

R. DINESHKUMAR @ DEENA

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v.

STATE REP. BY INSPECTOR OF POLICE & OTHERS

(Criminal Appeal No.454 of 2015)

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MARCH 16, 2015

[J. CHELAMESWAR AND C. NAGAPPAN, JJ.]

Code of Criminal Procedure, 1973 – s. 319 – Power under – Exercise of – Summoning of prosecution witness as an additional accused u/s. 319 – On facts, murder of ‘V’ – Trial of seven persons including appellant – Evidence of PW 64 as to the genesis of the conspiracy to kill ‘V’ of which various accused and also PW64 were parties at different points of time; and that he developed cold feet after the initial stage and withdrew from the conspiracy and did not participate in the actual killing of ‘V’ – Thereafter, appellant filed petition u/s. 319 seeking to summon PW64 as an additional accused to be tried together with the rest of the accused, who were already facing trial – Dismissed by trial court – Subsequently, revision petition dismissed by the High Court holding that PW64 cannot be prosecuted by summoning him as an additional accused u/s. 319 Cr.P.C. however, he could be separately prosecuted for offence u/s. 120B IPC – On appeal, held: High Court rightly refused to summon PW64 as an accused to be tried alongwith the appellant and others – However, erred in holding that he could not be tried alongwith the other accused already facing trial as the said conspiracies did not form part of the same transaction – To meet ends of justice trial court directed to grant pardon in favour of PW64 – s. 307.

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- A *Evidence Act, 1872 – s. 132 proviso – Rule against self-incrimination under – Held: Proviso to s. 132 embodies facet of the rule against self-incrimination and is statutory immunity against self incrimination which deserves the most liberal construction – Thus, no prosecution can be launched*
- B *against the maker of a statement falling within the sweep of s. 132 on the basis of the answer given by a person while deposing as a witness before a Court.*

Disposing of the appeal, the Court

- C **HELD: 1.1** In the instant case, except the evidence of PW64 and his statement u/s. 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
- D evidence and the statement u/s. 164 Cr.P.C. of PW64 prima facie indicate a conspiracy to kill 'V' to which conspiracy PW64 was a party at least at the initial stage. According to PW64, he developed cold feet after the
- E initial stage and withdrew from the conspiracy and did not participate in the actual killing of 'V'. The evidence on record indicate that as of today there is no evidence to prosecute PW64 for any offence other than the one punishable u/s. 120B IPC. Therefore, if law permits the
- F use of the content of either the evidence given at trial or the statement made u/s.164 Cr.P.C. by PW64, he could be tried for an offence punishable u/s. 120B IPC. Because, on his own admission, PW64 agreed to kill 'V' for a price and accepted money from A2 towards the part payment of such price and also drafted A3 into the
- G conspiracy. [Paras 11, 15] [617-A-D] [619-D-E]

- 1.2 As regards, the question whether the offence said to have been committed by PW64 and the offence for which the appellant and other accused in Sessions
- H Case are being tried were "committed in the course of

the same transaction”, the High Court concluded “that the conspiracies committed by A2 and the 2nd respondent/PW 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.” The conclusion by the High Court that PW64 could not be tried together with the other accused already facing trial in Sessions Case as the said three conspiracies “do not form part of the same transaction”, cannot be accepted. [Para 17, 18] [619-G-H; 620-A-D]

1.3 It is not a case of either the prosecution or PW64 that the murder of ‘V’ 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 ‘V’ 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, 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. [Para 25] [626-C-E]

1.4 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 ‘V’. On the other hand, it is the case of the accused that not trying PW64 along with them would cause prejudice to their defence. Therefore, the High Court was clearly wrong in concluding that PW64

A could not be tried alongwith the other accused. [Paras 26, 27] [626-F-G]

1.5 The second requirement u/s. 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 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 u/s. 3 of the Evidence Act. The High Court concluded that the evidence of respondent no.2, as a prosecution witness before the trial court, and the incriminating answers given by him amount to compelled testimony falling within the sweep of s.132 and thus, he is protected by the proviso to s.132. [Paras 28, 31] [627-A-B; 628-A-B]

1.6 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 Section 161 Cr.P.C., 1898. Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Another facet of the rule against self-incrimination finds expression in Sections 25 and 26 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. The proviso to s. 132 of the Evidence Act embodies another 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 s. 132 on the basis of the “answer” given by a person while deposing as a “witness” before a Court. [Paras 45, 47] [636-G-H; 637-A-C; 638-D]

1.7 The High Court rightly refused to summon PW64 as an accused to be tried alongwith the appellant and others. [Para 48] [638-E] A

1.8 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. In the circumstances, the proposition is not examined. However, in view of the fact s. 307 Cr.P.C. authorizes even a Court conducting trial to tender pardon to such a person, the ends of justice 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. [Paras 55, 56] [641-F-H; 642-A-B] B
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The Queen v. Gopal Doss & Another ILR 3 Mad. 271 – approved. E

Balbir v. State of Haryana & Another 1999 (4) Suppl. SCR 120 : (2000) 1 SCC 285 – held inapplicable.

Major E.G. Barsay v. State of Bombay AIR 1961 SC 1762; 1962 SCR 195 ; *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru* 2005 (2) Suppl. SCR 79: (2005) 11 SCC 600; *M.L. Sharma & Others v. Central Bureau of Investigation* 2008 CrI. L.J. 1725; *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao & Another* AIR 1963 SC 1850 : 1964 SCR 297 ; *T.B. Mukerji v. The State* AIR 1954 All 501; *Laxmipat Choraria & Ors v. State of Maharashtra* (1968) 2 SCR 624; *Nandini Satpathy v. P.L. Dani & Another* 1978 (3) SCR 608: (1978) 2 SCC 424; *Laxmipat Choraria &* F
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- A *Others v. State of Maharashtra* AIR 1968 SC 938: 1968 SCR 624; *A.R. Antulay v. R.S. Nayak & Anr* 1988 (1) Suppl. SCR 1: (1988) 2 SCC 602 – referred to.

Case Law Reference

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|---|-------------------------|---------------|---------|
| B | 1962 SCR 195 | referred to. | Para 13 |
| | 2005 (2) Suppl. SCR 79 | referred to. | Para 14 |
| | 1999 (4) Suppl. SCR 120 | held | |
| C | | inapplicable. | Para 18 |
| | 2008 CrI. L.J. 1725 | referred to. | Para 18 |
| | 1964 SCR 297 | referred to. | Para 20 |
| D | AIR 1954 All 501 | referred to. | Para 21 |
| | ILR 3 Mad. 271 | approved. | Para 32 |
| | (1968) 2 SCR 624 | referred to. | Para 39 |
| E | 1978 (3) SCR 608 | referred to. | Para 44 |
| | 1988 (1) Suppl. SCR 1 | referred to. | Para 53 |

- CRIMINAL APPELLATE JURISDICTION: Criminal Appeal
 F. No. 454 of 2015.

From the Judgment and Order dated 13.11.2014 of the High Court of Madras in CrI. R. C. No. 425/2014.

- A. Sharan, Chandra Shekharan, Amit Anand Tiwari,
 G. Shakun Sharma, Abhinandan Banerjee for the Appellant.

- Karpaga Vinayagam, Mayil Samy K, G. Ananda Selvam,
 Ram Sankar, V. S. Lakshmi, Mehoobu, Kumaran,
 Muthukrishnan, N. Vijaya Raj, Subramonium Prasad, Yogesh
 H. Kanna, J. Janani, M. Aggarwal, Rajiv Dalal Barrister for the

Respondents.

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Sudha Vijaya Kumar (Respondent-in-person).

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

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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:

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“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.”

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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 judgment¹ under appeal, it appears:

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“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

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

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A 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
B respondent herein) was over, the petitioner herein
filed a petition in Cr.I.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
C 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.”

D 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:

E 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
and his statement under Section 161 Cr.P.C. was recorded.
F 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
G 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
H 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

A 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.

B 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.”

F 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

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Case No.73 of 2009 are available to prosecute him along with A
A2 and A3.

7. In our opinion, the second conclusion recorded by the
High Court contained in para 64 extracted above is really B
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 C
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 D
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 E
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.” F

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 G
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 H

A together with the accused” already facing trial?

B 10. Section 223² 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.

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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;
- D (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 (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 (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
- G 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

H to do, try all such persons 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 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 conspiracy³ 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.

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

“The gist of the offence is an agreement to break the

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.

A 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.”

B 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:

C 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
D 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
E 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.

F 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
G 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*,
H 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:

“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.”

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

A 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;

B “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.”

C 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* D 2008 Cri. 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

E 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*.

F 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.

21. The facts, the question and the decision (insofar as

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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 H with the accused, who are presently facing the prosecution.

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. A

(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 239⁵ (of the Old Cr.P.C. corresponding to Section 223 of the Code of Criminal Procedure, 1973) did not permit such a procedure. B C

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

".....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 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, E F G

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. H

A **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
B “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
C 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
D 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.
E 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
F 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)
G 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
H 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

A 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
B 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
C 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
D 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
E 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.

F 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
G 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
H Balbir and Rajinder of the murder of Om Prakash. It was

alleged therein that the police had deliberately suppressed A
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 B
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 C
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 D
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 E
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 F
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 G
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 H

- A 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. A
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 B
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 C
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? D

30. It was argued before the High Court as well as this
Court that in view of the proviso to Section 132⁶ 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 E
other accused.

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

"63. In view of all the above discussions, I hold that 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. G

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." H

A evidence of the 2nd respondent, as a prosecution
witness before the trial court, and the incriminating
answers given by him **amount to compelled**
B **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
C 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
D 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
E 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
F 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
G 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/
H - 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

A 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
B 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
C “..... 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
D 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.

E “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
F 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
G 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
H

the answer shall not be admitted in evidence against him in a criminal prosecution.” (per Muttusami Ayyar, J.) A

[emphasis supplied]

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

“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 C

.... 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.” D E

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

(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. G

H

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

(c) Turner, CJ held:

B “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.”

C 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.”

F 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

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excluded from consideration and the appeal reheard on facts here or in the High Court". A

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

"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...." C

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

"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** H

A **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
B **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
C 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.
D **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
E 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
F 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**
G **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
H that "in India the privilege of refusing to answer has been

removed” and that “the safeguard to this compulsion” in A
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 B
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 C
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 criminales himself.
Without such an immunity, a witness who is giving evidence
before a Court to enable the Court to reach a just conclusion D
(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 E
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. F

(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”. G
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 H

A 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
 B 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
 C '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"
 D 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
 E 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
 F 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
 G [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
 H

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 identical⁷. A

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25⁸ and 26⁹ 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. B

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

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 D E

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. F

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. G

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) H

A 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 witness to a “penalty
or forfeiture of any kind etc.”, the proviso grants immunity to
B 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
C 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
D 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.

E 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
F 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.

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

H “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.”

A

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:

B

“..... 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.”

C

D

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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.

G

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A 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
B 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
C 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
D 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
E 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
F 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 prosequere
G 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
H pronouncement of this Court in **Laxmipat Choraria v.**

State of Maharashtra: 1968CriLJ1124 where A
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 B
have promptly put her in the dock because of her in-
criminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if
they thought that her evidence was necessary to C
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 D
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; E
some others proposed to be so examined; and two oth-
ers, 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." F

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 G
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 H

- A 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.
- B
- C

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

Nidhi jain

Appeal disposed of.