

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPEAL NO.298 OF 2002**

Union of India )  
(at the instance of Superintendent of )  
Customs [P], Gold Control, Masjid [East], )  
Mumbai – 400 009 ) ....Appellant/Complainant

V/s.

1. Narendra Ratanchand Jain )  
residing at Kothari Niwas, Dongri Jail Road )  
(E), Mumbai – 400 009 )  
2. State of Maharashtra ) .....Respondents/Accused

----

Ms. Anuradha A. Mane for appellant.

Mr. V.P. Shastri i/b. Mr. Devendra S. Singh for respondent no.1.

Mr. Shanay Shah, Advocate appointed as Amicus Curiae.

----

**CORAM : K.R.SHRIRAM, J.  
DATE : 15<sup>th</sup> JANUARY 2020**

**ORAL JUDGMENT :**

1           At the outset, I have to note that on 6<sup>th</sup> January 2020, when the matter was called out, respondents were not represented and therefore, this Court requested Mr. Shanay Shah, an Advocate practicing in this Court, to be the Amicus Curiae. Mr. Shah agreed and the contribution of Mr. Shah, I have to note, has been immense. Today respondent no.1 was represented by Mr. Shastri.

2           This is an appeal impugning an order of acquittal passed by the Additional Chief Metropolitan Magistrate, 47<sup>th</sup> Court, Esplanade, Mumbai, on 29<sup>th</sup> October 2001 acquitting respondent no.1 of offence punishable under Section 135 (1) (b) read with Section 135 (1) (i) of the Customs Act, 1962 and under Section 8 (1) of Gold Control Act punishable under Section 85 (1) (ii) of the Gold (Control) Act, 1968.

3           The prosecution's case in brief is that on 25<sup>th</sup> March 1985, the Officers of Gold Control Wing of appellant received specific information regarding some persons carrying foreign marked gold bars and who were to deliver it near a pan beedi shop at Abhinandan Market, Kalbadevi Road, Mumbai. The Officers of appellant alongwith the informant, reached the spot and kept a watch. When respondent no.1 reached the spot, as per the information received by the Officers, the Officers apprehended respondent no.1 as he could not give satisfactory answers to the questions put to him by the said Officers. Accordingly, the Officers of appellant searched respondent no.1 and found some hard substance in his right hand side pocket of his trouser. On further persistent enquiry from the said Officers, respondent no.1 admitted that he was carrying 5 foreign marked gold bars of 10 tolas each. As the said place was an open market place and the Officers felt it was not safe for detailed search as well as seizure panchnama of respondent no.1, the said Officers took him to the Office of the Gold Control and produced him before the Superintendent of Customs – Madhukar Krishnarao Pansare (PW-1). Thereafter, panchas were called and search was made of the person of respondent no.1. Appellant found 5 foreign marked gold bars of 10 tolas each, totally weighing 582.500 gms. and the local market value at that time was Rs.1,86,400/-. It seems simultaneously an authorised valuer was also called for testing the purity of the gold bars and a certificate was obtained. Thereafter, the said gold bars were seized under the reasonable belief that the same were smuggled and liable for confiscation under the provisions of

the Customs Act as well as Gold Control Act.

4           Statement of respondent was recorded on 25<sup>th</sup> March 1989 under Section 108 of the Customs Act, which was subsequently retracted on 26<sup>th</sup> March 1989 when respondent was produced before the Magistrate for remand. I have to note that in the retraction, respondent has stated that he was mercilessly beaten by the Customs Officers and he even requested the Magistrate for medical treatment as he was receiving pain on his private parts and also the whole body. The retraction is very clear and it says that the statement was dictated by Officer and it was written on his dictation under duress, coercion, force and assault, the statement is not binding on him and he disowns the same. Respondent also says that the statement was obtained after assault and was not a voluntarily statement and nothing was found on his person. The retraction was taken on record on 26<sup>th</sup> March 1989 while the Magistrate granted remand till 27<sup>th</sup> March 1989. The Magistrate also directed the Superintendent, Bombay Central Prison, to send respondent no.1 to Medical Officer to examine and submit a medical report. A medical report has been submitted by the Chief Medical Officer, Bombay Central Prison Hospital, who has recorded that though there are no marks of any surface injuries seen locally, there is tenderness and physical trauma over lower abdomen and over subcapsular region (over back side).

5           It is prosecution's case that in the statement recorded under Section 108 of the Customs Act, respondent no.1 admitted possession of 5 foreign marked gold bars for delivery to one Ramesh of M/s. Milap

Jewellers at Abhinandan Market, that he had purchased it from one Malbari at Anrol Store for Rs.35,900/- each and was to sell the same at Rs.36,000/- each. After completion of investigation, necessary sanction was sought and thereafter, a complaint under Section 135 (1) (b) read with Section 135 (1) (i) of the Customs Act, 1962 and under Section 8 (1) of Gold Control Act punishable under Section 85 (1) (ii) read with Section 85 (1) (a) of the Gold (Control) Act, 1968 was filed against respondent no.1 on 19<sup>th</sup> April 1991. I have to note that the sanction to prosecute respondent no.1 has been granted only on 19<sup>th</sup> April 1991, more than 2 years after respondent no.1 was intercepted and produced before the Magistrate and remand obtained.

6 Charges were framed and respondent denied charges. Respondent's case, as per suggestion put in cross examination as well as statement recorded under Section 313 of the Code of Criminal Procedure, is that respondent is innocent and these 5 foreign marked gold bars were foisted upon him and he has been falsely implicated in this case.

7 Prosecution to prove its charge, led evidence of six witnesses, viz., Madhukar Krishnarao Pansare, the then Superintendent of Customs (Preventive) Mumbai as PW-1; Sukhbinder Singh, an Intelligence Officer, who was present at the time of intercepting accused, as PW-2; Ganpat Anappa Shanbag, Superintendent of Customs (Preventive) as PW-3; Devchandra Asha Baba as PW-4; Ashok Kumar Chunilal Jain, seizure panch witness as PW-5; and Kamlesh Hastimal Parmar, seizure panch witness as PW-6. PW-5 and PW-6 turned hostile. In their evidence, PW-5 and PW-6 state

that they do not know the contents of the panchnama but were simply told to sign, respondent no.1 was present in the office when they were called to sign the panchnama and they were not even told that respondent no.1 was caught with gold etc. Therefore, the seizure has not been independently proved.

8           Before I proceed further, I have to also note that there is nothing on record to indicate that respondent no.1 was apprised of his rights under Section 102 and consequences thereof. For proving the offence under Section 135, prosecution must prima facie establish a case of legal seizure of contraband gold from the conscious possession of accused. For that purpose, at the outset, prosecution must prove that the seizure effected from the person of accused on 25<sup>th</sup> March 1985 at Kalbadevi Road, was legal. Before prosecution seizing any gold in person, there are certain formalities to be followed as mentioned in Section 102 of the Customs Act, 1962. Section 102 reads as under:

*102. Persons to be searched may require to be taken before gazetted officer of customs or magistrate.—*

*(1) When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of the customs shall, if such person so requires take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.*

*(2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate.*

*(3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.*

*(4) Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person*

*and signed by such witnesses.*

*(5) No female shall be searched by any one excepting a female.*

Search, seizure and arrest of respondent under the provisions of Customs Act without appraising his right under Section 102 of the Customs Act, would become suspect and if there is any conviction based on possession of such search and seizure under the provisions of Customs Act, the same will have to be set aside. This is because sub-Section 1 of Section 102 mandates that When any officer of customs is about to search any person under the provisions of Customs Act, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate. These are necessary safeguards available to an accused against the possibility of false involvement and therefore, the procedure prescribed has to be meticulously followed. The communication of this right has to be clear, unambiguous and individual. Accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. I find support for this view in many decisions rendered by the Apex Court and other High Courts under the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act 1985 and in particular ***State of Rajasthan V/s. Parmanand and Anr.***<sup>1</sup>. The only difference between Section 102 of the Customs Act and Section 50 of the Narcotic Drugs and Psychotropic Substances ACT, 1985, (NDPS Act) is under Section 50 of NDPS Act the person has to be searched either in the

---

1. (2014) 85 ACC 662

presence of a nearest Gazetted Officer of any of the departments mentioned in Section 42 of NDPS Act or a Magistrate, but under the provisions of Customs Act, accused has to be taken without unnecessary delay to the nearest gazetted officer of customs or magistrate. I find support for this view in the judgment of Learned Single Judge of this court in **Yusuf Suleman V/s.**

**V.M. Doshi<sup>2</sup>** Paragraphs 15 and 16 of the said judgment read as under:

*15. Lastly, it was contended by Ms. Kaushik that Section 102 of the Customs Act was not complied with and, therefore, the conviction and sentence recorded against the appellant even under the provisions of Customs Act is liable to be quashed and set aside.*

*16. Sub-section 1 of Section 102 of the Customs Act mandates that when any officer of customs is about to search any person under the provisions of the Customs Act, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. The wording of Sub-section 1 of Section 102 is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory. The only difference is that whereas under Section 50 of the N.D.P.S. Act if the accused so requires he has to be searched either in the presence of a nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or a Magistrate but under the provisions of Customs Act the accused has to be taken without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. As stated earlier in respect of the similar provisions of the N.D.P.S. Act the Apex Court has held that the accused has to be apprised of his right and asked whether he wants his search to be taken in the presence of a Gazetted Officer or a Magistrate and the search, seizure and arrest of the accused without appraisal of his right to the accused becomes suspect and his conviction is liable to be set aside. On the same analogy, the search, seizure and arrest of the appellant under the provisions of the Customs Act without appraisal of his right to the accused under Section 102 of the Customs Act would become suspect and the conviction based on such search and seizure is liable to be set aside. In these circumstances, the conviction and sentence recorded against the appellant even under the provisions of the Customs Act is liable to be quashed and set aside.*

9 Apex Court in **State of Punjab V/s. Baldev Singh<sup>3</sup>**, though that judgment was rendered under the provisions of NDPS Act, held that it is an obligation of the empowered officer and his duty before conducting the

---

2. 2001(4) Mh.L.J. 76

3. 1999 (6) SCC 172

search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. This court in *Yusuf Suleman* (Supra) has held that the wording of Sub-section 1 of Section 102 is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory.

10           The provisions of Section 102 of The Customs Act, 1962 (“**the said Act**”) accord a protection to the suspect prior to a search being taken under section 100 or 101 of the said Act. Such protection is with the view to ensure that such search is taken with good cause and to lend credence to the evidence derived from such search. The expression “*if such person so requires*” in Section 102 necessarily implies that to enable him to exercise his legal rights under Section 102, he should be made aware of such rights. It is the obligation of the officer of customs to apprise the suspect of the rights available to him under Section 102, viz. to be taken to the nearest Gazetted Officer of customs or magistrate. This is a necessary sequence to be complied with for enabling the suspect exercise his rights; and the failure to do so will render such valuable rights conferred to the suspect under Section 102 illusory and a mere farce. The choice, whether to be taken to the nearest Gazetted Officer of customs or a magistrate, lies with the suspect and in the event such choice is made known by him to the officer of customs, he shall

be searched only in that manner. It is not up to the officer of customs to make this choice or elect before whom the accused is to be taken. Therefore, even assuming that the officer taking the search is a Gazetted Officer, it is still imperative for him to comply with his obligation to apprise the suspect of the legal rights available to him under Section 102. Also because, upon exercise by the suspect of his right to be taken before a Gazetted Officer or magistrate, the provisions of Section 102(3) come into play, which, in my opinion, is a check on the misuse of power and also provides an additional measure of protection to the suspect. Section 102(3) provides that once the suspect is taken either before the Gazetted Officer or the magistrate, whichever the case may be, such Gazetted Officer or magistrate is empowered to forthwith discharge the person if he sees no reasonable ground for search, or otherwise direct that the search be made. In my opinion, the suspect will be denied of this additional degree of protection / opportunity if a Gazetted Officer himself takes search and does not apprise the suspect of his rights under Section 102 thereby the procedural requirements of Section 102(3) not being complied with.

11           The Hon'ble Supreme Court has, in ***Vijaysinh Chandubha Jadeja V/s. State of Gujarat***<sup>4</sup>, observed that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings,

---

4. (2011) 1 SCC 609 – para 32

it may verily strengthen the prosecution as well.

It was submitted before constitutional Bench of Hon'ble Supreme Court as under:

*“14. Adopting the same line of arguments, Mr. P.P. Malhotra, the learned Additional Solicitor General, appearing on behalf of the Government of NCT of Delhi maintained that it is clear from language of Sections 41(2), 42 and 43 of the NDPS Act that the legislature has dealt with gazetted officers differently, reposing higher degree of trust in them and, therefore, if a search of a person is conducted by a gazetted officer, he would not be required to comply with the rigours of Section 50(1) of the Act. It was argued that the view expressed by this Court in Ahmed (supra), is incorrect and, therefore, deserves to be reversed.”*

But the Hon'ble Supreme Court has considered who will be a more appropriate authority between a Gazetted Officer and a Magistrate. In paragraph 32 Supreme Court stated as under :

*“32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.”*

12 In ***Customs V/s. Mohammad Bagour<sup>5</sup>***, also it was held that, the compliance with the procedural safeguards contained in Sec. 50 of NDPS Act, is intended to protect a person against false accusation and frivolous charges, as also to lend creditability to the search and seizure conducted by the empowered officer. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the search and seizure proceeding and it would also strengthen the prosecution case.

---

5. Unreported judgment of Delhi High Court in CRL.P. No.284/2011 dated 25.11.2011

But if the search is carried out by the Gazetted officer belonging to a department which is effecting a seizure, he may have bias in favour of the department, whereas no bias can be attributed to a Magistrate or a Gazetted Officer belonging to another department. Associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid. Para 24 of Mohammad Bagour (supra) reads as under:

*“24. The Trial Judge has recorded that notice Ex PW5/B served upon the respondents/accused was not in compliance of provisions of Section 50 of NDPS Act, as it was partial notice and as the respondents/accused had offered to be searched in the presence of a Gazetted Officer of a custom besides a Magistrate. The purpose behind Section 50(1) NDPS Act, is to avoid criticism of arbitrary and high handed action against authorised officer. It has to be borne in mind that a Gazetted officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a Gazetted Officer belonging to the other department. Thus, associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid.”*

13           None of the witnesses PW-1 to PW-6 say anything about having appraised accused of his right and asked whether he wanted to get his personal search in the presence of a Gazetted officer or a Magistrate. Therefore, on this ground alone, the search of the person of accused or seizure of gold has to be held as illegal.

14           Therefore, the seizure itself would be illegal if at all there has been really a seizure. Prosecution is relying purely on the statement recorded under Section 108 of the Customs Act. The prime witness for this statement is PW-1 – Madhukar Pansare. His evidence itself demolishes his case because PW-1 states as under :

*“After that I recorded statement of Mr. Jain. He was interrogated in Hindi. He replied in Hindi. Statement was written down in Hindi by*

*him. Statement bears my signature. His signature is there on the statement. I am producing the statement. It is in English. Marked at Exhibit P-2.”*

15            Though Ms. Mane suggested that there must be a typographical error instead of English, he might have by mistake stated Hindi, it is far too late in the day to make this suggestion. First of all, such a clarification should have come through the witness himself. Prosecution has not chosen to re-examine PW-1 to get that clarified. Prosecution, even when one assumes that the copy of evidence was not available on the same day, nothing stopped prosecution from applying to the Court to recall the witness to have this clarified. Therefore, PW-1 comes across as someone unreliable and the statement recorded by under Section 108 of the Customs Act itself falls flat.

16            It is settled law that even though a statement recorded under Section 108 is admissible in evidence, it has no evidentiary value unless it is corroborated by independent witnesses. Moreover, in this case, respondent has retracted and in his retraction alleged that he was mercilessly beaten by the Customs Officers. The Magistrate was also pleased to direct the Superintendent of Jail to send respondent no.1 for medical examination and the Medical Officer of the Jail has certified that accused had injuries. That indicates, in my view, torture and makes me conclude that the confession could not be said to be voluntary. This Court has in ***State of Maharashtra V/s. Hasmukh Hargovind Shah***<sup>6</sup> held that corroboration required for the purpose of basing a conviction on 108 statement alone must necessarily be independent which pre-supposes that it is distinct and separate from

---

6. 1993 CRI. L.J. 1953

statements and admissions made by the accused. Paragraphs 7 and 8 of the said judgment read as under :

*7. Coming to the second aspect of the matter, Mr. Kotwal has submitted that it is well settled law that even if the statement of the accused is held to be admissible and even if the Court construes it as being a voluntary statement that it cannot form the sole basis of conviction. The leading case on the point is the decision of the Supreme Court in the case of Shevantilal v. The State of Maharashtra but this position has thereafter been reiterated in several other decisions. The Supreme Court had in Aherraja Khima v. State of Sourashtra, dealt with the aspect of presumption of innocence that is available to an accused person and the situation where a reasonable explanation is tendered and had observed that a retracted confession cannot form the basis of a conviction. The Court had dealt with a situation whereby the validity of the confession is questioned on the ground that it is not voluntary or that it has been obtained by bullying the accused or by holding out an inducement that he would secure advantages by making a particular admission and in these circumstances had pointed out the dangers in relying on such a statement. It is true that in the earlier decisions, Percy Rustumji Besta v. State of Maharashtra and, Rameshchandra v. State of West Bengal, the Supreme Court had occasion to deal with the aspect of the admissibility of such a statement and it is now well settled law that since a Customs Officer is not a Police Officer a statement made to such an authority is admissible in evidence. Mr. Kotwal, has not disputed the admissibility but he has seriously assailed the evidentiary value of this statement in relation to the facts of the present case and to that extent the submission canvassed is a very sound and a valid one. In the case of Haroom Haji Abdullah v. State of Maharashtra, the Supreme Court had occasion to observe that a Court should be put an caution while dealing with a statement under Section 108 of the Customs Act in so far as these statements are distinguishable from confessions recorded by a Magistrate who is a judicial authority and who observes the requisite precautions while recording such a statement. The credibility of statement in the latter case is undoubtedly much higher and this very valid distinction has been highlighted by the Supreme Court in the present case. Mr. Kotwal also drew my attention to a recent Division Bench ruling of the Andhra Pradesh High Court in the case of Krishnaprasad v. Directorate of Enforcement reported in 1992 Cri LJ 1888 wherein the Division Bench of the Andhra Pradesh High Court had occasion to deal with this very aspect of the matter and in a considered judgment had occasion to hold that it is a requirement of law when statements are recorded under Section 108 of the Customs Act that the accused be warned that the statement in question is liable to be used against him and that he should be put on notice. This last aspect of the matter is one of considerable significance because even if statements are admissible the Courts must take cognizance of the fact that the accused person, even if he had at that point of time not been placed under arrest was confined by the Department's Officers that his liberty was curtailed and that, therefore, the all important question is to whether or not in the circumstances so placed the accused would voluntarily make a*

*statement requires carefully scrutiny. Apart from this one needs to bear in mind the fact that the Court must also consider the possibility of coercion or inducement. In the present case, however, as indicated by me the voluntariness of the statement is in serious dispute and under these circumstances no conviction could be based on this statement.*

*8. Mr. Kotwal has also attacked the original findings whereby the accused is alleged to have identified and pointed out the three parcels and this circumstance has been used as a piece of corroborative evidence. Mr. Kotwal points out a fundamental error in the reasoning adopted by the trial Court wherein the learned trial Magistrate has erroneously delinked this particular piece of evidence from the earlier statement attributed to the accused. Mr. Kotwal submits, and very rightly to my mind, that there is virtually no distinction between admissions contained in the 108 statement and these admissions made by the accused that the parcels in question are the very ones which were despatched by him and he therefore submits that such material can never come under the head of independent corroboration. The learned counsel is fully justified and perfectly right in this submission in so far as the corroboration required for the purpose of basing a conviction on 108 statement alone must necessarily be independent which pre-supposes that it is distinct and separate from statements and admissions made by the accused.*

17                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 also find support in ***State of Maharashtra V/s. Harshad Vaherbhai Patel & Ors.***<sup>7</sup> and unreported judgment of this court in ***Shri Malki Singh V/s. 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 that the Custom Officers are not police officers and resultantly, a statement made to the*

---

7. 2012 (1) Bom.C.R.(Cri)500

*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 24<sup>th</sup> 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.”*

18           Moreover, PW-2 in his cross examination states that when they went to Abhinandan Market, Kalbadevi, to intercept respondent no.1, they did not take panch witnesses with them, which itself shows that there is no independent witness to prove that respondent no.1 was intercepted at Abhinandan Market, Kalbadevi and was ferried in a taxi to the office of appellants.

19           In the impugned judgment, the Trial Court has come to a conclusion that the Customs Officers did not warn accused that his statement recorded under Section 108 of the Customs Act will be used against him as evidence and unless it is properly explained and warning is given to accused, the statement which is recorded under Section 108 of the Customs Act cannot be considered as admissible. In *Hasmukh Harvgoind Shah* (Supra) the Court has referred to a judgment of a Division Bench of Andhra Pradesh High Court in the case of ***Krishnaprasad V/s. Directorate of Enforcement***<sup>8</sup>. Andhra Pradesh High Court in *Krishnaprasad* (Supra) had occasion to deal with the aspect as to whether the Customs Officer while recording a

---

8. 1992 Cri LJ 1888

statement under Section 108 of the Customs Act has to administer a caution or warning embodied under Section 164 (2) of Code of Criminal Procedure before recording a statement of confessional nature from the person summoned. The Court held, failure to do so would make the statement so recorded inadmissible in evidence for any purpose. In other words, Andhra Pradesh High Court held that the statements recorded by empowered authority under Section 108 of the Customs Act, were inadmissible in evidence and liable to be eschewed from consideration for any purpose, as no caution or warning embodied under Section 164(2) of CrPC was administered to the person from whom the statement was recorded.

20           Bombay High Court (Panaji Bench) in ***Suleman Yakub & Ors. V/s. S. Reynolds, Superintendent of Customs (Preventive)***<sup>9</sup> did not follow the view expressed by the Andhra Pradesh High Court and held that the provisions of Section 164 of Code of Criminal Procedure are not applicable to the confessional statement of the person whose statement was being recorded under Section 108 of the Customs Act, and thereby rejected the contention raised that the safeguard prescribed under Section 164 of Code of Criminal Procedure having not been complied by the Customs Officers, the statement is inadmissible in evidence. The Court held that a statement recorded under Section 108 of the Customs Act is not hit by Section 164 of Code of Criminal Procedure. This judgment was carried in appeal to the Apex Court and the Apex Court upheld the view expressed by the Bombay High Court. In ***Gulam Hussain Shaikh Chougule V/s. S. Reynolds Supdt. of***

---

9. 2000 Supp Bom CR 557

**Customs, Marmgoa<sup>10</sup>**, paragraphs 8, 9, 10, 11 and 12 read as under :

8. *The learned counsel for the appellant reiterated the contentions raised before the High Court that the safeguards prescribed under section 164 Criminal Procedure Code for recording the confessional statement of an accused have not been followed by the Customs Officer.*

9. *Section 108 of the Customs Act, 1962 reads as follows :*

*108. Power to summon persons to give evidence and produce documents (1) Any gazetted officer of custom shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.*

*(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.*

*(3) All persons so summoned shall be bound to attend either in person or by an authorised agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required.*

*Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.*

*(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).*

10. *In the case of [Assistant Collector of Central Excise, Rajamundry vs. Duncan Agro Industries Ltd. & Ors.](#), 2000(7) SCC 53, this Court held that the provision in [section 164](#) of Criminal Procedure Code empowers a Judicial Magistrate to record any confession or statement made to him during the course of investigation. The power conferred by [Section 164, Criminal Procedure Code](#) to record confessions and statements can be exercised only by a Judicial Magistrate. Even a police officer on whom power of a Magistrate has been conferred is forbidden from recording a confession. Sub-sections (2) and (4) deal with procedure which such Magistrate has to follow while recording inculpatory statements made by persons. Referring to [section 108](#) of the Customs Act, this Court observed :*

*[Section 108](#) of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned*

---

10. (2002) 1 Supreme Court Cases 155

*by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the Magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost.*

*.....The ban contained in Section 25 of the Evidence Act is an absolute ban. But it must be remembered that there is no ban in regard to the confession made to any person other than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.*

11. *In the judgment this Court quoted with approval the following observations made by Hidayatullah, J. (as he then was) in Haroon Haji Abdulla vs. State of Maharashtra (1968) 2 SCR 641) :*

*.....These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Section 171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from someone in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him.*

12. *Reference was made to the decision in Romesh Chandra Mehta vs. State of West Bengal ( 1969) 2 SCR 461) wherein it was held :*

*When an inquiry is being conducted under Section 108 of the Customs Act, and a statement is given by a person against whom the inquiry is being held it is not a statement made by a person accused of an offence and the person who gives the statement does not stand in the character of an accused person.*

Therefore, the Apex Court held that since the statement under Section 108 of the Customs Act is not recorded by a Judicial Magistrate but the power is exercised by the Gazetted Officer of the customs department, Section 164 of Code of Criminal Procedure is not applicable. Of course, the court has to specially scrutinize and consider whether the statement recorded under Section 108 of the Customs Act can be considered to be voluntary. If so, they may be received against the maker and in the same way as confession are received.

21 Therefore, to that extent, the finding of the Trial Court in paragraph 12, is set aside. I will hasten to add, this does not change the conclusions arrived at in this appeal, that the appeal requires to be dismissed.

22 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***<sup>11</sup> 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.*

---

11. (2007) 4 SCC 415

*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 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.”*

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

24            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, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

25            Appeal dismissed.

**(K.R. SHRIRAM, J.)**