IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.396 OF 1999

Assistant Collector of Customs
(M & P) Bombay ....Appellant

Versus

1 Shri Kashiram Laxman Karade
C/o. Shah Rupchan Tarakcahnd
7 8/a 1st floor, Zaveri Bazar,
Mumbai 400 002.

2 Shri Jayantilal Virchand Shah
B-54, Fifth Floor, Sarvodaya Nagar,
Panjarpol, Mumbai 400 001

3 State of Maharashtra ....Respondents

Mrs. Anuradha A. Mane, Spl. P.P. for Appellant.
Mr. Abbas Z. Mookhtiar, Advocate for Respondent No.2.
Mr. Ajay Patil, APP for Respondent No.3-State.

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CORAM :- SANDEEP K. SHINDE, J.

DATE :- 7TH FEBRUARY, 2018.

ORAL JUDGMENT :-

1 This Appeal under Section 378 of the Code of Criminal Procedure is preferred by the Assistant Collector of Customs (M & P), Mumbai against the order of acquittal passed by the Metropolitan Magistrate, 8th Court, Esplanade, Mumbai in C.C.

No.254/CW of 1989 whereby the Accused Nos.1 and 2 were acquitted of the offences punishable under Section 135(1)(a)(i) and 135(1)(b)(i) of the Customs Act, 1962 read with Section 34 of the IPC as well as offences punishable under Section 85(i)(ii)(iii) read with Section 85(1)(a) of the Gold Control Act, 1968.

2 Complainant's case is that on 8.1.1988, officers of the complainant apprehended one Mr. Kashiram Karade, Accused No.1. Officers searched this person in presence of panchas and found that he was having one paper wrapped heavy packet in his banian pocket containing three gold biscuits of foreign origin. He was removed by the officers at Everest House and three gold biscuits of foreign origin were recovered weighing 349.800 gms valued at Rs.1,14,000/-. Biscuits were seized by the officers under reasonable belief that same were smuggled in contravention of the provisions of the Customs Act, 1962 and Gold (Control) Act, 1968. It is the complainant's case that the statement of Accused No.1, Kashiram Karade was recorded under Section 108 of the Customs Act, 1962 wherein he disclosed that he was working with M/s. Shah Rupchand Tarakchand and Company at Zaveri Bazar owned by the Accused No.2, Mr. Jayantilal Shah. Accused No.1 Kashiram further informed the officers that at the instance of the Accused No.2, he collected

three gold biscuits from one person from C.P.Tank and he was on his way for handing over the same to the Accused No.2.

3 It appears, during the course of the investigation, business premises of the Accused No.2 as well as residence was also searched but nothing of incriminating nature was recovered. That the statement of the Accused No.2 was recorded under Section 108 of the Customs Act. It further appears that in the adjudication proceeding, gold weighing 349.800 valued at Rs.1,14,000/- was confiscated absolutely and penalty of Rs.10,000/- and 20,000/- under the Customs Act, 1962 and the Gold (Control) Act, 1968 was imposed on the Accused Nos.1 and 2.

4 It is the complainant's case that both the accused knowingly concerned in respect of said gold biscuits in the fraudulent evasion of duty charge-able thereon and prohibition imposed under Customs Act committed an offence punishable under Section 135(1)(a) of the Customs Act, 1962.

5 Mr. C.C.Nagpure, Assistant Collector of Customs thus filed a complaint in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai which was registered as C. C. No.884/CW/1989.

6 The learned trial Judge after appreciating the evidence of the prosecution witnesses and after perusing the documents placed on record, acquitted accused of all the offences for which they were tried by the judgment and order dated 31.8.1994.

7 That aggrieved by the order of acquittal, Assistant Collector of Customs has preferred this appeal.

8 Heard Mrs. Mane, the learned counsel for the Appellant and Mr. Abbas Mookhtiar the learned counsel for the Respondent-Accused No. 2.

9 It may be stated that vide order dated 5.6.2002, the case of the Respondent No.1 is separated since notice could not be served to him despite all efforts were made. That as such this appeal now proceeds only against the Accused No.2.

10 Mrs. Mane the learned counsel for the Appellant has taken me through the statements of the Accused No.1 recorded under Section 108 of the Customs Act, 1962 on 8.1.1988 a date on which biscuits were recovered from Accused No.1. I have gone through these statements. I have gone through two statements which are at Exhibit P-11 and P-12. Both these statements are in Marathi dictated by P.W.2. In both statements, Accused No.1 had stated that he had collected gold biscuits from one person as

directed and instructed by the Accused No.2. It further appears from the statement that he was working in the shop of the Respondent No.2 at Zaveri Bazar. It further appears from his statement that he is an illiterate person and earns hardly Rs.600/- per month. It further appears that he also lives in the said shop.

11 Accused No.1 as it appears has disclosed the name of the Accused No.2. On the same day, statements of Accused No.2 were recorded under Section 108 of the Customs Act, 1962 which are at Exhibit P-14 and P-18.

12 Mrs. Mane has taken me through the statements of Accused No.2 and would submit that statement recorded under Section 108 of the Customs Act is material piece of evidence collected by the Customs officials. She would submit that the statement of Accused no.1 is inculpatory in contravention of the provisions of Customs Act, 1962. She would, therefore, submit that statement of Accused No.1 being inculpatory, it can be used as against Accused No.2 as substantive evidence connecting him with contravention of the provisions of Customs Act and Gold Control Act. Mrs. Mane would, therefore, submit that the learned trial Judge has committed an error by discarding statements of the Accused Nos.1 and 2. She would further submit that statements of the

Accused No.1 were not under Section 161 of the Code of Criminal Procedure and being inculpatory, the trial Court ought to have held the said statements as substantive evidence. However, having not done so has committed illegality and further committed mistake by recording the acquittal.

13 On the other hand, Mr. Abbas Mookhtiar appearing for the Accused No.2 has taken me through the evidence of P.W.1 and P.W.2. So far as the evidence of P.W.2 is concerned, he is the person at whose instance, statements of the accused were recorded under Section 108 of the Customs Act. I have gone through his evidence. At the relevant time, he was working as Superintendent of Customs and posted at M & P Department. It appears from his evidence that he had recorded the statement of the Accused No.1 after asking him questions in Marathi and dictated to his inspector who wrote down same in Marathi. In evidence, he would state that statement of Accused No.1 as well as Accused No.2 were voluntary statements. In other words, he would submit in the evidence that statements of both the accused were not under the coercion or undue influence.

14 Mr. Mookhtiar has invited my attention to the cross-examination of this witness. He would first submit that as P.W.2 merely dictated statements to inspector however, person who wrote

the statements was not examined. He would further submit that the Accused No.2 has been implicated in this case only on the statement of Co-accused. He would submit that evidence of the co-accused is a weak piece of evidence and it needs corroboration at-least on material facts. He would further submit that Accused No.1 does not know English; rather he was illiterate person. He would further submit that the Accused No.1 was not exclusively working with Accused No.2 but was also working for other traders in Zaveri Bazar. Mr. Mookhtiar would submit that the prosecution ought to have brought on record such other material and in the given set of facts, sole reliance on the statement of the co-accused could not be placed.

15 Mr. Mookhtiar, the learned counsel appearing for the Respondent No.2 would also submit that the statement of Accused No.2 was recorded on 8.1.1988 but the same was retracted by him on 14.1.1988. In support of his submission, he has taken me through the evidence of P.W.2 who has stated in his cross-examination that

> "I received retraction letter issued by the Accused No.2 Jayantilal on 15.1.1988. We replied to the letter of the Accused No.2 on 20.1.1988".

Mrs. Mane the learned counsel for the Appellant when confronted with this portion of evidence and was called upon to answer as to how this has been dealt with by the learned Judge while weighing and appreciating evidence, she could not give any satisfactory reply as both the letters dated 15.1.1988 as well as reply dated 20.1.1988 were not found on record.

16 Be that as it may, the fact remains that Accused No.2 had retracted statement either on 15.1.1988 or may be in late July, 1988. As I have come across one of the Exhibits D-2 wherein it is stated that statements were retracted by him. Mr. Mookhtiar appearing for the Respondent No.2, therefore, submits that in view of the fact that statements were retracted by the Accused No.2, the prosecution ought to have examined independent witness to establish that there was an attempt by the Accused No.2 to obtain contraband and/or prohibited articles through his employee, Accused No.1.

17 I have gone through the entire evidence placed on record by the prosecution. It is not in dispute that the statement recorded under Section 108 of the Customs Act, 1962 is substantive piece of evidence and could be pressed into service for conviction. However, at the same time, it needs to be stated the statement must

be given voluntarily without any force or undue influence. No doubt the P.W.2 in his evidence had stated that statements of both the accused were voluntary. Mr. Mookhtiar appearing for the Respondent No.2 drawn my attention to the part of the evidence of P.W.2. In cross-examination, this witness P.W.2 has stated "*Both accused were in the office for whole night till they were produced in the Court on the next date" (emphasis supplied)*. That by pointing out to this part of the statement of P.W.2, the learned counsel for the Respondent No.2 would submit that on 8.1.1988 Accused No.1 was apprehended at 1.30 p.m. Thereafter, he was removed to the office of the Customs and panchanama was concluded on the same day at about 3.30 p.m. He would further submit that house and office of Accused No.2 was searched on the same day and panchanama were concluded at 6.30 p.m. and thereafter statements under Section 108 were recorded.

As against this the learned counsel for the Appellant was asked to ascertain at what time statements of Accused Nos.1 and 2 recorded under Section 108 were concluded. She could not answer at what time both the statements of the Accused Nos.1 and 2 were concluded. I have perused the statements. However, I could not find time at which statements were recorded and concluded. This query was made to ascertain for what purpose both the accused were detained in the office for whole night. The learned counsel for the Appellant however submitted that immediately after panchanamas, their statements were recorded and having found they were indulged in criminal activities, their arrest was effected. In the circumstances, she was requested to find out time and the date on which arrest was effected. Mrs. Mane would submit that accused were shown arrested on 9.1.1988 at 10.00 a.m.

18 Looking at the chronology of the events, it appears that all panchanamas were concluded at 6.30 p.m. on 8.1.1988. Statements as recorded would hardly require 3 to 4 hours. In fact Mrs. Mane submitted statements were recorded after concluding house search panchanama. Question is why accused were detained in office for whole night ? Why Appellant could not clarify at what time statements of accused under Section 108 of the Customs Act were recorded ? As informed accused were arrested on 9.1.1988 at 10 a.m. i.e. next day. In these circumstances, it can be safely concluded that both the accused were detained in the office of the Customs for whole night and thus, the contention of the Appellant that the statements were voluntary and were not influenced by the authorities cannot be accepted. In view of the evidence available on

record, I am of the considered view that both the statements recorded under Section 108 of the Customs Act, 1962 were not voluntary statements in-as-much as there is evidence on record of P.W.2 to show that both the accused were detained in the office of the Customs for whole night and on the second day, i.e., 9.1.1988 at 10.00 a.m. they were shown arrested and produced before the learned Magistrate.

19 Thus even though statement under Section 108 carry substantive evidentiary value, such statements in the case in hand are of no assistance to the Prosecution. I, therefore, reject the arguments of the Appellant. There is no other evidence on record, except such statements.

20 In the result, the Appeal fails and is dismissed accordingly.

(SANDEEP K. SHINDE, J.)