

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION
CRIMINAL APPEAL NO. 136 OF 1995**

The Asstt. Collector of Customs)
(preventive), New Customs House,)
Bombay, through the Public)
Prosecutor, Central Government)Appellant/Complainant

V/s.

1. Hasanali Rumi, aged 32 yrs)
2. Siddique Haroon Chawda, aged 27 yrs)
3. Saleh Ishak Jagaviya, aged 32 yrs)
4. Suleman Ali Mohd. Dosani, aged 28yrs)
5. Abubhai Suleman, aged 35 yrs)
6. The State of Maharashtra)
Respondent no.1 r/o Motasalaya village)
Mandvi Tal. Kach,)
Respondent No.2 Navpura Janpada Katch)
Mandvi, Gujarat State.)
Respondent No.3, r/o Juma Masjid Okha)
Mandal Dist Jamnagar Gujarath)
Respondent No.4 Motasalya Mandvi)
Kutch Gujarath)
Respondent No.5 r/o Dhindh (Nayalpur))
Mandi Katch Gujarath State) ...Respondents/Accused

Ms Anuradha Mane for Appellant
Mr. Taraq R. Sayed for Respondent Nos.1, 2 & 5

**CORAM : K.R.SHRIRAM, J.
DATE : 17th DECEMBER 2019**

ORAL JUDGMENT:

1 This is a case where the customs authorities are impugning an order of acquittal dated 8-10-1993 passed by the Additional Sessions Judge, Mumbai, acquitting respondent nos.1, 2, 3, 4 and 5 of offence under various

provisions of Customs Act 1962 and Imports and Exports (Control) Act 1947.

2 It is noted that accused no.4 during the course of pendency of this appeal died and as per the order dated 25-11-2011, the appeal against the said accused no.4 abated. The impugned judgment was passed in the appeal filed by the accused challenging an order and judgment dated 7-12-1989 passed by the Chief Metropolitan Magistrate, Esplanade, Mumbai, convicting the accused for the offences punishable under Section 135(1)(a) (i) of the Customs Act 1962, read with Section 67 of the Foreign Exchange Regulation Act, read with Section 11 of the Customs Act, read with Section 77 of the Customs Act 1962, read with Section 135(1)(b)(i), read with Section 5a of the Imports and Exports (Control) 1947. The Learned Magistrate had sentenced the accused for various terms of rigorous imprisonment and fine.

3 The case of the prosecution in brief is that on 22-1-1987, on information received, the customs officers went to Hay Bunder in Mumbai port and noticed a country craft, which was anchored there and boarded the said country craft. The name of the country craft is M. V. Mamun (the said vessel). There were 20 crew members which include the accused as well. Accused no.1 was the Tandel of the said vessel. The officers had also taken with them two panch witnesses and in the presence of those panch witnesses, searched the vessel. During the search, the officers found that there were cavities in the planks at different places in the vessel and there

were 14 cloth belts and 8 brown paper packets concealed in those cavities and when those 14 cloth belts and 8 brown paper packets were opened, it contained 750 gold bars with foreign markings. Each gold bar was weighing 10 tolas and the total value of the gold on that date was approximately Rs.2,17,75,050/- . None of the crew including the accused could account for importing or possession of the gold, as importation of gold was banned at that time. Officers seized all the gold found on the said vessel under a panchanama in the reasonable belief that it was smuggled and liable to be confiscated. The said vessel had come from Dubai and was in Indian Waters. She was also carrying wet dates and almonds.

4 It is also the case of prosecution that on 16-2-1987, the officers once again went on board the said vessel and took search again and found T.V set, V.C.R.s , Air Conditioners, Dinner sets, Gas Table etc., all of foreign origin, valued at Rs.88,500/- approximately (the contraband goods). The officers found these goods were not listed in the import general manifest filed by the person in charge of the conveyance of the vessel under Section 30 of the Customs Act, nor were these goods mentioned in the personal property list of the vessel. As there were no legal documents for import of those goods, those goods were also seized under a panchnama in the reasonable belief that they were smuggled and liable to confiscation.

5 On 23-1-1987 the statement of accused no.1 was recorded. The statement is recorded in English but it is stated that it was read over to accused no.1, in Hindustani who accepted it and signed it. Further

statement of accused no.1 was recorded in a similar fashion, i.e., asking questions in Hindi, answering in Hindi, but written in English and read over to accused no.1, who has signed it. The third statement of accused no.1 was recorded on 31-1-1987 and all these statements, of course have an endorsement that it has been read over and explained in Hindi to accused no.1, who has accepted it and signed it. Similarly, statement of accused nos.2, 3 and 5 was recorded on 23-1-1987, 24-1-1987 and 24-1-1987, respectively.

6 According to prosecution, all statements were voluntary and correctly recorded without use of any force or inducement. Three samples of gold bars were sent to the Government Mint for analysis and remaining gold bars were also handed over to the Mint. There is nothing on record to indicate that other than three samples, the rest were not gold and, therefore, I can safely proceed on the basis that all 750 bars were of gold weighing 10 tolas each.

7 After the completion of investigation the papers were processed, sanction was obtained and complaint is filed. The prosecution examined three witnesses, i.e., Anilkumar Tak, a Preventive Officer of Customs, Bombay (PW.-1), Girdhari Arjun Sahoo, a Preventive Officer of Customs Bombay (PW.-2) and T. S. Jairaman, Superintendent of Customs, Bombay (PW.-3). PW.-1 was the officer who boarded the said vessel on 22-1-1987, when the gold was recovered. PW.-2 is the officer, who boarded the said vessel on 16-2-1987 and found the contraband goods. PW.-3 is the officer,

who speaks of recording of the statements of various accused persons.

8 In the statements recorded under Section 108 of the Customs Act, it is allegedly stated that accused including original accused no.4 are the only persons who are involved in carrying gold and the contraband goods and, therefore, the customs have proceeded to prosecute only these 5 persons and not the rest of the crew. The vessel had a complement of 20.

9 On 25-1-1987 accused were produced before the Magistrate and were remanded to judicial custody till 10-2-1987. On 27-1-1987, the accused filed, along with their bail applications, their statements of retraction. The retraction statement states that the accused never admitted in their statement recorded under section 108 of Customs Act that they had knowledge or that they have assisted in concealing the gold in the cavities of wooden plank. It is also stated that accused no.1 never admitted that he was to get Rs.300/- per bar and he has not given the name of any of the party in Dubai or in Bombay. Accused have stated that the statements were not voluntary and were obtained under duress and hence not admissible. It has to be noted that on 22-1-1987, 23-1-1987, 24-1-1987 and until the accused were produced before the Magistrate, the accused were in the custody of the customs authorities. Ms Mane states that the accused were arrested and produced on 25-1-1987, but she is unable to explain where the accused were kept from 22-1-1987 to 24-1-1987 when their statements were being recorded. Ms Mane is unable to state whether those accused were allowed to go and come back, move around easily or they were kept in

the office of the customs authorities.

10 The Learned Magistrate after considering the evidence and despite the fact that the panchas were not produced and panchnama recorded on 22-1-1987 and 17-2-1987, have not been proved, still passed the order of conviction relying on the statements recorded under Section 108 of the Customs Act. The Additional Sessions Judge while setting aside the order of the Learned Magistrate, has considered the validity of the statement recorded under Section 108. The Sessions court has held that the statements recorded under Section 108 have not been independently corroborated. The Sessions Court held that without an independent corroboration or without any evidence, the statements recorded of the accused under section 108 has no evidentiary value, more so, when there has been a retraction. I am in agreement with the conclusion arrived at by the Learned Sessions Judge. The Learned Sessions Judge has dealt with various aspects, which for the sake of brevity, I am not repeating.

11 Admittedly, panch witness of the panchnama recorded on 22-1-1987 when the gold was seized and the panch witness of the panchnama which was recorded on 17-2-1987, when the said contraband goods were seized, have not testified. If I have to accept the submission of Ms Mane that dehors the panchnama, in view of the confession recorded under Section 108, the court can still convict the accused, then I ask myself why should they even take any panch witness and why should any one go through the trouble of recording of panchnama and producing the panch

witness at the time of trial. Moreover, if I have to simply accept the statement recorded under Section 108 as gospel truth and without any corroboration, I ask myself another question, as to why should anyone then go through a trial. The moment the customs authorities recorded the statement under section 108, in which the accused has confessed about his involvement in carrying contraband gold, the accused could be straightaway sent to jail without the trial court having recorded any evidence or conducting a trial. First of all, all the statements have been recorded in English. The accused have stated that they do not read or write English. The statements do not state why the accused were not asked to write their statements in their handwriting in the language they knew. The statements do not mention anywhere that the accused stated that they could not write and hence it was written by one of the customs officer. There is an endorsement by P.W.-3 that it was read over and explained to the accused and they have signed after understanding and agreeing with the statement. But the fact which has to be kept in mind is, the accused were with the customs authorities from 22-1-1987 night till 25-1-1987 morning, when they were produced before the Magistrate and remanded to judicial custody. Ms Mane states that after recording of statements, the accused were arrested and kept in police lock and then produced before the Magistrate on 25-1-1987. But the indisputable fact is the accused were with the customs authorities and on the very first opportunity on 27-1-1987, they have retracted the confession recorded. Ms Mane has not produced any law to

justify the action of the customs authorities to keep the accused with them from 22-1-1987 till 24-1-1987. There is no explanation whatsoever as to why, when the gold allegedly found on 22/23-1-1987 on board the said vessel, the accused were not immediately arrested and why were they not immediately produced on 23/24-1-1987 before the Magistrate. In my view, detention of the accused by the customs authorities upto 25-1-1987, is in clear violation of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India. Therefore, for reasons stated above, I cannot accept that the statement of accused recorded under Section 108 was voluntary or absolutely truthful.

12 Various courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. For this, I find support in ***State of Maharashtra Vs. Harshad Vaherbhai Patel & Ors.***¹ and unreported judgment of this court in **Shri Malki Singh Vs. Suresh Kumar Himatlal Parmar** in Criminal Appeal No.228 of 1999 delivered on 29-11-2019. Paragraph 8 of Malki Singh's judgment reads as under:

"8. It is no doubt true that under Section 104 of the Customs Act 1962, the Customs Officer is vested with power to arrest if he has reason to believe that any person has committed an offence punishable under Section 135 or 135A of the Customs Act. Under Section 108 of the Customs Act, the Customs Officer is also vested with power to summon persons to give evidence documents and all persons so summoned are bound to attend, on being summoned. The statement made to the Custom Officer is not hit by Section 25 of the Indian Evidence Act, 1872, the position of law being very well settled

1 2012(1) Bom.C.R.(Cri)500

that the Custom Officers are not police officers and resultantly, a statement made to the Custom Officer is not hit by Section 25. At the same time, the position of a retracted confession is also well settled:- without any independent corroboration it cannot sustain a conviction and retracted confession may form basis of conviction without corroboration if it is found to be perfectly voluntary, true and trustworthy. The Court is duty bound to examine whether the statement referred to as a confessional statement meets the test of truthfulness and being voluntary in nature. In absence of any independent material brought on record by the appellant, the Chief Metropolitan Magistrate was perfectly justified in acquitting the accused no.2. In absence of any evidence corroborating the statement of the accused no.2 made before the Custom Officer on 24th March 1996 under Section 108 of the Customs Act, the statement in isolation do not warrant conviction, particularly when it is retracted with a plea of coercion.”

13 The Learned APP for respondent no.6 Ms Dabholkar relies on a judgment of the Apex Court in ***Shah Guman Mal Vs. The State of Andhra Pradesh***² to submit that under Section 106 of the Evidence Act when the gold has been found on the board the said vessel, the onus is on the accused to explain or to prove how the contraband goods found its way on board the said vessel. That may be the legal position. But the fact is, has it been proved that gold and the contraband goods were found on board the said vessel when the panch witnesses have not been produced and the seizure panchnama not having been proved. My answer will be No.

14 Ms Mane relied on the judgment of the Apex Court in ***Ramesh Chandra Vs. State of West Bengal***³ to submit that customs officers are not police officers and the statement recorded under Section 108 of the Customs Act 1962, is admissible in evidence. I have to be candid that I have no quarrels with the preposition submitted by Ms Mane. The issue is, Can that

2 AIR 1980 Supreme Court 793

3 AIR 1970 Supreme Court 940

statement be accepted blindly without corroboration, and the answer is no.

15 The fact is that the accused were kept in the custody of the customs authorities when the statements were recorded. The accused were arrested only in the evening of 24-1-1987 and produced before the Magistrate on 25-1-1987. As noted earlier, the detention, in my view, was not legal. Therefore, it will be reasonable to assume that there was coercion or undue pressure exerted on the accused to make the confession.

16 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***⁴ in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person

4. (2007) 4 SCC 415

shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

17 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless they are proved guilty by a competent court of law. Secondly, accused having secured their acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Sessions Court in Appeal rightly observed that the prosecution had failed to prove its case.

18 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

19 I have to also note that the judgment impugned is dated 8-10-1993. More than 16 years have passed since the acquittal. Since, I do not find any reason to interfere in the impugned judgment, the appeal is dismissed.

(K.R. SHRIRAM, J.)