

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.922 OF 2000

Assistant Commissioner of Customs)
(Marine and Preventive))
Meher Building, Chowpatty, Mumbai-400 038)....Appellant
V/s.

1) Nicholas Anthony Simoes)
R.No.7, D'souza Chawl, 4th Road, Golibar)
Santacruz (East).)
2) State of Maharashtra)Respondent
(Org.Accused)

Ms.Anuradha A.Mane APP for appellant/State.

CORAM : K.R.SHRIRAM,J
DATE : 31.1.2020

ORAL JUDGMENT :-

1. This is an appeal impugning an order and judgment dated 15.3.2000 passed by the Additional Chief Metropolitan Magistrate, 19th Court Esplanade, Mumbai acquitting accused no.1 of offence punishable under section 135 (1) (a) (b) (*Evasion of duty or prohibitions*) of The Customs Act, 1962.

2. The facts in brief are, on 7.12.1991 pursuant to an information received, appellant-department kept a secret watch outside the Santacruz Air port in front of a cafeteria and noticed that accused no.1 was proceeding towards the cafeteria in a silver colour scooter. The officers of appellant-department followed the scooter and apprehended accused no.1 along with the vehicle. Accused no.1 admitted he was carrying 120 bars of gold weighing total of 13.98 kilo grams valued at Rs.48,00,000/-. The officers took accused no.1 along with the scooter to the office of Marine and Preventive Wing of appellant for examination. Appellant states that accused no.1 was examined in the presence of 2 panchas and appellant-department recovered from the person of accused no.1, 120 bars of gold. 120 bars of gold were kept in 2 jackets, each of which contained 60 gold bars. Samples were drawn and sent to the Government of India Mint for ascertaining whether it was gold and it was confirmed to be gold. Statement of accused no.1 under section 108 of the Customs Act was also recorded and accused no.1 admitted the fact that he was in possession of smuggled gold.

3. After obtaining necessary sanction, a complaint was filed. Accused no.1 pleaded not guilty and claimed to be tried.

4. To prove its case, prosecution led evidence of 3 witnesses viz., Jairaj P.G. Nair as (PW-1); Gunwant Balan Shah, a panch witness as (PW-2); and one Narayan Kallapa Kadolkar, the then Superintendent of Customs who recorded statement under section 108 as (PW-3).

5. Statement of accused was recorded under section 313 of Cr.P.C. and accused pleaded not guilty and denied all charges.

6. After considering the evidence and the documents, the trial Court passed the impugned order and judgment acquitting accused.

7. The Apex Court in ***Ghurey Lal Vs. State of U.P.***¹ has culled out the factors to be kept in mind by the Appellate Court while hearing an appeal against acquittal. Paragraph Nos.72 and 73 of the said judgment read as under:

72. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty.

The accused possessed this presumption when he was

¹ (2008) 10 SCC 450

before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads

to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

8. The Apex Court in many other judgments including ***Murlidhar Vs. State of Karnataka***² has held that unless, the conclusions reached by the trial court are found to be palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice. Appellate Court should not interfere with the conclusions of the Trial Court. Apex Court also held that merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.

We must also keep in mind that there is a presumption of innocence in favour of respondent and such presumption is strengthened by the order of acquittal passed in his favour by the Trial Court.

9. The Apex Court in ***Ramesh Babulal Doshi Vs. State of Gujarat***³ has held that if the Appellate Court holds, for reasons to be recorded that the order of acquittal cannot at all be sustained because

² (2014) 5 SCC 730

³ 1996 SCC (cri) 972

Appellate Court finds the order to be palpably wrong, manifestly erroneous or demonstrably unsustainable, Appellate Court can reappraise the evidence to arrive at its own conclusions. In other words, if Appellate Court finds that there was nothing wrong or manifestly erroneous with the order of the Trial Court, the Appeal Court need not even reappraise the evidence and arrive at its own conclusions.

10. Having perused the impugned judgment, I see no reason to interfere with the same.

11. It is prosecution's case that what was found in person of accused-respondent no.1 was gold. Prosecution is relying on Gold Sample Certificates which are at Exh.P-2 (colly). Out of the 120 gold bars, 2 bars were allegedly sent to the India Government Mint for ascertaining whether it was gold. Exh.P-2 does say that the sample was found to be 998.9 purity gold. But Exh.P-2 does not indicate that the gold that was assayed was the sample of 120 bars of gold seized from accused no.1. The onus is on the prosecution to prove that what was found and seized from the person of accused no.1 was sent to India Government Mint, the sample that was assayed by the India Government Mint belonged to 120 bars of gold seized and the

certificate issued, Exh.P-2, belonged to the sample that was drawn from 120 bars seized from the person of accused. Exh.P-2 apart from disclosing that the samples were marked No.BM 7717 and BM 7718 by the authorities of India Government Mint, does not disclose to which sample the certificate was issued. It does not disclose that the sample pertains to 120 bars of gold seized from accused no.1. It also does not disclose that the sample which was examined and for which the certificate was issued are involved in a particular case of appellant department. Finally the certificate even does not disclose that it has been issued to the Assistant Collector of Customs (Marine and Preventive Wing).

12. On these grounds alone the trial Court is correct in acquitting accused because the prosecution has failed to prove that the contraband that was found on accused was smuggled gold and gold only.

13. Moreover, there is nothing on record to indicate that accused no.1 was appraised of his rights under section 102 of the Customs Act and consequences thereof. For proving the offence under section 135 of the Customs Act, prosecution must prima facie establish a case of legal seizure of contraband gold from the conscious

possession of accused no.1. For that purpose, at the outset, prosecution must prove that the seizure effected from the person of accused no.1 on 7.12.1991 was legal. Before prosecution seizing any gold in person, there are certain formalities as mentioned in section 102 of Customs Act 1962 to be followed.

14. As held by this Court in *Union of India Vs. Narendra Ratanchand Jain*⁴, appraising accused of his rights under section 102 is mandatory and failure to do so, the search and seizure itself will be rendered illegal. None of the witnesses say anything about having appraised accused of his rights and ask whether he wanted to get his personal search in the presence of a Gazetted officer or Magistrate. Therefore, on this ground alone, the search of the person of respondent no.1 for seizure of gold has to be held as illegal.

15. 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 his acquittal, the presumption of his

4 Unreported Criminal Appeal No.298 of 2002 dated 15.1.2020

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.

16. 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.

17. Appeal dismissed.

(K.R.SHRIRAM,J)