

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL. A. No. 577 of 2008

Reserved on: 5th August 2014

Decision on: 28th August 2014

DEPARTMENT OF CUSTOMS Appellant

Through: None for Appellant.

Mr. H.S. Phoolka, Senior Advocate
with Mr. Harsh Jaidka, Mr. Suryadeep
Singh and Ms. Shilpa Dewan,
Advocates for Mr. Naresh Grover.

versus

JOGINDER PAL JAIN

..... Respondent

Through: Mr. S.S. Gandhi, Senior
Advocate with Mr. Akshay Anand
and Mr. K.R. Dogra, Advocates along
with Respondent in person.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

28.08.2014

1. The Department of Customs has in this appeal challenged an order dated 29th September 2006 passed by the learned Additional Chief Metropolitan Magistrate ('ACMM') in Case No. 444/2004 acquitting the Respondent Joginder Pal Jain of the offence under Sections 132 and 135(1)(a) of the Customs Act, 1962 ('Act').

The complaint

2. The Complainant in this case was Mr. K.K. Dhasmana (PW-2) who at the relevant time was working as Air Customs Officer, IGI Airport, Terminal-II, New Delhi. According to the Complainant, on 29th January 1988, the Respondent was waiting at the IGI Airport, New Delhi at 1.30 am to travel to Hongkong via Bangkok by a Thai Airways Flight No. TG 914. The Respondent was holding an Indian passport issued from Chandigarh in the name of Mohan Lal S/o Ram Lal. The Respondent was travelling with one of his friends, Mr. Manohar Lal Grover who was also holding an Indian passport issued from Chandigarh.

3. In the evidence of PW-2, it emerged that the travel documents and the baggage of both passengers were examined. Mr. Grover disclosed that he was carrying only one hand bag. He also disclosed that the other passenger travelling with him in the name of Mr. Mohan Lal was actually Mr. Joginder Pal Jain S/o P.L.Jain, a resident of Moga in Punjab. According to PW-2, the Respondent also admitted that his actual name was Mr. Joginder Pal Jain but had got a passport made in an assumed name. It was found that the Respondent had checked in one cardboard carton, one sea green colour suitcase and one briefcase of black colour of Dunsen make. The Respondent was asked to declare the contents of the baggages. He was asked whether they contained any restricted or prohibited items, or currency - foreign or Indian - or if he was carrying any such item on his person. He denied carrying any such items. Mr. Grover declared that he had one checked

in baggage and that the Respondent had got the sea colour suitcase checked in Mr. Grover's name in the airline counter. This fact was also confirmed by the Respondent. The baggage of the Respondent was examined in the presence of witnesses. It is stated that the Respondent opened the suitcase with a key taken out from the pocket of the coat which he was wearing. The suitcase was found to contain the personal clothing of Respondent and two packets of sweets. They were of abnormal shape and weight. When asked whether they contained any objectionable restricted item, the Respondent is stated to have replied that the packets contained only sweets. The said packets were opened and found to contain two polythene bags, one in each packet, concealed under a layer of 'burfi'. The polythene bags were found to contain foreign currency equivalent to Rs.16,12,371.89. These were recorded in *panchnama*. A separate *panchnama* was prepared of the personal clothing found in the suitcase. The cardboard box was found to contain items which were recorded in Annexure 'C' to the *panchnama*.

4. The personal search of the Respondent resulted in the recovery of foreign and Indian currency equivalent to Rs.7,463.90. This was also recorded in the Annexure to the *panchnama*. Since the Respondent could not produce any evidence or documents showing lawful possession of the recovered currencies, they were seized under Section 110 of the Customs Act on the reasonable belief that they were being attempted to be exported in contravention of the

provisions of the Customs Act and the Foreign Exchange Regulation Act, 1973 ('FERA').

The statements of Mr. Grover under Section 108 Customs Act

5. The Respondent was produced before Mr. D.K. Malhotra (PW-1) who was posted as ACS (Preventive) at the IGI Airport. Mr. Grover made a statement before him on 29th January 1988 (Ex.PW-1/B) and thereafter again on 4th February 1988 (Ex.PW-1/A). On 29th January 1988, the Respondent also tendered a statement (Ex.PW-1/C) before PW-1. In his statement made on 29th January 1988, Mr. Grover stated that he arrived at the Old Delhi Railway Station on 28th January 1988 by Punjab Mail from Faridkot in the morning. After finishing some work in New Delhi, he met his friend, the Respondent, in Broadway Hotel. He stated that he and the Respondent were to travel by Thai Airlines to Hongkong on 29th January 1988 at 1.30 am. It had already been arranged between him and the Respondent that they would meet at the Broadway Hotel. He stated that the Respondent had on his own come to Delhi from Moga. Thereafter Mr. Grover reached the IGI airport at his own at around 10.30 pm. The Respondent reached there at 11.15 pm. They both entered the airport building together. As Mr. Grover was not fully aware of the procedure at the airport, the Respondent took his passport, ticket and small hand bag. The Respondent kept the hand bag in a trolley along with his own baggage consisting of one sea green suitcase, one card board carton and a black briefcase. He told Mr. Grover that he would manage and that Mr. Grover should not worry. Later both of them reported at the Thai

Airlines counter. The Respondent presented Mr. Grover's passport and baggage along with his own at the counter. Two boarding cards were issued to the Respondent and he returned to Mr. Grover his ticket and passport. Thereafter both of them reported at the departure hall. Mr. Grover stated that when the Customs Officer at the immigration counter asked him whether he was carrying any checked-in baggage, he replied that he was carrying only a small zipper hand bag containing his personal effects. When the customs officers examined the boarding pass, they found one baggage with tag No. TG 95-10-47 and asked Mr. Grover about it. He replied that the baggage belonged to the Respondent. The Customs Officer then asked the Respondent to bring his baggage to the Customs counter. The Respondent went to a nearby cabin where the suitcase and cardboard carton were lying near the baggage conveyor belt. The Respondent carried the said baggage to the Customs counter. After tallying the baggage tag number with those affixed on the boarding passes, Mr. Grover realised that the Respondent had checked-in his suitcase on Mr. Grover's ticket for reasons not known to Mr. Grover.

6. In his supplementary statement recorded on 4th February 1988, Mr. Grover reiterated that the earlier statement made by him on 29th January 1988 "was totally correct". He maintained that he was not aware till being informed by the Customs Officer that the Respondent was travelling in the fake name of Mr. Mohan Lal. The said statement records a question put to him stating that his lawyer had filed an application before the Metropolitan Magistrate ('MM') that he was

being compelled to give a confessional statement before the MM. Mr. Grover by way of reply to the question straightway denied it and stated that he had not moved any such application in any Court or instructed anyone to do so. He stated that any such application was not in his knowledge.

The statement of the Respondent under Section 108 Customs Act

7. On his part, by statement dated 29th January 1988, the Respondent stated that his actual name was Joginder Pal Jain but he was holding an Indian passport in the name of Mr. Mohan Lal bearing his photograph and issued at Chandigarh. He stated that he had arrived at the IGI Airport Terminal-II at 11.15 pm on 28th January 1988 and met Mr. Grover who was known to him for the last 15 years and belonged to Moga. Mr. Grover had one hand bag. He stated that Mr. Grover had met him in Moga about 2-3 days earlier and wanted to go to Hongkong for site seeing and that in Delhi they had met at Broadway Hotel. At the airport he stated that he asked Mr. Grover to keep his hand bag on trolley and then pushed the trolley to the immigration counter. He stated that he had got the cardboard carton and the sea green colour suitcase checked-in. The second bag bearing Tag No. 95-10-47, (the sea green colour suitcase) was stapled to the air ticket of Mr. Grover. He then more or less repeated what Mr. Grover had stated about the happenings thereafter. Inter alia, he stated that the sea green colour suitcase was not checked-in on his air ticket but on the ticket of Mr. Grover. This was intentionally done by him by presenting his and Mr. Grover's baggage together at the airline counter to escape

detection by the Customs Staff. He stated that the foreign currency found in his baggage was procured by him from several persons in Ludhiana who dealt in foreign currencies but he did not know their names and addresses. He stated that Mr. Grover had no concern with the recovered currencies/ traveller's cheque/demand drafts etc. He stated that these were to be handed over to Mr. Fauzdar Singh, a resident of Muddocks Road, Vancouver Canada who was to meet him at Hotel Imperial in Hongkong on 1st February 1988. Mr. Fauzdar Singh had promised to have the Respondent migrated and settled in Canada. Mr. Fauzdar Singh had further asked the Respondent to arrange whatever money he could and also promised to give him a loan to enable him to settle down in Canada. The Respondent claimed that his previous passport having his actual name had got lost and he had lodged a report for the same with PS Moga. He stated that as he was desperate to go out of India, he contacted one travel agency and arranged a passport in the name of Mr. Mohan Lal.

8. There were two panch witnesses in whose presence the seizure memo was drawn up. One was Mr. Dayanand Sharma and the other was Mr. Shyam Avtar.

9. The pre-summoning evidence in the case was recorded for a period of about 14 years during which PWs-1 and 2 were examined. By an order dated 4th January 2002, charges were framed against the Respondent under Section 132/135A of the Customs Act. By the same

order the case property, which was not claimed by the Respondent, was permitted to be disposed of.

The statement of the Respondent under Section 313 Cr PC

10. In his statement under Section 313 Cr PC, the Respondent stated that his passport was got issued in the name of Mohan Lal which was his childhood name. He admitted that he was Joginder Pal Jain but that by mistake his passport was got made in the name of Mohan Lal. He denied that Mr. Grover was questioned in his presence. He denied having confirmed that he had checked in the sea green suitcase in the name of Mohan Lal. He also denied opening the suitcase with any key and whether any packets of sweets were recovered from it. According to him, no sweet packets were opened in his presence and therefore he could not know what they contained. He denied that any currency was recovered from his possession. He also denied having made any voluntary statement before Mr. D.K. Malhotra. He claimed that the said statement was written by him at the dictation of Mr. Malhotra under threats and coercion. He stated that he retracted that statement immediately when he was produced in the Court for the first time on 30th January 1988, i.e. at the first available opportunity. When asked if he wanted to say anything the Respondent stated that all the articles recovered from the suitcase, briefcase and cardboard carton were mixed up by the customs officials; that he was detained for more than 36 hours and was tortured, pressurized and induced to write the statement dictated by Mr. Malhotra and Mr. K.K. Dhasmana; that he had been falsely implicated in this case.

The defence evidence

11. The Respondent examined Mr. Vijay Sood as DW-1 who was a resident of Moga, Punjab. DW-1 knew Mr. Grover. He also knew the Respondent. He claimed that on 27th January 1988 he went to Faridkot to see Mr. Grover and that he and Mr. Grover travelled together by train from Faridkot to Delhi on 27th January 1988. He stated that Mr. Grover was having one light green colour suit case and one zipper bag and that DW-1 was having one briefcase only. Before reaching Bhatinda, Mr. Grover got his right thumb injured with the window of the train compartment. He claimed that when the train reached Bhatinda somebody came to see Mr. Grover. When they reached Delhi, Mr. Grover accompanied by DW-1 went to the residence of a friend of DW-1 in East of Kailash where first aid was given to the right thumb of Mr. Grover. He claimed that he also accompanied Mr. Grover to Broadways Hotel where they met the Respondent. Since Mr. Grover had injured his right thumb, the Respondent wrote down certain figures on his behalf. He claimed that just before entering the airport, Mr. Grover handed over to DW-1, two inland letters (Ex.DW1/A and Ex.DW1/B), requesting him to keep them till he came back from Hongkong. He claimed that he came to know of the case of foreign currency recovered from the Respondent only once he returned to Moga. In his cross-examination, it transpired that by the sale of some property belonging to him, he had given a power of attorney to the Respondent. The purchaser had nominated the Respondent since he belonged to Moga.

12. The other witness examined by the Respondent was Mr. Bharat Mittal (DW-2) who was a witness to the search of the factory of the Respondent. He stated that Mr. Grover was serving as a Senior Clerk in the office of Deputy Commissioner, Faridkot and had told DW-2 that if he ever needed any help from any custom officer, he would be able to arrange for the same. He claimed that once Mr. Grover had brought him to one Mr. Gurdial Singh Malhotra, Customs Officer in Delhi. He claimed that Mr. Grover used to go abroad to Bangkok, Singapore, Hongkong etc. He also used to buy foreign exchange from the various villagers around Moga who used to come to him and sell foreign currency to him. Mr. Grover visited DW-2 on 2nd February 1998 and disclosed that he had been caught by the customs officers at the airport for carrying Indian currency and dollars. Mr. Grover is supposed to have disclosed that that he knew Mr. Gurdial Singh Malhotra, the latter helping him avoid arrest by the customs officer. In his cross-examination, DW-1 stated that except his own statement, there was nothing to prove that Mr. Grover used to go to Bangkok, Singapore and Hongkong and that he used to buy foreign exchange from various villagers around Moga. He admitted that he knew the Respondent. He denied that the Respondent was his family friend or that he and the Respondent had joint business and property in Delhi or Moga.

Judgment of the trial Court

13. The trial Court on analysing the evidence of the witnesses, first concluded that there was no satisfactory explanation as to why Mr.

Grover who was also travelling with the Respondent abroad was found in possession of only a small hand bag and was not carrying any change of clothes or shaving kit whereas the Respondent was carrying not only several pairs of clothes but also two shaving kits. In the circumstances, the plea of the Respondent that the sea green suit case belonged to Mr. Grover could not be rejected outrightly. Further, there was no explanation as to under what compulsion the Respondent had confessed the ownership of the said suitcase when there was no evidence against him except the statement of Mr. Grover. There was substantial element of doubt to the truthfulness of the confessional statement of the Respondent. The evidence on record produced by the prosecution did not appear to be consistent with the ordinary course of events in respect of the statement of Mr. Grover and confession of the Respondent. Although the defence witnesses of the Respondent did not appear to be reliable, the prosecution had failed to prove its case against the Respondent beyond reasonable doubt.

14. One other factor which weighed with the trial Court was that during the pendency of the proceedings, Mr. Grover expired and the other witnesses could not be found. An application filed by the Customs Department belatedly under Section 311 Cr PC for recalling the witnesses was dismissed by the trial Court. With Mr. Grover not being able to be examined, there was no evidence other than the confessional statement of the Respondent which appeared to be both inconsistent and involuntary. As regards the Respondent carrying a fake passport, he was facing a separate trial for the said offence. The

said circumstance may have created suspicion but did not constitute proof to establish the guilt of the accused as far as the offence under Section 135A of the Customs Act was concerned. In the circumstances, the Respondent was granted benefit of doubt and acquitted.

Proceedings in this Court

15. In the present appeal, for consecutive hearings none appeared for the Appellant. Mr. Naresh Grover, son of Mr. Manohar Lal Grover had separately filed Criminal Leave Petition No. 11 of 2007 challenging the impugned judgment of the trial Court acquitting the Respondent. By an order dated 30th August 2007 in Criminal Leave Petition No. 11 of 2007, this Court tagged the said criminal leave petition with the present criminal appeal. On 19th March 2010, the said criminal leave petition was dismissed as withdrawn after recording the statement made by learned counsel for Mr. Naresh Grover that he would assist the Public Prosecutor in the present appeal.

16. As no one had been appearing for the Appellant, this Court permitted Mr. H.S. Phoolka, learned Senior counsel to address the Court on behalf of Mr. Naresh Grover to assail the impugned judgment of the learned trial Court. This Court has also heard the submissions of Mr. S.S. Gandhi, learned Senior counsel for the Respondent.

Adjudication proceedings

17. A development which took place during the pendency of the present appeal was that by an order dated 15th December 2008, the Commissioner of Customs (Appeals) allowed an appeal filed by the Respondent against the Order-in-Original No. 4 of 2008 dated 30th January 2008 passed by the Additional Commissioner of Customs, IGI Airport, New Delhi levying a penalty of Rs. 75,000 on the respondent under Section 114 of the Customs Act.

18. The said Order dated 30th January 2008 was consequent upon an order of the Government of India (GOI) dated 16th July 1991 directing de-novo proceedings, not in respect of the confiscation of the foreign exchange, but in respect of confiscation of Indian currency worth Rs 750 and container from which the foreign exchange was recovered and penalty imposed on respondent. In the order dated 15th December 2008 allowing the Respondent in appeal, a reference was made to the detailed order passed by the GOI on 16th July 1991, wherein it was *inter alia* noted that:

“There is no doubt from the facts on record that Sh. Manohar Lal Grover was known to the Applicant and both of them did act in cohort. But, if for some reason, whether justified or unjustified, one of the suspected accused persons is not proceeded against, there is no law by which proceedings against the other party will automatically get dropped in all circumstances. The position would be different, say in a original proceedings, where charge of conspiracy (Section 120-A

of the IPC) or of common intention (Section 34 *ibid*) are invoked.

But position would be entirely different if after investigation it is decided to proceed against only one person (Sh. Joginder Pal Jain's alias Sh. Mohan Lal in this case) and not the other (Sh. Manohar Lal Grover) though in that case it shall not be permissible for prosecution (Department) to make use of any statement of Manohar Lal without at least granting an opportunity of cross-examination to Sh. Jain. In case the department decides to proceed against only one individual, it is incumbent to provide full evidence against him along with a reasonable opportunity of challenging the evidence, by way of cross-examination of material witness or in the alternative prove the case without reference to evidence of other persons, specifically of suspected accomplice. Such proceedings may also be based on a confirmation that is duly corroborated."

19. The order of the Appellate Authority also noted that the Adjudicating Authority did not allow the cross-examination of the *panch* witnesses since "they could not be traced and that they had shifted from the addresses given in the *panchnama*." The Appellate Authority found that this was contrary to the specific statement made by the Department before the Delhi High Court during the hearing of Criminal Miscellaneous Case No. 1342 of 2005. There it was stated that the Department was in a position to make the *panch* witnesses available for cross-examination. As a result, in the absence of cross-examination of the *panch* witnesses, the Adjudicating Authority could

not rely upon their version. The Appellate Authority concluded as under:

“At the time of booking the case, it was found that the Sea Green suitcase, from which the seized foreign currency was recovered, was checked-in in the name of Sh. Manohar Lal Grover, the baggage tags were stapled to his ticket and in his statement dated 29th January 1988 Sh. Manohar Lal admitted that he had met the Appellant in Hotel Broadway and that the Appellant was known to him. Thus it is clear that Sh. Manohar had given his consent to check in the said suitcase in his name and hence, was a co-accused as has been held by the Government of India in its order mentioned above. But Sh. Manohar Lal was let off and no case was booked against him. The Customs Officers, who booked the case, had no authority under the law to decide the fact that Sh. Manohar Lal was not involved in the case even though he had denied his involvement in his statement. They should have booked the case against both persons and left it for the Adjudicating Authority/Court to decide whether Sh. Manohar Lal was involved or not. By letting him off the hook they thus decided the case in favour of Sh. Manohar Lal and at the same time put the Appellant in a position of disadvantage, which is not permissible under the law. Moreover, when a person himself is co-accused in a case, his statement cannot be accepted as evidence against the other. In the present case, Sh. Manohar Lal was a co-accused as held by the Govt. of India, his statement could not be held as evidence against the Appellant.”

20. The above order of the Appellate Authority, allowing the appeal of the Respondent has attained finality.

Submissions of counsel

21. Mr. Phoolka submitted that the approach of the learned trial Court in not relying on the confessional statement of the Respondent was flawed as the plea of the Respondent that it was obtained under torture and coercion was an afterthought and was not substantiated. Mr. Phoolka placed reliance on the decision of the Supreme Court in ***M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (2003) 8 SCC 449***. According to Mr. Phoolka, the Respondent had confessed to two material facts; one that he was travelling on a fake passport and the second that the currency recovered from the sea green colour suitcase belonged to him and the suitcase also belonged to him. He had handed over the keys of the suitcase to the Customs Officer. Mr. Phoolka submitted that even the retracted confessional statement under Section 108 of the Customs Act would be admissible in evidence. Reliance was placed on the decision of this Court in ***Jasjeet Sinha Marwaha v. Union of India 2009 (239) ELT 407***. He submitted that as long as the Court was satisfied about the probative value of such confession, it did not require corroboration. Reliance was placed on the decisions in ***Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay 2013 (4) Scale 565*** and ***K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin 1997 (3) SCC 721***. Mr. Phoolka pointed out that along with the currencies recovered from the suitcase some letter pads of the company M/s. Phoneix Pharmaceuticals were also seized and those numbers of the material objects mentioned therein matched with the recoveries affected from the boxes of sweets. The Respondent himself

admitted that he was Managing Director of M/s. Phoneix Pharmaceuticals. Both the prosecution witnesses had no enmity against the Respondent. The Respondent himself had given suggestion to PW-2 that one shaving kit was recovered from Mr. Grover and one shaving kit was recovered from the brief case of the Respondent. Mr. Phoolka also pointed out the unreliability of the defence witnesses.

22. Countering the above submissions, Mr. S.S. Gandhi pointed out the boarding passes which showed that seats allocated to the Respondent and Mr. Grover were not next to each other. They could not have checked in together. Also the baggage tags were not consecutive. He referred to the cross-examination of PW-2 in this regard. The failure to produce Mr. Grover in cross-examination deprived the Respondent an effective defence and the Respondent being not responsible for that circumstance was rightly granted benefit of doubt by the trial Court. He pointed out that not only the Petitioner but even the Respondent had filed an application under Section 311 Cr PC for recalling of Mr. Grover but that application was rejected. Mr. Gandhi referred to the order dated 1st September 2005 passed by this Court in Criminal Miscellaneous Case No. 1342 of 2005 (***Department of Customs v. Joginder Pal Jain***) affirming the order dated 16th March 2005 passed by the trial Court dismissing the Petitioner's application under Section 311 Cr PC.

Decision of the Court

23. In the first place it must be required to be noticed that Mr. Grover who was perhaps the key prosecution witness, was unavailable for cross-examination. The other *panch* witnesses to the seizure at the IGI airport were not produced by the prosecution. The prosecution evidence concluded on 18th March 2002. When it was realized that these witnesses were not being produced, the Respondent filed an application under Section 311 Cr PC for recalling of the *panch* witnesses and that application was dismissed by the trial Court observing as under:

“Learned defence counsel argued that these *panch* witnesses/Shri M.L. Grover are the witnesses of the Complainant and not that of accused but the Complainant has not produced them in the witness box. Hence, now it is duty of this Court to summon these witnesses in the witness box to reach at the just conclusion. It is well-settled proposition of law that Court is not supposed to collect evidence on behalf of the parties. It is correct that Complainant has not produced these *Panch* witnesses/Shri M.L.Grover in the witness box. In these circumstances, the Complainant will bear all the legal consequences for non-production of the *panch* witnesses.....”

24. Clearly therefore, even on that date the prosecution was aware of the consequence of not producing the key witness for cross-examination (for reasons unexplained). The Customs Department waited for three years to file its application under Section 311 Cr PC. Not surprisingly the said application was dismissed by the trial Court

by its order dated 16th March 2005, on the ground that it was belated. The High Court by its order dated 1st September 2005 dismissed the Petitioner's Criminal Miscellaneous Application No. 1342 of 2005 challenging the said order. The failure to produce the *panch* witnesses and Mr. Grover deprived the Respondent of an effective defence and should invite the consequence of granting him the benefit of doubt.

25. In *Shahid Balwa, Vinod Goenka v. Directorate of Enforcement 201 (2013) DLT 211 (DB)* in the context of the Foreign Exchange Management Act, 1991 ('FEMA') a Division Bench of this Court analysed the legal position and observed as under:

“28. The legal position that would follow is that normally if the credibility of a person who has testified or given some information is in doubt or if the version or the statement of the person who has testified is in dispute normally right to cross-examination would be inevitable. If some real prejudice is caused to the Complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case.”

26. Naturally therefore the entire emphasis on the side of the prosecution which incidentally did not chose to argue the present appeal was on the confessional statement of the Respondent under

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Section 108 of the Customs Act. In his statement under Section 313 CrPC, the Respondent has mentioned that the said statement was written by him under the dictation of PW-1 and was retracted by him at the first available opportunity when he was produced for the first time in Court on 30th January 1988. This fact was not disputed. Once the confessional statement had been retracted it was necessary to seek corroboration of the facts adverted to therein. The suggestion to this effect was put to PW-1 in his cross-examination which was denied.

27. In *Telestar Travels Private Limited v. Special Director of Enforcement* (2013) 9 SCC 549, in the context of retracted confessions under the FERA, the Supreme Court observed that while considering the voluntariness of a statement, the Court was required to consider “the attending circumstances and all other relevant facts.” As noticed in the order dated 15th December 2008 passed by the Commissioner of Customs (Appeals), the Customs Department had failed to explain why Mr. Grover was not proceeded against. It adverted to the fact that the Government of India had in its order dated 16th July 1991 clearly observed that Mr. Grover was a co-accused and that “both of them did act in cohort.” It was further observed that it “shall not be permissible for prosecution (Department) to make use of any statement of Manohar Lal without at least granting an opportunity of cross-examination to Sh. Jain.” The order of the Commissioner of Customs (Appeals) also points out to the infirmity in the *panchnama* since it contained statements which were outside the knowledge of the *panch* witnesses, making it obvious that they had narrated what they

were told and not the facts. The basic material contradictions in the two confessional statements of the Respondent were noted. According to the department, the Respondent told PW-2 that he had given the sea green suitcase to Mr. Grover for getting it checked in the name of Mr. Grover. Another confessional statement had been made to PW-1 in which the Respondent stated that he had himself taken all the baggages, including the small zipper hand bag of Mr. Grover to have it checked in. In the light of these contradictions it was imperative for the Petitioner to have produced the two *panch* witness and Mr. Grover for cross-examination.

28. The mystery of Mr. Grover carrying only one hand bag for visiting Hongkong without a change of clothes has not really been satisfactorily explained by the prosecution. One shaving kit was recovered from the cardboard carton and the other from the sea green suitcase. Why would the Respondent be carrying two shaving kits has also not been explained. The mere fact that a suggestion was put to PW-2 in his cross-examination, that one shaving kit was recovered from Mr. Grover and another from the Respondent does not lead to the conclusion that the Respondent was carrying Mr. Grover's carrying shaving kit. The earlier answers of this witness have to be read in continuation:

“Q. I put it to you that you mixed up all the articles recovered from the accused as also from Manohar Lal Grover?

Ans. It is wrong to suggest that the articles recovered from Joginder Pal Jain were mixed up. Actually the

baggage owned by Sh. Joginder Pal Jain was examined exclusively in presence of Joginder Pal Jain, witnesses and Manohar Lal Grover and as per *panchnama* goods were seized.

Q. Is it correct that the briefcase of Joginder Pal Jain was found to contain a shaving kit as recorded on page 3 of *panchnama* PW3/A?

Ans. Yes it is correct.

It is correct that one shaving kit was recorded from the cardboard carton being carried by the accused as recovered in Annexure C of the *panchnama* Ex.PW3/A.

Q. Did you asked him why he was carrying two shaving kits?

Ans.: Case was investigated by the then Supdt. Preventive.”

29. In fact the witness denied the suggestion that the contents of the baggage were mixed up. The decision of the Supreme Court in ***K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin 1997 (3) SCC 721*** no doubt states that not each fact or circumstance contained in the retracted confession needs separate or independent corroboration but certainly the material aspects of such confession do require corroboration. In the present case the role of Mr. Grover, and whether the baggage checked in was his and what was being carried in it are material aspects of the confessional statement of the Respondent which was been retracted. It finds no corroboration from any independent source. This was adverted to by

the Commissioner of Customs (Appeals) and that order has not been challenged.

30. In his examination-in-chief, PW-2 produced two boarding passes and baggage tags. Neither of the two seats were allocated to the passengers next to each other. Surprisingly the baggage tags were not consecutive which was even more surprising, if indeed both the bags had been checked in at the same time. There are too many unexplained facts and unanswered questions in the prosecution case which persuade the Court to agree with the reasoning and conclusion arrived at by the trial Court. The prosecution has been unable to prove the case against the Respondent beyond reasonable doubt.

31. As pointed out in *Basappa v. State of Karnataka (2014) 5 SCC 154* it would be permissible for this Court in an appeal against an acquittal to reappraise the evidence only if the conclusion of the trial Court is perverse i.e. against the weight of the evidence. On that yardstick, the Court is not persuaded to hold that the impugned judgment of the trial Court suffers from any legal infirmity warranting interference.

32. Consequently, the appeal is dismissed but in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J.

AUGUST 28, 2014

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