Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 454 OF 2015
(Arising out of SLP (Criminal) No.9928 of 2014)

R. Dineshkumar @ Deena
...Appellant

Versus

State
Rep. by Inspector of Police & Others ...
Respondents

J U D G M E N T

Chelameswar, J.

1. Leave granted.

2. One Vijayan @ Vijayakumar was killed on 4th June 2008 in the city of Chennai. It appears from the judgment under appeal that the incident occurred in the following manner:

> "At the time of occurrence, the deceased was proceeding in his car. The assailants came in a white Ambassador car, intentionally dashed the said car against the car driven by the deceased. As a result, the car driven by the deceased came to a halt. Some people suddenly emerged and brutally attacked Vijayan @ Vijayakumar and he succumbed to the injuries instantaneously."

3. A case in Crime No.618 of 2008 came to be registered with respect to the said incident at Abiramapuram Police Station, Chennai. A final report came to be filed against seven accused persons of whom the appellant herein is one (A-5). All the seven accused are facing trial in Sessions Case No.73 of 2009 on the file of the Principal Sessions Judge, Chennai. From the judgment[1] under appeal, it appears:

> "The trial Court has framed charges under Sections 147, 148, 302 & 120-B IPC. As many as 71 witnesses were cited in the final report. During trial, already 65 witnesses have been examined on the side of the prosecution and all such witnesses have been cross examined by the counsel appearing for the respective accused, except PW64. PW64 is one Shri L. Venkatesh, the 2nd respondent in this revision petition. After the chief examination of PW64 (the 2nd respondent herein) was over, the petitioner herein filed a petition in Crl.M.P. No.4188 of 2014 under Section 319 of Cr.P.C. seeking to summon the 2nd respondent/PW64 as an additional accused so as to be tried together with the rest of the accused, who are already facing trial. That petition was dismissed by the trial court by order dated 10.03.2014. Challenging the same, the petitioner/A5 is before this court with this criminal revision petition."

4. The factual background in which application under Section 319 of the Code of Criminal Procedure (for short "Cr.P.C.") came to be filed by the appellant herein is as follows:

Some three months after the death of Vijayan the 2nd respondent herein L. Venkatesh (who was examined as PW64 and for the sake of convenience hereinafter referred to as "PW64") was examined by the Police on 11.09.2008

[1] Judgment dated 13.11.2014 passed by the High Court of Madras in Crl. R.C. No.425 of 2014

and his statement under Section 161 Cr.P.C. was recorded. Subsequently, on 26.09.2008, his statement was recorded under Section 164 Cr.P.C. by the learned Metropolitan Magistrate, George Town, Chennai. Finally, the second respondent was examined as PW64 in the trial of the abovementioned case. The tenor of all the three statements of PW64 is said to be broadly consistent. **(**We say so because we have not scrutinized the statements nor we wish to scrutinize the same and record any conclusion as the trial of the criminal case is still pending and it would be inappropriate to record any definite finding at this stage of any matter connected with the said case.**)** The translated copies of all the three statements of PW64 are placed on record. The substance of the statements is that sometime in November 2007, one Karuna, the second accused had offered to pay PW64 an amount of Rs.5 lakhs if PW64 killed Vijayan. PW64 accepted the proposal. Karuna made an initial payment of Rs.50,000/- to PW64 on his accepting the proposal. Thereafter, PW64 contacted the third accused and disclosed the proposal whereupon the third accused agreed to join PW64. The third accused was paid an amount of Rs.10,000/- by PW64. However, subsequently, PW64

developed cold feet and started maintaining a distance from the second accused Karuna. But according to PW64, the second accused and the third accused were in contact with each other. After coming to know about the murder of Vijayan through newspapers, PW64 contacted the third accused and enquired about the matter upon which the third accused informed PW64 that the third accused along with three other named persons had murdered Vijayan and collected an amount of Rs. 4 lakhs from the second accused. The third accused further threatened PW64 that he would be "finished" if he revealed the information to anybody.

5. By the impugned judgment, the High Court dismissed the criminal revision. The operative portion of the judgment reads as follows:

> "63. In view of all the above discussions, I hold that the evidence of the 2nd respondent, as a prosecution witness before the trial court, and the incriminating answers given by him amount to compelled testimony falling within the sweep of Section 132 of the Evidence Act and thus, he is protected by the proviso to Section 132 of the Evidence Act. In such view of the matter, solely on the basis of his evidence as PW64 before the trial court, he cannot be prosecuted either by summoning him as an additional accused in the present case or in a separate trial.
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> 64. At the same time, for the offence of conspiracy allegedly committed by A2 and A3 and the 2nd respondent herein, there can be a prosecution for offence under Section 120(B) r/w 302 of IPC. But, such prosecution against the 2nd respondent cannot be based on his statement made under Section 164 of Cr.P.C. in this case and his evidence as PW64 before the trial court in the present sessions case. If there are other materials collected during investigation by which the said conspiracy could be proved against him, there can be no legal impediment to prosecute the 2nd respondent herein along with A2 and A3 for the said

offence of conspiracy by filing a separate police report. After such prosecution, the prosecution will be at liberty to approach the court to tender pardon to the 2nd respondent under Section 306 of Cr.P.C. and then to examine him as a prosecution witness in order to prove the said conspiracy, if need be."

6. In substance the High Court held that PW64 cannot be prosecuted by summoning him as an additional accused under Section 319 Cr.P.C. in Sessions Case No. 73 of 2009 on the basis of his evidence in the said Sessions Case as the proviso to Section 132 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") creates an embargo upon such a course of action. However, the High Court held that PW64 could be separately prosecuted for an offence under Section 120B of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") read with Section 302 IPC if independent evidence other than the statement under Section 164 Cr.P.C. of PW64 and his evidence in Sessions Case No.73 of 2009 are available to prosecute him along with A2 and A3.

7. In our opinion, the second conclusion recorded by the High Court contained in para 64 extracted above is really uncalled for in the context of the issue before the High Court. The question before the High Court was whether the Sessions Court was justified in declining to summon PW64 in

exercise of its authority under Section 319 of the Cr.P.C. as an additional accused in Sessions Case No.73 of 2009. We, therefore, will examine only the question whether on the facts mentioned earlier the Sessions Court is obliged to summon PW64 as an additional accused exercising the power under Section 319 of the Cr.P.C.

8. Section 319 of the Cr.P.C. insofar as it is relevant for the purpose of the present case reads as follows:

> "**Section 319. Power to proceed against other persons appearing to be guilty of offence**.—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."

The Section authorizes the Court making any inquiry into or conducting the trial of an offence to "proceed" against any person (other than the accused facing trial) subject to two conditions (i) that from the "evidence" it appears to the Court that such a person "has committed any offence", and (2) that such a person "could be tried together with the accused."

9. We shall first consider the question as to when could a person appearing to have committed an offence "be tried together with the accused" already facing trial?

10. Section 223[2] of the Cr.P.C. provides for the joint trial of different accused in certain circumstances. It enumerates different contingencies in which different persons may be charged and tried together. As rightly noticed by the High Court, the only clause if at all relevant for the purpose of the present case is Section 223(d) which stipulates that persons accused of different offences committed in the course of the same transaction could be charged and tried together.

11. It is admitted on all hands that except the evidence of PW64 and his statement under Section 164 Cr.P.C. there is no other evidence on record of the Sessions Court to indicate that PW64 has committed any offence. Both the evidence

[2] Section 223. What persons may be charged jointly. - The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course same transaction;
(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
(d) persons accused of different offences committed in the course of the same transaction;
(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;
(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860). or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Session may, if such persons by an application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

and the statement under Section 164 Cr.P.C. of PW64 *prima facie* indicate a conspiracy to kill Vijayan to which conspiracy PW64 was a party at least at the initial stage. According to PW64, he developed cold feet after the initial stage and withdrew from the conspiracy and did not participate in the actual killing of Vijayan. Whether his assertions in this regard are true and, if true, would legally absolve him of guilt are questions with which we are not concerned for the purpose of this case. We only take note of the evidence on record as it exists to indicate that as of today there is no evidence to prosecute PW64 for any offence other than the one punishable under Section 120B of IPC.

12. It is the settled legal position that an offence of conspiracy[3] is complete the moment two or more persons agree to do an illegal act, or agree to do an act which is not illegal in itself but by illegal means or in the alternative if two or more persons agree to cause to be done an illegal act or an act which is not illegal through illegal means.

[3] 120A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

13. In ***Major E.G. Barsay*** *v.* ***State of Bombay***, AIR 1961 SC 1762, this Court held thus:

> "The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, through the illegal act agreed to be done has not been done."

14. In ***State (NCT of Delhi)*** *v.* ***Navjot Sandhu alias Afsan Guru***, (2005) 11 SCC 600, this Court after analyzing the history of the offence of conspiracy held as follows:

> **88.** Earlier to the introduction of Sections 120-A and 120-B, conspiracy *per se* was not an offence under the Penal Code except in respect of the offence mentioned in Section 121-A. However, abetment by conspiracy was and still remains to be an ingredient of abetment under clause secondly of Section 107 IPC. The punishment therefor is provided under various sections viz. Sections 108 to 117. Whereas under Section 120-A, the essence of the offence of criminal conspiracy is a bare agreement to commit the offence, the abetment under Section 107 requires the commission of some act or illegal omission pursuant to the conspiracy. A charge under Sections 107/109 should therefore be in combination with a substantive offence, whereas the charge under Sections 120-A/120-B could be an independent charge.
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> **89.** In the Statement of Objects and Reasons to the Amendment Bill, it was explicitly stated that the new provisions (120-A and 120-B) were "designed to assimilate the provisions of the Penal Code to those of the English Law….". Thus, Sections 120-A and 120-B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable. Even if an overt act does not take place pursuant to the illegal agreement, the offence of conspiracy would still be attracted. The passages from *Russell on Crimes*, the House of Lords decision in *Quinn* v. *Leathem* and the address of Willes, J. to the Jury in *Mulcahy* v. *R.* are often quoted in the decisions of this Court. The passage in *Russell on Crimes* referred to by Jagannatha Shetty, J. in *Kehar Singh case* (SCC at p. 731, para 271) is quite apposite:
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> > "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."
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> This passage brings out the legal position succinctly."

15. Therefore, if law permits the use of the content of either the evidence given at trial or the statement made under Section 164 Cr.P.C. by PW64, he could be tried for an offence punishable under Section 120B IPC. Because, on his own admission, PW64 agreed to kill Vijayan for a price and accepted money from A2 towards the part payment of such price and also drafted A3 into the conspiracy.

16. If it is legally possible to try PW64 for such an offence, the further question would be whether he could be tried along with the other accused facing trial for the charge of murder of Vijayan. We have already noticed that Section 223(d) of Cr.P.C. authorizes the trial of "persons accused of different offences committed in the course of the same transaction".

17. That leads us to a further question whether the offence said to have been committed by PW64 and the offence for which the appellant and other accused in Sessions Case No.73 of 2009 are being tried were "committed in the course of the same transaction". The High Court examined this question and came to the conclusion that there were three different conspiracies; (i) between A-2 and PW64, (ii) between PW64

and A-3, (iii) between A-2 and A-3 to A-7 and recorded a conclusion;

> "Therefore, I hold that the conspiracies committed by A2 and the 2nd respondent/P.W. 64 and the conspiracy between the 2nd respondent/P.W. 64 and A3 have got nothing to do with the subsequent conspiracy hatched between A2, A3 and the rest of the accused."

18. After such a conclusion, the High Court placing reliance on ***Balbir*** *v.* ***State of Haryana & Another*** (2000) 1 SCC 285 and another judgment of the Gauhati High Court in ***M.L. Sharma & Others*** *v.* ***Central Bureau of Investigation*** 2008 Crl. L.J. 1725 reached the conclusion that PW64 could not be tried together with the other accused already facing trial in Sessions Case No. 73 of 2009, as the said three conspiracies "do not form part of the same transaction"[4].

19. We find it difficult to agree with the conclusion recorded by the High Court. In our opinion, the High Court misread the principle laid down in ***Balbir case***.

20. The legal position regarding the joint trial of various accused fell for the consideration of this Court in ***State of Andhra Pradesh*** *v.* ***Cheemalapati Ganeswara Rao & Another,*** AIR 1963 SC 1850.

[4] From these judgments, it is crystal clear that there is a vast difference between the expression in respect of the same subject-matter and in the course of the same transaction. Here, again, as I have already concluded, though all the conspiracies relate to the same subject-matter, they do not form part of the same transaction. Therefore, I have no hesitation to hold that in the present case, the 2nd respondent/P.W. 64 cannot be tried together with the accused, who are presently facing the prosecution.

21. The facts, the question and the decision (insofar as they are relevant for our purpose) in the case of ***Ganeswara Rao*** are as follows. Two of the respondents therein along with two others were tried for various offences under the Indian Penal Code. Both the respondents were convicted for offences under Section 120B and 409 of the IPC.

(i) The High Court set aside the convictions on various grounds; one of them being that the joint trial of two or more persons in respect of different offences committed by each of them is illegal. According to the Andhra Pradesh High Court, Section 239[5] (of the Old Cr.P.C. corresponding to Section 223 of the Code of Criminal Procedure, 1973) did not permit such a procedure.

(ii) Examining the correctness of the conclusion recorded by the Andhra Pradesh High Court, this Court held:-

> ".....The question is whether for the purposes of s. 239(d) it is necessary to ascertain any thing more than this that the different offences were committed in the course of the same transaction or whether it must further be ascertained whether the acts are intrinsically connected with one another. Under s. 235(1) what has to be ascertained is whether the offences arise out of acts so connected together as to form the same transaction, but the words "so connected together as to form" are not repeated after the words "same transaction" in s. 239. What has to be

[5] Section 220(1) and 223(d) employ the clause "the same transaction". It may be mentioned here that while Section 220(1) of the Criminal Procedure Code, 1973 deals with the joint trial of more than one offence committed by the **same person**, Section 223 deals with the joint trial of **different offences committed by different persons** under certain circumstances.

> ascertained then is whether these words are also to be read in all the clauses of s. 239 which refer to the same transaction**. Section 235(1)**, while providing for the joint trial for more than one offences, **indicates that there must be connection between the acts and the transaction**. According to this provision **there must thus be a connection between a series of acts before, they could be regarded as forming the same transaction.** What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily **depend upon the particular facts of each case** and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that **where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction.** It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and, therefore, the mere absence of the words "so connected together as to form" in cl. (a), (c) and (d) of s. 239 would make little difference.

(iii) This Court after taking note of the fact that the clause "same transaction" is not defined under the Cr.P.C. opined that the meaning of the clause should depend upon the facts of each case. However, this Court indicated that where there is a proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it is possible to infer that they form part of the same transaction. This Court also cautioned that every one of the above-mentioned elements need not co-exist for a transaction to be regarded as the "same transaction".

(iv) This Court approved a decision of Allahabad High Court in ***T.B. Mukerji*** *v.* ***The State,*** AIR 1954 All 501 insofar as it dealt with the general principles of the joint and separate trials and held as follows:

> "No doubt, as has been rightly pointed out in this case, separate trial is the normal rule and joint trial is an exception. But while this principle is easy to appreciate and follow where one person alone is the accused and the interaction or intervention of the acts of more persons than one does not come in, it would, where the same act is committed by several persons, be not only inconvenient but injudicious to try all the several persons separately. This would lead to unnecessary multiplicity of trials involving avoidable inconvenience to the witnesses and avoidable expenditure of public time and money. No corresponding advantage can be gained by the accused persons by following the procedure of separate trials. Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. **But here, again, if those offences are alleged not to be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves**. We entirely agree with the High Court that joint trial should be founded on some principle."
>
> [emphasis supplied]

(v) This Court recorded a final conclusion that the Andhra Pradesh High Court was wrong in setting aside the conviction on the ground that there was a misjoinder of the charges and held;

> "33. …Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless it in fact came to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice. For all these reasons we cannot accept the argument of learned counsel on the ground of misjoinder of charges and multiplicity of charges."

22. According to us, the principle enunciated in ***Ganeswara Rao case*** is that where several persons are alleged to have committed several separate offences, **which, however, are not wholly unconnected**, then there may be a joint trial unless such joint trial is likely to cause either embarrassment or difficulty to the accused in defending themselves.

23. Coming to ***Balbir case*** (supra), the facts are as follows. One Om Prakash was killed. On the basis of a report made to the police by the nephew of the deceased accusing two brothers Balbir and Rajinder to be the assailants, police registered a crime and investigated. On the basis of investigation, eventually, the police filed a chargesheet under Section 302 IPC against one Guria but not against the two accused mentioned in the FIR. The nephew of the deceased lodged a private complaint before the magistrate accusing Balbir and Rajinder of the murder of Om Prakash. It was alleged therein that the police had deliberately suppressed the case against the real culprits and filed a chargesheet against Guria. As a consequence, two sessions cases were registered and tried separately. Guria was acquitted and his acquittal became final. Whereas, Balbir

and Rajinder were convicted by the Sessions Court. Their conviction was confirmed by the High Court. It was argued before this Court by the convicts that such separate trials were uncalled for and both the cases must have been consolidated and tried jointly invoking Section 223(a) of the Cr.P.C. This Court rejected the submission:

> "16. …..for both versions here are diametrically divergent without anything in common except that the murdered person was the same. In such cases the most appropriate procedure to be followed by a Sessions Judge should be the same as followed in the present case i.e. the two trials were separately conducted one after the other by the same court before the same Judge and judgments in both cases were separately pronounced on the same day. No doubt the Sessions Judge should take care that he would confine his judgment in one case only to the evidence adduced in that particular case."

Both Guria on one hand and Balbir and Rajinder on the other hand were independently accused of murdering Om Prakash. It does not appear to be either the case of the police or the private complainant that all three accused acted in concert and killed Om Prakash. Therefore, this Court held that the application of Section 223(a) is clearly ruled out. In the process, this Court referred to ***Ganeswara Rao case*** and extracted certain passages.

24. In our opinion, the reference to ***Ganeswara Rao case*** in ***Balbir case*** is not really necessary. ***Ganeswara Rao case*** was a case falling under Section 223(d) (Section 239 of

old Cr.P.C.) which contemplates different offences committed by different persons. In ***Balbir case***, the offence is only one. It is the murder of Om Prakash. Different persons are accused not collectively but individually of having committed the murder of Om Prakash. Therefore, Section 223(d) would have no application to ***Balbir case***.

25. At any rate, the reliance placed on ***Balbir case*** by the High Court in the case on hand, in our opinion, is wholly misplaced. It is not a case of either the prosecution or PW64 that the murder of Vijayan was committed by the persons other than the accused facing the trial. PW64 only gave evidence as to the genesis of the conspiracy to kill Vijayan of which various accused and also PW64 are parties at different points of time. Going by the test laid down in ***Ganeswara Rao case***, assuming the correctness of the conclusion recorded by the High Court that there are three different conspiracies between different parties as explained earlier, it cannot be said that these offences are so wholly unconnected that they cannot be tried together. Then the only other consideration which might preclude a joint trial is that such a joint trial would either cause embarrassment or difficulty to the accused in defending themselves.

26. It is not the case of the accused that they would have some difficulty in defending themselves if PW64 is also tried alongwith them for the offence of conspiracy to kill Vijayan. On the other hand, it is the case of the accused that not trying PW64 along with them would cause prejudice to their defence.

27. Therefore, in our view, the High Court is clearly wrong in concluding that PW64 could not be tried alongwith the other accused under Sessions Case No.73 of 2009. But that does not solve the problem. The question whether the other requirements of Section 319 are satisfied warranting the summoning of PW64 under Section 319 of Cr.PC is still required to be examined.

28. The second requirement under Section 319 Cr.P.C. for a court to summon a person is that it must appear from the evidence that such a person has committed an offence. It is not necessary for us to analyse the full amplitude of the expression "evidence" occurring under Section 319, but it is axiomatic that the deposition made by a witness during the course of the trial of a sessions case is certainly evidence

within the meaning of that expression as defined under Section 3 of the Evidence Act.

29. Having regard to the content of the deposition of PW64 at the trial of Sessions Case No.73 of 2009, whether his deposition can be treated as evidence within the meaning of that expression occurring in Section 319 of the Cr.P.C. in order to summon him as an accused to be tried along with the appellant herein and other accused already facing trial?

30. It was argued before the High Court as well as this Court that in view of the proviso to Section 132[6] of the Evidence Act, the content of PW64's deposition is not evidence within the meaning of Section 319 of the Cr.P.C. to form the basis for summoning of PW64 as an accused to be tried along with the other accused.

31. The High Court on an elaborate consideration of the various authorities and the legal position came to the conclusion;

> "63. In view of all the above discussions, I hold that the evidence of the 2nd respondent, as a prosecution witness before the trial court, and the

[6] **132. Witness not excused from answering on ground that answer will criminate**.—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Proviso – Provided that no such answer, **which a witness shall be compelled to give,** shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

> incriminating answers given by him **amount to compelled testimony falling** within the sweep of Section 132 of the Evidence Act and thus, he is protected by the proviso to Section 132 of the Evidence Act."
>
> (emphasis supplied)

32. The learned counsel for the appellant argued that PW64 is not entitled to the benefit of the immunity provided under the proviso to Section 132 of the Evidence Act as such evidence of PW64 is evidence voluntarily given by him before the Court and not evidence which PW64 was "compelled to give". The learned counsel submitted that having regard to the language of the proviso, it is only those answers (whose content is incriminatory) which a witness is compelled to give that cannot be proved against such witness in any criminal proceeding. But, if such incriminatory statements are made by a witness at the trial of a civil or criminal proceeding voluntarily without there being any compulsion, then the protection under the proviso to Section 132 is not available to such a person. The learned counsel placed heavy reliance on a decision in the case of ***The Queen*** *v.* ***Gopal Doss & Another,*** ILR 3 Mad. 271 and other judgments of the various High Courts which either followed or are in tune with ***Gopal Doss*** (supra) in support of his submission.

33. The scope of Section 132 of the Evidence Act fell for the consideration of Madras High Court as early as in 1881 in the case of ***Gopal Doss***.

34. A Bench of five Judges heard the matter. The facts are as follows.

(i) A suit for summary recovery of an amount of Rs.1000/- was filed against Gopal Doss and his son Vallaba Doss. It was a suit under Order XXXIX of Code of Civil Procedure 1859, corresponding to Order XXXVII of the CPC 1908 based on a promissory note allegedly signed by Gopal Doss and his son. Both the father and son sought leave of the Court to defend the suit, which was granted. Gopal Doss denied his signature on the suit promissory note whereas his son "swore that he wrote both signatures on the promissory note according to the instructions of the plaintiff" for a monetary consideration. The suit was decreed against the son. Subsequently, Gopal Doss prosecuted his son and the plaintiff for forgery and other charges. The plaintiff was acquitted and Vallaba Doss was convicted. The question was – whether **(a)** the affidavit filed by Vallaba Doss in the summary suit in support of his claim for leave to defend the suit, and **(b)** his deposition at the trial of the said suit are

admissible evidence against Vallaba Doss in the criminal case.

(ii) The matter was heard by a Bench of five Judges. Three of them held both the affidavit and deposition were admissible evidence, whereas two Judges held that only affidavit was admissible, but not the deposition. **(**Dissenting opinion was written by Justice Muttusami Ayyar with whom Justice Kernan agreed.**)**

(iii) Insofar as the deposition of Vallaba Das in the summary suit, the basic issue was whether the compulsion contemplated under Section 132 is compulsion of law arising out of a statutory obligation or compulsion by the presiding Judge by not excusing the witness from answering any particular question put to him.

35. Chief Justice Turner commenced from the premise that under Section 14 of the Indian Oaths Act, 1873 (corresponding to Section 8 of the Oaths Act, 1969), every person giving evidence on any subject before any court (or a person authorized to administer oaths and affirmations) shall be bound to state the truth of such subject and the Court was the authority to either compel or excuse the witness

from complying with the requirement of the above-mentioned rule. Turner, CJ examined the scheme of Sections 121 to 132 of the Evidence Act and held that the expressions "compelled" and "permitted" employed in those sections "are so used as to pre-suppose a public officer having authority to compel or to permit and exercising it at the time, the necessity when such compulsion or permission arises". He further held that "..... implies an inquiry and decision on the circumstances which excuse or prohibit the compulsion or permission and action on the part of the authority presiding at the examination in pursuance of its decision". In substance, Turner, CJ opined that the compulsion is not by virtue of an obligation arising under law but imposed by the Judge.

36. On the other hand, both Justice Ayyar and Justice Kernan opined that the compulsion is the obligation arising out of law, but not the compulsion imposed by the Judge.

> "It seems to me that the Legislature in India adopted this principle, **repealed the law of privilege**, and thereby obviated the necessity for an inquiry as to how the answer to a particular question might criminate a witness, and gave him an indemnity by prohibiting his answer from being used in evidence against him and thus secured the benefit of his answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness when a criminal proceeding is instituted against him. The conclusion I come to is that **Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every question material to the issue**, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that the answer shall not be admitted in evidence against him in a criminal prosecution." (per Muttusami Ayyar, J.)
>
> [emphasis supplied]

37. Logic of Justice Ayyar for coming to such a conclusion was:

> "It seems to me incongruous that the Legislature should have directed the Judge never to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question.
>
> … Under the law of privilege, it is necessary to set it up because it is only an excuse which the Judge may or may not recognize as good, and it is his decision that either accords the privilege or withholds it; but under Section 132 it is not in the power of the Judge to excuse a witness from answering if the question is relevant to the issue. Such being the case, it is not clear to me why a witness should go through the form of asking and being refused to be excused."

38. Coming to the question of the admissibility of the affidavit of Vallaba Doss,

(a) Justice Ayyar opined that since the affidavit given in the summary suit was given by Vallaba Doss in his capacity as a party (but not as a witness) to the suit with a view to obtaining leave to defend the suit, it was a voluntary statement made by Vallaba Doss without any compulsion (either from the Judge or of law) within the meaning of Section 132 of the Evidence Act, and therefore, admissible evidence against Vallaba Doss, the subsequent prosecution.

(b) Justice Kernan agreed fully with the views of Justice Ayyar.

(c) Turner, CJ held:

> "If I am right in the construction I have put on the language of Section 132, it follows that the affidavit on which the accused obtained leave to defend was also admissible."

39. The scope of Section 132 of the Evidence Act fell for consideration of this Court in ***Laxmipat Choraria & Others*** *v.* ***State of Maharashtra***, (1968) 2 SCR 624. Three appellants (brothers) were convicted for the offence under Section 120-B of the Indian Penal Code and Section 167(81) of the Sea Customs Act, 1878. Briefly stated the facts are that the three appellants before this Court were part of an international gold smuggling organization. The kingpin of the organization was a Chinese citizen living in Hong Kong. One Ethyl Wong, an Air Hostess of Air India was also a member of the abovementioned organization and carried gold on "several occasions". She was examined as a prosecution witness in the case. "She gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transaction. Her testimony was clearly that of an accomplice."

40. Before this Court, the main argument was that "Ethyl Wong could not be examined as a witness because (a) no oath could be administered to her as she was an accused person since Section 5 of the Indian Oaths Act bars such a course and (b) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly

with the appellants. The breach of the last obligation vitiated the trial and the action was discriminatory. In the alternative, even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here or in the High Court".

41. Dealing with the question whether Ethyl Wong should have been prosecuted along with other accused, this Court opined:

> "The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness...."

42. Dealing with the immunity conferred under Section 132, this Court held thus:

> "Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. **Under Section 132 a witness shall not be excused from answering any question** as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard **to this compulsion** is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, **Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers.** Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso). **In India the privilege of refusing to answer has been removed so that**

> **temptation to tell a lie may be avoided but it was necessary to give this protection**. The protection is further fortified by Article 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. **A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself**. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him."
>
> [emphasis supplied]

43. In substance, this Court held that once the prosecution chose to examine Ethyl Wong as a witness **she was bound to answer every question put to her**. In the process, if the answers given by Ethyl Wong are self-incriminatory apart from being evidence of the guilt of the others she could not be prosecuted on the basis of her deposition in view of the proviso to Section 132 of the Evidence Act. This Court's conclusions that "in India the privilege of refusing to answer has been removed ....." and that "the safeguard to this compulsion" in our opinion, are clearly in tune with the dissenting opinion expressed by Ayyar, J. in ***Gopal Doss's case.*** This Court opined that the proviso to Section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a

fundamental right that "no person accused of any offence shall be compelled to be a witness against himself." Though such a fundamental right is available only to a person who is an accused of an offence, the proviso to Section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminates himself. Without such an immunity, a witness who is giving evidence before a Court to enable the Court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case.

44. The sweep of Article 20 fell for consideration of this Court in ***Nandini Satpathy*** *v.* ***P.L. Dani & Another***, (1978) 2 SCC 424. Justice V.R. Krishna Iyer spoke for the bench. **(i)** It was a case where a crime under the Prevention of Corruption Act and certain other offences under the Indian Penal Code came to be registered against Nandini Satpathy, former Chief Minister of Orissa.

(ii) This Court examined the scheme of Article 20(3) and Section 161(2) and opined that "….. we are inclined to the view,

terminological expansion apart, the Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause". This Court also recognised that protection afforded by Section 161(2) is wider than the protection afforded by Article 20(3) in some respects. "…The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression 'accused of any offence' must mean formally accused in *praesenti not in futuro* – not even imminently as decisions now stand."

(iii) This Court opined that there is "cluster of rules" commonly grouped under the term 'privilege against self-incrimination'. The origins of such privilege against self-incrimination are traceable to a sharp reaction to the practice of the court of Star Chamber which readily convicted persons on the basis of self-incrimination. Such a rule of the common law is embodied in Article 20(3) of the Constitution of India.

(iv) This Court opined that the protection of Article 20(3) is available not only to a person who is facing trial for an offence before a Court of law but even to a person embryonically accused by being brought into police diary. In other words, 'suspects' but 'not formally charged' are also entitled for the protection of Article 20(3).

45. The rule against self-incrimination found expression in Indian law much before advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in **(i)** Section 161 Cr.P.C., 1898. Sub-section (1) authorised a police officer investigating a case to examine any person "supposed to be acquainted with the facts and circumstances of the case". Sub-section (2) exempted such person from answering the questions "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Sub-sections (2) of both the old and new Code are substantially identical[7].

[7] Section 161(2) of CrPC 1973. – Such person shall be bound to answer **truly** all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

Section 161(2) of Cr.P.C. 1898. – Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25[8] and 26[9] of the Evidence Act which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

(iii) The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

46. Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in ***Gopal Doss*** *(supra),* the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a

[8] Section 25. Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.

[9] Section 26. Confession by accused while in custody of police not to be proved against him.—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.

Explanation.—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)

witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act.

47. The proviso to Section 132 of the Evidence Act is a facet of the rule against self incrimination and the same is statutory immunity against self incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court.

48. In the light of our above discussion, we are of the opinion the High Court rightly refused to summon PW64 as an accused to be tried alongwith the appellant and others.

49. Before we part with this case, we must also place on record that during the argument and in the written submission filed on behalf of the appellant, a point is sought

to be made that PW64 could not have been examined as a witness without securing pardon under Section 306 Cr.PC.

50. In the application filed under Section 319 Cr.PC before the trial Court in this regard, it is stated as follows:

> "The petitioner submits that if the prosecution wants him to be a witness, he should have been made as an Approver and tender of pardon proceedings should have been taken up."

51. It is not very clear from the judgment under appeal as to what exactly was the submission made in support of the above mentioned plea, but the High Court recorded at para 20:

> "…… If it is so held, then the 2nd respondent is liable to be tried along with the other accused in the present case, undoubtedly, the examination of the 2nd respondent/P.W.64 as a prosecution witness without there being an order of pardon is illegal. But, for any reason, if it is so held tha the 2nd respondent/P.W.64 cannot be tried together with the rest of the accused in one and the same trial on the ground that these offences have not been committed in the course of the same transaction, then, there is nothing illegal in examining the 2nd respondent as a witness for the prosecution without pardon under Section 306 of Cr.P.C. In other words, suppose, the trial of A2 and A3 is conducted in respect of the offence of conspiracy, allegedly committed by them along with the 2nd respondent, in that trial, if the 2nd respondent is to be examined as a prosecution witness, certainly, pardon under Section 306 Cr.P.C. is mandatory and without such pardon, he cannot be examined as a prosecution witness. Thus, the crux of the issue involved in this case is whether the 2nd respondent could be tried together with the rest of the accused in the present trial."

52. The High Court recorded the conclusion that the examination of PW64 as a prosecution witness without securing pardon under Section 306 Cr.PC is illegal if PW64 is

a party to the conspiracy alongwith A2 and A3 without assigning any reason in support of such a conclusion.

53. The question whether prosecution could have examined somebody as a witness against whom there is some material indicating his participation in a crime fell for the consideration of this Court on two occasions in ***Laxmipat Choraria & Others*** *v.* ***State of Maharashtra***, AIR 1968 SC 938 and ***A.R. Antulay*** *v.* ***R.S. Nayak & Another***, (1988) 2 SCC 602.

54. We have already taken note of the relevant facts and the decision of this Court in ***Choraria case***. The relevant facts of ***A.R. Antulay case*** are as follows. Before the "trial Court" it was contended by Antulay that the examination of some of his alleged co-conspirators as witnesses and proposal to examine some more of them is legally not tenable and they must be arrayed as accused. Such a contention was negated by the trial Judge. Aggrieved by the same, Antulay carried the matter in appeal to this Court. Unfortunately, the majority judgment did not consider this aspect. It is only Justice Venkatachaliah, as His Lordship

then was, who in his dissenting judgment considered this aspect and held as follows:

> "133. …….. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle proseque against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in *Laxmipat Choraria* v. *State of Maharashtra*: 1968CriLJ1124 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:
>
> > Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).
> >
> > ...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence.
>
> 134. On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in the interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal."

55. In the light of the above two decisions, the proposition whether the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the

commission of the crime for which the other accused are being tried requires a deeper examination.

56. Unfortunately before us, except asserting the proposition no clear submissions are made in this regard. In the circumstances, we do not propose to examine the proposition in the present case. However, in view of the fact Section 307 Cr.P.C. authorizes even a Court conducting trial to tender pardon to such a person, we believe that the ends of justice in this case would be met by directing the trial Court to grant pardon in favour of PW64 after following the appropriate procedure of law and record his evidence afresh.

57. We order accordingly. The appeal stands disposed of.

.....J.
(J. Chelameswar)

.....J.
(C. Nagappan)

New Delhi;
March 16, 2015