

The Supreme Court on October 29 has ruled that statements recorded by an officer appointed under the Narcotic Drugs and Psychotropic Substances (NDPS) Act would not be treated as a confession under section 67 of the NDPS Act. It was a 2:1 judgment with Justices Rohinton Fali Nariman and Navin Sinha asserting this while Justice Indira Banerjee gave a dissenting opinion.

Senior Advocates Sushil Kumar Jain, Anand Grover, and S Nagamuthu appeared for the various appellants before the Court. Additional Solicitor General Aman Lekhi appeared for the Union of India.

The majority judgment held that officers under section 53 of the NDPS Act are "police officers" and as a consequence of this, any confessional statement made to these officers would be barred under section 25 of the Evidence Act and "cannot be taken into account in order to convict an accused under the NDPS Act."

The two Judges added, "That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

According to Section 67 of the NDPS Act, any officer authorised by the Centre or a State Government may during an investigation call for information "from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder". The officer may also "require any person to produce or deliver any document or thing useful or relevant to the enquiry" or examine any person acquainted with the case. Section 25 of the Indian Evidence Act on the other hand, provides that "no confession made to a police officer shall be proved as against a person accused of any offence".

This majority verdict by Justice Nariman and Sinha has overruled two previous judgements of the Supreme Court: Raj Kumar Karwal vs Union of India (1990) 2 SCC 409 Kanhaiyalal vs. Union of India (Crl. App. No. 788 of 2005). Both these were two member benches of the court.

Thereafter in 2013, a two judge Bench comprising of A.K. Patnaik, A.K. Sikri of the Supreme Court in *Toofan Singh vs State of Tamil Nadu* (Crl. App. No. 152 of 2013), had referred the matter to a larger bench and posed this question: whether or not an officer investigating a case under the NDPS Act would qualify as a police officer and whether therefore a statement recorded by them can be treated as a confession? Subsequently this matter was placed before a three Judge Bench of the Apex Court.

Raj Kumar Karwal Judgment

A Division Bench comprising of Justices A.M. Ahmadi and Fathima Beevi had held that section 25 of the Evidence Act that makes confession to the police officer inadmissible in court must not be construed in a narrow or technical manner. Even if an officer is invested under any special law with powers analogous to those exercised by a police officer in-charge of a police station investigating a cognizable offence, he does not thereby become a police officer under Section 25 of the Evidence Act, unless he has the power to lodge a report under Section 173 of the Code of Criminal Procedure. The court had rejected the contention that an officer appointed under Section 53 of the NDPS Act, other than a police officer, is entitled to exercise "all" the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code. It was held that there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the NDPS Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code of Criminal Procedure. "This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the Directorate of Revenue Intelligence (DRI), the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned government. Needless to say, that such a complaint would have to be under Section 190 of the Code", noted the Bench.

Inconsistencies in Raj Kumar Karwal

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Justice RF Nariman, who authored the present majority judgment also on behalf of Justice Navin Sinha pointed out a few anomalies in the above observations made in Raj Kumar decided in 1990. He points out that there is a void in the NDPS Act. He said, "Suppose a designated officer under section 53 of the NDPS Act investigates a particular case and then arrives at the conclusion that no offence is made out. Unless such officers can give a police report to the Special Court stating that no offence had been made out, and utilise the power contained in section 169 CrPC to release the accused, there would be a major lacuna in the NDPS Act which cannot be filled."

By procedure, "after the police report under section 173(2) of the CrPC is forwarded to the Magistrate (the Special Court in the NDPS Act), the police officer can undertake 'further investigation' of the offence under section 173(8) of the CrPC.", said Justice Nariman. If, the officer designated under section 53 can only file a 'complaint' and not a 'police report', then such officer would be denuded of the power to further investigate the offence under section 173(8) of the Code after such 'complaint' is filed. This is because under procedure the further report can only be filed after a police report has been forwarded to the Court. "However, a police officer, properly so-called, who may be investigating an identical offence under the NDPS Act, would continue to have such power, and may, until the trial commences, conduct further investigation so that, an innocent person is not wrongly arraigned as an accused, or that a prima facie guilty person is not so left out", observed Justice Nariman. This would result in a violation of Article 14 of the Constitution of India because there is unequal treatment between identically situated persons accused of an offence under the NDPS Act solely due to the whether the investigating officer is a police officer or an officer designated under section 53 of the NDPS Act. The Division Bench on October 29, 2020 noted that this situation would only arise if the ruling in Raj Kumar Karwal is considered correct.

Another anomaly that Justice Nariman pointed out was when cognizance of an offence is taken under section 59 of the NDPS Act. The section lays down that cognizance will be taken only on a complaint and not a police report. Section

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59(3) further provides that for both offences that are punishable for a term of one year or more than 10 years, no court shall take cognizance of any offence except on a complaint in writing made with the previous sanction of the Central Government or the State Government.

So, in either case where the trial takes place by a Magistrate or by the Special Court for an offence, cognizance cannot be taken either by the Magistrate or the Special Court, except on a complaint in writing. This provision is in terms markedly different from section 36A(1)(d), which provides two separate procedures for taking cognizance of offences made out under the NDPS Act. The first procedure provided is that a Special Court may, upon perusal of police report of the facts constituting an offence will take cognizance under this Act OR upon complaint made by an officer of the Central Government or a State Government authorised in his behalf. Two provisions of the same Act laid down two separate procedures to be followed to take cognizance of an offence under the Raj Kumar judgment and hence it was overturned by Justice Nariman as the "law was not laid down correctly."

The Supreme court also observed that Raj Kumar Karwal did not properly appreciate the following distinctions that arise between the investigative powers of officers who are designated in statutes primarily meant for revenue or railway purposes, as against officers who are designated under section 53 of the NDPS Act. "That section 53 is located in a statute which contains provisions for the prevention, detection and punishment of crimes of a very serious nature. Even if the NDPS Act is to be construed as a statute which regulates and exercises control over narcotic drugs and psychotropic substances, the prevention, detection and punishment of crimes related thereto cannot be said to be ancillary to such object, but is the single most important and effective means of achieving such object. This is unlike the revenue statutes where the main object was the due realisation of customs duties and the consequent ancillary checking of smuggling of goods (as in the Land Customs Act, 1924, the Sea Customs Act, 1878 and the Customs Act, 1962); the levy and collection of excise duties (as in the Central Excise Act, 1944); or as in the Railway Property (Unlawful

Possession Act), 1966, the better protection and security of Railway property. Second, unlike the revenue statutes and the Railway Act, all the offences to be investigated by the officers under the NDPS Act are cognizable. Third, that section 53 of the NDPS Act, unlike the aforesaid statutes, does not prescribe any limitation upon the powers of the officer to investigate an offence under the Act, and therefore, it is clear that all the investigative powers vested in an officer in charge of a police station under the CrPC - including the power to file a charge-sheet - are vested in these officers when dealing with an offence under the NDPS Act", noted the Bench.

Reference was made by the two-judge Bench in 2013 expressing its doubt about the correctness of the dictum laid in *Kanhaiyalal vs. Union of India* (Crl. App. No. 788 of 2005). A division bench of Justices Altamas Kabir and B. Sudershan Reddy had held that an officer for the purpose of section 67 of the NDPS Act is not a police officer and so the confessions made to him shall be relied upon as confessional statement against him. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, the Supreme Court upheld the decision of the Madhya Pradesh High Court convicting the appellant.

But the majority judgment written by Justices Rohinton F Nariman and Navin Sinha has overruled this judgment and held that such statements can certainly not be treated as confessions to be used as admissible in law as evidence.

Justice Indira Banerjee' Dissent

Justice Indira Banerjee provided a dissenting opinion. She said that she is unable to persuade herself to agree that "officers invested with powers under Section 53 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) are police officers within the meaning of Section 25 of the Indian Evidence Act, 1872 or that any confessional statement made to them would be barred under the provisions of Section 25 or 26 of the Evidence Act."

She also observed that, "Police reports made after completing an investigation under section 173 of the Cr. PC will be applicable to inquiries and investigations

under that statute. "However, in the case of a statute like the NDPS Act, where the provisions of the Cr.P.C do not apply to any inquiry/investigation, except as provided therein, it cannot be held that the officer has all the powers of a police officer to file a report under Section 173 of the Cr.P.C. The NDPS Act does not even contain any provision for filing a report in a Court of law which is akin to a police report under Section 173 of the Cr.P.C."

Justice Banerjee has noted that while the right to a fair trial by an impartial Court and/or Tribunal is a human right under the Universal Declaration of Human Rights and an essential concomitant of the fundamental rights, at the same time, the fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society.

The Court has now sent back the appeals and Special Leave Petitions to Division Benches, to be disposed of on merits.