Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.666 OF 2001

Union of India	]	
(At the instance of Assistant Commissioner	]	
of Customs, Rummaging & Intelligence,	]	…. Appellant /
New Custom House, Mumbai.	]	(Org. Complainant)
V/s.		
1. Kasam Ali Jivan Vadsaria	]	
R/at Room No.134, Gita Apartment No.2,	]	
Maheklal Road, Navsari, Dist. Valsad	]	…. Org. Accused No.1
	]	
2. State of Maharashtra	]	…. Respondents

Mr. N. Natarajan, P.P., for the Appellant / UOI.

Ms. Rohini Dandekar, Appointed Advocate, for Respondent No.1 / Original Accused No.1.

Mrs. A.S. Pai, A.P.P., for Respondent No.2/State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 9TH DECEMBER 2015.

ORAL JUDGMENT :

1. This Criminal Appeal takes an exception to the Judgment and Order dated 10th April 2001 of Chief Metropolitan Magistrate, Esplanade Court, Bombay, under which Respondent No.1 is acquitted for the offences punishable under Sections 135(1)(a) and 135(1)(b) r/w. Section 135(1)(i) of the Customs Act, 1962 and also for the offence punishable under Section 5 of the Imports (Control) Order, 1947.

2. Brief facts of the Appeal can be stated as follows :-

. On 31st May 1992, PW-1 Dattaram Chari, the Air Intelligence Officer at Sahar International Airport, intercepted Respondent No.1 at the Airport. Respondent No.1 has arrived from Nairobi by the Kenya Airways Flight No.KA-206. He got cleared himself through the walk-through channel at the Airport. However, on suspicion, he was accosted and in the presence of the Panch PW-4 Sadanand Darekar, his personal search was carried out, after inquiring with him whether he was carrying any contraband articles or gold, to which he has replied in negative. However, when he was subjected to metal detector test, it was confirmed that he was carrying some metal on his person. He was again interrogated, but again he refused to accept the fact that he was carrying any metal on his person. During further interrogation, it was found that the pair of shoes, which he was wearing, was unusually heavy. On closer scrutiny of the shoes, a cavity was noticed in the shoes and, on examination, it was found that 12 pieces of gold, of different shapes and sizes, were concealed in the said cavity. Those 12 pieces of gold were recovered in the presence of Panchas. The weight of the gold was found to be 1.198 gms. and valued at Rs.4,94,774/- at local market value. The gold was seized under Panchanama.

3. During further investigation, the statement of Respondent No.1 came to be recorded under Section 108 of the Customs Act by PW-2 Premnath Rajput, the Superintendent. In the said statement, Respondent No.1 confessed that he was carrying contraband gold at the instance of one Mr. Khan Bhadur for monetary consideration of Rs.2,000/-. Hence, further to completion of the inquiry, the sanction was obtained for prosecution of Respondent No.1 and the case was filed in the Trial Court against him on 29th January 1992.

Prosecution, in support of its case, examined five witnesses, namely, PW-1 Dattaram Chari, the Air Intelligence Officer, who has intercepted Respondent No.1 at Sahar International Airport; PW-2 Premnath Rajput, who was working on the post of Superintendent of Customs and has recorded the statement of Respondent No.1 under Section 108 of the Customs Act; PW-3 Jogendralal Pal, who has led corroborating evidence to PW-1 Dattaram Chari; PW-4 Sadanand Darekar, the Chief Traffic Assistant in Baggage Section of Air India, in whose presence the Seizure Panchanama of the gold was made; and, lastly, PW-5 Uday Shinde, the Intelligence Officer, to prove the certification of inventory of the gold made by the Special Metropolitan Magistrate.

4. On appreciation of their evidence, the Trial Court found that there

were several lacunae and infirmities in the prosecution case and, hence, extended the benefit of the same to Respondent No.1 by acquitting him of the offences charged against him.

5. This Judgment of the Trial Court is challenged in this Appeal by learned counsel Mr. Natarajan, P.P. for the Appellant/UOI, whereas, supported by learned counsel for Respondent No.1.

6. The prosecution, in the instant case, has relied upon the evidence of PW-1 Dattaram Chari and PW-3 Jogendralal Pal to prove that on 31st May 1992, at about 8:30 am, Respondent No.1 was intercepted, after he arrived from Kenya and on suspicion, his personal search was taken and it was found that in the cavity of the shoes, which he was wearing, there were 12 pieces of contraband gold of different sizes and shapes concealed. The Panchanama of the said fact was drawn accordingly and the pieces of gold were seized along with the shoes, which Respondent No.1 was wearing at that time.

7. The prosecution has further relied upon the exercise of calling upon Respondent No.1 to wear those shoes in the Court to prove that they were of his size. In my considered opinion, the Trial Court has rightly held the evidence relating to this exercise to be not admissible. Moreover, the Trial Court, which has itself witnessed the said exercise, found that the

shoes, which were seized under Panchanama were found to be of a smaller size than that of the size of the feet of Respondent No.1. The Trial Court has noticed that Respondent No.1 could not wear those shoes and he had difficulty even to tie the lace of the shoes. In my considered opinion, therefore, this entire exercise of calling upon Respondent No.1 in the Court to wear the shoes and the shoes being not found to be of the size of the feet of Respondent No.1 is, thus, proved to be not helpful to the prosecution.

8. The second circumstance, on which the prosecution is relying upon, that the metal, which was seized from the possession of Respondent No.1, was the contraband gold. On this aspect, as rightly found out by the Trial Court, the gold-smith is not examined. His evidence was of vital importance to prove that the metal, which was seized from Respondent No.1, was a primary or contraband gold, liable for confiscation. The prosecution has relied upon the evidence of PW-5 Intelligence Officer Uday Shinde to prove that the inventory of the said metal was taken before the Special Metropolitan Magistrate. Certificate to that effect is also produced at Article-A. However, again the fact remains that mere inventory or production of the certificate cannot be of any help, unless the gold-smith Mr. S.M. Lanjekar, who has issued the certificate, was examined as a witness before the Trial Court to prove the contents

thereof. The non examination of the gold-smith, therefore, constitutes a major and fatal lacunae in the prosecution case, because, on account of his non examination, prosecution has failed to prove that the metal seized from the possession of Respondent No.1 was a contraband gold.

9. In the course of arguments, the learned P.P. Mr. Natarajan has submitted that, as the Inventory Certificate goes to prove that some yellow metal was seized from the possession of Respondent No.1 and as Respondent No.1 has not produced on record any license to show that he was permitted to import the said metal, the prosecution has proved its case. However, I am not inclined to accept this submission, because in order to hold Respondent No.1 liable for importing any metal to India, it must be shown that the said metal was prohibited to be imported or it was a contraband metal. Unless the identity of the metal is ascertained whether it was gold or of any other character, simplicitor because Respondent No.1 has imported some metal, he cannot be held liable for prosecution; especially in the absence of any evidence produced on record to show that the import of such metal was prohibited or it was a contraband metal. Therefore, this argument also fails.

10. The prosecution has then relied upon the statement of Respondent No.1, recorded under Section 108 of the Customs Act, by PW-2 Premnath

Rajput, the Superintendent. Learned counsel for Appellant Mr. Natarajan has placed reliance on ***K.I. Pavunny Vs. Assistant Collector (Head Quarter), Central Excise Collectorate, Cochin, 1997 (1) Crimes 210***, to substantiate his submission that, the statement recorded by Customs Officer under Section 108 of Customs Act, even if it is retracted, can be relied upon and can constitute a sole basis for conviction, it being a substantive piece of evidence. Perusal of this authority shows it was further held therein that, to rely upon such statement, the Court is required to examine whether the confessional statement was voluntary; in other words, whether it was not obtained by threat, duress or promise. Only if the Court is satisfied from the evidence that it was voluntary, then it is required to be examined whether the statement is true. If the Court, on examination of the evidence, finds that the retracted confession is true, then that part of the inculpatory portion could be relied upon to base conviction. It was further observed in this authority that, **"the prudence and practice, however, require that the Court would seek assurance getting corroboration from other evidence led by the prosecution to such statement"**.

11. Therefore, the first and foremost test, which the confessional statement, as recorded under Section 108 of the Customs Act by PW-2 Premnath Rajput, is required to be fulfilled is that the said statement

needs to be proved to be voluntary without any threat or inducement or promise. Here in the case in this reported authority, the statement of the accused was given in his own handwriting before the Customs Official and, naturally, it was in the language known to him. In the instant case, the perusal of the evidence of PW-2 Premnath Rajput, the Superintendent, who has recorded the said statement, goes to show that he himself has recorded it and it is not in the handwriting of Respondent No.1. Further, he has stated that he questioned Respondent No.1 in Hindi and Respondent No.1 gave replies in Hindi, but the statement is recorded in English and it is scribed by his officer; therefore not by him also. Further, he has admitted in his cross-examination that, it is desirable to record the statement of the accused in the language known to him. Here in the case, he has admitted that the Respondent No.1/Accused was knowing Gujarati. Despite that, the statement is recorded in English, without ascertaining whether Respondent No.1 was knowing the English language or conversant therewith. It is pertinent to note that the questions are asked in Hindi, according to him, and not in Gujarati. Therefore, the entire exercise of recording of statement becomes futile.

12. There is also material brought out in his cross-examination, which reveal that in the summons, which was issued to Respondent No.1 calling

him to the office for recording of the statement, there was clearly mentioned that he would not be allowed to leave the office, thereby creating an apprehension in his mind that he would be confined in the office, unless he signs on the statement. Therefore, the statement itself cannot be called as voluntary, recorded properly in the language known to Respondent No.1 and understood by Respondent No.1. Therefore, such statement cannot form the sole basis for conviction of Respondent No.1. At the most, it would have lent some assurance or corroborating, but, on that aspect also, the prosecution should have proved that whatever material was imported by Respondent No.1 was a contraband metal, which prosecution has failed to prove.

13. There is also one more fatal lacunae, which is in the sanction order produced on record by the prosecution. The law is well settled that sanction for prosecution is undoubtedly not an idle formality. It must reflect the application of mind by the Sanctioning Authority. Here in the case, if the material portion of the sanction is reproduced, it reads as follows :-

> *"And Whereas the statement of Shri. Kasam Ali Jivan Vadsaria u/sec. 108 of the Customs Act, 1962 in which he stated that he had carried the gold at the instance of Shri. Khan Bhadur for monetary*

consideration of Rs.2,000/-. He admitted knowledge, concealment, recovery of the said gold. In a statement u/sec. 108 of the Customs Act, 1962, Smt. Shanu Abbas Merchant admitted the concealment, possession and recovery of the said gold. She further stated that the said gold was handed over to her by her cousin Mr. Saleem Memon at Karachi."

14. Thus, sanction contains the portion relating to one Smt. Shanu Abbas Merchant, who has admitted about concealment, possession and recovery of gold, which was handed over to her by her cousin Mr. Saleem Memon at Karachi. This portion in the sanction has absolutely no relevance or concern with the facts of the present case.

15. In my considered opinion, these contents in the sanction order leads to only one conclusion that the Sanctioning Authority has not applied its mind at all, but has signed on the sanction in a mechanical way. Hence, such sanction can hardly be useful for the prosecution to rely upon.

16. The learned counsel for Appellant Mr. Natarajan has relied upon ***Union of India Vs. Ashok Sukhadeo Singh Chavan, 1991 CRI. L. J. 2359***, to submit that, the production of the sanction itself is sufficient to

prove that there was application of mind and examination of Sanctioning Authority as a witness is not essential. In my considered opinion, from the mere fact that in the concluding para, the Sanctioning Authority has written that, *“on the material placed on record, he was satisfied that sufficient ingredients of the offence are made out”*, it cannot be said that there was application of mind on his part. If he has really applied the mind, then the above said portion relating to the case of Smt. Shanu Abbas Merchant would not have found reference or mention in the Sanction Order. The very fact that the said portion is appearing in the Sanction Order makes it necessary to infer that there was patently, obviously and totally non application of mind. In such situation, the evidence of the Sanctioning Authority was essential to prove how this portion appeared in the Sanction Order and whether he has really applied his mind and despite that such portion appeared. Therefore, in my considered opinion, the Trial Court has rightly concluded that there was total non application of mind and the sanction issued for prosecution of Respondent No.1 was not legal and valid.

17. Lastly, the Trial Court also found that there was non compliance of Section 102 of the Customs Act, which provides a safeguard of search to be taken before the Gazetted Officer of Customs or Magistrate. Section 102 categorically provides that, when any Officer of Customs is about to

search any person under the provisions of Section 100 or Section 101, the Officer of Customs shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. According to learned counsel for Appellant Mr. Natarajan, the relevant clause in this Section is, *“if such person so requires”* implying thereby that unless and until the person, who was to be searched, makes request that his search would be taken by the Gazetted Officer or by the Magistrate, the provisions of this Section are not mandatory like Section 50 of N.D.P.S. Act.

18. It is true that the provisions of this Section are not mandatory and the breach thereof may not result ipso facto, automatically in the acquittal of the Respondent/Accused, but the fact remains that this is an additional safe guard provided to the accused in the case and he must be aware that there is such protection or safe guard. Unless and until he is made aware of such safe guard or protection, he cannot be in a position to exercise that right. Therefore, in order to enable him to make requisition for search by Gazetted Officer or by the Magistrate, he must be given understanding or made aware of it. There is no evidence to the effect that PW-1 Dattaram Chari or PW-2 Premnath Rajput, who had intercepted and convicted Respondent No.1 and taken his personal search, had made

Respondent No.1 aware of the same. There is also no evidence to show that any of them were Gazetted Officers at the relevant time. They have not stated so in the evidence before the Court and in such situation, in the absence of any evidence, the Trial Court was justified in taking a view that the legality of the search, in the present case, is also not proved properly.

19. Hence, on re-appreciation of the entire evidence and the submissions advanced at bar by learned counsel for both the parties, it is apparent that the view taken by the Trial Court being a probable, reasonable and possible view, while sitting in an Appeal against the Judgment of acquittal, this Court cannot be justified in causing interference therein. The Appeal, therefore, deserves the fate of dismissal and stands dismissed accordingly. Bail Bond of Respondent No.1 stands cancelled.

20. Fees of Ms. Rohini Dandekar, the Advocate Appointed from High Court Legal Aid Panel to argue the case of the Appellant, is quantified @ Rs.2,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]