

Before Jitendra Chauhan, J.

KASHMIR SINGH @ BITTU AND OTHERS—Appellants

versus

INSPECTOR OF CUSTOMS, AMRITSAR—Respondent

CRA No.609-SB of 2000

September 12, 2013

Narcotic Drugs and Psychotropic Substances Act, 1985 - S.15 & 25 - Code of Criminal Procedure, 1973 - S.313 - Customs Act, 1962 - S.108 - Indian Evidence Act, 1872 - S.25 'Confession' - 'Independent witness' - 'Case Property' - Appellant, driver of car was apprehended by custom officials - Two gunny bags containing 88.5 Kgs. of poppy husk recovered from car - Kashmir Kaur and Jit Kaur were also

travelling in car - They stated that bags belonged to Baljit Kaur and they had hired car - Baljit Kaur suffered voluntary statement - Named Harbans Singh - All tried - Kashmir Singh, Kashmir Kaur and Jit Kaur convicted - Harbans Singh and Baljit Kaur acquitted - Appellants 2 and 3 (Kashmir Kaur and Jit Kaur) died during pendency of appeal - Appeal qua them abated - Appeal allowed - Held, Retracted confessional statement alone is not sufficient to bring home guilty - It is required to be substantially corroborated by other independent and cogent evidence - Independent witnesses not examined - Given up as unnecessary - Case property not produced before Court - Defence probable - Appellant not aware what luggage he was carrying for master being driver - Appeal allowed - Acquitted.

Held, that the essence of the above authorities, in the opinion of this Court, is that a retracted confessional statement made by an accused before the Customs Officer, alone is not enough to bring home guilt to the accused. It is required to be substantially corroborated by other independent and cogent evidence. It is admitted fact that the alleged confessional statements of the accused in the present case are retracted ones. Therefore, prosecution was required to prove its case by leading corroborative and cogent evidence.

(Para 14)

Further held, that another aspect of the matter is that the two independent witnesses to the alleged recovery, namely, Ashok Kumar and Vikram Bhandari, were not examined. They were given up being unnecessary.

(Para 16)

Further held, that in the instant case, PW-6, H.K. Kaushik, Inspector, Customs and Excise, deposed that the case property was never produced before the Court after 20.07.1992. The alleged recovery in the instant case is of 20.07.1992 itself. On 11.12.1992, Judicial Magistrate 1st Class, Amritsar, came to the Customs Office. The seizing officer took out the case property from the Malkhana and the same was produced before the Magistrate.

(Para 17)

Further held, that even if the prosecution case is believed to be correct, it is not proved that the present surviving appellant was in conscious possession of the case property. He was not aware as to what luggage he was carrying for his master, being the driver of the car. He has also explained as to how he came in possession of the contraband in the form of luggage. The defence version put forth by the accused appears believable and probable than the prosecution version. So, the benefit is extended to the accused/appellant.

(Para 18)

Dinesh Trehan, Advocate, *for the appellants*.

D.D. Sharma, Advocate, *for the respondent*.

JITENDRA CHAUHAN, J.

(1) The present appeal has been preferred challenging the judgment and order dated 27.04.2000, passed by the learned Additional Sessions Judge, Amritsar (hereinafter referred to as 'the trial Court'), whereby, the appellants stand convicted for the commission of offence under Sections 15, of the NDPS Act, and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, or in default of payment of fine, to further undergo rigorous imprisonment for a period of three years.

(2) Briefly stated, the facts of the present case as narrated in para 2 of the impugned judgment, are reproduced as under:-

"2. Brief facts of the case, as disclosed by the statements of Mohinder Singh, Inspector Customs, PW3 and Bachan Lal Superintendent Customs, Amritsar, PW4 are that on 20-7-92 they alongwith other police officials were holding a Naka near the bridge of Beas river, opposite a school on the G.T. Road, where at about 12 noon, a car bearing No.DNB-6254 came from the side of Beas. The car was signalled to stop. The car was stopped by its driver, accused Kashmir Singh. The Customs officials enquired about his identity from the driver, who disclosed his name. Two ladies namely Kashmir Kaur and Jit Kaur were sitting on the back seat of the car. Two gunny bags were lying at

the back seat of the driver. The customs party enquired from the driver and the ladies as to what the bags contained. Kashmir Kaur, the accused disclosed that the commodity in the bags belonged to accused Baljit Kaur who was not present in the car. Kashmir Kaur also disclosed that Baljit Kaur was widow of Jarnail Singh resident of Kapurthala. On suspicion, the customs officials, brought the car and its occupants to the Customs House, Amritsar, where two independent witnesses namely Vikram Bhandari and Ashok Kumar were joined with the customs officials. Thereafter, the car was searched and poppy husk was recovered from the gunny bags. Poppy husk was weighed which was found to be 88.500 kilograms in both the bags. The bags were separately weighed. Three samples each of 50 grams were separated from each of the bags. The samples were sealed with customs' seal bearing impression '106'. Slips signed by the three accused namely Kashmir Singh, Jit Kaur and Kashmir Kaur were affixed on each of the sample. Slips were also signed by Mohinder Singh seizing Officer, PW3. The remaining poppy husk was put into gunny bags which were sealed with seal mark '106'. Slips duly signed by the accused and Mohinder Singh, seizing officer, PW3 were also pasted on this bags. Case property alongwith the samples was taken into custody vide memo Ex. PE. Panchnama Ex. PF and weighment sheet Ex. PG were also prepared. Panchnama and weighment sheet were attested by Ashok Kumar and Vikram Bhandari and were also signed by all the three accused. Mohinder Singh Seizing Officer, PW3, also attested these documents. Memo (recovery) Ex. PE was also attested by the aforesaid witnesses. From further search of the car one registration book Ex. P1, Insurance police Ex. P2 were also recovered which were also taken into custody vide memo Ex. PE. Case property was deposited in the malkhana of the Customs House, vide memo Ex. PJ and the car was also deposited in the Malkhana vide Ex. PK. At the instance of Mohinder Singh, PW3, Miss Shama, PW2, recorded the statements of the accused which were voluntary. Statement of Kashmir Kaur is Ex. PB which is signed by her as a token of correctness. Statement of Kashmir Singh is Ex. PC which is also

signed by him as a token of its correctness. Statement of Jit Kaur is Ex. PD who thumb marked the same as a token of its correctness. Kashmir Kaur stated in her statement that she was a servant of Baljit Kaur, the accused. Similar was the statement of Jit Kaur. They also stated that they were working as menials in the house of Baljit Kaur who had asked them to bring her luggage in a car from the house of Harbans Singh at village Sathiala. Kashmir Singh, the accused had stated that he was plying a taxi and that a lady had engaged that taxi for Rs. 5000/- on 20.7.92 at 9 a.m. at Kapurthala. The taxi belonged to Tilak Raj, who was also examined by the Customs Officials. He stated that he was a businessman and that his car was plying as a taxi. Mohinder Singh PW3 also prepared a detailed report of the recovery Ex.PL. On 22.7.1992 case property was deposited with H.K. Kaushik, Inspector, PW6 by Mohinder Singh Inspector Customs. Panchnama Ex.PF was also prepared. IPS Ahluwalia, PW5 deposited the case property in the Central Revenue Control Laborator, New Delhi, on 28-7-1992. He stated that so long as the case property was in his possession, it was not tampered with. D.L. Pasahan, retired Superintendent, Customs, PW7 stated that on 21 or 22.7.1992 he raided the house of Baljit Kaur who suffered her voluntary statement Ex.PW7/A. He also recorded statements of Varinder Kumar Ex.PW7/B and that of Tilak Raj Ex.PW7/C. House of accused Harbans Singh was also searched which yielded no recovery of any contraband, and a Panchnama mark A to that effect was prepared at the spot. Case property was produced before the learned Judicial Magistrate 1st Class, Amritsar, who recorded his order Ex.PW6/A that he found the case property to be intact. After completion of investigation, complaint against the accused was submitted by Mohinder Singh Inspector Customs PW3."

(3) Accused-appellant Kashmir Singh was charged under Sections 15 and 25 of the NDSP Act, accused-appellants, Kashmir Kaur and Jit Kaur, were charged under Section 15 of the NDPS Act, whereas Harbans Singh and Baljit Kaur, were charged under Section 29 of the Act, to which they pleaded not guilty and claimed trial.

(4) In order to substantiate its case against the accused, the prosecution examined the following witnesses:-

PW-1, Rameshwar Singh, Inspector, Central Excise, who stated that on 22.07.1992, Inspector Mohinder Singh, PW-3, deposited the case property in the Malkhana. He also gave other details of the case property deposited.

PW-2, Ms. Shama, Lady Searcher, Customs Officer, Amritsar, deposed regarding recording of statements of Kashmir Kaur, Ex.PB, and Jit Kaur, Ex.PD, at the instance of Mohinder Singh, Inspector Customs. She also recorded statement of Kashmir Singh, Ex.PC. She also proved Ex.PB/1, PC/1 and Ex.PD/1, vide which copies of statements of the accused were given to them.

PW-3, Mohinder Singh, Inspector Customs, narrated the whole case of the prosecution and proved all the documents relied upon by the prosecution.

PW-4, Bachan Lal, Superintendent Customs, Amritsar, deposed that he was a member of the Naka party. He also narrated the entire case of the prosecution.

PW-5, IPS Ahluwalia, Inspector Customs, deposed that on 23.07.1992, he was posted as Inspector Customs, Preventive, Amritsar and on that day, Parminder Singh Sodhi handed over two sample parcels and one request letter, Ex.PM, for depositing the samples with the Central revenue Control Laboratory, New Delhi.

PW-6, H.K. Kaushik, stated that on 22.07.1992, Inspector Customs, Mohinder Singh, deposited the case property of this case with him. He further stated that all the articles were sealed with seal of Customs bearing No.106 and the seals were intact. He further stated that on 03.08.1992, remaining samples were received from the Central revenue Control Laboratory.

PW-7, D.L. Pasahan, retired Superintendent Customs and Central Excise, deposed that he raised the house of Baljit Kaur and recorded her statement, Ex.PW7/A. He also proved statements of Varinder Kumar, Ex.PW7/B and Tilak Raj, Ex.PW7/C.

PW-8, Subhash Batra, Inspector Customs, deposed that he was also a member of the Naka party.

Vikram Bhandari, Satpal Singh Constable and Tiwari Lal, were given up as unnecessary.

(5) During his examination under Section 313 Cr.P.C., the accused-appellant Kashmir Singh, took the stand that he was arrested from his house and after detaining him in customs house for some days, he was falsely implicated in this case. Accused- Kashmir Kaur and Jit Kaur (@ Jeeto, also gave similar statements. Accused Harbans Singh pleaded that he was never arrested by the Customs officials and pleaded innocence. Baljit Kaur also pleaded innocence stating that she never gave any statement to the Customs Authorities.

(6) After hearing learned counsel for both the parties and on the strength of material/evidence placed on record, the learned trial Court, acquitted accused, Harbans Singh and Baljit Kaur, whereas Kashmir Singh, Kashmir Kaur and Jit Kaur (@ Jeeto, were convicted and sentenced, as detailed at the outset of this judgment.

(7) Hence, the present appeal, which was admitted by this Court on 11.09.2000.

(8) At the outset, the learned counsel for the appellants submits that appellant Nos.2 and 3, Kashmir Kaur (@ Bheero and Jeet Kaur (@ Jeeto, have since died. Accordingly, the present appeal qua appellant Nos.2 and 3, stands abated.

(9) The learned counsel for the appellant, inter alia, contends that the prosecution has based its case solely on the basis of confession of the accused before the Customs Officer under Section 108 of the Customs Act. However, such a confession made before a Customs Officer is hit by Section 25 of the Indian Evidence Act. The learned counsel further contends that there are major contradictions in the statements of prosecution witnesses. He further states that PW-6, H.K. Kaushik, Inspector, Customs and Excise, deposed that the case property was never produced in the Court after 20.07.1992, whereas the occurrence itself is of the same day, i.e. 20.07.1992. Thus, it is clear that the case property was not produced before the Court

and thus, the appellant deserves to be acquitted. The learned counsel further contends that the seal after use, was not handed over to the independent witnesses, who was available at that time. The learned counsel further contends that the samples sent for chemical examination were never deposited in the Malkhana despite the fact that Malkhana was housed in the police post itself. The learned counsel further contends that the prosecution has not been able to link the evidence with the accused inasmuch as the owner of the vehicle from which the contraband was recovered, was not associated. The learned counsel lastly contends that no explanation has come forth as to why the car in question was not searched at the spot.

(10) On the other hand, the learned counsel for the respondent has vehemently argued that the Customs Officer is not a police officer within the meaning of Section 25 of the Indian Evidence Act, 1872, and therefore, the confessional statements of the accused before Customs Officer in the instant case are admissible in evidence. All the prosecution witnesses have supported the case of the prosecution on material aspects and the contradictions, if any, are not fatal. The learned counsel has, thus, prayed for maintaining the conviction and sentence awarded by the trial Court.

(11) I have heard the learned counsel for the parties and perused the record.

(12) The first and foremost question which arises for determination of this Court is whether or not the statement made by the accused before the Customs Officer is admissible in evidence. In *Noor Aga versus State of Punjab (1)*, Hon'ble the Apex Court had dealt with similar question and observed as under:-

“25. Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs,

Excise, Prohibition, Forest, Taxes etc., came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If he does, he will be a police officer.”

Section 25 of the Evidence Act was enacted in the words of Mehmood J in *Queen Empress v. Babulal* [ILR (1884) 6 All. 509] to put a stop to the extortion of confession, by taking away from the police officers 50 as the advantage of proving such extorted confession during the trial of accused persons. It was, therefore, enacted to subserve a high purpose.

The Act is a complete code by itself. The customs officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act but also with the offences having serious consequences.

Section 53 of the Act empowers the customs officers with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special statute in terms of sub-section (2) of Section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable.

A legal fiction as is well known must be given its full effect. [See *UCO Bank and Anr. v. Rajinder Lal Capoor* 2008 (6) SCALE 1]

Section 53A of the Act makes such a statement relevant for the purposes of the said Act. The observations of the High Court, thus, that confession can be the sole basis of conviction in view of Section 108 of the Customs Act, thus, appear to be incorrect.

26. An inference that the appellant was subject to duress and coercion would appear from the fact that he is an Afghan National. He may know English but the use of expressions such as 'homogenous mixture', 'drug detection kit', 'independent witnesses' which evince a knowledge of technical terms derived from legal provisions, possibly could not be attributed to him. Possibility of fabrication of confession by the officer concerned, thus, cannot altogether be ruled out. The constitutional mandate of equality of law and equal protection of law as adumbrated under Article 14 of the Constitution of India cannot be lost sight of. The courts, it is well settled, would avoid a construction which would attract the wrath of Article 14. It also cannot be oblivious of the law that the Act is complete code in itself and, thus, the provisions of the 1962 Act cannot be applied to seek conviction thereunder.

27. This Court in *Alok Nath Dutta v. State of West Bengal* [2006 (13) SCALE 467], stated :

"We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well-settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon."

[See also *Babubhai Udesinh Parmar v. State of Gujarat*, (2006) 12 SCC 268].

In *Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras* [(1999) 6 SCC 1], whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded.

28. There is another aspect of the matter which cannot also be lost sight of.

A search and seizure or an arrest made for the purpose of proceeding against a person under the Act cannot be different only because in one case the authority was appointed under the Customs Act and in the other under another. What is relevant is the purpose for which such arrest or search and seizure is made and investigation is carried out. The law applicable in this behalf must be certain and uniform.

Even otherwise Section 138B of the 1962 Act must be read as a provision containing certain important features, namely:

- (a) There should be in the first instance statement made and signed by a person before a competent custom official.
- (b) It must have been made during the course of enquiry and proceedings under the Customs Act.

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 his 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 under Section 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature.

{See **Gopal Govind Chogale v. Assistant Collector of Central Excise and another**, [1985 (2) BomCR 499 Paras 12-14]}

(13) In *Nirmal Singh Pehlwan @ Nimma versus Inspector, Customs, Customs House Punjab (2)*, while placing reliance on the view taken in Noor Aga's case (*supra*), it has been held as under:-

“We also see that the Division Bench in Kanahiya Lal's case had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a- vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in Raj Kumar's case (*Supra*). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.”

(14) The essence of the above authorities, in the opinion of this Court, is that a retracted confessional statement made by an accused before the Customs Officer, alone is not enough to bring home guilt to the accused. It is required to be substantially corroborated by other independent and cogent evidence. It is admitted fact that the alleged confessional statements of the accused in the present case are retracted ones. Therefore, prosecution was required to prove its case by leading corroborative and cogent evidence.

(15) In the instant case, the prosecution has not been able to connect the accused with the crime. As per the prosecution story, statement of accused Kashmir Kaur, Ex.PB, was recorded to the effect that on 20.07.1992 at about 9.30 a.m., she was called by accused Baljit Kaur and asked her to go to the house of Harbans Singh at Sathiala, along with co-accused Jit Kaur, and bring her luggage in a car. On their way back from the place of Harbans Singh, they were apprehended by the Customs

Officers at 12 noon, near Beas Bridge. Accused-Jeet Kaur also gave similar statement. However, except for these statements, nothing incriminating has come on record against accused-Harbans Singh and Baljit Kaur and in the absence of any corroboration, Harbans Singh and Baljit Kaur, were acquitted. The prosecution projected these accused to connect the co-accused/appellants, with the crime. However, once the story put forth by the prosecution qua accused, Harbans Singh and Baljit Kaur stands disbelieved by the trial Court, on the same set of evidence, the story qua remaining three accused, also becomes doubtful. In the instant case, the owner of the car from which the alleged recovery was effected, has not been associated by the prosecution. It has also not been able to make out a case that the accused-appellants were earlier known to each other and were in conspiracy. Appellant-Kashmir Singh, who was the hired driver of the car in question which was being used as taxi, is so poor that even after grant of bail on 27.01.2004, he could be released only on 26.11.2007, as he could not furnish bail bonds earlier.

(16) Another aspect of the matter is that the two independent witnesses to the alleged recovery, namely, Ashok Kumar and Vikram Bhandari, were not examined. They were given up being unnecessary. In *Noor Aga's case (supra)*, this point has been dealt with in the following manner:-

“40. Independent Witnesses

It is accepted that when the appellant allegedly opted for being searched by a Magistrate or a Gazetted Officer. Kuldip Singh called K.K. Gupta, Superintendent Customs, PW2) and independent witnesses Mahinder Singh and Yusuf. Whereas K.K. Gupta was examined as PW2, the said Mahinder Singh and Yusuf were not examined by the prosecution. There is nothing on record to show why they could not be produced. Their status in life or location had also not been stated. It is also not known as to why only the said two witnesses were sent for. The fact remains that they had not been examined. Although examination of independent witnesses in all situations may not be imperative, if they were material, in terms of Section 114(e) of the Evidence Act, an adverse inference could be drawn.

41. In a case of his nature, where there are a large number of discrepancies, the appellant has been gravely prejudiced by their non- examination. It is true that what matters is the quality of the evidence and not the quantity thereof but in a case of this nature where procedural safeguards were required to be strictly complied with, it is for the prosecution to explain why the material witnesses had not been examined. Matter might have been different if the evidence of the Investigating Officer who recovered the material objects was found to be convincing. The statement of the Investigating Officer is wholly unsubstantiated. There is nothing on record to show that the said witnesses had turned hostile. Examination of the independent witnesses was all the more necessary inasmuch as there exist a large number of discrepancies in the statement of official witnesses in regard to search and seizure to which we may now take note of.”

(17) In the instant case, PW-6, I.I.K. Kaushik, Inspector, Customs and Excise, deposed that the case property was never produced before the Court after 20.07.1992. The alleged recovery in the instant case is of 20.07.1992 itself. On 11.12.1992, Judicial Magistrate 1st Class, Amritsar, came to the Customs Office. The seizing officer took out the case property from the Malkhana and the same was produced before the Magistrate.

(18) Even if the prosecution case is believed to be correct, it is not proved that the present surviving appellant was in conscious possession of the case property. He was not aware as to what luggage he was carrying for his master, being the driver of the car. He has also explained as to how he came in possession of the contraband in the form of luggage. The defence version put forth by the accused appears believable and probable than the prosecution version. So, the benefit is extended to the accused/appellant.

(19) In the light of the above discussion, this Court has no hesitation to conclude that the instant case is full of discrepancies, the alleged recovery has not been proved beyond all reasonable doubts, and in the absence thereof, benefit has to go to the accused. Consequently, the present appeal is allowed; impugned judgment and order dated 27.04.2000, passed by the learned trial Court, is hereby set aside; and he is acquitted of the charges framed against him. The appellant is stated to be on bail, his bail bonds shall stand discharged.