

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.L.P. 153/2007**

Reserved on : 15.09.2010

Pronounced on: 27.09.2010

IN THE MATTER OF :

DEPARTMENT OF CUSTOMS

..... Petitioner

Through: Mr. S.C. Aggarwala, Advocate

versus

LUKE ANTONY KOCHERRY

..... Respondent

Through: Mr. Rajiv Davar, Advocate

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

- | | |
|--|-----|
| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J.

1. The present petition is filed by the Department of Customs under Section 378(iv) of the Cr.PC praying *inter alia* for leave to appeal against the judgment dated 23.04.2007 passed by the learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi, dismissing the complaint of the petitioner against the respondent for the offence punishable under Section 135(1)(a) of the Customs Act, 1962 (hereinafter referred to as 'the Act'), on the ground that the prosecution had not been able to prove and substantiate the allegations and acquitting the respondent.

2. The relevant facts leading to filing of the aforesaid complaint are that on 29.09.1998, the respondent, holder of an Indian passport, reported

in the departure hall of IGI Airport, New Delhi for going to Moscow by Aeroflot Flight. After completing his immigration formalities, when the respondent reported at the Customs Counter, he was asked by a uniformed customs officer as to whether he was carrying any foreign currency or contraband goods, to which he replied in the negative. As he was proceeding towards the security hold area, he was stopped by a customs officer in plain clothes, Sh.Y.S. Rawat (PW1) and was asked whether he was carrying any unauthorized foreign currency or narcotic drugs, to which he replied in the negative. At this stage, two independent witnesses were called and the respondent was again asked whether he was carrying any unauthorized foreign currency or narcotic drugs, to which he again replied in the negative. But as the customs officers were dissatisfied with his reply, a notice under Section 102 of the Act (Ex. PW1/C) was served upon the respondent. The respondent gave his no objection in writing by stating that search could be conducted by any customs officer. The checked in baggage and hand baggage of the respondent were searched thereafter. One brown coloured leather purse was recovered from the briefcase of the respondent, which revealed 11000 US Dollars and Indian currency worth ₹6,500/-. As the respondent could not produce any document showing legal import/acquisition/possession/exportation of the recovered currency, the same were seized under Section 110 of the Act and a *Panchnama* (Ex.PW1/D) dated 29.09.1998 was drawn to the said effect by Sh.Y.S. Rawat (PW1), which was signed by two witnesses. Summons (Ex.PW2/A) were issued to the respondent under Section 108 of the Act. Thereafter, the statement of the respondent/accused was recorded by the Superintendent of

the Department, on duty, Ms.S.Mishra (PW2) at 6:00 AM on 30.09.1998, under Section 108 of the Act (Ex. PW2/B).

3. After seizure and enquiries, the respondent was arrested and produced before the Court, whereafter a complaint under Sections 132 and 135(1)(a) of the Act was filed. Pre-charge evidence was recorded and charges were framed to which, the respondent pleaded not guilty and sought cross-examination of the witnesses, who were examined before charge. The witnesses were produced at the post-charge evidence and the statement of the accused was recorded under Section 313 Cr.PC. After arguments were addressed, the impugned judgment dated 23.04.2007 acquitting the respondent was pronounced. Aggrieved by the same, the petitioner has filed the accompanying appeal.

4. Counsel for the petitioner submitted that while passing the impugned judgment, the learned ACMM completely ignored the voluntary statement of the respondent made under Section 108 of the Act and the *Punchnama* duly signed by him. He submitted that the provisions of Section 58 as also 106 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") were not taken into consideration. He further argued that the trial court failed to appreciate the fact that there was no reason for the Department to have falsely implicated the respondent and once possession was established, the onus shifted to the respondent to rebut the presumption against him, which he failed to discharge. He urged that in the light of the evidence placed on the record, the learned ACMM erred in concluding that the Department had failed to prove that the accused had not

declared the foreign currency before the "proper officer". In support, he relied on the evidence of PW1 and the *Panchnama* and stated that merely because the *Panchnama* was not proved by the two *Panchas*, it does not mean that the same could not be relied upon as the same was also signed by PW1, who corroborated the contents thereof in his testimony. It was canvassed on behalf of the petitioner that retraction of the statement made by the respondent under Section 108 of the Act, was of no value as he had failed to prove the fact that the said retraction was made for valid reasons and in these circumstances, the confession made by the accused under Section 108 of the Act alone was sufficient to indict him, without any corroboration, though in the present case, the said statement was corroborated by both, by PW1 and PW2, as also the *Panchnama*. Counsel for the petitioner relied on the provision of Sections 58 and 106 of the Evidence Act and contended that as it was within the special knowledge of the respondent alone that he was carrying foreign currency, the burden of proving that the same was duly declared by him, lay at his door. In support of his submissions, counsel for the petitioner relied upon the following judgments:-

(i) K.I. Pavunny vs. Assistant Collector (Head Quarter), Central Excise Collectorate **1997(3) SCC 721**

(ii) M. Prabhulal vs. The Assistant Director, Directorate of Revenue Intelligence; **2003 (3) JCC 1631**

(iii) Rehmatullah vs. Narcotics Control Bureau **2008(9) AD (Delhi) 480**

(iv) Kanhaiyalal vs. Union of India **2008[1] JCC [Narcotics] 23**

(v) State of Punjab vs. Lakhwinder Singh & Anr. **(2010) 4 SCC 402**

5. Per contra, counsel for the respondent/accused supported the impugned judgment and drew the attention of this Court to the testimony of PW1 and PW2 to submit that their testimony did not corroborate the statement made by the accused under Section 108 of the Customs Act, which was subsequently retracted. He relied on the provisions of Section 77 of the Act, which deals with declaration by the owner of the baggage and submitted that in the present case, declaration of the contents was not made before the "proper officer" as stipulated under the Act and hence, the learned ACMM rightly concluded that the Department failed to prove that the accused had not declared the foreign currency before the "proper officer" namely, the first uniformed customs officer, who had intercepted the accused at the Customs Counter. He submitted that the petitioner failed to discharge the burden of proof placed on it under Section 101 of the Evidence Act, which requires the Department to prove all the facts which were asserted by him and having failed to do so, Section 106 of the Evidence Act could not be invoked against the respondent. Lastly, counsel for the respondent asserted that if the findings of acquittal, as reached by the trial court, cannot be said to be unreasonable, then the appellate Court should not disturb it in an appeal against acquittal even if it was possible to reach at a different conclusion on the basis of the material on the record and if two views are reasonably possible, on the basis of the evidence on the record, the appellate Court should not interfere simply because it would have taken a different view if the case had been tried by it. He supported his submissions by referring to the following judgments:-

- (i) Chelloor Mankkal Narayan Ittiravi Nambudiri vs. State of Travancore-Cochin **1953 AIR (SC) 478**
- (ii) Akoijam Ranbir Singh vs. The Government of Manipur; **AIR 1976 SC 2191**
- (iii) Babu and others vs. State of Uttar Pradesh **1983 CrI.L.J. 334**
- (iv) The State vs. Makund Harijan & Anr. **1983 CrI.L.J. 1870**
- (v) Chandigarh Administration, Chandigarh vs. Dharam Singh **AIR 1985 SC 1671**
- (vi) Abid Malik vs. Union of India & Anr. **2009 V AD (Delhi) 749**
- (vii) Directorate of Revenue Intelligence vs. Moni **2010 (252) E.L.T. 57 (Del.)**
- (viii) NCB vs. Aziz Ahmad **2010 (1) JCC (Narcotics) 6**

6. This Court has heard the counsels for the parties limited to the aspect of grant of leave to appeal and has considered their respective submissions in the light of the judgment rendered by the trial court and the judicial pronouncements on the points raised.

7. To take the last point first, as to the scope of interference in an appeal against acquittal, the principles are now well settled. While the courts have consistently recognized the right of the appellate court to review the entire evidence and come to its own conclusion, it can, however, not be forgotten that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principles of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is not weakened but further reinforced,

reaffirmed and strengthened by the trial court. The above principles of law were examined at length by the Supreme Court in the case of Nepal Singh vs. State of Haryana reported as **2009(6)SCALE 555**, wherein the Court traced the law in this regard from the first important decision rendered by the Judicial Committee of the Privy Council in the case of Sheo Swarup vs. R. Emperor reported as **(1934) 61 IA 398**, wherein it was held that Sections 417, 418 and 423 Cr.PC (old Code), gave full power to the High Courts to review at large the evidence upon which, the order of acquittal was founded, and to reach the conclusion that upon that evidence, the order of acquittal should be reversed and that no limitation should be placed upon that power, unless expressly stated so in the Code. However, the appellate courts were cautioned as below:

"But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." (emphasis added)

8. The aforesaid judgment has been reiterated from time to time in a catena of decisions starting from the case of Nur Mohd. vs. Emperor **AIR 1945 PC 151**; Prandas vs. State **AIR 1954 SC 36**; Surajpal Singh vs. State

1952 Crl.L.J.331; Ajmer Singh vs. State of Punjab **1953 Crl.L.J. 521**; Atley vs. State of UP **1955 Crl.L.J. 1653**; Aher Raja Khima vs. State of Saurashtra **1956 Crl.L.J. 426**; Sanwat Singh vs. State of Rajasthan **1961 Crl.L.J. 766**; M.G. Agarwal vs. State of Maharashtra **[1963] 2 SCR 405**; Shivaji Sahabrao Bobade vs. State of Maharashtra **1973 Crl.L.J. 1783**; K. Gopal Reddy vs. State of A.P. **1980 Crl.L.J. 812**, Ramesh Babulal Doshi vs. State of Gujarat **1996 Crl.L.J. 2867**; and has been echoed down the years, to find mention in the cases, Allarakha K. Mansuri vs. State of Gujarat **2002 Crl.L.J. 1489**; Bhagwan Singh vs. State of M.P. **2002 Crl.L.J. 2024**; Harijana Thirupala vs. Public Prosecutor, High Court of A.P. **2002 Crl.L.J. 3751**; Ramanand Yadav vs. Prabhu Nath Jha **2004 Crl.L.J. 640**; Kallu vs. State of M.P. **2006 Crl.L.J. 799**; Chandrappa & Ors. vs. State of Karnataka **2007 Crl.L.J. 2136** and lastly, in Ghurey Lal Vs. State of UP **(2008) 10 SCC 450**.

9. In the case of Chandrappa (supra), the general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal, as culled out from the aforesaid judgments, were summarized, in the following words:-

“(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail

extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

10. It is necessary to test the decision of the trial court on the anvil aforesaid judgments to see, if the valuation of the evidence done by the learned ACMM suffers from any illegality, arbitrariness, perversity which deserves interference and to verify if the main grounds on which, the trial court has based its order, are reasonable and plausible. A perusal of the impugned judgment shows that the trial court has analysed at length the testimony of PW1, Sh. Y.S. Rawat, the second customs officer in plain clothes, who stopped the accused when he was proceeding towards the security hold area, to ask whether he was carrying any unauthorized foreign currency or narcotic drugs and of PW2 Smt.S.Mishra, the Superintendent of the Department on duty at the airport on the relevant date, who recorded the statement of the accused under Section 108 of the Act. After perusing the deposition of the aforesaid witnesses, the learned ACMM held that the

complaint filed by the petitioner pursuant to the authorization had been proved in accordance with law, and the notice under Section 102 of the Act given by PW1 to the accused as also drawing of the *Panchnama* of recovery and seizure had also been proved in accordance with law. But it was observed in the judgment that it was an admitted case of the parties that the independent witnesses to the *Panchnama* were not examined by the petitioner despite opportunities being granted in this regard, there was no corroboration to the testimony of PW1 on the aspect of seizure, and the department had failed to identify, cite or produce the uniformed customs officer as a witness, who had first intercepted the accused at the customs counter, where he was asked as to whether he was carrying any foreign currency or contraband goods. While referring to the testimony of PW1 and PW2, the learned ACMM noticed that initially, the accused had been stopped and asked to make a declaration by a uniformed customs officer and despite the said fact and the fact that PW1 admitted in his cross-examination that though he had met the said officer on a number of occasions even after the incident, he had not been cited by the Department as a witness in the present case. In these circumstances, the trial court concluded that the petitioner failed to prove in accordance with law, the fact that though the accused was under an obligation to declare the foreign currency to the said uniformed customs officer, who was admittedly the first person to have stopped and questioned him, he did not do so.

11. Further more, the trial court found the statement of seizure made by the accused to be very consistent. As per the accused, when he reported to the airport, he was never intercepted by any person, nor was

any question put to him as to whether he was carrying any currency or contraband. Rather the accused had himself approached the officers and informed them that he was carrying certain amount of currency for which, he enquired whether any declaration was needed to be made, whereupon he was told that declaration form would be given to him for filling it up. The accused stated that at that juncture, he had shown his purse to the customs officers, who took him downstairs to let him know if the declaration was required to be made and later on when he came back, he told the accused that the currency was liable to be confiscated. As a result, a confusion was created and the accused was forced to go behind in one of the rooms and was made to sign certain papers.

12. The trial court observed that it was an admitted case of the prosecution that the currency recovered from the possession of the accused was not hidden anywhere but was in the purse, which he was carrying. It was also noticed that the recovery of currency had not been disputed by the accused. The trial court referred to Section 77 of the Act, which mandates that for the purposes of clearance of baggage, declaration of the same is required to be made to the "proper officer" and held that in the present case, the uniformed customs officer, who first intercepted the accused at the Customs Counter, was the "proper officer", who had not been cited or examined by the prosecution. In the light of the aforesaid findings, the trial court concluded that the only corroborative evidence was the statement of the accused under Section 108 of the Act and the Department had failed to prove that the accused had not declared the foreign currency before the "proper officer", nor was it able to establish that the accused had requisite

knowledge or dishonest intention to fraudulently evade or attempt to evade the duty chargeable on the articles. Lastly, it was held that as the case of the petitioner was that the accused had attempted to evade the prohibition imposed on the export of foreign currency, it was necessary for it to place on record the details of such prohibitions to ascertain and determine the extent of the attempted evasion, which was not done. In these circumstances, it was held that the prosecution had failed to prove and substantiate its allegations under Section 135 (1)(a) of the Act and as a result, the accused was acquitted.

13. The submission of the counsel for the petitioner that the accused retracted his confessional statement belatedly and he did not discharge the burden of proving that the said statement was obtained from him under threat, duress or promise, is to be seen in the backdrop of the facts of the case in hand. It is a well settled legal position that confession can form the basis of conviction, as held in the case of K.I. Pavunny (supra) and reiterated in the case of Rehmattullah (supra), M. Prabhulal (supra) and Kanhaiyalal (supra), but it is also true that each case has to be seen on its own facts. The judgment in the case of K.I. Pavunny (supra) relied upon by the counsel for the petitioner itself raised a question as to whether the retracted confessional statement requires corroboration from any other independent evidence. After examining the facts of the instant case, the Supreme Court held that the rule of prudence and practice does require that the Court seeks corroboration of the retracted confession from other evidence, so as to implicate the accused in the crime and each case requires to be examined in the light of its peculiar facts and circumstances in which

the confession came to be made.

14. In the instant case, the trial court cannot be faulted in seeking corroboration of the statement of the accused, from the other evidence on the record, for the reasons that the statement made by him under Section 108 of the Act in the early hours of 29.09.1998, was retracted by him on the very next day, when he appeared before the learned ACMM. A perusal of the impugned judgment shows that the trial court sought to seek corroboration of the retracted confession of the accused from the other evidence on the record, namely, the testimony of PW1 and PW2 and the *Panchnama*, but was completely dissatisfied by the prosecution evidence in that regard. The testimony of PW1 is relevant. The said witness admitted the fact that he did not know the person who was the author of the notice (Ex.PW1/C) issued to the accused under Section 102 of the Act. He deposed that he could not identify the handwriting of the said person, though he admitted that he had signed the same. PW1 was unable to state in his cross-examination as to the significance of the handwritten No. "S-39/99" and the author thereof. He admitted that the seals on the back side of the envelope had been broken and there was some interpolation made and further that on the slip, the name of the accused was not mentioned though his own signatures were there. He admitted in his cross-examination that the seals on the *Panchnama* were broken partially and he did not remember the initials on the seals. He could not give the names of the witnesses of the *Panchnama* and as to how they reached at the spot.

15. Contradictions in the deposition of PW1 and PW2 on material points were noticed by the learned ACMM, particularly, the manner in which

PW1 had taken away the currency to some other place on the ground that the same had to be weighed. This fact was contradicted by PW2, who was the superior officer of PW1 and stated in her cross-examination that she was not aware of the fact that the seizing officer had taken out the currency from the departure hall for the purpose of weighing. Pertinently, neither of the two independent witnesses to the *Punchnama* were examined by the Department, despite opportunities given to it and most materially, there was no corroboration of the testimony of PW1 on the aspect of seizure. Lastly, the absence of the name of the uniformed customs officer, who first intercepted the accused at the customs counter and questioned him as to whether he was carrying any foreign currency and contrabands in the list of witnesses and failure on the part of the Department to produce the said officer in evidence, despite a specific admission by PW1 in his cross-examination that he had met the said officer on a number of occasions even after the incident and was well aware of his identity, were all factors which weighed with the court below, to acquit the respondent.

16. The contention of the counsel for the petitioner that the "proper officer" in relation to Section 77 of the Act could even mean PW1 and it was not necessary for the Department to have produced the uniformed customs officer, who first intercepted the accused, is noted only to be rejected. The term, "proper officer" is defined in Section 2(34) of the Act and means the officer of customs, who is assigned those functions to be performed under the Act by the Board or the Commission of Customs. On the relevant date, the Custom Counter was admittedly manned by the uniformed customs officer to whom the accused, as the owner of the baggage was required to

make a declaration of its contents and he qualified the definition of “proper officer” under Section 77 of the Act. It was therefore incumbent for the petitioner to have cited the said officer as a witness and to have produced him in the witness box to establish its case that the accused was intercepted by him and asked whether he was carrying any foreign currency, to which he replied in the negative.

17. As regards the judgment in the case of State of Punjab (supra) relied upon by the counsel for the petitioner to contend that once it is proved by the prosecution that the accused was in physical custody of the currency notes, it was for him to prove that he had not committed the offence by showing that he was knowingly not in possession thereof, in the instant case, the respondent never denied possession of the currency notes. Rather, the learned ACMM noticed the fact that the respondent was consistent in his statement that he had shown his purse to the customs officer, who took him downstairs to let him know if the declaration was required to be made and further that he was never intercepted by any person or questioned and he had himself approached the customs officers and informed them that he was carrying certain amount of currency for which, he enquired whether any declaration was required to be made by him.

18. All the aforesaid facts and circumstances when taken together, leads this Court to conclude that the decision arrived at by the learned ACMM, on the basis of the evidence on the record, is a plausible one. There does not appear any substantial or compelling reason for this Court to take a different view from that taken in the impugned judgment. Nor is it a case where admissible evidence has been overlooked. The retracted statement of

the accused under Section 108 of the Customs Act had to be examined in conjunction with the other corroborative evidence on the record. When so examined, there does not appear any serious infirmity in the view taken in the impugned judgment; nor can it be stated that there has been any miscarriage of justice in acquitting the respondent.

19. Having carefully perused the impugned judgment of acquittal, this Court is satisfied that the same does not suffer from any manifest legal error or perversity, which deserves interference. The basis of arriving at the impugned order is found to be reasonable and plausible and ought not to be disturbed. The impugned judgment is therefore upheld and the leave to appeal against the same is declined. The petition is dismissed.

SEPTEMBER 27, 2010
rkb

(HIMA KOHLI)
JUDGE