
Rashid Gafoor Parkar Vs State of Maharashtra

Criminal Revision Application No. 435 of 1982

Court: Bombay High Court

Date of Decision: Nov. 5, 1982

Acts Referred:

Customs Act, 1962 " Section 107, 108, 135, 138A, 138B#Evidence Act, 1872 " Section 3, 30, 8#Penal Code, 1860 (IPC) " Section 109, 120

Citation: (1983) 85 BOMLR 35

Hon'ble Judges: S.J. Deshpande, J

Bench: Single Bench

Judgement

S.J. Deshpande, J.

The petitioners are original accused Nos. 2, 3 and 4 in Criminal Case No. 59 of 1977 pending in the Court of Judicial

Magistrate, First Class, Dapoli. The petitioners are prosecuted for commission of offences u/s 135(a) and (b) of the Customs Act and Section 5 of

the Import and Export Act read with Section 120 of the Indian Penal Code and Section 109 of the Indian Penal Code. The petitioners are facing

trial along with 9 other accused. Accused Nos. 1 and 12 are reported to be dead. The offence was alleged to have been committed on November

23, 1968. The enquiries were made by the investigating officer and obtained prior sanction and the accused were put for trial before the learned

Judicial Magistrate, First Class, Dapoli. The learned Judicial Magistrate, on the basis of the statements made by other co-accused framed charge

against the petitioners and other accused by his order dated May 31, 1982. It is this order of framing charge which is challenged by the petitioners

in this revision.

2. The summary of the order of the learned Magistrate shows that all the accused Nos. 1 to 12 including the present petitioners are said to be

smugglers. They are residents of small village Bankot, District Ratnagiri. The petitioners are said to be real brothers along with the deceased

brother, who was original accused No. 1. In the investigation, it was revealed that the petitioners and other accused were parties to criminal

conspiracy to import into India and to take delivery of contraband goods in Indian Customs waters from foreign vessels which was to come on the

sea off Bankot-Shriwardhan on the West Coast of Maharashtra to carry them ashore, to land them at unauthorised places near Bankot. It appears

that original accused Nos. 5 to 9 were the persons who were found landing two vessels and both these vessels were brought to the sea-shore. As

far as accused No. 3 is concerned, it appears that he kept a truck ready for loading smuggled goods. The prosecution led evidence of four

persons. The witnesses included the police patil, who was panch for the search of the house of accused No. 6, custom inspector and some other

witnesses who had produced original documents pertaining to registration of vessels.

3. It appears that the statements of the present petitioners were also recorded by the custom officer. However, the prosecution, it is stated, did not

place any reliance on the said statements of the present petitioners in this case.

4. The statements of the other accused i.e. original accused Nos. 5 to 12 and also accused No. 1, were also recorded by the custom officer. It

appears that the original statements of these accused persons were not available, though attempt was made to call for original statements.

However, certified copies of the statements were made part of the record.

5. The learned Magistrate has accepted the contents of the certified copies of these statements as evidence in this case. The certified copies are no

other documents than the statements of the other co-accused who are facing trial in this case.

6. The statements of these co-accused contain some confessions. On the basis of these confessional statements, of which only certified copies are

produced before the Court, the learned Magistrate framed a charge against the accused and this order of framing charge was passed by the

learned Magistrate on May 31, 1982, It is this order of framing charge dated May 31, 1982 which is being challenged in this revision by the

petitioners.

7. It is undisputed in this case that the prosecution does not want to rely on the actual statements made by the petitioners to the custom officer.

8. However, the prosecution has relied on the statements of the other co-accused which were produced before the Court by filing the certified

copies. In the lower Court, reliance was placed on Section 30 of the Evidence Act to utilise the statements against the petitioners.

9. The learned Advocate for the petitioners objected production of certified copies of statements on the ground that the prosecution did not

examine any officer who recorded the said statements. The learned Advocate for the petitioners also objected to the material which is relied on by

the learned Magistrate which contains only statements of the co-accused, on the ground that it is not such material, which, if unrebutted can result

in conviction of the petitioners. The learned Advocate for the petitioners also relied on the fact that none of the other prosecution witnesses have

implicated the petitioners in the criminal act of assisting movement of contraband goods. All these objections were rejected by the learned

Magistrate and he passed the impugned order dated May 31, 1982.

10. It is against this order that the present revision has been filed by the original three accused, who are petitioners herein. I issued notice to the

respondents and the learned Advocate for the respondents also appeared at the instance of the notice of this Court. I have heard both the counsel.

The first contention raised by the learned Advocate for the petitioners is that there is no proper evidence to frame charge against the petitioners in

this case. The evidence relied on by the learned Magistrate only contains statements of the other co-accused. This evidence is of weaker type

evidence and cannot constitute substantial evidence at all. Such evidence, if rebutted cannot be the basis of conviction. Therefore, it was contended

by the learned Advocate for the petitioner that the charge framed against the accused on statements of co-accused, is groundless.

11. The learned Advocate for the petitioners attacked the reasonings of the learned Magistrate and pointed out that it was error on the part of the

learned Magistrate to have accepted certified copies of the statements without examining the officer.

12. Repelling this argument, the learned Advocate for the respondent No. 2 pointed out that u/s 138B of the Customs Act, the statements

recorded by the custom officer will be relevant. The constitute evidence and such evidence is prime facie sufficient for the purpose of framing

charge against the accused. Section 138B of the Customs Act was not pressed into service in the Courts below. The learned Advocate for the

respondent No. 2 has placed reliance on this section to show that this is a special ground enacted by the Customs Act and under this section

statements of the co-accused will constitute good evidence and they cannot be ignored on the ground that they are of weaker type or they cannot

be the basis of conviction at all.

13. The short question for determination which falls for consideration in this case formulated by me is as follows: Whether in a joint trial against the

accused charged u/s 135(a) and (b) of the Customs Act read with Section 120 and Section 109 of the Indian Penal Code, is it open for the

prosecution to rely exclusively and solely on the statements of the co-accused in order to frame the charge?

14. The irregularity and defect pointed out by the learned Advocate for the petitioners in regard to acceptance of certified copies is not of very

much significance in this case. The question was argued by both the parties on the footing that statements of the co-accused containing any

confession will be sufficient evidence at the time of framing of charge or not. The learned Advocate for the petitioners first of all invited my attention

to the judgment of the Supreme Court in Haricharan Kurmi v. State of Bihar [1964] 2 CrL. L.J. 344 . The Supreme Court in this case was dealing

with the appeals where two accused were convicted on the basis of confessional statements made by one of the two accused. The question about

conduct of confession made by the co-accused persons in criminal trial was determined by the Supreme Court in the light of the provisions of

Section 30 of the Evidence Act. It is not necessary to refer to other aspects in this case to show that confessional statements are voluntary and

they are not otherwise filed by not following safeguards in this regard. The Supreme Court has held (at p. 347):

... though such a confession may not be evidence as strictly defined by Section 8 of the Act, it is an element which may be taken into consideration

by the Criminal Court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which

is produced before the Court, it is not obligatory on the Court to take the confession into account. When evidence as denned by the Act is

produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in

the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an

approach can, however be adopted by the Court in dealing with a confession, because Section 30 merely enables the Court to take the confession

into account.

Relying on this observation of the Supreme Court, the learned Advocate for the petitioners contended that even if these statements are taken into

consideration, it is not obligatory on the Court to accept them as evidence. The Court may take into consideration or the Court may refuse to take

it into consideration. The wording of Section 30 itself provides that they are to be taken into consideration along with other evidence.

15. Ratio of this judgment lays down three principles: (1) Confessional statement of the co-accused is weaker type of evidence; (2) it may or may

not be taken into consideration; (3) it alone exclusively cannot be the basis of conviction of the accused. Bearing in mind these principles,

enunciated by the Supreme Court, it was contended by the learned Advocate for the petitioners that statements relied on by the learned Magistrate

in this case cannot constitute the basis for framing charge. It is undisputed in this case that the statements of the petitioners were not relied on by

the prosecution. The only statements exclusively made available for proof of the statements of the co-accused are contained in confession. Even if

provisions of Section 30 as interpreted by the Supreme Court are to be applied, the argument of the learned Advocate for the petitioners is well

founded. The learned Advocate for the petitioners further contended that the evidence which is to be taken into consideration by the Court at the

time of framing of charge must be of such character that if it remains unrefuted, it must form the basis of conviction. The learned Advocate for the

petitioners contended that if these statements are taken into consideration and admitted at this stage as evidence, in view of the infirmity attached to

these statements, they cannot constitute substantial piece of evidence at all. If they are not substantial piece of evidence, they cannot be relied on to

frame the charge on that ground also, these statements should not be accepted by the Court.

16. The learned Advocate for the petitioners invited my attention to two unreported judgments of this Court in support of this contention. It was

judgment of my brother Kotwal J, in Harbansingh Kirpalsing v. M.K. Chakraborty (1979) Criminal Revision Application No. 461 of 1979

decided on September 24, 1979 by Kotwal J. (Unrep.), wherein in paras. 8, 9, 10, 11 and 12 the learned Judge has discussed the limited scope

of utilising statements and nature of the evidence disclosed by these statements. Relying on this unreported judgment and also the judgment of the

Supreme Court (supra) the learned Advocate for the petitioners contended that there is no evidence in this case to involve the petitioners. The only

material ultimately, which is the basis of framing charge against the accused consists of these statements alone. In the absence of any other

evidence, these statements cannot be the material for framing charge.

17. In answer to this contention, the learned Advocate for the respondent contended that having regard to the principles laid down by the Supreme

Court in the above judgment, it is permissible to accept these statements as some kind of evidence. According to the learned Advocate for the

respondent, it cannot be said that it is -no evidence at all. If it is some evidence, the learned Advocate for the respondents contended that such

evidence would be quite sufficient for framing charge. The learned Advocate for the respondent contended that the Supreme Court has not stated

that it is not evidence at all. It may not be evidence strictly within the meaning of Section 3 of the Evidence Act. These statements may not be

evidence in strict definition of the term evidence yet, it is in Court's discretion to consider them as evidence or reject them. It is permissible for the

Court to rely on these statements in order to frame the charge against the petitioners.

18. The learned Advocate for the respondent then invited my attention to Section 138B of the Customs Act and relying on the provisions of this

Section 138B it was contended by the respondent that the statements of the co-accused are relevant and they can constitute relevant evidence to

consider framing of charge. Section 138B reads as follows:

138B-relevancy of statements, under certain circumstances-

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act

shall be relevant, for the purpose of proving in any prosecution for an offence under this Act, the truth of the fact which it contains-

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the

adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court

considers reasonable; or

(b) When the person who made the statement is examined as a witness in the case before the Court, and the Court is of opinion, that, having

regard to the circumstances of the case, the statement should be admitted in the interest of justice.

(2) The provisions of Sub-section (1) shall, so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a

Court.

Relying on these provisions, the learned Advocate for the respondent contended that in view of Section 138B it is not necessary to refer to

provisions of Section 30 of the Evidence Act. Provisions of Section 138B if they are analysed, will show that u/s 138B the statement has to be

made and signed by person (1) it is to be made before the custom officer, (2) it is to be proved during the course of inquiry or prosecution for

offence under this Act. If these two things are seen, the statements made and signed by the person become relevant for the purpose of proving

offence under this Act. Reference to enquiry or prosecution u/s 138B can only be proceedings u/s 107 or 108 of the Customs Act, 1962. In this

case, statements of the co-accused are certainly recorded by the custom officer. They are statements recorded in the course of inquiry or

proceedings under this Act. They are, therefore, certainly relevant as provided by this section.

19. Now, it must be borne in mind that Section 138B was inserted by Amendment Act No. 36 of 1973 and it has come into force on September

2, 1974. The learned Counsel for the respondent contended that although this section came into force after the offence was committed, and even

after statements were recorded, this section is a part of rule of evidence and governed by procedural law. Therefore, this section is retrospective in

operation. In this case, the statements of the co-accused were recorded somewhere in 1971, offence was committed on November 23, 1968. So

the first question which arises for consideration is if relevant Section 138B is past, is it permissible to apply this section to the past statements or

offence which was committed prior to the coming into force of this section. In this connection, the learned Advocate for the petitioners pointed out

that this section cannot be given retrospective effect. It was pointed out by the learned Advocate for the petitioners that before this section, can be

pressed into service, it must be established that section applies to the present proceedings; but the section will have only prospective operation. In

support of this contention that the section will have prospective operation, the learned Advocate for the petitioners relied on a judgment of the

Supreme Court in the case of Amba Lal v. Union of India AIR [1961] S.C. 264. This is a case relating to Sea Customs Act, 1878. The provision

of Section 178A was under consideration in this case. This case was relating to a confiscation order which was passed by the Court under the Act

of 1878. Relying on the provisions of Section 178A it was argued in the Supreme Court that onus of proof changed with the provisions of Section

178A which was introduced in the Act. The Supreme Court in para. 6 of its judgment stated as follows (at page 266):

Section 178A of the Sea Customs Act does not govern the present case, for that section was inserted in that Act by Act No. XXI of 1955

whereas the order of confiscation of the goods in question was made on January 18, 1952. The section is prospective in operation and cannot

govern the said order.

The provision of Section 178A was relied on in this case. It was in connection with the burden of proof. The question of burden of proof falls in domain

of evidence. Relying on this observation of the Supreme Court, it was contended by the learned Advocate for the petitioners that provisions of

Section 138B should be held to be in operative only for the future and they cannot affect the present transaction. It was contended that the offence in

this case was committed in 1968 and the statements, which are being sought to be used in this case now, are themselves recorded in 1971. As

these statements were recorded prior to the coming into force of Section 138B, it cannot be made applicable in this case.

20. The learned Advocate for the respondents invited my attention to a judgment of the Gujarat High Court in the case of Union of India v.

Kanchanlal [1977] Guj. L.R. 289 in support of his contention that the Gujarat High Court had occasion to consider the provisions of Section

138A and B, inserted by the Act No. 36 of 1973. In the case before the Gujarat High Court, Section 138A was relied on by the prosecution

although in that case the offence was committed prior to the coming into force of that section. Relying on this judgment of the Gujarat High Court, it was

contended by the learned Advocate for the respondent that the Gujarat High Court had stated that provisions of Section 138A are more drastic

provisions and this provision was applied by the Gujarat High Court retrospectively. Therefore, Section 138A should be applied retrospectively in

this case. The Gujarat High Court in para. 9 at page 295 of the said judgment has observed:

Thus the said section came into operation subsequent to the date of offence and the prosecution cannot take an advantage of the said provisions. It

is difficult to accept the argument of Mr. Thakore. Section 138A requires a presumption to be raised and it thus provides a rule of evidence and

the rule of interpretation is that the rule of evidence is retrospective in operation so as to affect the pending cases. Therefore, the prosecution can

rely upon the provisions of Section 138A and the Court has to raise a presumption as required by the section.

The above observations of the Gujarat High Court are of general character. The learned Advocate for the respondents broadly relied on the

principles as far as procedural law is concerned, and contended that the procedural laws are retrospective and, therefore, any amendment to the

rule of evidence must be held to be applicable to any pending proceedings.

21. It is true that Section 138B enacts a rule of evidence. The question of burden of proof falls in the category of proof of facts of evidence. The

judgment of the Supreme Court which was cited by the learned Advocate for the petitioners furnishes some guidance to the application of rule of

evidence. In respect of burden of proof, rule of evidence seems to be of stronger merit. In view of the Supreme Court judgment, I do not agree

with the ratio of the judgment of the Gujarat High Court. The question which is to be decided with reference to Section 138B can be well

formulated in this contention of the learned Advocate. The proof of such evidence can be made the basis for determination of any question in issue.

The question which is to be decided in this case is whether, in case of person who is accused of an offence, can it be said that if improved rule of

evidence relating to burden of proof is produced and evidence is altered, in such case, whether such alteration can be said to be only procedural in

general way? It is well settled that even amendment to procedural law which affected substantial rights of the parties, cannot be said to be

retrospective. Even statute dealing with matter of procedure may have retrospective effect, but the provisions which touch the rights in existence at

the time of passing of statute are not to be applied retrospectively in the absence of any express enactment or necessary intendment. Reliance was

placed on the judgment in the case of AIR 1927 242 (Privy Council) and in the case of Jose Da Costa and Another Vs. Bascora Sadasiva Sinai

Narcornim and Others, In the present case, I am of the opinion, that Section 138B cannot be applied retrospectively. Section 138B of Customs

Act enacts substantive provisions relating to rule of evidence. It is fundamental principle, of criminal jurisprudence that accused person is entitled to

have complete notice of the material on which charge is framed or on the basis of which he was charged with commission of offence, In this

connection, benefit which is available to the accused person on exclusion of certain types of evidence against him is being denied by application of

Section 138B and this benefit is denied after commission of offence and even after statements which form evidence against him are recorded by the

custom officer. The material which is sought to be relied on by the prosecution witnesses in the Courts below was prior to the coming into force of

the new section. The ratio of the judgment of the Supreme Court in Ambalal's case (supra) in my opinion, can be made applicable. Provisions of

Section 138A were pressed into service in the case before the Supreme Court, on the ground that they provide further material evidence in the

form of shifting of burden. Similarly, provisions of Section 138B are now pressed into service in order to utilise the material i.e. statements as piece

of evidence against them. In this view of the matter, following the ratio of the Supreme Court judgment, I hold that Section 138B cannot be said to

be in operation in regard to the offences which were committed prior to the coming into force of the Act. In this case offence was committed in

1968, statements were recorded in 1971. I may make it clear that in this case offence was committed and statements were recorded before

coming into operation of the Act. I am afraid, I am unable to accept the contention, that amended procedural law will apply retrospectively and,

therefore, Section 138B should be applied to the present case.

22. Once I hold that Section 138B is not applicable to the present case, then question which falls for consideration is whether statements of the co-

accused may be made available for prosecution in this case. The learned Advocate for the petitioners invited my attention to the judgment of my

brother Kotwal J. in the case of S.S. Sekhon v. Jagdish Laherchand Parekh (1980) Criminal Application No. 594 of 1980 (Bom.) with Criminal

Appeal No. 845 of 1980 (Bom.) decided on October 16, 1980 by Kotwal J. (Unrep.). Relying on certain portion of the said judgment, especially

reference to Section 138B, which is found in this case, it was contended by the learned Advocate for the petitioners that Section 138B will not be

applicable for any other reason. As I am holding that Section 138B is prospective in operation, I do not think that I will be justified in considering

other aspects of the arguments which were advanced before me. However, I shall in fairness, refer to the arguments advanced before me.

23. The other aspect which was relied on by the learned Advocate for the petitioners was that Section 138B even if it applies, it will not include

statements made by the co-accused, it will apply only to the statements made by the witnesses. The learned Advocate for the petitioners

emphasised that thrust of the section is that it is the witnesses who are not available or who are incapable of giving evidence or who are not to be

examined in the course of trial, they are the persons who are included in the section. A person accused of the offence cannot be said to be person

within the meaning of Section 138B.

24. The learned Advocate for the respondents contended that the word "person" used in Section 138B must also include the person such as

accused. I do not propose to deal with this point for the simple reason that in this case I am holding that Section 138B itself is not retrospective in

operation. Therefore, I do not wish to deal with this point in detail. I am only referring to the arguments of both the sides. Whether the word

"person" used in Section 138B will include accused persons or not will be certainly decided in appropriate case when it is found that Section 138B

is applicable.

25. The only submission which now remains to be examined is relating to Section 30 of the Evidence Act. If ratio of the Supreme Court judgment

in Haricharan Kurmi's case (supra) is taken into consideration, it is quite clear that statements of the co-accused cannot be utilised for the purpose

of conclusion or inference to hold that prima facie case is made out by the contents of such evidence. The statement of the co-accused is not

substantial piece of evidence, and by reason of the infirmity and the limited scope, it is not possible to utilise the statements as direct evidence, it is

impossible to say that they can be available for the prosecution as some kind of evidence for framing charge. In this case, it is undisputed that there

is no other evidence except these statements. In the absence of any other evidence, statements of the co-accused will only supply some material

for consideration of the evidence. This material is weak, because, it is the discretion of the Court to accept or to reject it. It is not obligatory on the

Court to accept the same. It is well settled that findings have to be considered separately in the light of the proof of charge. In the case before the

Supreme Court, the Supreme Court was dealing with case where the High Court had committed error substantially on this point. There the High

Court considered the confessional statement as basis of its findings and then turned to other evidence. It was this course which was adopted by the

High Court, which was criticised by the Supreme Court and it was held that proper principle which should be applied is that first evidence

excluding confessional statements must be considered and if the other evidence adduced against the accused persons is found satisfactory, then it is

the confessional statements which may be taken into consideration. If this limited character of the confessional statements is taken into

consideration, it is difficult to accept the contention that confessional statements can form the basis for framing charge against the petitioners,

framing of charge is also based on the consideration of material and evidence which is produced at the time of framing charge. If it is an obligation

of the Court to consider the material at the time of framing charge, meaning of the word "evidence" must be given substantial evidence alone. it is

me main evidence which itself must be of some substantial character. I am not entirely satisfied with the basic requirements of the provisions of

Section 3 of the Evidence Act, when section says that the Court while framing charge will consider evidence which means that such evidence which

cannot be of subsidiary character. Evidence of weaker type cannot be said to be basis even at the time of framing charge. In this view of the

matter, I am unable to accept the reasoning of the learned Magistrate, where he has relied upon Section 30 to accept confessional statements as

sufficient to frame the charge. It was contended by the learned Advocate for the petitioners that the officer, who recorded the statements was not

called and, therefore, statements cannot be accepted as proved. This point has no substance at all, at this stage because the record shows that

prosecution has made an attempt to call the original statements and if the prosecution could not for any reason, secure the original statements, it is

not proper to call the officer, to prove the certified copies, as the certified copies were accepted on record and no objection was raised to their

production, I do not think that this can affect the proof of these statements in this case. Therefore, the contention that the certified copies should not

have been accepted and should not have been allowed to be produced without examining the officer, is rejected.

26. In the last, it is important to note that offence was committed in 1968, and charge was framed in 1982. The period which has lapsed during the

last several years has no relevance to decide the point which arises for determination before me. The learned Advocate for the petitioners

however, makes a grievance that after such a long time it would be against principles of criminal jurisprudence that the petitioners should be

subjected to trial after such long delay. This argument has no substance for the simple reason that the petitioners are facing trial in respect of

economic offence and any delay or some kind of delay on the part of the prosecution in such offences cannot be a substantial infirmity as far as

accused are concerned, who are involved in the economic offences. As I have decided the main point which arose for my consideration in regard

to the character of the statements of the co-accused in this case, all other points and defects which were pointed out by the learned Advocate for

the petitioners, though I have referred to them, do not survive for material consideration and examination at all. I, therefore, hold that the

confessional statements of the co-accused alone exclusively in the absence of evidence cannot constitute any substantial evidence to frame the

charge against the petitioners in this case.

27. In the result, the rule is made absolute. The charge against the petitioners will not survive and they will be absolved. The order of the learned

Magistrate to that extent is set aside. The petitioners (Original Accused Nos. 2, 3 and 4) are discharged.