

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2015

CORAM:

THE HONOURABLE **MS. JUSTICE R. MALA**

Criminal Appeal No.821 of 2006

Union of India
Rep. by its Enforcement Officer
Enforcement Directorate
Chennai.

.. Appellant/Complainant

v.

Lal Chand

.. Respondent/Accused

Prayer:Criminal Appeal filed under Section 378 CrPC. against the judgment of acquittal dated 25.07.2006 in E.O.C.C.No.499 of 2002 on the file of the learned Additional Chief Metropolitan Magistrate, E.O.I., Egmore, Chennai.

For Appellant : Mr.Dhandapani
Special P.P. for Enforcement Directorate

For Respondent : Mr.B.Satish Sundar
Mr.N.Balaji

J U D G M E N T

The Criminal Appeal arises out of the judgment of acquittal dated 25.07.2006 in E.O.C.C.No.499 of 2002 on the file of the learned Additional Chief Metropolitan Magistrate, E.O.I., Egmore, Chennai.

2.The case of the prosecution based on the prosecution witnesses is as follows:

(i)On the side of the prosecution, P.W.1 and P.W.2 were examined and Exs.P1 to P14 were marked.

(ii) On 10.04.1990, P.W.1/Enforcement officer along with team officers was proceeding near Dadha Pharmaceutical and Co., Nainiappa Naicken Street, intercepted two persons by name Haja Mohideen and Lalchand/accused herein at 4.00 p.m. While intercepting Haja Mohideen, P.W.1 found Rs.4 lakhs wrapped in a newspaper kept in a polythene bag and two chits from his pocket and the search was conducted in the presence of two independent witnesses. But P.W.1 could not recover anything from the respondent/accused.

(iii)On examination, P.W.1 came to know that the said Haja Mohideen reached the place of occurrence in a car and after searching, he found Rs.5 lakhs wrapped in news paper and also found two persons by name Munavar Hussain and Syed Mohamed Buhari, who

were sitting at the rear side of the car. Nothing could be recovered from Munavar Hussain. But P.W.1 recovered two letters on search of Syed Mohammed Buhari. The total currency of nine lakhs and other documents were seized under a mahazar Ex.P1 dated 10.04.1990.

(iv) The said Haja Mohideen in his statement Ex.P5 admitted that he had been doing the business of receiving and making compensatory payments on behalf of one Abdul Khader of Dubai for a commission of Rs.500/- for the distribution of one lakh rupees. The seized amount of Rs.4 lakhs from him was received from the respondent herein as per the instructions of Abdul Khader and the seized amount of Rs.5 lakhs from his car was received by him from an unknown person at Nainiappa Naicken street as per the instruction of Abdul Khader on 10.04.1990.

(v) Thereafter, P.W.1 issued Ex.P6 summons for further investigation. The said Haja Mohideen appeared before him on 11.04.1990 and gave further statement Ex.P7.

(vi) On 05.08.1990, the accused/respondent herein retracted his confession made in Ex.P7 and the reply of Additional Director was marked as Ex.P8.

(vii) According to P.W.1, Haja Mohideen received more than one crore and made payments on behalf of said Abdul Khader of Dubai

to various persons in India and the present accused received Rs.4 lakhs from an unknown person and paid the same to Haja Mohideen. Hence, Ex.P9 show cause notice was issued to the said Haja Mohideen and to the respondent herein by the Special Director of Enforcement, New Delhi.

(viii)The Additional Commissioner of Customs adjudicated the matter and imposed a penalty of Rs.1,00,000/- on Haja Mohideen and Rs.75,000/- on the respondent and the copy of the Adjudication order was marked as Ex.P10. But both of them did not pay the penalty. The seized amount of Rs.9 lakhs was ordered to be confiscated to the Central Government by the Adjudication Authority.

(ix) P.W.2/Enforcement Officer was called by the Assistant Director of Enforcement Directorate, Chennai and was informed that the accused only known Hindi. On his instruction, P.W.2 recorded Ex.P12 statement of the present accused. During the course of the statement, the accused surrendered one rupee currency note which was taken over by him. Ex.P13 summons was issued to the accused under Section 40 of FERA Act, 1973 for his appearance on 11.04.1990 at 11.00 hours. On 11.04.1990, the accused appeared and gave further statement before P.W.2 in his own handwriting in Hindi and

translated version was marked as Ex.P14. The accused was arrested by P.W.1 on 11.04.1990.

3.The Trial Court placed the incriminating evidence before the accused under Section 313(1)(b) of Cr.P.C. and the accused denied the same in toto. On the side of the defence, D.W.1 was examined and Exs.D1 to D14 were marked. After considering the oral and documentary evidence, the trial Court acquitted the accused, against which, the present appeal is preferred by the Enforcement Directorate.

4.Challenging the judgment of acquittal passed by the trial Court, learned Special Public Prosecutor has submitted the following points for consideration:

(i)The trial Court has erred in acquitting the accused on the ground that the accused has not contravened the provision of Section 9(1)(b) and 9(1)(d) of FERA Act, 1973 and not guilty of any offence under Section 56(1)(i) of FERA Act and Sections 49(3) and (4) of FEMA Act, 1999.

(ii)On the basis of statement given by the first accused Haja Mohideen under Exs.P5 and P7, the accused/respondent herein

was implicated. On 10.04.1990, the respondent herein has given Ex.P12 statement and on summons under Ex.P13, he appeared on 11.04.1990 and gave another statement Ex.P14, which has not retracted the statement in Ex.P12. But once the accused has accepted the commission of offence, he has to prove that he is innocent, but he has not proved the same. The trial Court has also failed to consider the same.

(iii) Further, the trial Court erroneously held that because of non conducting joint trial as per Section 30 of the Indian Evidence Act, statement given by A1/Haja Mohideen cannot be taken as an evidence.

He has drawn attention of this Court through Sections 59, 71 and 72 of the FERA Act and submits that the respondent/accused has to prove that he is innocent and hence, burden is shifted upon the accused to prove the same. Therefore, he prayed for conviction of the accused/respondent and allowing this appeal.

5.Resisting the same, learned counsel for the respondent/accused submits that there is no evidence to show that the seized amount of Rs.4 lakhs from A1 was paid by the respondent. The ingredients of Sections 9(1)(b) and 9(1)(d) of FERA Act, 1973 have not

been made out. There is no evidence to show that on the instruction of non resident of India namely, Abdul Khader, the accused herein received amount and handed over to A1. The statements alleged to have given by the accused under Exs.P12 and P14 are retracted by him and to prove the same, respondent was himself examined as D.W.1 and marked Exs.D1 to D14 on his side. He has also deposed that the statements were obtained by threat and coercion and he was beaten by the Enforcement Wing during enquiry. It is further submitted that the evidence of co-accused cannot be looked into unless the case has been tried jointly. The trial Court has considered all the aspects in proper perspective and rightly acquitted the respondent/accused and hence, he prayed for dismissal of the appeal. To substantiate his arguments, he relied upon the following decisions:

(i) In **2013 (288) E.L.T.366 (Del.) (Krishan v. R.K.Virmani, Air Customs Officer)** and **AIR 1964 SC 1184 (Haricharan Kurmi and another v. State of Bihar)**, wherein it was held that confession of co-accused, its use how to be made in joint trial. But in the case on hand, no joint trial was conducted and hence, confession of co-accused cannot be used.

(ii) In the Judgment of Bombay High Court reported in **2009 (247) E.L.T. 97 (Bom.) (Assistant Collector of Customs (Pre.), Bombay v. Ahmed Abdulkarim)**, in para-21 and 22, it was held that retracted confessional statements of the co-accused in the same case cannot be acted upon to convict the accused without corroboration as to the connection of the accused with the crime. If two views are possible, the view favouring the accused should be taken into consideration. There is no evidence to show that the accused has retracted his statement.

(iii) In the judgment of Delhi High Court reported in **2010 (252) E.L.T. 57(Del.) (Directorate of Revenue Intelligence v. Moni)**, in para-10 and 11, it was held that retracted statement cannot be the sole basis for conviction, when it was not corroborated by other witness and no recovery effected from the respondents. In pursuance of the statement recorded under Section 40 of the FERA Act, no recovery has been effected from the respondents. The car from where some seizure of contraband has taken place does not belong to either of the respondents. The case of the petitioners is solely rest upon the statement of the accused recorded under Section 108 of the Customs Act which stands retracted and which is not supported by any other evidence led by the prosecution.

(iv) In **2013 (288) E.L.T. 366 (Del.) (Krishan v. R.K.Virmani, Air Customs Officer)**, in para-19, it was held that as per Section 30 of Evidence Act, confession of co-accused is not an admissible in evidence when the deponent is not tried jointly with other co-accused.

6.Considered the rival submissions made on both sides and perused the materials available on record.

7.It is the case of prosecution that on 10.04.1990, on information, while Enforcement Wing was searching, they caught hold of A1/Haja Mohideen and seized Rs.4 lakhs from him and in his car, they seized Rs.5 lakhs and on the basis of his confession, the accused/respondent herein was implicated. At that time, Haja Mohideen has given a statement stating that he received Rs.4 lakhs from the respondent and on that basis only, respondent was examined and his statement Ex.P12 was recorded. Then Ex.P13 summons was issued to the respondent and Ex.P14 statement was recorded on 11.04.1990.

8. Now this Court has to decide whether the confession given by Haja Mohideen is reliable? It is appropriate to consider Section 30 of Evidence Act, which reads as follows:

“30. Consideration of proved confession affecting person making it and others jointly under trial for same offence: - When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.”

9. In the judgment of the Apex Court reported in **AIR 1964 SC 1184 (Haricharan Kurmi and another v. State of Bihar)**, in paragraphs 12 and 16 (portions marked), it was specifically held as follows:

“12... .. It would be noticed that as a result of the provisions contained in S. 30, the confession has no doubt to be regarded as amounting to evidence in a general way. Because whatever is considered by the Court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in

that generic sense because of the provisions of S. 30, the fact remains that it is not evidence as defined by S. 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

16. As we have already indicated, it, has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible for the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of

criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt. . . . ”

In the above decision, it was specifically held that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person, it must begin with other evidence adduced by the prosecution. In the case on hand, except the evidence of co-accused Haja Mohideen and his statements under Exs.P5 and P7, no other independent witness was examined.

10.The above proposition was followed in para-17 to 19 of the judgment reported in **2013 (288) E.L.T.366 (Del.) (Krishan v. R.K.Virmani, Air Customs Officer)**.

11.Considering the above two decisions along with the facts of the present case, I am of the view, confession of co-accused is admissible only if the case of other co-accused has been tried jointly as per Section 30 of Indian Evidence Act. In such circumstances, no reliance can be placed on Exs.P5 and P7/statements of Haja Mohideen.

12.It is true, statement of respondent/accused was recorded

under Section 40 of FERA Act. Once the respondent has admitted his guilty, he ought to have proved his innocence. There is presumption under Section 59 of the FERA Act and burden is shifted on the accused to prove that he is innocent as per Sections 71 and 72 of the FERA Act. Now it is appropriate to incorporate Sections 59, 71 and 72 of the FERA Act, which read as follows:

"59.Presumption of culpable mental state.__(1)

In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. __In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

(3) The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation to any prosecution for an offence under this Act.

71. Burden of proof in certain cases.__ (1) Where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

(2) Where any person is prosecuted or proceeded against for contravening the provisions of sub-section (3) of section 8, the burden of proving that the foreign exchange acquired by such person has been used for the purpose for which the permission to acquire it was granted shall be on him.

(3) If any person is found or is proved to have been in possession of any foreign exchange exceeding in value [fifteen thousand rupees], the burden of proving that the foreign exchange came into his possession lawfully shall be on him.

72. Presumption as to documents in certain cases.__ Where any document, __

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside

India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any offence under this Act alleged to have been committed by any person, and such document is tendered in any proceedings under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the Court or the adjudicating officer, as the case may be, shall-

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document. "

13.As per Ex.D10/letter sent by the accused through the jail authority dated 16.04.1990, he was taken into custody on 10.04.1990

at 3.30 p.m. and he was taken to the Magistrate on 11.04.1990. Before that, he was assaulted by the enforcement officers. He also filed Ex.D12/O.P.chit issued by the Medical officer, jail hospital and Ex.D13/slip issued by Ophthalmic hospital. Ex.D13 shows that the respondent was alleged to have been hit by some persons (i.e.) Enforcement Officers on 11.04.1990 and 10.04.1990 and that the respondent was complained of eye pain for six days and the accused was given treatment for the injuries. So Ex.D10 is affirmed and fortified by Exs.D12 and D13, which shows that Exs.P12 and P14/statements of the accused are obtained by coercion.

14.Furthermore, the accused, who was examined as D.W.1, deposed that he is doing business of purchasing goods in auction and selling the same, for which, he filed Assessment order of Commercial Taxes Department Ex.D1. He further deposed that Madras Port Trust has issued notification calling sealed tenders from bidders and the bidders, who want to participate should remit Rs.3,25,000/- as an E.M.D. for the lot No.1305/89, Sl.No.22 and Rs.75,000/- for Lot No.1737/89, Sl.No.26. So the accused has possessed Rs.4 lakhs for taking demand draft to participate in the auction-cum-tender and to prove the same, Exs.D1 and D2 were marked. Further he deposed

that he went to Chennai Port Trust for inspection of goods and signed in the catalogue and received auction list Ex.D3. Ex.D4 is the entry in Day book and Ex.D5 is the translation of Ex.D4. Ex.D2 is the cash receipt which shows that the accused is doing business in the name and style of M/S.S.Lalchand and Sons and its date is 30.03.1989. It shows that the respondent is doing business prior to this occurrence. So it is clear that the respondent is doing business on the date of occurrence on 10.04.1990 and to participate in the auction to be held on Port Trust, he possessed Rs.4 lakhs for taking demand draft.

15.It is to be noted that the respondent/accused was arrested and remanded to judicial custody on 11.04.1990. On 16.04.1990, he sent a letter Ex.D10 through the jail authority stating that he was assaulted by the Enforcement Officers and obtained statement from him by force. The respondent/accused has also filed Exs.D12 and D13 medical documents to affirm and fortify Ex.D10. It is clear that the respondent/accused has not only taken treatment in jail hospital and he has also taken treatment before Eye hospital, Egmore.

16.As already stated supra, except the statement of co-accused, no other independent witness was examined. Even though there are

two attestors for the seizure mahazar, no one was examined and no reason has been assigned for non examination of those two independent witnesses, who were present at the time of searching A1/Haja Mohideen, Munavar Hussain and Syed Mohammed Buhari, who were sitting in the car. As per the judgment reported in **2010 (252) E.L.T. 57(Del.) (Directorate of Revenue Intelligence v. Moni)**, even though statement has been recorded under Section 40 of FERA Act, no recovery was effected from the respondents. This judgment is squarely applicable to the facts of the present case.

17. Whereas P.W.2 in his evidence deposed as follows:

“During the course of the statement he surrendered one rupee currency note which was taken over by me.”

It shows that the accused/respondent herein has surrendered one rupee currency note, but that note was not seized, which falsifies the case of the Enforcement Wing. Because on 10.04.1990, while P.W.1 intercepting both the accused, P.W.1 stated that he could not recover anything from the accused/respondent herein. Furthermore, on perusal of Exs.P2 to P4, it reveals that two small chits, two letters, old paper

and polythene cover have been seized. But no explanation has been assigned by the Enforcement Wing that once they seized papers from A1/Haja Mohideen as to why they have not seized one rupee currency note from the accused/respondent herein.

18.Considering the aforestated circumstances of the case, I am of the view, the respondent has proved his innocence by way of examining himself as D.W.1 and marking Exs.D1 to D14. The trial Court has also rightly held the respondent has proved that he is innocent by way of marking documents and hence, acquitted the respondent/accused for offences under Sections 9(1)(b) and 9(1)(d) of FERA Act, 1973 and Section 56(1)(i) of FERA Act, 1973 read with sub-sections 3 and 4 of FEMA Act, 1999. So the judgment of acquittal passed by the trial Court does not suffer any perversity and it is hereby confirmed. The Criminal Appeal deserves to be dismissed and it is hereby dismissed.

19.In the result, the Criminal Appeal is dismissed by confirming the judgment of acquittal dated 25.07.2006 in E.O.C.C.No.499 of 2002 on the file of the learned Additional Chief Metropolitan Magistrate, E.O.I., Egmore, Chennai.

03.03.2015

Index:Yes
Internet:Yes
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To

1.Union of India

Rep. by its Enforcement Officer
Enforcement Directorate
Chennai.

2.The Additional Chief Metropolitan Magistrate
(E.O.I.), Egmore, Chennai.

3.The Special Public Prosecutor (Enforcement Directorate)
High Court, Chennai.

4.The Record Keeper
Criminal Section, High Court, Chennai.

R.MALA,J.

Crl.A.No.821 of 2006

03.03.2015