

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 20th May, 2015
Judgment Pronounced on: 24th July, 2015

CRL.REV.P. 538/2007

AJIT SINGH

..... Petitioner

Through: Ms. Sangita Bhayana,
Advocate.

versus

ADDITIONAL COMMISSIONER OF CUSTOMS Respondent

Through: Mr. Satish Aggarwala with
Mr. Amish Aggarwala,
Advs.

CRL.REV.P. 539/2007

OM PRAKASH

..... Petitioner

Through: Mr. Arvind Nigam, Sr. Adv.
with Mr. Anish Dhingra,
Advocate.

versus

A.K. GANDHI AND ORS.

..... Respondents

Through: Mr. Satish Aggarwala with
Mr. Amish Aggarwala,
Advs.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J.

1. By this common order, I shall decide the revision petitions bearing Nos.538/2007 and 539/2007 filed by the petitioners Ajit Singh and Om Prakash respectively as a complaint against both of them for commission of offences under Section 135(1)(a) of the Customs Act, 1962 and under Section 5 of the Imports and Exports (Control) Act, 1947 was filed and they have been convicted and sentenced vide judgment dated 09.08.2002 and order dated 14.08.2002. The criminal appeals filed by both the petitioners were also dismissed vide common judgment dated 14.08.2007, passed by the learned Additional Sessions Judge.
2. Aggrieved by the judgment of conviction dated 09.08.2002 and order on sentence dated 14.08.2002 passed by the learned Additional Chief Metropolitan Magistrate, awarding the sentence to the petitioners to undergo rigorous imprisonment for a period of three years and a fine of Rs.1,000/- each for offence under Section 135(1)(a) of the Customs Act and in default of payment of fine to further undergo simple imprisonment for 1½ years and upholding the judgment of conviction and sentence by the learned Additional Sessions Judge vide judgment dated 14.08.2007, the present revision petitions have been filed by the petitioners.

3. Factual matrix, as emerges from the record, is that on 05.02.1990, the complainant Sh. A.K. Gandhi and Sh. A.K. Dikshit, ACO were keeping surveillance inside the aero-bridge at bay No.42 of IGI Airport. Flight No.KLM 836 had landed and they noticed that the petitioner Ajit Singh handed over a small packet to the petitioner Om Prakash. The petitioner Om Prakash was apprehended along with the packet and then he was taken to the international arrival hall. There he identified the petitioner Ajit Singh who was standing in the queue before the immigration counter. In the presence of the petitioner Ajit Singh and two witnesses, the packet recovered from Om Prakash was examined and it was found to contain one slab of gold with markings 1 Kil 999.9, Deak International Australia and one gold biscuit of 10 tolas. The statement of the petitioner Ajit Singh was recorded under Section 108 of the Customs Act in which he admitted to have brought the said packet and handing it over to the petitioner Om Prakash. He also admitted to the recovery of gold from the packet and identified the petitioner Om Prakash to whom he handed over the packet at the aero-bridge.
4. The learned Additional Chief Metropolitan Magistrate had taken cognizance of the offences and summoned the petitioners. Charges under Section 135(1)(a) of the Customs Act were framed against both the petitioners. The petitioners pleaded not guilty to the charges framed.
5. To prove its case, prosecution examined 3 witnesses. After conclusion of prosecution evidence, the statements of the

petitioners were recorded under Section 313 Cr.P.C. in which they had claimed innocence. The learned Additional Chief Metropolitan Magistrate vide judgment dated 09.08.2002 held both the petitioners guilty for the offence punishable under Section 135(1)(a) of the Customs Act and convicted them for the said offence. The order on sentence was passed on 14.08.2002.

6. Thereafter, the petitioners filed criminal appeals bearing Criminal Appeal Nos.35/2002 and 12/2003. The learned Additional Sessions Judge vide common judgment dated 14.08.2007 dismissed both the appeals and upheld the conviction and sentence awarded to the petitioners.
7. Feeling aggrieved by the same, the petitioners preferred the present revision petition to set aside the judgments rendered by the Courts below and claiming acquittal.
8. Learned Senior Advocate for the petitioner Om Prakash has argued that there was no basis to convict the petitioner on the charges framed against him. The conviction of the petitioner is based on the disclosure statement of the co-accused/petitioner Ajit Singh which is not admissible in evidence in the light of the ratio laid down in ***Union of India v. Bal Mukund and Others (2009) 12 SCC 161*** by the Hon'ble Supreme Court. Relevant para 20 of the judgment reads as under :

“If a statement made by an accused while responding to a summon issued to him for obtaining information can be applied against a co-accused, Section 30 of

the Evidence Act being not applicable, we have not been shown as to under which other provision thereof, such a confession would be admissible for making the statement of a co-accused relevant against another co-accused. If an accused makes a confession in terms of the provisions of the Code of Criminal Procedure or otherwise, his confession may be held to be admissible in evidence only in terms of Section 30 of the Evidence Act and not otherwise. If it is merely a statement before any authority, the maker may be bound thereby but not those who had been implicated therein. If such a legal principle can be culled out, the logical corollary thereof would be that the co-accused would be entitled to cross-examine the accused, as such a statement made by him would be prejudicial to his interest.”

9. It was further argued by the learned Senior Advocate that the alleged confessional statement made by the petitioner Om Prakash under Section 108 of the Customs Act to the Custom Officer Sh. A.K. Gandhi was later retracted by him and thus, it cannot be used in evidence against him. In support of this contention, learned Senior Advocate placed his reliance on the landmark judgment of ***Pakala Narayana Swami v. The King-Emperor AIR 1939 PC 47*** in which it was observed that “*a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of the gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession.*” He further placed reliance on ***Noor Aga v. State of Punjab & Anr. JT 2008 (7) SC 409*** in which the Hon’ble Supreme Court observed as under :

“Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be

*compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two. A retracted confessional statement may be relied upon but a rider must be attached thereto namely if it is made voluntary. The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution. It may not be necessary for us to enter into the question as to whether the decisions of this Court that a Custom Officer is not a Police Officer should be revisited in view of the decision of this Court in **Balkrishna Chhaganlal Soni v. State of West Bengal** [1974 (3) SCC 567].”*

10. After hearing submissions of learned counsel for the parties, this Court examined the Trial Court record as well as the judgment passed by the learned Additional Sessions Judge.
11. It is alleged against the petitioner Ajit Singh that he was seen handing over one packet to the petitioner Om Prakash. On the apprehension of petitioner Om Prakash, one packet containing gold was recovered from him. It was further alleged that confessional statements of both the petitioners were recorded under Section 108 of the Customs Act. The contention of the petitioners is that they had not made any such confessional statements and the same were obtained under coercion and duress from them. The learned Trial Court after going through the evidence produced on record and the confessional statements made by the petitioners, convicted them which has been upheld by the learned appellate Court also.
12. As per the law laid down in above mentioned cases, a confessional statement made by a co-accused cannot be used against another

accused and also that if the statement made by an accused under Section 108 of the Customs Act has been retracted later on, then it must be corroborated by other evidences and materials on record. In the present case, confessional statement made by co-accused/petitioner Ajit Singh cannot be used against another accused/petitioner Om Prakash as observed in ***Bal Mukund*** (supra). It is apparent from the record that the petitioners retracted their alleged confessional statements recorded under Section 108 of the Customs Act. The MLC Ex.PW1/DA of petitioner Ajit Singh shows that he was medically examined on 16.02.1990. As per his MLC, he was having partially healed abrasion over his right forearm, abrasion over right buttock, recently healed abrasion on lower inner aspect of left arm, pain in spine, forearm, healed abrasion over left forearm. The doctor opined that the above injuries were of 10-12 days duration. This MLC Ex.PW1/DA creates doubt about the case of the prosecution that the petitioner Ajit Singh made voluntary statement under Section 108 of the Customs Act and for this reason it cannot be used against him as observed in ***Pakala Narayana Swami*** (supra) and ***Noor Aga*** (supra) and also it cannot be used against co-accused/petitioner Om Prakash. Even otherwise, there is nothing incriminating against the petitioner Ajit Singh in the confessional statement of petitioner Om Prakash.

13. Learned Senior Advocate for the petitioner Om Prakash further argued that the panch witnesses have not been examined in the

present case which creates doubt about the prosecution case. It is further argued that the goldsmith who allegedly issued the purity certificate has also not been examined by the prosecution to prove the certificate issued by him. It is further argued that mere marking of exhibit on the purity certificate cannot be said to be a due proof of its contents.

14. Perusal of record shows that two panch witnesses, namely, Sh. Abhlesh Kumar and Sh. Vijay were made part of the proceedings conducted in the present case regarding recovery and seizure of alleged gold from the petitioner Om Prakash. Though, both these panch witnesses were cited as prosecution witnesses in the list of witnesses, but the prosecution had not examined them. No explanation had come on record as to why these independent witnesses were not produced before the Court to corroborate the testimony of the official witnesses. As per record, the prosecution examined PW1 Sh. A.K. Gandhi, Air Custom Officer to prove the proceedings conducted regarding apprehension of petitioners, recovery of alleged gold, furnishing of purity certificate and seizure of gold. PW2 Sh. R.L. Lamba had proved the statements of the petitioners only. There is no independent corroboration to the testimony of Sh. A.K. Gandhi as the independent public witnesses have not been examined in the present case. Thus, the prosecution story does not seem to be completely reliable and truthful.

15. In similar circumstances, the Hon'ble High Court of Delhi in ***DRI v. Satyanarayan Agarwal 2012 (2) JCC 1043*** observed as under :

“It is further recorded, in fact PW2 Shri L.D. Rajput, who allegedly seized the recovery (gold biscuits and Indian currency) from the accused in the presence of two independent witnesses vide punchnama dated 01.11.1990, which has been proved as Exh. PW2/A, shows that the said punchnama dated 01.11.1990 was prepared in the presence of two independent panch witnesses, i.e., Shri Rajesh son of Shri Balbir Chand and Shri Pradeep son of Shri Dunni Chand. However, as per record, the prosecution had failed to examine the above mentioned independent public witnesses without any sufficient reasons although they were cited as witnesses in the list. The non-examination of the abovesaid independent public punch witnesses by the prosecution was a very material lacuna in this case, therefore, benefit of doubt goes in favour of the accused.”

16. It is also matter of record that the purity certificate has been proved on record by Sh. A.K. Gandhi (PW1) as Ex.PW1/D. The perusal of panchnama Ex.PW1/C prepared at the spot shows that the name of goldsmith is not mentioned therein. In the certificate, it is only mentioned that a certified goldsmith was called who certified the recovered substance as gold and gave purity certificate. In the list of witnesses, the name of the goldsmith has been given as Sh. Kuldeep Sugandh. But the fact remains that the said goldsmith was never produced in the Court to prove the alleged purity certificate Ex.PW1/D. In the considered opinion of this Court, mere producing the document on record and marking as exhibit does not prove the contents of a document in the absence of author of the document. This view gets strength from the ratio of judgment in case of *Sait Tarajee Khimchand and Ors. v. Yelamarti Satyam @ Sattayya & Ors. MANU/SC/0022/1971* in which it was observed

that the mere marking of an exhibit does not dispense with the proof of documents.

Similarly in *Narbada Devi Gupta v. Birendra Kumar Jaiswal and Anr.* AIR 2004 SC 175, it was observed as under :

“...The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence that is by the ‘evidence of those persons who can vouchsafe for the truth of the facts in issue’. The situation is, however, different where the documents and produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the court...”

Further in *Bishwanath Rai v. Sachhidanand Singh* MANU/SC/0448/1971, the Hon’ble Supreme Court observed as under :

“.....The contents of this letter were proved by the evidence of Ram Chandra Sharma who stated that he knew the handwriting of Swamiji with whom he had correspondence even earlier. His evidence, thus, was sufficient to prove that Swamiji wrote this letter to Ram Chandra Sharma, and that the statement contained in the letter were made by Swamiji himself. It is true that, in the absence of examination of Swamiji, the correctness of those statements cannot be held to be proved. Thus, the evidence of Ram Chandra Sharma proves the contents of the letter, but not the correctness of those contents.....”

The above law is further supported in *Madholal Sindhu v. Asian Assurance Co. Ltd.* MANU/MH/0184/1955, whereby the Bombay High Court held that it was futile to merely prove the

signature or the handwriting of the person who had signed or written various documents without calling that person, who was the only person who could depose to the correctness of the contents of these person. The said decision was approved by a Division Bench of Bombay High Court in ***Mohammed Yusuf and Anr. v. D. and Anr.*** MANU/MH/0106/1968 while observing that the evidence of the contents of a document was hearsay evidence unless the writer thereof was examined before the Court.

17. Another discrepancy in the case of the prosecution is that the gold allegedly recovered from the petitioner Om Prakash was never produced in the Court for identification by the prosecution witnesses PW1 Sh. A.K. Gandhi and PW2 Sh. R.L. Lamba. It is the case of the prosecution that one gold bar weighing 1 kg and one gold biscuit were recovered, but neither the said gold bar nor the gold biscuit was produced in the Court for identification. No explanation has come on record as to why the recovered gold was not produced for identification.

18. In ***Noor Aga's case (supra)***, it was observed as under :

“132. The last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin were also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act.

135. Physical evidence of a case of this nature being the property of the court should have been treated to

be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant.”

19. In the present case, besides the Air Custom Officer Sh. A.K. Gandhi (PW1), the prosecution has failed to examine the panch witnesses as well as the goldsmith who gave the purity certificate Ex.PW1/D. So, mere marking of exhibit and proving the same by PW1 cannot be held to be due proof of its contents for the want of independent public witnesses and the writer of the document i.e. the goldsmith, as observed in above referred judgments.
20. In view of the above discussion and the facts and circumstances of the case, this Court is of the view that there are several lacunae in the prosecution case. As observed above, the statement of the petitioners recorded under Section 108 of the Customs Act cannot be said to be voluntary and, therefore, cannot be used against them in evidence. It has also been observed that the confessional statement of co-accused/petitioner Ajit Singh cannot be read against the petitioner Om Prakash as the same was shown to be not voluntary and that there was nothing incriminating against the petitioner Ajit Singh in the alleged confessional statement of petitioner Om Prakash. The non-examination of public independent witnesses is also a loophole in the case of the prosecution. Another lacuna in the case of prosecution is non-examination of goldsmith

who allegedly gave the purity certificate of gold and in the absence of his examination, contents of purity certificate cannot be held to be duly proved.

21. In totality of evidence, material placed on record, case law cited and the above detailed discussion, both the revision petitions are allowed. As a result, the judgment of conviction and order of sentence passed by the learned Trial Court are set aside. The petitioners are discharged of their bail bonds.

P.S.TEJI, J.

July 24, 2015

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