GULAM MOHD. @ GULAL SHAIKH

v.

STATE OF GUJARAT

(Criminal Appeal No.1770 of 2008)

NOVEMBER 11, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Code of Criminal Procedure, 1973 – s.439 – Prevention of Terrorism Act, 2002 – s.49 – Bail – Grant of – Confession purportedly recorded under s.32 of POTA – Bail applications under the Acts – Rejected by trial Court – High Court affirming same – Correctness of – Held: Correct – When applicant was produced for confirmation of the so called confessional statement, there was no plea that the same was obtained under pressure – It was claimed that there was retraction – If in reality there was no confession, the question of any retraction did not arise.

The applicant was facing trial for alleged commission of offence under Penal Code, Prevention of Terrorism Act, 2002 (POTA) and Arms Act. A confessional statement was purportedly recorded u/s.32 of POTA. The applicant filed application u/s.439 Cr.P.C. and s.49 of POTA, which was dismissed by the Trial Court. High Court affirmed the same. Hence the instant appeal.

Dismissing the appeal, the Court

HELD: Two other factors need to be noted. When the appellant was produced for confirmation of the so called confessional statement there was no allegation that the same was obtained under pressure. It is claimed that there was retraction on 9.8.2003. If in reality there was no confession, the question of any retraction does not arise. [Para 8] [1043-D-E]

A *State (NCT of Delhi) v. Navjot Sandhu alis Afsan Guru* **(2005) 11 SCC 600, referred to.**

Case Law Reference:

(2005) 11 SCC 600 referred to para 9

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1770 of 2008.

From the final Judgment and Order dated 21.2.2006 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. C 1704 of 2004.

Nima Ramakrishnan and M.A. Chinnasamy for the Appellant.

D Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

E 2. Challenge in this appeal is to the order passed by a Division Bench of the Gujarat High Court dismissing the Criminal Appeal No.1704 of 2004. Challenge before the High Court was to the order passed by learned Special Judge, POTA, Ahmedabad in Criminal Miscellaneous Application No.2219 of 2004 in connection with I.C.R. No.6 of 2003 of DCB F Crime Police Station, Ahmedabad City (presently numbered as POTA Case NO.12 of 2003).

3. The background facts in a nutshell are as follows;

G An application in terms of Section 439 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') and Section 49 of the Prevention of Terrorism Act, 2002 (in short 'POTA') was filed. The applicant is facing trial for alleged commission of offences punishable under Sections 120-B, 121, 121A, 122, 123 of the Indian Penal Code, 1860 (in short 'IPC') and H

Sections 3(1)(A)(B), 3(3), 4, 20, 21(2) B, 22(3)(A)(B) of POTA and Sections 25 (1)B, C, 27 and 29 of the Arms Act, 1950 (in short 'Arms Act'). According to the applicant, on 3.4.2003 five boys were picked up from a park of Ahmedabad City and on 4.4.2003 first information report was lodged wherein commission of offences punishable under the POTA were included. Case was registered as CR.No.6 of 2003. According to the applicant he was picked up by the Crime Branch and was kept in illegal custody. Certain news items were published in newspapers on 30.6.2003. It is pointed out that another co-accused under trial in another case was not produced. The counsel appearing for him made a statement before the Court that he was in illegal custody of Crime Branch. The name of that co-accused is Rafiq and same stand was taken. Notice was issued by the learned Additional Sessions Judge fixing the date 16.7.2003. The appellant was shown to have been arrested in the present case on 15.7.2003. A confessional statement purported to have been recorded under Section 32 of POTA on 8.8.2003. The appellant does not know Gujarati and, therefore, the question of making a confessional statement does not arise and he did not sign before the Deputy Commissioner. Though he was produced before the Magistrate for confirmation in terms of section 32(5) of POTA, he was remanded to judicial custody. He made a retraction from the so-called confession on 9.8.2003. It was pointed out that the so-called confession under Section 32 of POTA is not admissible as the provision is entirely different from Section 15 of Terrorist and Disruptive Activities (Prevention) Act, 1987 The trial Court rejected the application prima facie with the following observations:

> "If one looks at the confessional statement of the accused himself it provides sufficient material to prima facie point out his thick relations with the absconding accused Rasool Khan @ Rasool Party. He not only has provided him huge amount of money time and again but, he has worked at his instance continuously and also made frantic hunt for

A renting a godown for the purpose of hiding the weapons which were to be sent in large quantity from the time the alleged conspiracy was hatched. Till the date of his arrest he had been in constant touch with Rasool Party with whom he appears to have talked even after he left the B country to base himself at Pakistan. His wife and children with active connivance of this applicant accused could cross the border. He had helped him in executing the various tasks in pursuance of the conspiracy hatched and therefore, even without taking into consideration the C confessional statement of others this prima facie sufficiently involves him to deny him the bail. The statements of other witnesses and also of those witnesses who have provided links to the alleged conspiracy also prima facie involve this applicant accused and therefore, also he does not deserve the bail. The Court also if looks D at statement of Kaleemullah one of the key accused in the instant case who is also an accused in the other matters, his alleged role in the involvement at every stage of conspiracy and for its execution gets prima facie established.

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His past criminal antecedent reflected by him in his confessional statement also would not permit this Court to grant him the bail as there would be a fair possibility of his not facing the trial. He may have been a TADA accused F and provided with the Regular Bail, but, in every case, the facts will have to be considered from the documents adduced along-with the charge-sheet and moreover, orders of his regular bail in the TADA matters are, not before this Court for it to appreciate anything."

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4. The order of rejection was challenged before the High Court which, as noted above, dismissed the appeal.

5. In support of the appeal, learned counsel for the appellant submitted that this Court has categorically held that H the confession, if any, under Section 32 of POTA made by the

co-accused is not admissible. It was submitted that there was retraction from the confession and, therefore, there was no material before the trial Court to reject the prayer for bail.

6. Learned counsel for the respondent on the other hand submitted that the role of the accused is clearly established. His link with the absconding accused Rasul and Mufti Sufian is clearly established. There was recovery of country made revolver and live cartridges. It was pointed out that it was not only the statement recorded under Section 32 of POTA but other factors like recovery, and antecedents were also taken into consideration.

7. It also referred to the evidence which indicated that the appellant had collected money from one Mohd. Saiyed and Tanvir and ultimately handed over the money to Mufti Sufian and, therefore, it cannot be said that except the confession under Section 32 of POTA, there is no other evidence.

8. Two other factors need to be noted. When the appellant was produced for confirmation of the so called confessional statement there was no allegation that the same was obtained under pressure. It is claimed that there was retraction on 9.8.2003. If in reality there was no confession, the question of any retraction does not arise.

9. In *State (NCT of Delhi) v. Navjot Sandhu alis Afsan Guru* (2005 (11) SCC 600) it was noted at para 50 as follows:

> "We are therefore of the view that having regard to all these weighty considerations, the confession of a co-accused ought not to be brought within the sweep of Section 32(1). As a corollary, it follows that the confessions of the first and second accused in this case recorded by the police officer under Section 32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under Section 30 of the

A Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in policy custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a B confession which qualifies for proof in accordance with the provisions of the Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here."

10. Above being the position, we dismiss the appeal. It is, C however, to be noted that learned counsel for the respondent pointed out that the case is at the advance stage of trial. It would be proper for the trial Court to conclude the trial as early as possible.

D 11. The appeal fails and is dismissed.

D.G. Appeal dismissed.