IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 272 OF 2000

Union of India
(at the instance of Assistant Commissioner
of Customs, Marine & Preventive,
Mumbai). :: **APPELLANT**
(Orig. Complainant)

-: Versus :-

1. Moolchand Veerchand Shah,
10/339, Main Bazar, Todpatri
Distt. Anantpur, A. P.
(Appeal separated against
respondent No.1 as per order
dtd. 04/7/2002).

2. Yuvraj Poonamchand Jain,
Shop No.10, Kamathipura 10th lane,
Mumbai-400008.

3. State of Maharashtra. :: **RESPONDENTS**
(R-1 and R-2 :Orig.Accused)

None for the appellant and respondent No.2.
Mr. A. S. Shitole, A.P.P. for respondent No.3-the State.

CORAM : S. B. SHUKRE, J.
1st JULY, 2015

O R A L J U D G M E N T

1. This is an appeal preferred against the judgment and order dated 30/7/1999 passed by Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai in criminal case

No.101/CW/95. Briefly stated, the facts of the case are as under.:

On 06/3/1991, officers of Customs, Marine and Preventive Wing, Mumbai received information that one person was likely to pass through the area between Vitthalwadi and Cotton Exchange on Kalbadevi road after obtaining foreign marked gold biscuits from the shop at 10th Kamathipura lane. The officers, therefore, kept watch towards the said area and on seeing respondent No.1 as passing through the area, accosted him. Preliminary investigation was made and it was prima facie found that respondent No.1 was carrying gold biscuits in a cotton belt tied to his waist. He was then taken to the office of the appellant and after following due procedure, his search was conducted. The search yielded 24 gold biscuits of three different foreign markings totally weighing 2799.60 gms. valued at Rs.9,60,000/-. Respondent No.1 could not give account for possession of those foreign marked gold biscuits and their acquisition and also their concealment. Therefore, they were seized under panchanama under the reasonable belief that they were smuggled into India and liable for confiscation. On the basis of information given by respondent No.1, the officers of the appellant then searched shop cum residential premises of respondent No.2, from where one piece of primary gold weighing 15.6 gms. valued at Rs.4,350/-

was found concealed behind cooking gas cylinder in the kitchen. Further, in the cavity of wooden loft in the said premises, Indian currency of Rs.14,800/- was also found to be concealed. As respondent No.2 did not give cogent explanation, the officers of the appellant seized primary gold and also Indian currency under a reasonable belief that the gold was smuggled into India and the currency of Rs.14,800/- represented the sale proceeds of the contraband gold.

During the course of investigation, statements of respondents No.1 and 2 were recorded in terms of Section 108 of the Customs Act, 1962 whereby both the respondents admitted of their illegal possession of the contraband gold and also about sale and purchase of gold biscuits that took place between respondent No.2 and respondent No.1.

After completion of investigation, sanction for prosecution of both the respondents was accorded by the Collector of Customs (Preventive), Mumbai and thereafter, Assistant Collector of Customs filed the complaint.

After framing of the charge and recording of evidence that was brought on record, learned Magistrate found that the appellant could not prove the charge for offences punishable under Section 135(1)(i)(ii) read with Sections 135(1)(a) and

135(1)(b) of the Customs Act, 1962 read with Section 120-B of the Indian Penal Code and also under Section 5 of the Import and Export (Control) Act, 1947, that was framed against both the respondents by the judgment and order dated 30/7/1999. Not being satisfied with the same, Customs Department is before this Court in the present appeal.

2. Under the order passed by this Court on 09/11/2001, the appeal preferred against respondent No.1 has been separated and the appeal as against respondent No.2 has been directed to be proceeded in accordance with law. Therefore, this appeal has been taken up for final hearing only as against respondent No.2.

3. Nobody is present on behalf of the appellant. Nobody is present also on behalf of respondent No.2. Mr. Shitole, learned A.P.P. is present on behalf of respondent No.3-State of Maharashtra. The appeal being very old, I have taken it up for final disposal on its own merits as per the mandate of Section 386 of the Criminal Procedure Code. Accordingly, I have heard learned A.P.P. for respondent No.3, who has submitted that an appropriate order in the matter be passed.

4. On going through the impugned judgment and order, I find that there has been material inadequacies in the evidence led by the prosecution, i.e. the Customs Department, which led to

the learned Magistrate passing an order of acquittal of respondent No.2 in the present case. Panchanama in respect of seizure of gold piece and currency notes from the shop cum residential premises of respondent No.2 has not been proved in accordance with law by the prosecution. The raid on the shop cum residential premises of respondent No.2 was carried out on the information received by another Customs Officer one Mr. Batatawala. But he could not be examined as prosecution witness as he was not alive when the case reached the stage of recording of evidence. The panchanama that was prepared in this case was not signed by P.W.-1 or P.W.-3. Panch witness, P.W.-5 Hasan Gafoor, turned hostile and he did not support the prosecution case. Another panch witness was not examined in the matter. The result was that panchanama (Exh.P2) could not be proved by the prosecution.

5. Statement of respondent No.2 recorded under Section 108 of the Customs Act was found by the learned Magistrate as having been recorded under duress. On 08/3/1991, respondent No.2, when produced before the Additional Chief Magistrate, had made complaint of ill-treatment and the learned Magistrate had also found prima facie substance in the said complaint of respondent No.2. In the report (Exh.D3), concerned Medical

Officer mentioned that upon examination of respondent No.2, he noticed two bruises and multiple tenderness on the person of respondent No.2. According to respondent No.2, these injuries were suffered by him in an assault made upon him by the officers of Customs. No evidence has been led by the prosecution to explain these injuries and also the fact that Customs officers were not responsible for the said injuries. Even in the statement of respondent No.2 that was recorded, nothing was mentioned to the effect that respondent No.2 was warned by the Customs officers that his statement could be used against him.

6. The evidence available on record also indicates that the prosecution failed to prove the fact that shop cum residential premises situated at 10^{th} lane, Kamathipura, Mumbai belonged to respondent No.2. This fact reasonably shows that whatever action taken by the Customs officers as against respondent No.2 in the present case was full of doubt and highly suspicious in nature.

7. Cumulative effect of the discussion of prosecution evidence made as above, leads me to conclude that learned Magistrate has rightly found that the prosecution or the appellant has failed to prove the offences alleged against respondent No.2 and thus, the learned Magistrate has rightly acquitted respondent No.2 of all the offences.

8. In the circumstances, I find that no case has been made out for making any interference with the impugned judgment and order so far as it relates to the appellant's case as against respondent No.2. The appeal, therefore, deserves to be dismissed as against respondent No.2.

Appeal stands dismissed as against respondent No.2.

Appeal as against respondent No.1 shall be proceeded in accordance with law.

S. B. SHUKRE, J.