(B)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ Crl.Rev.Pet.No.439/2008

Hasam Din & Anr. ..... Petitioners
Through: Ms.Sangeeta Bhayana, Advocate with petitioners in person.

versus

Shri S.M.Ali, Intelligence Officer, DRI ..... Respondent
Through: Mr.Satish Aggarwal, Advocate for DRI

HON'BLE MR. JUSTICE SUNIL GAUR

% **O R D E R**
14.10.2011

For order see Crl.Rev.Pet.No.420/2008.

(SUNIL GAUR)
JUDGE

October 14, 2011
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ (i) Crl.Rev.Pet.No.420/2008

Bashir Khan ..... Petitioner
Through: Ms.Sangeeta Bhayana, Advocate.

versus

Shri S.M.Ali, Intelligence Officer, DRI ..... Respondent
Through: Mr.Satish Aggarwal, Advocate for DRI

\+ (ii) Crl.Rev.Pet.No.422/2008

Vipin Kumar Kapur ..... Petitioner
Through: Ms.Sangeeta Bhayana, Advocate.

versus

Shri S.M.Ali, Intelligence Officer, DRI ..... Respondent
Through: Mr.Satish Aggarwal, Advocate for DRI

\+ (iii) Crl.Rev.Pet.No.435/2008

Mohsin ..... Petitioner
Through: Ms.Sangeeta Bhayana, Advocate.

versus

Shri S.M.Ali, Intelligence Officer, DRI ..... Respondent
Through: Mr.Satish Aggarwal, Advocate for DRI

\+ (iv) Crl.Rev.Pet.No.439/2008

Hasam Din & Anr. ..... Petitioners
Through: Ms.Sangeeta Bhayana, Advocate.

versus

Shri S.M.Ali, Intelligence Officer, DRI ..... Respondent
Through: Mr.Satish Aggarwal, Advocate for DRI

AND

+ (v) Crl.Rev.Pet.No.441/2008

Sanjay Verma ..... Petitioner

Through: Ms.Sangeeta Bhayana, Advocate.

versus

State ..... Respondent

Through: Mr.Satish Aggarwal, Advocate for DRI

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER

% **14.10.2011**

1. The above captioned five criminal revision petitions spring out of common impugned judgment of 26th July, 2008 of the learned Additional Sessions Judge, New Delhi who has upheld the conviction of the six petitioners herein for the offence under Section 135 (1)(b) of the Customs Act, 1962 and the minimum substantive sentence of three years with fine of Rs.10,000/- each imposed by the Trial Court.

2. With the consent of both the sides, these petitions were heard together and are being disposed of by this common Order as the facts and the grounds on which the impugned Order is assailed are identical.

3. At the hearing, counsel for the parties had referred to the factual matrix of this case as noted in the impugned Judgment in the following words:-

> "Facts in brief giving rise to the present appeals are that on the intervening night of 20/21.1.91 acting on a specific intelligence the officers of Directorate of Revenue Intelligence (Head Quarters, New Delhi) intercepted truck No. RRN 5254 outside the factory situated at A071 Industrial Area GT Karnal road, Delhi. Two drivers namely

Bashir Khan and Hasamdeen and three helpers namely Qamardin, Imamdin and Jamaldin were found in the truck at the time of interception. Besides these persons three other persons namely Vipin Kumar Kapoor, Sanjay Verma and Mohsin Anwar were also present near the truck to take delivery of the goods loaded in the truck. On seeing the officers Vipin Kr tried to run but was overpowered. Truck NO. RRN 5254 was brought to the office of DRI for its thorough rummaging. Accused No.4, 5 and 6 were also summoned to the DRI office. Truck NO. RRN 5254 was searched in the presence of accused persons and two independent persons. In search 25 slabs of silver each weighing 30 Kg approximately wrapped in gunny bags were recovered which were found concealed on the floor of the truck with thick layer of soil. The accused persons were asked to show or produce any document or otherwise in support of the legal importation, possession, acquisition or transportation of the 25 sliver slabs recovered from the truck. The accused persons stated that they did not possess any such evidence. Thereafter those sliver slabs 6 collectively weighing 852.34 Kg were seized by the officers of DRI U/s 110 of the Customs Act, 1962 under the reasonable belief that the same were smuggled and were therefore liable to be confiscated U/s 111 of the Customs Act. The truck No. RRN 5254 was also seized as the same was used for transporting the abovesaid smuggled silver and was liable to confiscation. Some other documents from the truck were also seized. A government approved valuer was called on the spot who analyzed the sliver slabs and found them to be of 99.50 purity valued at Rs 5795912/-. On this complaint cognizance was taken vide order dated 15.3.91 for the offence punishable U/s 135 (1)(b) of the Customs Act. Pre charge evidence was recorded and thereafter all the appellants herein were charged for the offence punishable U/s 135 (1)(b) of the Customs Act to which they pleaded not guilty and claimed trial. Thereafter complainant produced all the three witnesses i.e complainant as PW 1, Deepak Kr as PW 2 and V.K. Goel were examined in post charge evidence. Three more

witnesses were examined at post charge stage i.e Sh V.K. Budhiraja PW 4, Naresh Kr Sharma PW 5 and Sh Kamal Narain Kapoor PW 6. Thereafter complainant closed its evidence and the case was fixed for recording statement of the accused persons. Their statements were recorded U/s 313 Cr.P.C . They claimed innocence. They did not wish to lead evidence in defence."

4. Trial Court on the strength of the evidence on record, had returned the finding of guilt against the petitioners which was challenged on the various grounds raised in appeal but without success, resulting in dismissal of their appeals. Aggrieved by the impugned judgment of the Appellate Court, present revision petitions have been filed, urging the same very pleas which were pressed before the Appellate Court.

5. Both the sides were heard at some length on the legality of the impugned conviction and punishment imposed and thereafter it became apparent that the impugned Judgment does not suffer from any illegality or infirmity. Realising it to be so, learned counsel for the petitioners had promptly placed on record the affidavits of the petitioners giving up their challenge to their conviction on merits and to urge that in the facts and circumstances of this case, it would be in fitness of things to scale down the substantive sentence imposed upon the petitioners, to the period already undergone by them.

6. Petitioner - Bashir Khan, aged 40 years, a truck driver claims to be blissfully unaware of what was being transported in the truck impounded in this case and has asserted on affidavit that he was to just get Rs.1,500/- as his wages for plying the truck in question from Rajasthan to Delhi and he

has no previous conviction to his discredit and has faced the agony of the proceedings of the case for the last two decades and had remained in custody in this case for 14 months. He claims to be the sole bread earner of his family comprising of his old and ailing mother, a wife, four daughters and a son. He prays for leniency while urging that his financial condition is pitiable and if he is sent behind bars, his family will die of starvation.

7. Petitioner - Vipin Kumar Kapur, aged 59 years, claims to be a victim of circumstances, a heart patient, sole bread earner of his family, having a daughter of marriageable age and of not being able to make his both ends meet, prays for leniency while submitting that he has a clean record and of incarceration of 17 months meeting the ends of justice.

8. Petitioner – Mohsin, aged 54 years, claims to be living hand to mouth and of being the only bread earner of his family and having onerous responsibility not only of a mentally retarded brother, solely dependent upon him but also of maintaining marriageable daughter and to take care of his wife having an heart ailment and a tumour in her neck. He claims to be an infirm person himself, who has already remained in custody for about 18 months, with no previous criminal record.

9. Petitioners - Hasam Din & Qamar Din were the driver and helper of the impounded truck, who feign ignorance about the contraband recovered from the truck in question. Both of them claimed to be poor persons and sole bread earners of their large families i.e. Hasam Din having a wife, three

daughters apart from old and ailing parents and four sons; whereas Qamar Din is having six daughters, a wife and ailing parents to support. With no previous conviction to their discredit, both the petitioners pray for leniency while pointing out that they have remained behind bars for 14 months and have already faced the agony of the protracted proceedings of this case for last two decades.

10. Petitioner – Sanjay Verma, aged 46 years, driver of the truck in question also claims to be a poor person having a family to support and of not being a previous convict and of having remained behind bars for 16 months. Leniency is prayed for, urging that if he is directed to undergo the remainder of the sentence, then his family would be ruined.

11. Attention of this Court is drawn to the various decisions in Crl.Revision NO.483/2003, tiltled as *Ashok Jain vs. Anil Kumar Gera,* decided on 26.2.2004; *Naushad Khan vs. Dy.Commissioner of Customs,* 123(2005) DLT 602; *Kamlesh Kumar Uppal vs. Customs & Ars.,* 2004(74)DRJ 446 (decided on 19.2.2004); Crl.Rev.No.165/2002, titled as *Mohd. Jamil vs. Customs,* 2002 (81) ECC 693 (decided on 5.4.2002); in Crl.L.P.No.216/2007, titled as *DRI vs. Moni,* decided on 2.12.2009, and in Crl.Rev.P.No.52/2004, titled as *Ram Narain Kapoor & Anr. Vs. State,* decided on 16.03.2010 pertaining to Customs Act, 1962 to highlight that while taking into consideration the antecedents of the accused and of their facing the ordeal of trial for about a decade or so, the substantive sentence was reduced from the minimum prescribed to the period already undergone by them, i.e. of ten months or so.

12. The permissibility of toning down the punishment in the light of the subsequent legislation was considered in *T.Barai vs. Henry AH Hoe and Anr.*, (1983) 1 SCC 177, which was followed in *State vs. Gyan Singh* (1999) 9 SCC 312 and was reiterated by the Apex Court in *Superintendent, Narcotic Control Bureau vs. Parash Singh*, (2008) 13 SCC 499, holding with reference to Article 20(1) of the Constitution that *it is the fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation downgrades the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.*

13. When confronted with the afore-quoted legal position, Mr.Satish Aggarwal, counsel for the respondent could not distinguish *T.Barai* (supra), which has been consistently followed, nor could cite any decision to the contrary.

14. Undisputedly, the minimum sentence liable to be imposed upon the petitioners at the conclusion of the trial was 3 years, under Section 135(1)(b) of Customs Act, 1962.

15. With passage of time, the Customs Act, 1962 has undergone changes and by the Amendment Act No.XXII of 2007, for the offence under Section 135(1)(b) of Customs Act, 1962 no minimum punishment is prescribed and the said offence is punishable for a term, which may extend to 3 years or with fine or with both.

16. By virtue of the aforesaid amendment in the Customs Act, 1962 the harshness of the sentence stands diluted, so the legislative benevolence can be extended to the petitioners, who await decision on the quantum of sentence and it can be so done, in view of the recent decision of the recent Apex Court in *Parash Singh* (supra).

17. In the light of the dictum herein noticed above and in peculiar facts and circumstances of this case, on the quantum of sentence, these petitions are partly allowed to the extent that the substantive sentence awarded to the petitioners stands reduced to the period already undergone by them, while doubling the fine imposed upon them.

18. Consequently, these petitions are disposed of while reducing the substantive sentence imposed upon the petitioners to the period already undergone by them, subject to their depositing the enhanced fine of ₹10,000/- each within four weeks, failing which, they shall be liable to undergo simple imprisonment for a period of six months each. Trial court be forthwith apprised of this order to ensure its compliance.

(SUNIL GAUR)
JUDGE

October 14, 2011
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