

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.621 OF 2001**

Union of India)
(at the instance of Assistant Collector of)
Customs, (P), New Customs House, Ballard)
Estate, Bombay – 400 038)Appellant/Complainant

V/s.

1. Kisan Ratan Singh)
Bombay Indian Inhabitant)
residing at 3rd Floor, Room No.12, V.C.)
Co-operative Housing Society, 36-A, Champa)
Galli Cross Lane, Bombay – 400 002)
2. Kalu Singh Rajput)
Bombay Indian Inhabitant)
residing at 3rd Floor, Room No.12, V.C.)
Co-operative Housing Society, 36-A, Champa)
Galli Cross Lane, Bombay – 400 002)
3. State of Maharashtra)Respondents/Accused

Ms. Anuradha A. Mane for appellant.
Mr. Rajeev Matkar for respondent nos.1 and 2.
Mr. Shanay Shah, Advocate appointed as Amicus Curiae.
Mr. Ramesh Parab, Superintendent of Custom, R & I.
Mr. Sourabh Paraskar, I.O., R & I.

**CORAM : K.R.SHRIRAM, J.
DATE : 7th JANUARY 2020**

ORAL JUDGMENT :

1 At the outset, I have to note that yesterday, i.e., 6th January 2020, when the matter was called out, the counsel for respondents was not present 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 respondents were represented by Mr. Matkar.

2 This is a case where the customs authorities are impugning an order of acquittal dated 17th January 2001 passed by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, acquitting respondents of offence under various provisions of Customs Act 1962 and Imports and Exports (Control) Act 1947.

3 The case of the prosecution in brief is that on 4th February 1991, on the basis of specific information received by the Officers of Directorate of Revenue Intelligence, Bombay Zonal Unit, to the effect that respondent no.1 was dealing in Foreign marked gold biscuits in large scale and respondent no.1 receives contraband gold, its sale proceeds in the form of foreign and Indian currencies and stores the same in a room situated on the 3rd Floor of 12-V.C. Co-operative Housing Society, 36-A, Champa Galli Cross Lane, Mumbai 20 (the said premises), the Officers of DRI and the Officers of appellants effected a raid and search of the said premises and respondents were found in the said premises. After thorough search of the said premises in presence of the panchas, the officials recovered 24 marked gold biscuits each weighing 10 tolas, large quantities of foreign currencies of various denominations of different countries equivalent to Indian Rs.5,88,750/- and Indian currency in the sum of Rs.5,06,000/-. Both respondents failed to give satisfactory explanation for the possession of those 24 marked gold biscuits and Indian and Foreign currency and also failed to produce any documents regarding lawful possession of the same. After following due procedure, the gold bars and currencies were taken charge of by the department under

seizure panchnama. Respondent nos.1 and 2 were brought to the office of DRI for further interrogation and investigation. Thereafter, further investigation was carried out by appellants after issuing summons under Section 108 of the Customs Act, 1962. Statements of respondent nos.1 and 2 were recorded and those statements are at Exhibit P-4 and P-11, respectively. After completion of investigation and after compliance of the provisions of law, complaint against respondents was filed.

4 The Trial Court framed charges and read out the same to the accused. Both of them denied the charge. According to respondents, they were poor villagers who had come to Mumbai in search of job and they were looking for job. Somebody gave them the address of the said premises and respondents went to the said premises looking for work. They found three persons in the room and while they were making inquiries from those people about work, a number of persons rushed into the room and disclosed their identity to be DRI Officers. Despite respondents telling them that they were there only few minutes before in search of work and that they may be allowed to go, the DRI Officers told them that they cannot leave and they were under arrest. After some time, the DRI Officers took them alongwith the three other persons in the room to their office where they all were questioned about their background. Later, the DRI Officers came and they were threatened with physical hurt and their signatures have been obtained by force.

5 To drive home the charge, appellant examined two witnesses, one A.P. Patil as PW-1 and the other D.K. Savekar as PW-2. Both of them were part of the raiding party. In the chargesheet, eight witnesses have been cited and name of six have been provided. Despite that only two of them have deposed. Of the remaining four witnesses, two of them are panch witnesses, in whose presence the gold and the Indian and Foreign currencies were recovered from the respondents. Panch witnesses have not been examined and therefore, the raid has not been independently proved. The other two witnesses are M.K. Chakraborty and R. D'lima, who are both Customs Officers but strangely they were not asked to step in to corroborate what the other two witnesses have stated. I would have expected appellants to call those two persons also to give evidence in view of the absence of panch witnesses.

6 I have to note very importantly that on 11th February 1991 respondents filed an application before the Learned Metropolitan Magistrate for retracting the statements recorded. Their case has also been stated in the statement of retraction and it is very clearly stated that there were three others who were in the room. In the evidence, PW-1 and PW-2 are totally silent about these three persons. In response filed to the application of retraction, M.K. Chakraborty, who was listed as the first witness in the chargesheet and who was not called to give evidence, has categorically stated that there were three other persons. In the retraction, the respondents have stated that they went to the room and they found three persons inside

the room but in response to the retraction, M.K. Chakraborty says “for the statement of other three persons, who were found loitering in the passage adjacent to the said room”. I would say this is a mischievous statement because the respondents in their retraction state the three persons were found in the room and have not stated that three persons were found loitering. As regards the three persons, M.K. Chakraborty then says that these three persons were brought to the office of DRI on suspicion and their statements have been recorded but they denied having any connection with the seized gold and seized currency and they were permitted to go. Those statements have not been produced. The retraction and the response are at Exhibit D-1 and D-2, respectively. It has to be noted that in the panchnama recorded at the time of raid, there is no mention of these three persons. Even the remand application dated 5th February 1991 does not mention about these three persons were taken into custody and that their statement was recorded.

On 5th February 1991 when respondents were produced for remand and jail custody was granted till 11th February 1991, respondents were not represented by any advocate and it does not look like they were provided any legal assistance either. On 11th February 1991, when accused were produced before the Magistrate and when accused also filed an application for bail, the retraction has been filed. Therefore, on the first opportunity respondents filed retraction.

7 According to prosecution, the statements of both accused were voluntarily and correctly recorded without use of any force or inducement. The Trial Court after considering the evidence recorded and the facts and circumstances of the case, has held that the statements recorded under Section 108 have not been independently corroborated. The Trial Court has held that without an independent corroboration or without any evidence the statements recorded of 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 Trial Court.

8 Admittedly, panch witness of the panchnama recorded on 4th February 1991, when the gold and Indian and Foreign currencies were allegedly seized, have not testified. Even the persons, who typed the panchnama, and PW-1 says it was one G.H. Shaikh, has not testified. Moreover, the panchnama is written in English but the panch witnesses have signed in Hindi and Gujarati. Panchnama also does not record whether the panch witnesses knew English. PW-1 also says both panch witnesses are from N.M. Joshi Marg as per panchnama Exhibit P-2 and that N.M. Joshi Marg was 4 to 5 km. away from the said premises. How did the panchas then land at the said premises? That is a mystery. Therefore, I am unable to believe the panchnama as produced was really prepared. To add to this, PW-2 says he does not know the details of panchnama because he was not party to panchnama. PW-2 also says PW-1 had called the panch witnesses and they were taken from “our” office to the said premises. If that was so,

why were the panch witnesses not examined. PW-2 also says, though he was a member of the search party, he does not remember the mode of transport that was used to go to the said premises from their office. One can understand he may not remember the vehicle details but “mode of transport” is unbelievable. 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.

9 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 V/s. Harshad Vaherbhai Patel & Ors.***¹ and unreported judgment of this court in

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

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 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."

10 Ms. Mane relied on the judgment of the Apex Court in **Ramesh Chandra V/s. State of West Bengal²** 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 statement be accepted blindly without corroboration, and the answer is no.

11 One more point which comes to my mind is if the panch witnesses have not been produced, what is the evidence to satisfy that the

2. AIR 1980 Supreme Court 793

said premises is where the respondents were found. I have to also note that an electricity bill in the name of Jayantilal Pandya has been seized from the said premises by prosecution. The said Jayantilal Pandya has not been summoned and no effort has also been made to trace this Jayantilal Pandya. The prosecution should have also, particularly when there were some other persons present when the raid took place, collected documentary evidence as well as record the statements of the people residing in the adjoining rooms to find out who this Jayantilal Pandya was. Moreover, it is stated that there is a telephone connection in the said premises, but in whose name the telephone connection was and why the prosecution did not make any effort to trace out the subscriber of the telephone, is also not explained. So therefore, no effort has been made to establish occupancy of the said premises by the two respondents. There is no evidence to even show how respondents were in occupation of the said premises, whether they were on leave and license basis or they were trespassers or they owned the premises. There is no evidence brought on record to clarify and factually establish the specific occupancy of room no.12 by respondents.

12 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***³ 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

3. (2007) 4 SCC 415

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 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.”

13 The Apex Court in ***Basalingappa V/s. Mudibasappa***⁴ has explained the word “perverse” in terms as understood in law for this Court to interfere in an order of acquittal. Paragraph 31 of the said judgment reads as under :

13. This Court had occasion to consider the expression “perverse” in Gamini Bala Koteswara Rao and others Vs. State of Andhra Pradesh through Secretary, (2009) 10 SCC 636, this Court held that although High Court can reappraise the evidence and conclusions drawn by the trial court but judgment of acquittal can be interfered with only judgment is against the weight of evidence. In Paragraph No.14 following has been held :-

“14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that

4. 2019 (5) SCC 418

interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so."

14 There is an acquittal and therefore, there is double presumption in favour of the 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 he is proved guilty by a competent court of law. Secondly, the accused having secured acquittal, the presumption of their 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.

15 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.

16 I have to also note that the judgment impugned is dated 17th January 2001. More than 19 years have passed since the acquittal. Since, I do not find any reason to interfere in the impugned judgment.

17 Appeal dismissed.

(K.R. SHRIRAM, J.)