

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1020 OF 2003**

Union of India)
(at the instance of Asstt. Collector of Customs)
[P], 12th Floor, New Customs House, Ballard)
Pier, Mumbai – 400 038)Appellant/Complainant

V/s.

1. Oghadmal Hiralal Jain)
residing at Flat No.15, 2nd Floor,)
Pandurang Bhavan, M.G. Acharya Marg,)
Chembur, Mumbai – 400 071)
2. State of Maharashtra)Respondents/Accused

Mr. N. Natarajan for appellant.
Mr. D.S. Jambaulikar for respondent no.1.
Ms. Pallavi Dabholkar, APP for State – respondent no.2.
Mr. Sourabh Parashar, IO/R & I present.

**CORAM : K.R.SHRIRAM, J.
DATE : 15th JANUARY 2020**

ORAL JUDGMENT :

1 This is a case where the Customs Authorities are impugning an order of acquittal dated 6th March 2003 passed by the Additional Sessions Judge, Greater Mumbai, acquitting respondent no.1 of offence punishable under Section 135 (1) (A) and (B) read with Section 135 (1) (i) of the Customs Act, 1962 (the said Act).

2 Prosecution's case is, on 8th January 1991, on receipt of specific information, the premises of respondent no.1 situated at Pandurang Bhavan, M.G. Acharya Marg, Chembur, Mumbai – 400 071 (the said premises) was raided. Alongwith respondent no.1, there was one more person, Vinodkumar Bafna, who was found holding a plastic bag in his hand. The personal search

of respondent no.1 resulted in the recovery of five gold bars of 10 tolas each and the search of the plastic bag carried by Vinodkumar Bafna, contained Indian currency of Rs.2,75,000/-. It is prosecution's case that on interrogation, respondent no.1 admitted that he had just purchased those five gold bars from Vinodkumar Bafna and handed over Rs.2,00,000/- cash to Vinodkumar Bafna. It is also prosecution's case that Vinodkumar Bafna also admitted the same. The five gold bars were weighing 583 gms. with a market value of Rs.2,08,714/-. It is stated that those gold bars were seized in the reasonable belief that the same were smuggled into India and hence, liable to confiscation under the provisions of the said Act. The Indian currency amounting to Rs.2,75,000/-, that was recovered from Vinodkumar Bafna, was also confiscated under Section 121 of the said Act as the same was believed to be sale proceeds of smuggled gold bars. Therefore, it is prosecution's case that respondent no.1 had purchased the five imported gold bars from Vinodkumar Bafna and Vinodkumar Bafna was carrying the sale proceeds of smuggled gold.

3 Statements of respondent no.1 and Vinodkumar Bafna under Section 108 of the said Act were recorded. In the statements, it is recorded that respondent no.1 admitted that he was a money lender by profession and as his daughter's marriage was fixed and he was in need of primary gold for making gold ornaments and also offer the same in marriage of his daughter. It is also recorded that respondent no.1 stated that Vinodkumar Bafna was known to him and Vinodkumar Bafna had offered to sell gold bars for

Rs.40,000/- each and accordingly, he paid Rs.2,00,000/- to the said Vinodkumar Bafna, who in turn gave five foreign marked gold bars and the transaction was completed on the same day. Vinodkumar Bafna in his statement recorded under Section 108 of the said Act has confirmed what respondent no.1 in this appeal has stated.

4 After completion of investigation and obtaining the sanction for prosecuting the two accused under Section 137 of the said Act, the complaint came to be filed in the Court of Chief Metropolitan Magistrate on 23rd October 1992. Charges were framed and respondent no.1 pleaded not guilty. Statement of respondent no.1 under Section 313 of the Code of Criminal Procedure also was recorded. The stand of respondent no.1 was that there was no gold found in the said premises but when the raiding party came, they took away Rs.2,00,000/- from the cupboard of his residence in his absence. Respondent no.1 states that he does not know anything about the gold. Vinodkumar Bafna was declared an absconder by the Trial Court and the trial was separated and proceeded only against respondent no.1.

5 Prosecution to prove the charge, led evidence of four witnesses, viz., Ravindranath Singh (PW-1), Rajnarayan Vikramaditya Pathak (PW-2), Jagdish Prasad Chaurasiya (PW-3) and Mukesh Thakurdas Hemdar, the panch witness as PW-4. PW-1 to PW-3 are Customs/DRI employees. The defence on behalf of respondent no.1 led evidence of two witnesses, viz., Hemraj Arjunlal Mehta (DW-1) and Ramchandra Mandovara (DW-2). After considering the evidence and the records and proceedings, the Trial Court,

i.e., Chief Metropolitan Magistrate, Esplanade, Mumbai, by an order and judgment dated 14th August 2001, was pleased to convict respondent no.1 for offence punishable under Section 135 (1) (i) of the said Act. Under Section 135 (1) (a) (i) of the said Act. Respondent no.1 was sentenced to suffer imprisonment for two years and to pay a fine of Rs.15,000/- and in default, to undergo simple imprisonment for three months. No separate sentence was passed under Section 135 (1) (b) (i) of the said Act. The gold, which was seized, had already been disposed.

6 Against the order of the Trial Court, respondent no.1 - Oghadmal Hiralal Jain filed an appeal in the Courts of Sessions at Greater Mumbai being Criminal Appeal No.230 of 2001. The Sessions Court re-appreciated the evidence and by an order and judgment dated 6th March 2003 was pleased to allow the appeal and thereby set aside the order and judgment dated 14th August 2001 passed by the Trial Court. The Sessions Court acquitted respondent no.1. Aggrieved by the said order and judgment of the Additional Sessions Judge, Greater Mumbai, appellant has filed the present appeal.

7 With the assistance of Mr. Natarajan, learned counsel for appellant and Mr. Jambaulikar, learned counsel for respondent no.1, I have perused the order and judgment of the Trial Court, the impugned order and judgment and the evidence. I am in agreement with the views expressed by the Sessions Court.

8 Before I go ahead dealing with the evidence and explain why I am in agreement with the conclusions arrived at by the Sessions Court, admittedly the formalities to be followed under the provisions of Section 102 of the said Act have not been followed. Mr. Natarajan, in fairness, true to his role as an Officer of the Court, admitted that the requirements of Section 102 of the said Act have not been complied with and compliance with those requirements is mandatory.

9 For proving the offence under Section 135 of the said Act, prosecution must *prima facie* establish the case of legal seizure. For that purpose, at the outset, prosecution must prove that the seizure effected from the person of respondent no.1 on 8th January 1991 was legal. Section 102 of the said Act 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.

10 Search, seizure and arrest of respondent under the provisions of Customs Act without appraising his right under Section 102 of the said 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 of the said Act 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.***¹. The only difference between Section 102 of the said 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 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,

1. (2014) 85 ACC 662

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***² 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.

11 Apex Court in ***State of Punjab V/s. Baldev Singh***³, 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 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

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

3. 1999 (6) SCC 172

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 of the said Act is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory.

12 The provisions of Section 102 of 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.

13 The Hon'ble Supreme Court has, in *Vijaysinh Chandubha Jadeja V/s. State of Gujarat*⁴, 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.”

14 In ***Customs V/s. Mohammad Bagour***⁵, 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. But if the search is carried out by the Gazetted officer belonging to a

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

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.”

15 None of the witnesses PW-1 to PW-4 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 five bars of gold or cash of Rs.2,75,000/- has to be held as illegal. If the seizure of the gold is illegal, the question of respondent no.1 being prosecuted does not and cannot arise.

16 In the adjudication proceedings, the Collector of Customs (Appeals) Bombay by an order dated 30th November 1993 has directed that the amount of Rs.2,00,000/- be returned to respondent no.1 on the ground that there is no evidence that the amount of Rs.2,00,000/- was sale proceeds of smuggled gold. This appeal was filed against an order dated 21st April

1993 passed by the Additional Collector of Customs (P) Bombay. Admittedly that amount has been returned to respondent no.1. Mr. Natarajan states and Mr. Jambaulikar admits that respondent no.1 has received the amount of Rs.2,00,000/-. As noted earlier, it is prosecution's case that the gold was found on respondent no.1 and the sale proceeds was found on Vinodkumar Bafna. Whereas, it is the case of respondent no.1 that no gold was found on him and the amount of Rs.2,00,000/- was seized from his cupboard at his residence in his absence. Once the adjudicating authority accepts that prosecution has failed to prove that Rs.2,00,000/- was the sale proceeds of smuggled gold and directs the Customs Authorities to return Rs.2,00,000/- to respondent no.1, I find it difficult to accept that any gold was found on respondent no.1 as alleged by prosecution. On this ground also the appeal has to be dismissed.

17 On the evidence of PW-1 and PW-4 a lot has to be said. In the adjudication proceedings, the two panch witnesses, i.e., Shashidan and Mukesh T. Hemdar (PW-4) were produced and they were cross examined by respondent no.1. Shashidan was not called to testify in the Trial Court though the order of the Collector of Customs (Appeals) Bombay was produced by prosecution in the Trial Court. The Collector of Customs (Appeals) Bombay has observed that Shashidan admitted during cross examination that on 8th January 1991 he was called by the Customs Officers in the Customs House, the Customs Officers showed five gold bars and nothing else was shown to him, panchnama was already drawn when he

went to the Customs House and he was not shown any search warrant. Therefore, the fact that the panchnama was drawn at the said premises is falsified because Shashidan says he was called to the Customs House to sign the panchnama. It is also recorded that Shashidan was in the Baggage Centre when the Officers came to call him to act as a panch. The Collector of Customs (Appeals) Bombay also recorded that PW-4 has admitted that he was called from UB Centre by Customs Officers and thereby indicated that he was not a spot witness.

18 Moreover, the case of prosecution is based on the evidence of PW-1 and PW-4. PW-4 was summoned by the adjudicating authority and respondent no.1 was permitted to cross examine PW-4 in the adjudicating proceedings. The adjudicating authority had recorded evidence of PW-4 in the adjudicating proceedings. Prosecution produced before the Trial Court the evidence dated 16th November 1992 of PW-4 recorded by the adjudicating authority. In the evidence before the adjudicating authority, PW-4 says that on 8th January 1991 at 5.30 p.m. he was called from the UB Centre by the Customs Officers to the Customs House and when he reached there, he was shown some packets containing gold bars. PW-4 says he only saw the gold bars and panchnama was drawn in his presence at 6.00 p.m. But the panchnama, which is on record in the Trial Court at Exhibit P-2, shows that record of panchnama entered at 4.00 p.m.

19 The Trial Court noted the contradictions found in the deposition of PW-4 recorded before the adjudicating authority and before the Trial

Court. The evidence of PW-4 shows that the contents of panchnama Exhibit P-2 were written by the Customs Officer - Ravindranath Singh (PW-1) on his own and the panchas had no talk with the Customs Officer. PW-4 in his cross examination, after charge says "the writing of the panchnama was going on for an hour. I was present on Acharya Marg, a road. I was passing by the side of the same building when the Officers called me. It was 2.15 p.m.". Therefore, it does indicate that the entire panchnama was not recorded in his presence. PW-4 says that before writing panchnama he and other panch had no talk with the Customs Officers in respect of showing of the search warrant. PW-4 also says that he did not dictate the contents of panchnama and the Customs Officers wrote the contents on their own. PW-4 says that there was a talk between the Officers with Bafna and Jain in respect of search warrant but PW-4 does not know whether they had any other talk as "we panchas were standing at some distance". PW-4 says the weighment of biscuit was not made in the premises and PW-4 was not in a position to say anything about the total weight of biscuits. The value of the gold was told by the Officers and PW-4 cannot give the particulars of denomination of currency notes recovered by the Officers. PW-4 says he also had no occasion to count the currency notes but the Officers told him about the total amount but did not tell him about the denomination of currency notes. Therefore, the evidence of PW-4 and the contents of panchnama (Exhibit P-2) is unreliable.

20 PW-2 - Rajnarayan Vikramaditya Pathak, who recorded Exhibit P-5 of respondent no.1, states that respondent no.1 was interrogated in Hindi and replies were given by him in Hindi. PW-2 also admits that it was desirable to record statement under Section 108 in the language known to the deponent and in his handwriting. PW-2 also confirms the fact respondent no.1 was able to read and write Hindi but explains that the statement at Exhibit P-5 was written by an Officer as respondent no.1 was found to be slow in writing. There is no record of this fact which shows that an attempt was made by respondent no.1 to write the statement and the attempt was given up for reasons mentioned by PW-2. There is no independent or distinct corroboration to the facts stated in the statement at Exhibit P-5.

21 I have to also note that in the cross examination, PW-4 says that he has met PW-1 earlier and due to the nature of his work, he was required to visit Customs Office again and again. PW-4 also says he did say no initially to PW-1 when he was called to be the panch witness but then he was told by PW-1 that as he was working as Customs Agent he was expected to do the work and so he consented to act as panch witness. This also indicates that PW-4 was a pliable witness.

22 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka*⁶ 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 :

6. (2007) 4 SCC 415

“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 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.)