
(2009) 08 DEL CK 0437
In the Delhi High Court
Case No : Criminal A. 315 of 2007

Vinod Kumar Sahadev

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Constitution of India, 1950 — Article 136, 21
Customs Act, 1962 — Section 108, 138B, 138B(1)
Evidence Act, 1872 — Section 24, 25, 26, 27, 28
Foreign Exchange Regulation Act, 1973 — Section 35, 40, 50, 71, 71(2)
Penal Code, 1860 (IPC) — Section 164

Citation : (2010) 1 Crimes 204 : (2010) 6 RCR(Criminal) 1573

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Sangita Bhayana, for the Appellant; Deepak Anand and Rajdipa Behura, for the Respondent

Judgement

Mool Chand Garg, J.—The appellant had filed a writ petition impugning the order dated 23.3.2007 passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as "respondent No. 2") which writ petition was converted as an appeal u/s 35 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA, 1973"). By the impugned order, the respondent No. 2 modified the order dated 10.4.1991 passed by the Special Director, Enforcement Directorate (hereinafter referred to as "respondent No. 3") to the extent that the penalty of Rs. 8,50,000/- imposed upon the appellant was reduced to Rs. 5,00,000/- in respect of three show cause notices for the alleged contravention of the provisions of Section 8(1) and 8(2) of the FERA, 1973.

2. The respondent initiated the proceedings against the appellant relying upon the statement made by one Surinder Kumar Dhawan, who, as alleged, was arrested by the Customs Authorities at Palam Airport on 13.9.1985 and was found in possession of Saudi Riyals 43,500, DM 12,500 and DHs 2000 while he was moving towards security check at the airport for going to Singapore by KLM

Flight and stated that the foreign exchange was received by him from Vinod Kumar Sahadev, the present appellant.

3. As a follow up action, the respondent conducted a search at the residential and business premises of the appellant, Surinder Kumar Dhawan and B.S. Malik. It is the case of the respondents that during the aforesaid search some loose sheets were recovered from the house of Vinod Kumar, which had some calculations and which were described as calculations of dealing in foreign exchange by the petitioner with one Kasturi Lal.

4. The respondent claims to have recorded the statement of the present appellant u/s 40 of the FERA, 1973 on 13.9.1985 alleging that the appellant accepted having handed over foreign exchange in question to Surinder Kumar Dhawan and to Kasturi Lal and his involvement in similar transactions between September 1984 till 12.9.1985 to the tune of Rs. 30 lakhs.

5. It is also the case of the respondents that the statement of Kasturil Lal was also recorded where he has denied his involvement in any such transaction, yet three show cause notices were issued to all, besides launching of prosecution against the present appellant.

6. The criminal complaints were also filed by the respondent in respect of the same facts. However, the appellant and Kasturi Lal were discharged in one of the complaint case by the learned ACMM, New Delhi on 3.12.1998. In the second complaint, the appellant, B.S. Malik and Kasturi Lal were also discharged by the learned ACMM, New Delhi on 8.3.1999.

7. According to the appellant, he had retracted his alleged voluntary statement recorded by the respondent, on 14.9.1984 itself. According to him the said statement was not given by him voluntarily but was given under duress and that the same was obtained by using force by the officers of the respondent. It is in these circumstances, the appellant has assailed the order of the Tribunal dated 23.3.2007 on the following grounds:

(i) There is no evidence against the appellant that he contravened the provisions of Section 8(1) and 8(2) of the FERA, 1973.

(ii) The statements which the respondents rely upon and states was voluntary statements made by the appellant, Surinder Kumar Dhawan, B.S. Malik, stand retracted and was obtained under duress and fraud and there is no corroboration of those statements by any independent witness.

(iii) The stand of the respondent that the recovery of foreign currency is corroborated by the voluntary statements of appellant, Surinder Kumar Dhawan and B.S. Malik is not correct.

(iv) No corroborative evidence has been led by the respondent to prove the retracted confessional statement inasmuch as no opportunity was granted to cross-examine the officials who recorded the statement of Surinder Kumar

Dhawan, B.S. Malik, Kasturi Lal and the appellant. Even the punch witnesses who were the witnesses to the alleged recovery of foreign exchange from Surinder Kumar Dhawan were also not produced during the course of adjudicatory proceedings and they were also not permitted to be cross-examined. It is also stated that even the allegations made by the appellant in his retracted confession sent by the registered post on 14.9.1985 itself, receipt of which is not disputed by the respondent, has not been refuted by the respondent inasmuch as none of the officers who recorded the statement of the petitioner has come in the witness box to corroborate the version of the respondent. Even the annexure to the panchnama containing the details of the documents recovered allegedly was also not produced by the department, which makes the recovery of the documents from the residence of the petitioner doubtful. The witnesses who witnessed the alleged recovery of the incriminating documents from the appellant have been examined by the respondent in the course of adjudicating proceedings. In fact, no reply has been filed to the allegation made by the appellant about the exercise of duress and force upon him while recording his alleged statement on 13.9.1985.

8. It is thus submitted that once the recovery of foreign currency has not been proved in accordance with law and there is no corroboration of the documents seized or the statements made by other accused persons, the imposition of penalty on the appellant who is even otherwise not in a position to pay the same cannot be sustained.

9. It would be appropriate to take note of the judgment of the Supreme Court in K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, , wherein it is held:

20. The question then is whether the retracted confessional statement requires corroboration from any other independent evidence. It is seen that the evidence in this case consists of the confessional statement, the recovery panchnama and the testimony of PWs 2, 3 and 5. It is true that in a trial and proprio vigore in a criminal trial, courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the IPC it is now well-settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculcating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise

like any other person as was held in *Bhagwan Singh v. State of Punjab* AIR para 30. If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seeks corroboration of the retracted confession from other evidence. The confession must be one inculcating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of a given set of facts. The high degree of proof and probative value is insisted in capital offences.

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

10. Reliance has also been placed on a judgment delivered in the case of *Vinod Solanki Vs. Union of India (UOI)* and Another, , wherein the Apex Court has discussed the effect of the retracted confession for the purpose of levy of penalty under the FERA, 1973. The relevant portion of the judgment is quoted below:

14. As indicated hereto before ,the courts below proceeded on the premise that a confession was made by appellant, although retracted later, that he had acquired foreign exchange during the period 1993-94 on the basis of forged import

documents where after he got the same transferred to his bank account Nos. 564-000-4888-5 and No. 96300-1254-9 in Standard Chartered Bank, Asian House VI Branch and American E, Bank, Central Branch, at Hongkong and misutilized the said foreign exchange and failed to import any rough diamonds for which purpose the same was acquired.

15. The questions which would arise for our consideration are: (1) whether the appellant had made bald statement at the time of retraction alleging threat and coercion so as to shift the burden of proof from him to the Enforcement Directorate; and (2) whether consolidated penalty could have been imposed only on the basis of such retracted confession.

16. Indisputably, a confession made by an accused would come within the purview of Section 24 of the Indian Evidence Act, 1872, which reads as under:

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

17. The proceeding under the Act is quasi criminal in nature. Section 50 of the Act is a penal provision prescribing that in the event of contravention of any of the provisions of the Act or of any rule, direction or order made there under, a penalty not exceeding five times the amount or value involved in any such contravention may be imposed.

18. Section 71 of the Act provides for burden of proof in certain cases. Sub-section (2) of Section 71 provides that the burden of proving that the foreign exchange acquired by such person has been used for the purpose for which permission to acquire it was granted shall be on such person.

19. The Act is a special Act, which confers various powers upon the authorities prescribed therein. Even the salutary principles of mens rea and actus reus in a proceeding under the Act may not be held to be applicable. It is now a well settled principle that presumption of innocence as contained in Article 14 of the International Covenant on Civil and Political Rights is a human right although per se it may not be treated to be a fundamental right within the meaning of Article 21 of the Constitution of India.

[See Article 11(1) of the Universal Declaration of Human Rights (1948) and Article 6.2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (1950) and Article 14.2 of the International Covenant on Civil and Political Rights (1966)]

20. Sub-section (2) of Section 71 places the burden of proof upon an accused or a proceeded only when the foreign exchange acquired has been used for the purpose for which permission to acquire it was granted and not for mere possession thereof. The Parliament, therefore, advisedly did not make any provision placing the burden of proof on the accused/proceedee.

21. The Act, thus, does not provide for a "reverse burden". No presumption of commission of an offence is raised under the Act. Even in a case where the law provides for a burden on the accused having regard to the aforementioned presumption of innocence as a human right, this Court in *Noor Aga v. State of Punjab* and Anr. 2008 (9) Scale 681 held as under:

114. Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section 138B deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner u/s 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

11. After making the aforesaid observation, taking into consideration the stand of the appellant that he had retracted the confession allegedly relied upon by the Enforcement Directorate, the Apex Court further observed:

33. In *Gulam Hussain Shaikh Chougule Vs. S. Reynolds*, Suptd. of Customs, Marmgoa, , this Court refused to exercise its discretionary jurisdiction under Article 136 of the Constitution of India opining that the confession was rightly held by the High Court to be voluntary in nature.

34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a

conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

35. In the instant case, the Investigating Officers did not examine themselves. The authorities under the Act as also the Tribunal did not arrive at a finding upon application of their mind to the retraction and rejected the same upon assigning cogent and valid reasons there for. Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or a quasi criminal case but there cannot be any doubt whatsoever that the court is obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage.

36. Appellant is said to have been arrested on 27.10.1994; he was produced before the learned Chief Metropolitan Magistrate on 28.10.1994. He retracted his confession and categorically stated the manner in which such confession was purported to have been obtained. According to him, he had no connection with any alleged import transactions, opening of bank accounts, or floating of company by name of M/s Sun Enterprises, export control, Bill of Entry and other documents or alleged remittances. He stated that confessions were not only untrue but also involuntary.

37. The allegation that he was detained in the Office of Enforcement Department for two days and two nights had not been refuted. No attempt has been made to controvert the statements made by appellant in his application filed on 28.10.1994 before the learned Chief Metropolitan Magistrate. Furthermore, the Tribunal as also the Authorities misdirected themselves in law insofar as they failed to pose unto themselves a correct question. The Tribunal proceeded on the basis that issuance and services of a show cause notice subserves the requirements of law only because by reason thereof an opportunity was afforded to the proceeded to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law. The statement made by the appellant before the learned Chief Metropolitan Magistrate was not a bald statement. The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceeded does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent

examination of the factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act.

12. Referring to the show cause notices issued in that case based upon the confessional statement, the Court further observed:

40. In Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd. and Others, , this Court held as under:

12. Per contra, learned Counsel for the respondents submitted that there is no material that the respondents had ever been parties to the so called arrangement, even if it is accepted for the sake of arguments but not conceded, that such arrangement was in reality made. There was no material brought on record to show that the respondents had any role to play in such matters as alleged. Even the show cause notice did not refer to any particular material to come to such a conclusion. Therefore, the Commissioner and the CEGAT were justified in holding that the respondents were entitled to the benefits.

13. We find that in the show cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise holder (sic franchiser). On a perusal of the show cause notice the stand of the respondents clearly gets established.

14. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted.

41. For the reasons aforementioned, the order of the Tribunal and consequently the impugned judgment and order cannot be sustained. They are set aside accordingly. This appeal is allowed. The amount of Rs. 2,65,000/- which is with the Department shall be refunded to the appellant within four weeks from date. In the facts and circumstances of the case, there shall be no order as to costs.

13. In view of the aforesaid, it is apparent that once the alleged statement made by the appellant on 13.9.1985 was retracted on 14.9.1985 itself with allegations of force and duress upon the appellant, the onus to prove that the said

statement was voluntary shifted upon the respondent, which onus has not been discharged by them and it is on that basis even the criminal prosecution resulted in the discharge of the appellant and other accused persons.

14. The learned Counsel appearing on behalf of the respondent though submitted a written note opposing the case of the appellant but has not been able to substantiate the proof of alleged statement of Surinder Kumar Dhawan, which is the basis of the involvement of the present appellant in this case. The voluntariness of the statement of the present appellant has also not been proved. No copy of the statement dated 2.7.1986 has been placed on record. Thus, there is no evidence which may prove the role of the appellant in this case. Further, as stated above, in this case the enquiry is not fair inasmuch as no opportunity has been granted to the appellant to cross-examine the witnesses who recorded the statement of the appellant and of other accused persons or the witnesses to the recovery of the incriminating documents or the witnesses to the recovery of the alleged foreign exchange from Surinder Kumar Dhawan and as such even the lighter burden to prove their case by preponderance of probability has not been discharged by the respondent. More so, they have also not been able to lead evidence before the adjudicating authority that the alleged confessional statement, on which reliance has been placed by the respondents, was made voluntarily and was not recorded by using any force upon him as alleged by the appellant in his written communication sent on 14.9.1985.

15. In view of the aforesaid, I find no ground for imposition of penalty upon the appellant in this case and consequently, the penalty imposed by respondent No. 3 vide order dated 10.4.1991, upheld by respondent No. 2 though by reducing the penalty amount, is not sustained. Accordingly, the appeal filed by the appellant is allowed. In case any amount has been deposited by the appellant, the same shall be returned to him within three months from today.

16. Trial Court record be sent back. Crl.M.A.6780/2007 (stay) In view of the orders passed above, the application is disposed of as having become infructuous.