IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.677 of 2001

Union of India
(At the instance of Assistant
Collector of Customs (Preventive)
Rummaging and Intelligence
Division, New Custom House,
Ballard Estate, Mumbai 400010 .. Appellant

Versus

1 Ambalal Manilal Shah,
residing at 197/1572 Matilal Nagar
No.8, Goregaon (W),
Mumbai 400062.

2 The State of Maharashtra .. Respondents

…

Ms.Anuradha A. Mane for the appellant.
Ms.Pallavi Dabholkar, AGP for the State.

CORAM: BHARATI DANGRE, J.

DATED : 29th NOVEMBER 2019

JUDGMENT :-

1 The Union of India through Collector of Customs (Preventive) has filed the present Appeal under Section 378(4) of the Code of Criminal Procedure, being aggrieved by the judgment of acquittal passed by the Sessions Court for Greater

Bombay thereby acquitting the respondent (accused No.1) of the offence punishable under the Customs Act, 1962 and the Gold Control Act.

2 The Assistant Collector of Customs (P) Mumbai, approached the Chief Metropolitan Magistrate, Esplanade at Mumbai by filing a criminal case which came to be numbered as Criminal Case No.499/CW/90, pursuant to a sanction received under Section 137(1) of the Customs Act. The complaint alleged that on 6th May 1988 the accused no.1 Ambalal Manilal Shah (respondent no.1) and one Virendra Gohil were intercepted by the Customs Intelligence Officer (PW 1) as they were passing Laxmi Narayan Mandir, Madhav Baug, C.P. Tank Road, Mumbai and approaching Mahajan Galli. On disclosing the identity, the Custom Officers inquired from the said persons whether they had concealed any gold on their person to which they responded in the affirmative. The accused persons were taken to the Custom House and in presence of the two panchas, they were interrogated. It is the case of the appellant that on search of the accused person in presence of the Addl. Collector of Customs (Preventive), from accused no.1, 20 gold bars were recovered. The gold bars were placed in the pocket of the bundi (vest) worn by the accused no.1 and were wrapped in newspaper packet. The 20 gold bars had foreign marking and they were found to be collectively weighing 2332 gms and the total value of if was

assessed at Rs.7,55,568/-. Nothing incriminating was found on the person of the accused no.2. The statement of both the accused persons under Section 108 were recorded. According to the appellant, the accused no.1 Ambalal stated that he was carrying the gold bars in question on behalf of and as per instructions from the accused no.2 for monetary consideration. The gold bars were seized on a belief that they were smuggled and hence were liable for confiscation under the provisions of Customs Act, 1962 since the accused persons did not produce any valid documents showing legal importation or acquisition of the same.

The complainant alleged that the import of gold into India without the general or special permission of Reserve Bank of India is prohibited under Section 13(1) of the Foreign Exchange Regulation Act 1973 read with notification dated 25th August 1948 and by virtue of Section 67 of the Foreign Exchange Regulation Act, 1973, the restrictions imposed by sub-section (1) of Section 13 of the Act are deemed to have been imposed under Section 11 of the Customs Act and based on this allegation, both the accused persons were charged with offences punishable under Section 135(1)(a) read with Section 135(1)(i) of the Customs Act, 1962 and Section 85(1)(ii) and Section 85(1)(iii)(a) and Section 86 read with Section 16 of the Gold Control Act. Since both the accused persons pleaded to be not guilty, they faced the trial in the Court of Metropolitan Magistrate, Esplanade, Mumbai.

3 The Department of Customs examined three witnesses in support of its case which included one Roshansingh Negi who intercepted the accused persons. The Superintendent of Customs attached to Head Quarters Intelligence Unit, Mr.T.S. Jayaram came to be examined as Prosecution Witness No.2 and one Shri Haridas R. Pai, a panch witness who was signatory to the panchnama of seizure of the gold bars was examined as Prosecution Witness No.3. On 16th June 1998, Chief Metropolitan Magistrate, Mumbai delivered a judgment thereby convicting the respondent no.1 – Ambalal Manilal Shah for the offence with which he was charged and acquitted the accused no.2 Virendra Gohil of all the offences, he was charged with. The Metropolitan Magistrate recorded that there was no material brought on record to attribute the accused no.2 with possession of the 20 gold bars and hence he cannot be held responsible for possessing the gold bars jointly with the accused no.1. The benefit was granted to the accused no.2 of the fact that his statement under Section 108 of the Customs Act was transcribed in English and was not written by accused but it was interpreted to him in Gujarati by one independent witness named Shri Karia. The said statement which was subsequently retracted was therefore not found to be a bonafide statement, sufficient for sustaining his conviction. As far as respondent no.1 (accused no.1) is concerned, the Metropolitan Magistrate arrived at a

conclusion that the evidence against him is clinching and although there are certain flaws in the manner of recording a statement under Section 108 of the Customs Act, which is merely a corroborative piece of evidence, the seizure of gold bars from the person of accused no.1 was established by the prosecution through its witness. On recording the finding of guilt, he was sentenced to suffer RI for six months on each count and pay fine of Rs.3,000/- for every offence established and in default to suffer RI for three months.

Being aggrieved by the judgment of conviction, the respondent no.1 approached the Sessions Judge by filing an Appeal and urged that the seizure of the gold bars is doubtful since the Magistrate did not appreciate that the identity of the bars was not established since the witnesses did not prove that the seized articles were sealed and the signature of the panchas were obtained on the same. Further the credit worthiness of PW No.3 who had stated that he did not sign the panchnama after reading the same was also heavily attacked. The statement recorded under Section 108 of the Customs Act which was transcribed in English whereas the language known to the accused was Gujarati was also sought to be assailed.

4 The Sessions Court considered the submissions in Appeal and found that the evidence with regards to the despatch of the gold from the custody of custom officials for the purpose of

assaying is not produced on record and what was produced was only the report known as 'assay' report.

The learned Sessions Judge, therefore, accepted the submission advanced on behalf of the appellant that the linkage of evidence as far as the dispatch of the gold bars for assaying and receipt of the report have not been properly proved. The Sessions Judge recorded that the despatch of gold from the custody of the custom officers along with its staff report and the link of the same that the very gold which was seized under panchnama is sent is an important factor and in absence of the link being established it is a material irregularity in the matter of proving as to how gold was taken to the goldsmith for the purpose of assaying. The learned Sessions Judge also concluded that the statement of appellant recorded under Section 108 also does not meet the requirement of law as to the manner in which the statement is to be recorded and for the same reasoning, the Metropolitan Magistrate had discarded the statement of accused no.2 which resulted into his acquittal and no justiciable reason has been cited by the Magistrate as to why the same logic and analogy cannot be made applicable to the statement of the appellant recorded under Section 108 of the Customs Act and he resultantly discarded the said statement.

5 As a result of the aforesaid flaws being noted, the Addl. Sessions Judge by his judgment 11th December 2000

allowed the Appeal filed by the appellant and set aside the conviction order passed by the Metropolitan Magistrate, Mumbai on 16th June 1998. Being aggrieved by the said judgment, the Union of India has filed the present Appeal. Mrs. Mane, learned counsel for the appellant would submit that the decision of the Sessions Judge is patently illegal as the Sessions Judge has ignored the statement of the appellant recorded under Section 108 of Customs Act which was interpreted and explained to him in his mother tongue which is Gujarati and the statement contains an endorsement by Shri Karia who has interpreted the same and it is also countersigned by the respondent no.1 and in spite of this according to her, the Sessions Judge had discarded the said statement. Learned counsel would also submit that the learned Sessions Court has given more weightage to minor discrepancies when the evidence was fully and amply supported by the documents and there were no contradictions. According to her, the learned Magistrate has accepted the evidence which was cogent and convincing and has rightly convicted the respondent no.1. She also submits that no fault can be found in the panchnama which was duly executed which recorded the seizure of the gold bar and this was corroborated by the statement of the respondent no.1 under Section 108. She therefore prays for quashing and setting aside the judgment passed by the Sessions Judge.

6 I have perused the impugned order as well as the order passed by the Metropolitan Magistrate. The prosecution has relied upon three witnesses and it is necessary to ascertain the case of the prosecution from what has been deposed by the said witnesses. The Prosecution Witness No.1 is the Intelligence Officer who intercepted the accused persons on 6th May 1998 at Madhav Baug on the basis of certain information received. According to this witness, on being questioned whether the accused were carrying any contraband or gold and on an admission being given by them, he called two independent panchas on the spot. However, since the crowd gathered, the panchas along with two accused persons were taken to the Custom House where the panchnama was drawn. The search of the accused was conducted in presence of the Addl. Collector and it is the case of the Department that 20 gold bars were found on the person of the accused no.1 which were wrapped in newspaper and placed in the pocket of his bundi. The said gold bars were seized under a panchnama. The panchnama also mentioned about the seizure of the gold pieces, the newspaper in which they were wrapped and also the bandi worn by the accused. The said panchnama was signed by the panch witnesses and also Prosecution Witness No.1. The Prosecution Witness No.3 who is the panch witness had deposed that on the wrapper his signature was obtained. He makes a reference to a signature on the panchnama and identify his signature. He further depose before

the Court that the panchnama contained another signature in Gujarati. However, he was not aware as to whose signature it is. In the cross- examination, the said panch witness stated that the Officer scribed the panchnama and it was read over to him and explained in Hindi. He further admitted that he himself did not read the panchnama since he was unable to do so. The panch witness in the cross examination has deposed that before he came to the Court for the purpose of being examined, the Officer from the Customs Department met him and explained to him the date etc and also reminded him of the incident and the proceedings which took place 10 years back. This material brought on record by the Department creates a doubt as to whether the panchnama executed by the panch witnesses was executed after its due understanding. Further, the Prosecution Witness No.1 has also made a reference to the sealed packet containing gold pieces which was sent for assaying and before the Court when it was opened it contained one gold bar with drilling marks from where the sample was collected. The other gold bars according to this witness, were sealed separately and the gold bar which was sent separately for assaying was sealed separately. However, the Prosecution Witness No.3 has deposed that he did not remember whether all the 20 bars were packed together but he categorically stated that there was only one packet. Apart from this, the prosecution witness no.1 in his cross-examination has categorically admitted that after seizure, the gold was kept in the warehouse and all the 20 gold bars including the exhibits were despatched in the warehouse but he was not aware as to who despatched the samples to the warehouse. He also admitted that in the warehouse, many properties of different cases are stored.

7 The Addl. Sessions Judge has rightly tracked the discrepancies in the evidence of the prosecution witnesses and also noted the lacunae in the link evidence as regards the despatch of the gold bars for the purpose of assaying and obtaining the report is not linked to the recovery of the gold bars on the alleged recovery of gold bars from the respondent no.1 and has rightly passed on the benefit of doubt to the respondent no.1.

8 Prosecution Witness No.2 is the person who has interrogated the accused persons. He deposed that he had recorded the statement as per their say and Ambalal – Accused no.1 was interrogated in Hindi and he replied in Hindi and the statement was scribed by one Shaikh, which was signed by him as well as the accused. He deposed that the said statement is voluntary and it was interpreted to the accused in Gujarati by one independent witness Mr.Karia. Shri Karia has not been cited as a witness. The procedure adopted by the Department is in utter contradiction of the one prescribed. The mother tongue of the accused is Gujarati and this witness has admitted that the accused knows Gujarati and he can write in Gujarati. He was also aware

of the legal position that the statement of the accused is to be recorded in his own hand writing but he admits that the statement recorded and exhibited as Exhibit P-11 is not in his handwriting nor is it in gujarati but it is in english. The manner in which the statement has been recorded which has been subsequently retracted also creates a cloud of suspicion on the manner in which the statement has been recorded. Whether the statement was explained to the accused in the language which he understands is not established since Mr.Karia has not been examined as a witness. In the statement recorded under Section 313 of the Code of Criminal Procedure, the respondent no.1 had denied that his statement which was recorded vide Exhibit P-11 was a voluntary statement. He denied that the statement was interpreted to him in Gujarati.

The learned Metropolitan Magistrate has given the benefit of the fact that the statement has not been explained to accused no.2 in the language he understood and it was not in his handwriting but it was scribed in English and has been given benefit of the ambiguity created. The Sessions Court was perfectly justified in extending the said benefit to the respondent no.1.

9 With this lacunae in the investigation and the inconsistency in the evidence brought on record through the prosecution witness, the Addl. Sessions Judge has rightly concluded that the Department of Customs was not able to

establish the guilt of Respondent no.1 beyond reasonable doubt. There being no legal infirmity in the finding recorded by the Addl. Sessions Judge in the Appeal filed by the respondent no.1, I am convinced that the impugned judgment dated 11th December 2000 deserves to be upheld and is accordingly upheld.

10 Resultantly, the Criminal Appeal filed by the Union of India assailing the said judgment is dismissed.

SMT. BHARATI DANGRE, J

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