

TURNING A NEW LEAF: INADMISSIBILITY OF THE CONFESSIONAL STATEMENTS UNDER NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

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The Supreme Court of India in its recent judgment has progressively settled one of the most important questions of law on whether the statement of the accused person recorded under Section 67 or Section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “NDPS Act”) can be treated as confessional statement or not. Further, the Apex Court has also laid down the law with respect to the admissibility of such statement/ confession vis-à-vis the Indian Evidence Act (IEA) and the Code of Criminal Procedure, 1973.

In a catena of judgments, the Supreme Court of India had always preserved the fundamental rights of accused persons and has time and again reiterated the importance of a fair investigation and trial. The Supreme Court, yet again, in the case of *Tofan Singh vs. State of Tamil Nadu*¹, has protected the fundamental rights of accused persons under the NDPS Act and observed as follows:

“155.(i) That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

(ii) That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

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¹Criminal Appeal No. 152 of 2013 (Judgment dated 29.10.2020) rendered by the Supreme Court of India.

FUNDAMENTAL RIGHTS AND THE NDPS ACT

Like any other legislation, the NDPS Act should be interpreted in consonance with Constitution of India. A balance must be maintained between the power of the state/investigating agency and the fundamental rights of the accused person enshrined in Part III of the Constitution of India. The Constitution of India provides for certain constitutional safeguards against confession. Firstly, Article 20(3) provides the right against self-incrimination². Secondly, Article 21³ provides for Right to life and the Supreme Court of India in the Judgment of *K.Puttaswamy v. Union of India*⁴ observed that the right to life includes right to privacy and this right also includes informational privacy and privacy of choice. Further, it shall be noted that Section 58 of the NDPS Act also in a way protects right to privacy of an accused person. Section 58 of the NDPS Act deals with punishment for vexatious entry, search, seizure or arrest by any person empowered under Section 42, Section 43 or Section 44. This Section provides for imprisonment for a term which may extend to two years or with fine or with both. Thus, it makes it clear that a person's privacy is not to be impeded, and makes any officer who trifles with it liable to be punished under the provision.⁵ Thus, the Supreme Court in the case of *Tofan Singh vs. State of Tamil Nadu* observed that if a police officer, were to "investigate" an offence under the NDPS Act, all the safeguards contained in Sections 161 to 164 of the Cr.P.C. would be available to the accused, but that if the same police officer or other designated officer under Section 42 were to record confessional statements under Section 67 of the NDPS Act, these safeguards would be thrown to the winds. Even if any such anomaly were to arise, the alternative construction being in consonance with fundamental rights, alone would prevail, as Section 67 would then have to be "read down" so as to conform to fundamental rights.

In light of the well-settled position of law, the Supreme Court made it clear that Section 67 and other provisions of the NDPS Act must be read in consonance with the fundamental rights and the Constitution of India and that the NDPS Act is to be construed in the backdrop of Article 20(3) and Article 21.

²Article 20(3) Constitution of India provides that no persons accused of any offence shall be compelled to be a witness against himself.

³ Article 21 of the Constitution of India provides that no person shall be deprived of life or personal liberty except according to the procedure established by law

⁴(2017) 10 SCC 1

POSITION PRIOR TO THE JUDGMENT

It is an undisputed fact that in numerous cases, coercive measures are used against accused persons during an investigation and it is in recognition of this likelihood that Section 25 of the Indian Evidence Act was enacted to discourage coerced/influenced confession made to the police officers and any such confession has therefore been made inadmissible in law. At this juncture, it is essential to note that NDPS Act, being a Special statute and a complete code in itself overrides the provisions of the Code of Criminal Procedure and Indian Evidence Act. Thus, Section 25 of the Indian Evidence Act was inapplicable to cases filed under the NDPS Act and the statement recorded under Section 67 of the NDPS Act was admissible in Court of law as a substantive piece of evidence, on the basis of which convictions were sought.

Section 42 of the NDPS Act provides that the officers have the power of entry, search, seizure and arrest without warrant or authorization, provided there is reason to believe, upon information gathered in an enquiry made in that behalf, that an offence has been committed. Section 53 deals with Power to invest officers of certain departments with powers of an officer-in-charge of a police station and such officers are provided the power of investigation. Section 67 deals with Power of any officer under Section 42 to call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder; or require any person to produce or deliver any document or thing useful or relevant to the enquiry or examine any person acquainted with the facts and circumstances of the case. Section 53A provides for Relevancy of statements under certain circumstances.

The Evidence Act has in its own way discouraged confessions that may be shrouded with taint, by not assigning any evidentiary value to confessions made in police custody. It ensures that police officers do not opt for undue influence or coercion in securing a confession of an accused person. Section 24 of Indian Evidence Act deals with irrelevancy of a confession made by an accused person in a criminal proceeding. Section 25 states that no confession made to a police-officer, shall be proved as against a person accused of any offence. Section 26 states that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Therefore, in view of the above provisions, the officer-in-charge under the NDPS Act was not considered a 'police officer' under Section 25 of the Indian Evidence Act and thus, the

confessions made before such officers were admissible and acted as evidence capable of securing conviction of the accused person. The Judgment in *Raj Kumar Karwal⁶ and Kanahiyalal v. UOI⁷*, were applicable wherein, the Court observed that the designated officer under Section 53 of the NDPS Act cannot be said to be a police officer under Section 25 of the Evidence Act.

POSITION AFTER THE JUDGEMENT

The Supreme Court's interpretation of the Sections under NDPS Act pertaining to statements recorded by officers will have tremendous impact on all ongoing cases, appeals and future cases. Any statement made by the accused before the officer in charge under the NDPS Act will not be admissible in law. Further, the Supreme Court has sent back the Appeals and Special Leave Petitions before it in the matter of *Tofan Singh vs. State of Tamil Nadu* to Division Benches of this Court to be disposed of on merits, in the light of this judgment.

That with respect to the issue that confessional statement made under Section 67 of the NDPS Act is sufficient to convict an accused person, the Supreme Court observed that a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act and the confessional statements made before an officer under Section 53 of the NDPS Act if held as the basis to convict a person would be "a direct infringement" of constitutional guarantees.

At this juncture, it is important to note that certain statutes which deal with detection and prevention of crime, are immune from the bar/limitations provided under Section 25 of the Indian Evidence Act and thus, the confession made under those Acts are still admissible in law. Firstly, the confession made before police officers under the provisions of the TADA are still "admissible" in a trial. The TADA Act has a *non-obstante* clause by which the Evidence Act has to give way to the provisions of the TADA Act. In *Kartar Singh v. State of Punjab⁸*, the Court observed that the additional safeguards/guidelines were issued to ensure that the confession obtained under TADA Act in the course of investigation by a police officer is not tainted with any vice but is in strict conformity with the well-recognized and accepted aesthetic principles and fundamental fairness. Secondly, the confessions under POTA are also admissible in law as Section 32 and 52 of the POTA provides for necessary safeguards to

⁶1990 SCR (2) 63

⁷2008 AIR (SC) 1044

⁸1994 SCC (3) 569

confession maker and the judgment of *State (NCT of Delhi)v. Navjot Sandhu*⁹, still holds the field wherein, it has been observed that the breach of any of the requirements given under Section 32 and 52 of POTA, would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession.

CONCLUSION

The judgment rendered by the Supreme Court is pathbreaking as it protects the liberty and fundamental rights of the accused persons under the NDPS Act, without discriminating on the basis of the investigating agency. The admissibility of confession has led to a large number of convictions in NDPS matters on the basis of the confession that may have been tainted with vice of coercion and threats and thus, this judgment had finally put an end to the abuse of the process and violations of the fundamental rights of the accused person. The NDPS Act is an extremely stringent statute which affixes severe punishment and strict principles/guidelines in granting bail to the accused persons. Thus, in order to protect the liberty of an individual, it is important that the statutes like the NDPS Act should be construed bearing in mind the fact that the severer the punishment, the greater should be the care taken to see that the safeguards provided in the statute and as laid down by the Supreme Court are scrupulously followed.¹⁰ In cases like these, the Courts should endeavor to strike a balance between the powers of the investigating agency and the fundamental rights of the accused. One can only hope that this judgment becomes the guiding light for many other statutes that may have left enough scope for misuse, thereby robbing people of their fundamental rights.

⁹(2005) 11 SCC 600

¹⁰*Union of India v. Bal Mukund* (2009) 12 SCC 161