugs Act. The trial court imposed against A.2 a sentence of three months R.I. for the offences under Sections 8(1)(a) read with 14(a) of the Dangerous Drugs Act; for the offence u/s 120-B read with 411 I.P.C., Section 21 of the Dangerous Drugs Act, a sentence of imprisonment till the rising of the Court was imposed; no separate sentence was imposed for the offence u/s 20 of the Dangerous Drugs Act. Against A.4, a sentence of two years R.I. for the

offence u/s 120B read with Section 381, and fine of Rs.500/- in default to undergo 3 months was imposed. Against A.5, one year R.I. for the offence u/s 8(1) read with Section 14(a) of the Dangerous Drugs Act and a fine of Rs.500/-, in default to undergo three months R.I. and for the offence u/s 21 of the Dangerous Drugs Act, one year R.I. was imposed; u/s 21 of the Dangerous Drugs Act, no separate sentence was imposed. Against A.7, sentence of one year R.I. for the offence u/s 120B read with Section 411 I.P.C. was imposed; A.8 was imposed a sentence of two years R.I. for the offence u/s 120B read with Section 381 I.P.C.; A.9 and A.10 were imposed a sentence of one year R.I. for the offence u/s 120B read with Section 411 and two years R.I. for the offence u/s 8(1)(a) read with Section 14(a) of the Dangerous Drugs Act and a fine of Rs.1000/-, in default to undergo six months R.I.; Against A.11, a fine of Rs.1000/- was imposed and in default to undergo six months R.I. A.12 and A.13 were imposed a sentence of two years R.I. for the offence u/s 120B read with Section 409 and a fine of Rs.100/-, in default to undergo one month R.I.; A.14, and A.15 were imposed two years R.I. the offence u/s 120B read with 409 I.P.C. A.16 and A.17, were imposed two years R.I. for the offence u/s 120B read with Section 382 I.P.C; A.18 was imposed a fine of Rs.500/-, in default to undergo three months R.I.; and A.19 was imposed a sentence of one year R.I. for the offence u/s 120B read with 411 I.P.C.

6. On appeal by the accused, the First Additional Sessions Judge, Madras acquitted A.1, A.2, A.5, A.12, A.14 to A.19 of all the charges; It confirmed the conviction only against A.3, A.4, A.7, A.9, A.10, A.11, and A.13. The learned Sessions Judge confirmed the sentence imposed on A.4, A.7, A.8, A.9 A.10, A.13 and A.18; but, A.3 was acquitted of the offence u/s 21 of the Dangerous Drugs Act. The sentence against A.11 was modified to that of fine of Rs.1,000/-; (he has paid the fine and did not prefer any revision against conviction).

7. Against the acquittal, the State has filed these appeal against acquittal. C.A.No.461 of 1989 is the appeal filed against the acquittal of A.5. C.A.462 of 1989 is the filed filed by the State against the acquittal of A.15. C.A.463 of 1989 is the appeal filed by the State against the acquittal of A.12 and A.14. C.A.464 of 1989 is the appeal filed by the State against the acquittal of A.17 and A.18. C.A.465 of 1989 is the appeal filed by the State against the acquittal of A.17 and A.18. C.A.466 of 1989 is the appeal filed by the State against the acquittal of A.19. C.A.467 of 1989 is the appeal filed by the State against the acquittal of A.16.

8. Challenging the conviction, the accused preferred revisions cases. CrI.R.C.134 is filed by A.8, CrI.R.C.135 of 1989 is filed by A.4, CrI.R.C.136 of 1989 is filed by A.9, CrI.R.C.138 of 1989 is filed by A.10, CrI.R.C.139 of 1989 is filed by A.3, CrI.R.C.140 of 1989 is filed by A.7 and CrI.R.C.153 of 1989 is filed by A.13.

9. During the pendency of these cases, A.8 died; a certificate has been filed to that effect. Hence, the revision filed by A.8 abated. All the appeals against acquittal and the revisions against convictions were heard together and the

common judgment is delivered.

10. On information that Accused-1 to 3 were selling medicines including Pethidine and Morphine. P.W.34 laid a trap on 18.3.1981 and sent P.W.1 as a decoy, giving one 50 rupee note after recording the number of the said Rs.50/- rupee note in the Mahazar, Ex.P.3; When P.W.1 went to the house of A.1, A.1 was not present; but A.2 and A.3 were present and A.2 sold 10 Pethidine and 10 Morphine injections for Rs.50/- that was handed over by P.W.1 to P.W.34. Then, P.W.34 prepared a Mahazar, Ex.P.4 and seized the 10 Pethidine and 10 Morphine injections. Immediately P.W.34 proceeded to the house of A.1 at Door No.18, Azad Street, Perambur along with the police party; A.2 and A.3 were in the house; A.3 was searched, the 50 rupee note given by P.W.34 to P.W.1 was found in the packet of A.3 and that was seized; Thereafter, the house was searched; large quantities of medicines and drugs were found and they were seized under the Mahazar Ex.P.2. P.W.34 took Ex.P.1, the thumb impression of A.2 in the seizure mahazar. During the search 16 ampules of Morphine and 688 ampules of Pethidine were also seized. Besides these narcotic drugs, a lot of drugs supplied to Government hospitals (some of them bearing Government Hospital stamp marks and some of them bearing E.S.I. Dispensary stamp marks) were found in card-board boxes as well as strewn on the floor; From the bed room of the house, another quantity of hospital goods, surgical instruments, (some of them had Government hospital logo/stamp marks) were also seized. A.2's thumb impression was also obtained in the seizure mahazar. They were found in the place and in possession of persons who had no licence or authority to purchase or stock or to deal with the goods. Further, they had no authority to possess Government Hospital drugs in such large quantities. Immediately, A.3 was arrested. A Search List was handed over to A.2. Thereafter, the case was registered against A.1 to A.3 by P.W.34; Ex.P.144 is the F.I.R.

11. On interrogation of A.3, it came to light to P.W.34, that there was a big racket by which the narcotic drugs like Morphine and Pethidine were regularly brought from Andhra Pradesh and sold in Tamil Nadu and that also the drugs supplied to various Government Hospitals as well as E.S.I. Dispensaries were illegally removed by the staff working in those Hospitals; they were purchased by A.1 and sold to A.5 and A.11 in Andhra Pradesh at a cheaper rate. On 23.3.1981, A.1 was arrested in his house. A.1 produced five piece of papers, Exs.P.126 to 130, in which names of hospital drugs, Exs.P.126 to 130 found written. A.1 also produced seven prescriptions, Ex.P.146 series for purchase of Morphine injections at Vijayawada at various dates prior to the registering of this case. On 1.4.1981, A.1 pointed out A.4 and his house was searched in the presence of P.W.6; From the house of A.4, six items of drugs bearing hospital stamp marks, M.Os.253 to 258 were seized under Ex.P.13 search list attested by witnesses. The search list, Ex.P.13 was also signed by A.4. Thereafter, A.1 took P.W.34 to the house of A.8 and his house was also searched in the presence of P.W.6 and M.Os.259 to 261 and Hospital store note book Ex.P.14 were recovered under search list Ex.P.15. Thereafter, on 7.4.1981, A.12 and A.13 pharmacists employed in E.S.I. Hospital,

Tiruvottiyur were arrested and examined. Thereafter, P.W.34 went to Vijayawada for investigation along with P.W.5 and a Drug Inspector and perused the records of the firm, "Siris" pertaining to manufacture and distribution of Pethidine injection. Ex.P.148 is the letter written by the Investigating Officer to M/s. Siris and Company seeking certain particulars relating to Pethidine injection manufactured in Batch No.01114; Ex.P.149 is the reply by "Siris" giving the list of persons to whom the Pethidine manufactured in that batch No.01114 was sent; Ex.P.150 is the list of supply of a portion of pethidine injections, the name of A.5 is found in the list; on perusal of the records, it was found that 50 boxes each containing 10 ampules of Pethidine have not been accounted for by Guntur Medical Hall belonging to A.5; but no complaint was made for non-receipt by A.5.

12. Thereafter, P.W.34 arrested A.14 and he pointed out the house of A.7 at Jegannatha Nagar, Arumbakkam. The house of A.14 was searched in the presence of A.6; 13 items of drugs and surgical items, M.Os.239 to 252 belonged to various Government Hospital and some of them bearing the Government logo marks and they were seized under Search List, Ex.P.5. On 1.8.1981, P.W.34 searched the house of A.9 on information at Door No.130, M.M.D.A. Colony, Arumbakkam; A.9 and A.10 were in the house. When the house was searched in the presence of witnesses, two suit cases, M.Os.262 and 264 and three card board boxes, M.Os.265 to 367 containing drugs bearing Hospital stamp marks or logo marks were seized. A railway ticket in the name of A.10 was also seized in Ex.P.31; Search Mahazar Ex.P.32 contains the list of drugs that were seized in the presence of witness, P.W.8; Copy of the Search List was handed over to the accused-9 and 10. The drugs that were seized also contained 25 ampules of Morphine injection; a Railway ticket in the name of A.10 for traveling from Chennai to kammam on 3.8.1981 along with reservation ticket was also found. These drugs were marked as M.Os.67, 265, 269, 270, 273, 276, 277, 278, 280, 282, 284, 286, 287, 288, 289; the seals were sent to Forensic Department. P.W.31 examined them and gave the opinion that the specimen seal of the hospital and the seals found in the drugs were found to be similar; the injections were examined and certified by Scientific Assistant, P.W.31, as pethidine and Morphine.

13. The lower Appellate Court found A.1 not guilty and acquitted A.1 of all the charges. It was of the opinion that though the medicines with the seal of the Government were seized from his house, since there was no complaint by the Corporation of Madras that there was theft of medicines from its medical stores/department. There is no evidence that the medicines seized from his house were stolen from Corporation Medical Dispensary. Therefore, there is no evidence to prove that the medicines seized from A.1's house were the medicines of the Corporation. Though the learned Sessions Judge has stated that when such medicines with Government seals were seized, onus is on that person to explain as to how it came to his possession, yet the learned Sessions Judge relied upon the confession statement of A.3, the brother-in-law of A.1 in which he has stated that it was A.3 who kept those medicines without the knowledge of A.1 and

therefore held that A.1 cannot be found guilty.

14. From the evidence of P.W.1, it is proved that on 18.3.1981, he went along with P.W.34 and other witnesses to Perambur where P.W.34 gave him a 50 rupee note and P.W.1 went to the house at No.18, Azad Street, Perambur; at that time, A.1 was not present. When P.W.1 asked for Pethidine and Morphine and gave M.O.1, a 50 rupee note, the boy who was there, informed a woman and when she came out, P.W.1 told her that he wanted Pethidine and Morphine for Rs.50/-, then the boy, A.3 gave 10 Pethidine and 10 Morphine injections given by the woman and that was handed over to P.W.34. This is corroborated by the Mahazar, Ex.P.3. P.W.2, the house owner, P.W.2 has stated that A.1 was a tenant in the house in the year 1981; he was living with A.2 his wife and A.3, the brother-in-law of A.1; A.2 has signed the seizure mahzar, Ex.P.1. Therefore, it is proved that the medicines were seized from the house of A.1. But, the lower Court has come to the conclusion that A.1 cannot be made responsible for possession of the medicines, because A.3 in his confession statement has stated that he kept the medicines without the knowledge of A.1. Admittedly, goods were seized from A.1's house. The confession statement of A.3 which excludes the complicity of A.1 cannot be relied upon to exclude A.1 or to absolve A.1 from discharging the onus on him to explain how the medicines came to his house.

15. The counsel appearing for the first accused submitted, merely because some medicines were seized from the house of A.1, it cannot be held that it was kept in the house of A.1 with the knowledge of A.1; unless the prosecution proves that they were in exclusive possession of A.1, he cannot be made responsible for the medicines seized from his house. In support of his argument, the counsel relied upon a decision of this Court, Ramaswami v. Emperor 1946, M.W.N. Cr. 136 wherein this Court held,

" The mere recovery of property from the house in which the two accused lived is not sufficient by itself to attribute guilty knowledge to either of them, unless there were some other circumstances connecting them with the possession of the property. "

16. The learned Additional Public Prosecutor relies upon a decision, In Re: Pachiripalli Satyanarayana, wherein this Court relying upon the earlier decision, held,

"But where stolen goods were found in a house inhabited by a joint Hindu family composed of a father, his son, and grandson and the circumstances were such that it was very improbable that such property could possibly have been placed when it was found without the connivance of some or all the members of the family, held that under the above circumstances, the conviction of the managing member u/s 411 Penal Code was a proper conviction. "

In the above decision In Re: Pachiripalli Satyanarayana, , this Court has further summed up as follows:

"in the case of a family living jointly in the same house, the head of the family will be presumed to be in possession of the illicit article found in the house; but this presumption is rebuttable and weight to be attached to it must vary according to the circumstances as laid down in Emperor v. Mir. Ahmad AIR 1937 Pes 73 (K). The strength of the presumption also varies according to the improbabilities that the articles having to its size etc., should have escaped the notice of the head of the family.Possession in order to justify a conviction under the Abkari Act need not necessarily be exclusive possession. The only point that must be proved in all these cases is that the accused or all the accused persons were aware of the presence of the illicit article and had control of the same. "

Further, the counsel relied upon a decision in the case Gopinath Naik Vs. The State, where the Orissa High Court has held that, that the junior; member cannot be held to be in possession of stolen properties for the mere fact that they were recovered from the house in his occupation and that he pointed out the place of his concealment. Proof of acts of appropriation or acts indicating conclusive control on the part required for the purpose of holding that he was in possession of the same.

17. Reading these two decisions together, it is clear that when contraband articles are seized from the house, the junior member in that house cannot be held to be in possession of those contrabands; only the head of the family is to be presumed to be in possession of the properties. Therefore, A.1 being the head of the family, there is a presumption that the contraband was in the possession of A.1. But the presumption is rebuttable. The Sessions Judge was of the view that the confession of A.3 rebutted the presumption against A.1. Therefore, the Sessions Judge held that the contraband was only in the possession of A.3 and not in the possession of A.1. The confession of A.3, a co-accused, exculpating A.1 cannot be the basis to rebut the legal presumption. Hence, the finding of the Sessions Judge that the prosecution has not proved possession by A.1 cannot be sustained. Therefore, the prosecution has proved that the contraband was in the possession of A.1.

18. From the evidence of P.W.5, it is proved that A.1 to A.3 have no licence to possess Pethidine or to import it from other States. P.W.5 has also stated that these medicines were seized from two rooms (pooja room and bed room) and some of the medicines were found strewn and some of the medicines were found underneath the cot in a room. A suggestion was put to him that the Government seals were affixed since the value of such medicines with the Government seal is much more than other medicines which are available in market; P.W.5 has further stated that they have not verified the stock register maintained in the Government hospital. From the evidence of P.W.5 and P.W.34, it is proved that 960 ampules of morphine were seized from pooja room and 688 ampules of pethidine were also seized from another room in the house of A.1. Section 32 of the Dangerous Drugs Act reads as follows:

" In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter-III, in respect of---

(a) any dangerous drug,

(b)

(c)

(d)

for the possession of which he fails to account satisfactorily."

Therefore, when it is proved that the dangerous drugs such as Morphine and Pethidine were seized from the house occupied by A.1, u/s 37, the Court may presume he has committed the offence. There is no evidence rebutting this presumption.

19. Apart from that, A.1 was the Dispensing Chemist in the Madras Corporation. From the Mahazar, it is seen that some of the medicines had special marking, viz., "GRH", "ESI supplies", "Government Logo", "Tamil Nadu Government Supply", "Hospital Use Only", "E.S.I. Supplies, Tiruvottiyur", "V.M.S. Government Royapettah Hospital." This proves that the medicines were originally supplied to Government hospitals and dispensaries. The Drug Inspector, P.W.5 has stated that the seal GRH referred to Government Royapettah Hospital. When examined u/s 313 Cr.P.C., the first accused has stated that A.3 was not residing with them and that only he and his wife were living in that house. Regarding the seizure, he has stated that he does not know anything about that. A.2 has stated in her statement u/s 313 Cr.P.C., that her house was not searched and she has not signed in the mahazar for search and that nothing was seized from her house. A.3 has stated that he was not residing in that house, though he admits that he was arrested and taken from the house of A.1. In the confession, Ex.P.37, given before the Magistrate by A.3 which was subsequently retracted, he has stated that on 3.3.1981 when A.1 was not present in the house, he kept the medicine in her sister's house and when she enquired about that, he told that it contains plastic materials. From this, the lower Appellate Court has come to the conclusion that this conclusively proved that A.1 had no knowledge of the medicines found in his house and it was kept without his knowledge and those medicines were kept by A.3 alone. The confession has been retracted by A.3; Further, A.2 has also not stated when examined u/s 313 Cr.P.C. that A.3 brought those medicines and told her that it was plastic materials. Therefore, taking all these together, no Court can come to the conclusion that it was A.3 who kept medicines in the house without the knowledge of A.1. Therefore that finding is nothing but perverse. Further, the manner in which these medicines were kept in the pooja room and the bed room, some of them were also found strewn all over the rooms, by no stretch of imagination, it can be concluded that only on the previous night, these medicines were brought to the house of A.1 by A.3 and

that was without the knowledge of A.1. Absolutely, there is no evidence to rebut the presumption except the retracted confession of A.3. Therefore, the retracted judicial confession which exculpates another accused, the occupier of the premises from where the contraband was seized cannot be the basis to rebut the presumption under law. Therefore, A.1 has not rebutted the presumption that these medicines were kept in his house without his knowledge. According to A.1, A.3 was not residing in that house at all. Therefore, being the head of the family, if illicit drugs are found from his house, he is legally presumed to be in possession of those contraband goods with the knowledge. Therefore, there is no basis for the first Appellate Court to come to the conclusion that A.1 was not proved to be in exclusive possession. Therefore, that finding is liable to be set aside and hence it is set aside.

20. From the evidence available on record, the offence against A.1 is proved beyond reasonable doubt. Therefore, the trial Court was right in convicting A.1 and that it was erroneous on the part of the first Appellate Court to set aside that conviction. Therefore, the acquittal against A.1 is set aside. In the result, the appeal against acquittal of A.1 is allowed in toto and the lower Court's judgment convicting A.1 is restored.

21. So far as A.2 is concerned, the medicines seized from the house of A.1 was in the exclusive possession of A.1. A.2 is the wife of A.1 and she cannot also be held to be in exclusive possession of those medicines. Further except that A.2 was in the house when the house of A.1 was searched, there is no other incriminating evidence against A.2. Even P.W.1 has not identified A.2. The 50 rupee note sent through p.W.1 was also not recovered from A.2. Therefore, there is absolutely no evidence to convict A.2. Hence, the lower Appellate Court was right in acquitting A.2. There is no reason to set aside that conclusion of the lower Appellate Court. Hence, the appeal against acquittal of A.2 is dismissed.

22. In so far as A.3 is concerned, A.3 was found in possession of the 50 rupee note handed over to P.W.1 by P.W.34; It was recovered from his pocket. It is proved by the evidence of P.W.1 that A.3 gave him the Pethadine and Morphine. Further, A.3 has given confession before the Magistrate; though it was retracted, the confession can be acted upon when it is found to be true by other witnesses. The learned Public Prosecutor referred to the judgment rendered in Pyare Lal Bhargava Vs. State of Rajasthan, wherein the Supreme Court has held that retracted confession may form the basis for conviction and there is no bar for basing the conviction only on the retracted confession. In another case in Abdul Ghani Vs. State of U.P., the Supreme Court has held even retracted extra-judicial confession can be the basis for conviction. In that confession, A.3 has stated that he was in possession of the medicines including Pethadine and Morphine and he sold it to P.W.1 and others. Therefore, the conviction of A.3 imposed by the Courts below is not illegal. Further, on the basis of the confession statement, medicines were recovered from other accused. Hence, the confession is true and can be relied upon. Therefore, the conviction of A.3 is legally sustainable; it

cannot be said that the conviction of A.3 is on the basis of inadmissible evidence or on the basis of no evidence. Therefore, the revision against conviction filed by A.3 is liable to be dismissed.

23. In so far as the acquittal of A.3 for the offence u/s 21 of the Dangerous Drugs Act, since he was convicted u/s 20 of the Act, he cannot also be convicted for the attempt to commit the same offence u/s 21. Hence the appeal against acquittal of A.3 is dismissed.

24. The conviction of A.5. the medical shop owner was set aside by the lower Appellate Court on the ground that there is no evidence against A.5. The Public Prosecutor submitted that A.5 was a registered dealer for Pethidine and P.W.5 had stated that on verification of the accounts of A.5 and that of "Siris", it is proved that the supply of 50 cases of Batch No.01114 Pethidine to A.5 on 24.1.1981 was not accounted by A.5. Pethidine of the same batch has been recovered from A.1's house. This is sufficient to prove the offence of A.5. The counsel appearing for A.5 submitted that A.5 has written a letter, Ex.P.10 that he did not get the supply from the manufacturer. Further, the counsel submitted that no incriminating materials were recovered from A.5 or at his instance. It proves that A.5 has not committed any offence.

25. From the evidence of P.Ws.5 and 34, it is proved that from the records of the firm, "Siris" relating to manufacture and distribution of Pethidine injections in Batch No.01114 and the records of A.5's shop together with the seizure of Pethidine and seizure of railway ticket to the place of A.5 from the house of A.1, the trial Court found A.5 guilty of the offence. But, in the absence of any recovery from A.5 and in the absence of any other evidence connecting to A.5 with A.1, it is very difficult to hold that A.5's complicity is proved beyond reasonable doubt. At the most, there may be a strong suspicion that Pethidine and Morphine were diverted by A.5 to A.1. But the suspicion alone is not sufficient to find A.5 guilty of the offence charged. Therefore, the lower Appellate Court is right in acquitting A.5. That finding of the lower Appellate Court cannot be set aside even assuming that this Court may come to a different finding. Hence, the acquittal of A.5 is confirmed and hence, the appeal against acquittal filed against A.5 is dismissed.

26. So far as A.19, another medical shop owner is concerned, there is absolutely no evidence to connect him with A.1 or A.3. Nothing has been recovered from A.19 or at his instance. Therefore, the acquittal of A.19 by the first Appellate Court is justifiable and hence, the appeal against acquittal against A.19 is dismissed.

27. The accused Nos.12, 14 and 15 are pharmacists in the E.S.I. Hospital in Thiruvottiyur. P.W.3, the witness who was examined to connect these accused, has turned hostile. Further, the other witnesses, P.Ws.24 to 30 were examined to prove that these witnesses were not supplied medicines by these accused. They also turned hostile. Therefore, there is no evidence to connect these accused.

The mere fact that some of the medicines recovered from A.1's house are found with E.S.I. marks, is not sufficient to come to the conclusion that these accused supplied medicines from the E.S.I. Hospital, Thiruvottiyur to A.1 or A.3. Therefore, there is absolutely no evidence against the accused and hence, the lower Appellate Court was right in acquitting these accused. Therefore, the appeals against acquittal against A.12, A.14 and 15 are dismissed.

28. Accused-16 and 17 are male nurses working in Royapettah Government Hospital. A.18 is the pharmacist working in Government Royapettah Hospital. Some of the medicines seized from A.1's house and at the instance of A.9 and A.10 from the house of one Padma contained the seal of Royapettah Hospital; that alone is not sufficient to hold that these accused-16 to 18 removed those medicines from Royapettah Government Hospital and gave it to A.1 and to others. There is no recovery at all from A.16 to A.18. P.W.33 who was examined to prove the complicity of these accused, turned hostile. Therefore, the only evidence available against A.16 to A.18 is the confession of A.3 who has stated in his confession, Ex.P.37 that these accused-16 to 18 used to take medicines from the hospital and hand it over to him for consideration. This being the confession of a co-accused, cannot be used against other accused. Therefore, this confession of A.3 cannot be the basis to convict A.16 to A.18. Hence, the acquittal of these accused by the lower Appellate Court is not illegal. Hence, the appeals against acquittal against A.16 to A.18 are dismissed.

29. Accused No.4 was a Male Nurse working in Stanley Hospital. He has filed a revision against his conviction. The counsel for the revision petitioner submitted that he was in possession of 6 tablets only; but it is not correct; it is only 6 kinds of tablets. The counsel for the revision petitioner submitted that only evidence against A.4, is that on the information furnished by A.4, the houses of A.6, A.7 were searched and the medicines having Government logo marks were seized. Apart from that, there is no evidence at all. A.7 is the postal employee; A.6 is the wife of A.7. There is no evidence to prove that A.7 was in exclusive possession of those medicines. In support of his contention, the counsel relied upon a decision reported in Ramaswami v. Emperor 1946 M.W.N. (Cri.) 136) But the witnesses who were examined to prove the recovery of medicines from A.7's house turned hostile. Therefore, there is no evidence to prove the seizure of medicines from the house of A.7. Further, there is no evidence to prove that these medicines alleged to have been found in A.7's house were stolen goods and therefore, he cannot be convicted u/s 411 also. Therefore, the conviction of A.7 is to be set aside. Further, A.14 who pointed out A.7 has been acquitted. Therefore, the counsel argued that in the absence of any evidence except the recovery, it cannot be said that A.7 was proved to be in exclusive possession of the medicines, nor that he was in possession of stolen properties.

30. From the evidence on record, it is proved that during the search of A.4's house, M.Os.253 to 258 were recovered; it is proved by the Mahazar, Ex.P.13. From the house of A.7, M.Os.239 to 252 containing Government logo marks were

seized. Ex.P.5 is the search list. It is true that the mahazar witness who was examined to prove the seizure turned hostile. But merely because the mahazar witness turned hostile, it cannot be held that the same was not proved. Even P.W.16 has admitted his signature in the mahazar, Ex.P.5. Therefore, it is sufficient to prove the seizure from A.7. The other evidence of the witness P.W.34 and M.Os.253 to 258 and Ex.P.5 corroborates the seizure from A.7's house. For the reasons stated above, since A.7 is the head of the family and A.6 is his wife, it has to be concluded that A.7 was in exclusive possession of the medicines. A.6 cannot be fastened with the liability for possession. The counsel for the revision petitioner further submitted that the evidence of P.W.31 being an expert opinion is not conclusive proof for the fact that these medicines were stolen from the Government Hospitals; Further, P.W.11 had stated in his evidence that no drugs have been stolen from his stores; further, he cannot say from which unit the medicines were taken; P.W.13 had also stated that he has not received any complaint about theft of medicines from the hospitals. Therefore, the counsel argued that there is absolutely no evidence to prove that these medicines were subject matter of theft from any of the Government hospitals; In the absence of such evidence, it cannot be held that the property that was recovered from A.4 is the stolen property. Further, the counsel contended that to prove the offence u/s 411, the proof of mens rea is also necessary. Therefore, in the absence of proof of mens rea, and in the absence of proof of theft, mere recovery alone is not sufficient to prove the offence; the article must be related to the article that was stolen and possession must be proved to be exclusive and conscious; That is, the counsel argued that only when the prosecution proves that the article was stolen and when the stolen property was proved to be recovered, the offence u/s 411 I.P.C. can be said to have been proved. Therefore, the counsel submitted, that, the conviction of the lower Appellate Court is not sustainable and hence they are entitled to be acquitted. P.W.11 is a Medical Officer in Royapettah Government Hospital; the mere fact that he had not reported about any theft from his stores, it cannot be said that nothing was stolen from the Government Hospitals. All that he has stated is that no medicines were stolen from his stores. But the fact remains that medicines were found to be in possession of A.4 and A.7; and they contain the Government logo marks. Such medicines can only be found in the Government hospitals or with the patients to whom it was prescribed in the Government hospitals. There cannot be a third category of persons who are entitled to be in possession of the property. Therefore, once it is proved that the medicines belonging to the government hospitals, the initial burden of proof has been discharged by the prosecution; absolutely, there is no evidence on behalf of the accused to prove legal possession. It is impossible for the medicines supplied to the Government hospitals to be found in bulk quantities in any other place except the hospital stores. Therefore, the mere fact that the medicines with the Government logos were possessed by the accused read with the evidence of P.W.31, which is acceptable, is sufficient to prove mens rea and also the offence of theft. It is not necessary that only when a complaint of theft has been given, it can be presumed to be a stolen property, the nature of possession is only illegal

possession. Therefore, there is no other possibility except that it was stolen from the Government stores. The fact that the person who was in medical stores has not given any complaint, goes to show that the authorities were not diligent enough or responsible enough to make a complaint about theft of medicines. This lethargic attitude of the persons responsible for the custody of the medicines cannot be taken advantage by the persons who were found to be in possession of the medicines. Therefore, the conviction of A.4 and A.7 cannot be said to be illegal. Hence, the revision petition filed by A.4 and A.7 against the conviction is liable to be dismissed and hence, dismissed.

31. The counsel appearing for the Revision Petitioner filed by A.9 and A.10 argued that P.W.34 has stated nothing was recovered from the house of A.9; A.10 has no connection with the house from which these medicines were seized; It was seized from one Padma; who has been examined only as a witness; A.9 and A.10 are not related to each other. From this evidence, it is not sufficient to hold that A.9 and A.10 were found to be in possession of these medicines. Apart from this, there is no evidence except the confession of A.3 to connect A.10; Since A.3's confession is the confession of the co-accused, it cannot be relied upon. The charge against A.10 cannot be said to be proved. Therefore, the conviction of A.9 and A.10 is not sustainable and it has to be set aside. In his evidence, P.W.8 has stated that the house at Door No.130, "J" Block, M.M.D.A. Colony, Arumbakkam was searched and at that time, A.9 and A.10 were present along with one Padma. From that house, two suit cases, M.Os.263 and 264 and three card board boxes were seized. In the suit case and in the card board boxes, M.Os.265 to 367 were seized; They were seized by mahazar attested by witnesses; these medicines contained the Government logos and Government Hospital seals and rubber stamps; He also states that in the search list, signatures of A.9 and A.10 were obtained; Ex.P.32 is the search list. P.W.34 has also stated A.9 and A.10 were in the house at M.M.D.A. Colony and when it was searched, and M.Os.263 to 367 were seized from the house. Among the documents which were seized from that house, a railway ticket in the name of A.10 and a marriage invitation issued to A.10 were also seized under the mahazar, Exs.P.31 and P.32. A copy of the search list was given to A.9 and A.10. It contained morphine injections. In the cross-examination by A.9 to A.11, P.W.34 has stated that A.9's usual residence is at Nehru Nagar, Madras and the recovery of M.Os. was at his another residence at Arumbakkam which he had taken for rent; he denied the suggestion that A.9 and A.10 were not arrested from that house. Accused-9 and 10 in the statement u/s 313 Cr.P.C. has stated that they had no connection with the house from which these M.Os. were seized. P.W.12 who is the owner of the house at No.J.130, M.M.D.A. Colony, Arumbakkam has stated in his evidence that this house was rented to one Padma. According to him, A.10 Venugopal is Padma's father's brother. After coming to know the fact that contraband medicines were seized from that house, he asked them to vacate the house. In the cross-examination, he has stated that the house was rented out only to Padma. Further, he has stated that during his

examination by the police, he did not say that A.10 accompanied Padma at the time of getting the house for rent. From this evidence of P.W.12, that A.9 was the tenant of this house has not been proved. There is no evidence even to show that A.9 was residing in that house. No other witness has been examined to prove that A.9 was in fact residing in that house. Similarly, there is no evidence that A.10 was residing in that house along with Padma. Therefore, the only evidence against A.9 and A.10 is the fact that they were present in the house when that house was searched. In the circumstances, it is difficult to hold that the house was rented by A.9 and the contraband was in exclusive possession either of A.9 or A.10, since the house was rented by one Padma who was examined only as a witness, and not been arrayed as an accused. The presumption is the person who has rented the house is in possession of the contrabands seized from that. There is no material to corroborate the evidence of P.W.34 that Padma was the concubine of A.9 and therefore, from this evidence, it cannot be held that A.9 or A.10 were in exclusive possession of the medicines. This proposition gets strengthened by the fact that even according to the prosecution, A.9 was residing in Nungambakkam. Therefore, in the absence of any evidence that this house was rented by A.9 and was in possession of A.9, it is not possible to hold that A.9 was in exclusive possession of the contrabands. Therefore, the conviction and sentence against A.9 and A.10 cannot be sustained. The appellate Court convicted A.9 and A.10 only on the ground that they were present in the house and the search list was signed. The mere presence of A.9 and A.10 cannot be a proof that they were in exclusive possession of the house. Therefore, a reasonable doubt arises as to whether A.9 was a tenant in that house and whether it was in exclusive possession of A.9 and A.10. The accused are entitled to the benefit of doubt. Therefore, A.9 and A.10 are liable to be acquitted on the basis of the benefit of doubt. The invitation given to A.10 and the railway ticket of A.10 would not be the conclusive proof that A.9 and A.10 were residing in that house. Therefore, the conviction of A.9 and A.10 is liable to be set aside. Hence, it is set aside.

32. The counsel appearing for A.13 has submitted that except for the confession of A.3, there is no other evidence to connect A.13. This argument is not acceptable. A.13 has given confession, Ex.P.41 before the Magistrate. In his confession, he has stated that he was working as pharmacist in E.S.I. Hospital and A.1 Ramakrishnan was introduced to him by his colleague, Balan, accused No.18. He along with Balan, Sathiamoorthy used to sell these medicines to A.1 and out of the sale amount, 50% will be given to the lady doctor working in the hospital. This confession of A.13, though retracted subsequently, is sufficient to hold that he has committed theft of medicines from the hospitals where he was working. Therefore, A.13 was guilty of the charges. The conviction imposed by the lower Appellate court cannot be said to be illegal.

33. The Public Prosecutor referred to the judgment of the Supreme Court in Nishi Kant Jha Vs. The State of Bihar, where the confession of the accused contains the exculpatory confession and such exculpatory confession may be ignored and it is

permissible to believe a part of the portion of the confession as held by the Supreme Court in Bhagwan Singh Rana Vs. The State of Haryana, . Therefore, the confession of A.13 is sufficient excluding the exculpatory portion to hold that A.13 is guilty of the offence charged. Therefore, the conviction imposed by the lower Appellate court is not illegal. Hence, the revision against conviction of A.13 is dismissed.

34. The lower Appellate Court imposed a maximum sentence of two years on all the convicted accused. All the accused were inside the jail for some time. Considering the fact that it is more than 22 years and in view of the fact that the accused suffered a portion of the sentence, they need not once again be sent to jail. Hence, the sentence imposed against all the convicted accused is modified to that of the period already undergone.

35. I. (i) In the result, Criminal Appeal No.464 of 1989 is partly allowed; Appeal filed against the acquittal of A.1 is allowed. The order of acquittal of A.1 by the lower Appellate Court is set aside and the conviction of A.1 by the trial Court is confirmed, but the sentence is modified to the period already undergone. The same appeal against the acquittal of A.2 and A.3 is dismissed, confirming the judgment of the lower Appellate Court, in so far as A.2 and A.3.

(ii) Criminal Appeal No.461 of 1989 filed against the acquittal of A.5 is dismissed;

(iii) Criminal Appeal No.462 of 1989 filed against the acquittal of A.15 is dismissed;

(iv) Criminal Appeal No.463 of 1989 filed against the acquittal of A.12 and A.14 is dismissed.

(v) Criminal Appeal No.465 of 1989 filed against the acquittal of A.17 and A.18 is dismissed;

(vi) Criminal Appeal No.466 of 1989 filed against the acquittal of A.19 is dismissed;

(vii) and Criminal Appeal No.467 of 1989 filed against the acquittal of A.16 is dismissed.

II. (i) Crl.R.C.134 of 1986 abated.

(ii) Crl.R.C.136 of 1986 filed by A.9 is allowed. (iii) Crl.R.C.No.138 of 1986 filed by A.10 is allowed. The conviction and sentence imposed on A.9 and A.10 are set aside.

III. (i) Crl.R.C.135 of 1986 filed by A.4 is dismissed; (ii) Crl.R.C.139 of 1986 filed by A.3 is dismissed; (iii) Crl.R.C.140 of 1986 filed by A.7 is dismissed; and

(iv) Crl.R.C.153 of 1986 filed by A.13 is dismissed. The conviction A.3, A.4, and A.13, is confirmed. However, the sentence of imprisonment imposed against them is modified to that of the period already undergone. In so far as A.7 is concerned, considering the fact that he has committed the offence u/s 411 I.P.C.,

he is released u/s (4)(1) of the Probation of Offenders Act, 1958 and he is entitled to the benefit of Section 12 of the Act.