

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case No:- **CrI A (D) 12/2024**
CrIM (382/2024)

Islam Ul Haq Peer Through NighatAppellant(s)/Petitioner
(s)

Through: M/s N. Hariharan & Kamal Nijhawan,
Sr. Advocates
M/s Umair A. Andrabi, Tanisha, Punya
Rekha Angara, Vasundhara N, Aman
Akhtar, Sana Singh, & Vinayak Gautam,
Advocates

Vs

Union of India
Through National Investigation Agency, Jammu. Respondent(s)

Through: Mr. Vishal Sharma, DSGI
Mr. Vipin Kalra, PP NIA

Coram: **HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE**
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

ORDER

(18.02.2025)(ORAL)

(ATUL SREEDHARAN-J)

1. The present appeal is against an order denying bail to the appellant in the aforementioned case, *inter alia* under the Narcotic Drug and Psychotropic Substances Act (NDPS) and Unlawful Activities (prevention) Act.

2. The appellant is the real brother of a co-accused. The undisputed allegation against the accused, as borne out from the charge-sheet and as accepted by the learned counsel for the Union of India as correct, is that his brother gave him a packet of Narcotics

(3KG of Heroin) which the appellant concealed in his house. The contraband was subsequently seized at the behest of the appellant and his 27 Memorandum reflects that he had knowledge that what he had concealed was Heroin. Some of the seizure witnesses have been examined in this case and one witness is yet to be examined, who is a police witness.

3. The learned Senior Counsel appearing on behalf of the appellant has submitted that a co-accused Ramesh Kumar, who was earlier denied bail by this Court in this case, has been granted bail by the Supreme Court of India on the grounds of delay in trial in Special Leave Petition (SLP) Criminal No. 13829 of 2024 dated 07-02-2025.

4. Learned counsel for the Union of India, on the other hand, vehemently opposed the appeal on the ground that the appellant had concealed the recovered contraband which was recovered at his behest and that he had knowledge that the article concealed was Heroin, as is established by the appellant's memorandum under section 27 of the Evidence Act.

5. The Memorandum under Section 27 of the Evidence Act if considered in the manner as is canvassed by the learned counsel for the Union of India, the same would set to naught the constitutional protection of the right against the self-incrimination as is protected by article 20(3) of the constitution. Besides, this right protected by the constitution also echoes as one of the basic

tenets of criminal law which provides that no man shall be compelled to inculcate himself of a crime, as enshrined in the Latin maxim "*nemo tenetur seipsum accusare*".

6. This constitutionally and legally protected right may be waived by the accused, but the same must be in a manner which is acceptable to law as the said right is precious and its waiver by the accused is fraught with dire consequences for his liberty and, depending upon the nature of the crime, his life itself.

MEMORANDUM US/ 27 OF THE EVIDENCE ACT – WHETHER A CONFESSION IN LAW?

7. Article 20(3) of the Constitution accords protection from self-incrimination. This however is a right that may be waived by the accused if he "**voluntarily consents**" to confess. When an accused consents to confess and incriminate himself, such consent must be an "**Informed Consent**", for which, the accused must possess the "**Consciousness of Consequence**" in order to give an informed consent whereafter, he relinquishes his right against self-incrimination and only then, would the confession be voluntary.

8. The right against self-incrimination is precious and the same cannot be waived by the accused in ignorance of the consequences of such relinquishment. A confession is a legitimate waiver of this right under article 20(3) of the constitution. But to ensure that a confession is either not prised out of the accused on account of fear or favour or simply on account of ignorance of the accused that he

has such a right, it is necessary that certain procedures are assiduously adhered to by law enforcement agencies or any authority which can use a confession of a person which could result in the loss of his liberty, before such a confession can be held as inspiring confidence of the Court to base a conviction solely on the basis of the confession or even using it as reliable corroborative material. It is obvious that a confession must be voluntary as already stated hereinabove. But then the question arises as to what constitutes a voluntary confession?

9. Firstly, for a confession to be voluntary, it must be based on the **informed consent** of the accused. The Court or the authority must be certain that the consent of the accused to confess was given, free of coercion or favour, with the knowledge that he could be convicted/punished on the basis of the confession alone. This requires the magistrate or authority before whom such a confession is made, to be satisfied that the accused has understood that he could be punished on the basis of his confession alone or that the same may be used against him as a corroborative fact to convict him.

10. Secondly, before an accused can give an “informed consent” it is necessary that he has **“consciousness of consequences”** which involves the accused having knowledge that not only shall he be convicted solely on the basis of his confession, but he must also be fully aware of the degree and extent of punishment that he

may receive for the offence that he is convicted for. He should also be aware of the consequence that he would lose his right of appeal against a conviction based upon a confession, unless he is able to establish that the confession was prised out of him by fear or by fraud and misrepresentation played upon him, the onus of establishing which, shall be upon him. Thus, a confession must reflect informed consent on the part of its maker fully conscious of the consequences of giving an informed consent, for the confession to be accepted as voluntary. Merely asking the accused whether he is making the confession of his free will without any coercion, is inadequate unless, the accused is also made fully aware of the consequences which shall befall upon him for making such a confession.

11. Confession by the accused in a case arising from an investigation by the police, can only be recorded by the Judicial Magistrate u/s. 164 Cr.P.C (s. 183 of the BNSS) after ensuring all the pre-requisites (like ensuring the absence of the IO/police in the Court, warning that the accused is not under any compulsion to make a confession and that it can be used against him, and if the accused changes his mind then he shall be sent to judicial custody and not to police custody) are adhered to. In addition, before recording the confession of the accused, the Magistrate must inform the accused that he has the right to consult his lawyer before making the confession who can apprise him effectively and

make him conscious of the consequence of making the confession. Where the accused is indigent, then a lawyer must be made available through legal aid. If the accused refuses right to counsel altogether, it must be so recorded by the Magistrate and only thereafter proceed to record the confession. Where the accused accepted access to a counsel, the Magistrate must record the name and enrolment number of the counsel to ensure that the process is verifiable on a later date. The Court is conscious that some of the requirements stated herein are in addition to what has been laid down in s. 183 of the BNSS but the same is not in derogation to the intent of s. 183 of the BNSS and instead, the same only go to realise the protection accorded to the offender under article 20(3) of the constitution, to the greatest extent.

12. The procedure under Section 27 of the Evidence Act does not require the police recording the Memorandum to put the accused on notice that whatever he states which may lead to recovery of an article connected to the crime, may be used as an evidence against him, in fact it accords none of the protections already stated hereinabove. Thus, this Court holds that the statement of an accused under Section 27 of the Evidence Act is only relevant to the extent of recovery of an artefact connected to the crime and is not a confession in law with reference to the inculpatory part of the memorandum u/s 27 of the Evidence Act.

13. Section 25 of the Evidence Act clearly renders irrelevant, any

statement made by the appellant to a Police Officer in the course of investigation.

14. In other words, the accused must be aware, or put in a position, where there is consciousness of consequence of making a confession which shall be clear and unequivocal. Any other admission which is secured from the accused, in any manner, where the accused is unconscious of the consequences of his statement, the same cannot be used against him as that would be in direct conflict of his right against self- incrimination.

15. It is essential to briefly refer to the case of Richard Buckland, the first person in the history of criminal jurisprudence against whom the charge of the rape and murder of two girls in a village in Leicestershire was dropped by the police on the basis of a DNA test. But what is relevant for the present case is not the exoneration of Richard Buckland on the basis of the science of DNA testing which was used for the very first time, but the fact that Richard Buckland had confessed to the police for a crime he had never committed, in a country where he could have been convicted only on the basis of the confession, subject to the same having inspired the confidence of the court. The stress that a person experiences psychologically when in police custody may make him confess to a crime that he never committed. For the record, Colin Pitchfork was finally convicted on the basis of the DNA science for the crime that was initially attributed to Richard Buckland on the basis of his

confession.

16. This Court put forward a question to the learned counsel for the Union of India that besides his 27 statement what *prima facie* evidence was in the possession of the prosecution to show the *mens rea* of the appellant that he was in conscious possession of the contraband? As mere possession will not be considered as an offence unless it was coupled with the knowledge of what was being possessed.

17. Learned counsel for the Union of India has stated that besides 27 Memorandum there is no independent evidence to establish, *prima-facie*, the *mens rea* of knowledge being possessed by the appellant herein with regard to the material he had concealed.

18. Taking into consideration, the argument put before this Court and the material placed on record, undisputed by the Union of India, and on a purely *prima facie* standard of appreciation, this Court is of the opinion that the appeal be allowed.

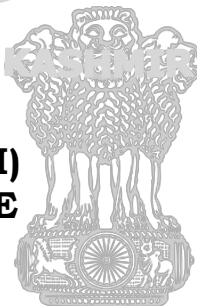
19. The appeal is **allowed** subject to the furnishing of a personal bond of ₹ 1.00 Lac (Rupees one lakh) and one surety in the like amount to the satisfaction of the Trial Court. In addition to that, the appellant shall appear for first time before Station House Officer (SHO) Parimpora, Srinagar on 03-03-2025 and thereafter, on such days fixed by the SHO to mark his attendance which dates shall not be more than 15 days at a stretch. Failure to appear before the SHO on the dates assigned by him or without any

intimation to him if there is any difficulty in appearing on the assigned date, the appellant must intimate and seek a different date from the SHO. Failure to do so and upon an application put forth by the Union of India before the learned Trial Court, the learned Trial Court shall be at liberty to consider and cancel the privilege given by this Court. Any effect to meet any of the witness or try to influence them by fair or favour shall also meet with the same result as mentioned herein above. The appellant shall not leave the UT of J&K without prior permission of the learned Trial Court.

The appeal is allowed.

(RAJESH SEKHRI)
JUDGE

(ATUL SREEDHARAN)
JUDGE



सत्यमेव जयते

JAMMU

18.02.2025

Suraj K. Singh/JS

Whether the order is speaking : Yes
Whether the order is approved for reporting: Yes