
(1981) 12 AP CK 0005

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 731 of 1981

Assistant Collector of Customs and Central Excise, Hyderabad	APPELLANT
Vs	
N. Ashok and Others	RESPONDENT

Date of Decision : 30-12-1981

Acts Referred:

Customs Act, 1962 — Section 111, 113, 115(2), 11A, 11B

Citation : (1984) 16 ELT 202

Hon'ble Judges : Chennakesav Reddi, J

Bench : Single Bench

Advocate : K. Subrahmanya Reddy, for Central Government, for the Appellant;
K. Srikrishna and Addl. Public Prosecutor, for the Respondent

Judgement

1. This appeal by the Central Government is preferred against the judgment of acquittal of the accused of the offence punishable u/s 135(1)(b) of the Customs Act, 1962 (hereinafter referred to as the "Act") by the Special Judge for Economic Offences in C.C. No. 1 of 1980.

2. The case for the prosecution is : On 13-3-1974 the Superintendent of Central Excise and Customs accompanied by his Inspectors searched the house No. 5-8-505/A/2 at Chirag Ali Lane, Hyderabad, belonging to accused 1 and 2 in the presence of mediators. The first accused is the son of the second accused. In the course of the search 56 bottles of liquor in the living room of the ground floor which was in the exclusive occupation of the first accused and 12 bottles of liquor in the dicky of the car bearing registration No. APG 4334 belonging to the second accused were found secreted. Entertaining a reasonable belief that the said bottles (M.Os. 1 to 68) are liquor of foreign origin and smuggled and, therefore, liable for confiscation, they were seized by the officers along with the car under a panchanama, Ex. P 6. The bottles were valued at Rs. 13,600/-. The accused failed to produce any documentary evidence to show that the seized bottles were not smuggled goods. The first accused gave a statement, Ex. P 7 admitting that the seized foreign whisky bottles belonged to him. The second accused also gave

a voluntary statement, Ex. P 11, in the presence of the mediators admitting the seizure of 68 bottles of foreign whisky in his house and the dicky of his car and denying any knowledge of the bottles found in the house or dicky of the car. A sample of the liquor seized from the house of the accused was sent to the Chemical Examiner of the Government for Excise, Andhra Pradesh (P.W. 4), for examination and opinion. The Chemical Examiner after examining the samples expressed his opinion that the whisky seized was foreign in origin. The Assistant Collector of Customs and Central Excise, Hyderabad, confiscated the 68 bottles of whisky and the car under Secs. 111(b) and 115(2) of the Act respectively. The second accused was, however, given an option to get the car released on payment of fine of Rs. 3,000/- and penalty of Rs. 2,000. The Collector of Excise then issued sanction to prosecute the accused. Thereafter, the complaint was filed against the accused before the IV Metropolitan Magistrate u/s 135(1)(b) of the Act.

3. On behalf of the prosecution, P.Ws. 1 to 4 were examined. The accused while admitting the search of their house denied seizure of any incriminating material, namely, foreign whisky bottles. The learned Special Judge for Economic Offences, on a consideration of the evidence in the case, acquitted the accused on the ground that the evidence was wholly insufficient to prove that the whisky seized was smuggled whisky of foreign origin. Aggrieved against the order of acquittal, the Central Government has preferred this appeal.

4. The learned Standing Counsel for the Central Government submits that the appearance of the goods, the inscription and the writings thereon and the inability of the accused to explain the possession of a large number of whisky bottles are sufficient to raise a reasonable belief u/s 123 of the Act. He contends that the accused failed to rebut the presumption u/s 123 and their acquittal was, therefore, wholly unjust and unsustainable.

5. The question that arises, therefore, is what is the width of the scope and the depth of the content of the expression "seized under this Act in the reasonable belief that they are smuggled goods" employed in Section 123(1) of the Act.

6. Before proceeding to consider the scope and content of Section 123(1) of the Act, it would be useful to look at the material provisions of the Act. Section 123 reads thus :

"123. Burden of proof in certain cases. - Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may be notification in the Official Gazette specify."

Then the relevant section is 2(39), which reads thus :

"2(39) "smuggling" in relating to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113."

Section 111 deals with the confiscation of improperly imported goods. For our purpose, sub-section (p) of Section 111 is relevant. It reads thus :

"111. The following goods brought from a place outside India shall be liable to confiscation :

* * * * (p) any notified goods in relation to which any provisions of Chapter IV-A or of any rule made under this Act for carrying out the purpose of that Chapter have been contravened."

7. Chapter-IV-A provides for the detection of illegally imported goods and prevention of the disposal thereof. Section 11-A(d) defines "notified goods" to mean goods specified in the notification issued u/s 11-B. Section 11-B empowers the Central Government to notify goods to which these provisions will apply when it is satisfied that the magnitude of smuggling in such goods is such that it is expedient to take special measures. Section 11-D deals with precautions to be taken by persons acquiring notified goods. Section 11-D says :

"11-D. Precautions to be taken by persons acquiring notified goods :- No person shall acquire (except by gift or succession from any other individual in India), after the notified date, any notified goods, -

(i) unless goods are accompanied by -

(a) the voucher referred to in Section 11-E or the memorandum referred to in sub-section (2) of section 11-G, as the case may be, or

(b) in the case of a person who has himself imported any goods, any evidence showing clearance of such goods by the customs authorities; and

(ii) unless he has taken, before acquiring such goods from a person other than a dealer having a fixed place of business such reasonable steps may be specified by rules made in this behalf, to ensure that the goods so acquired by him are not goods which have been illegally imported."

8. Therefore, Section 11-D provides that no person shall acquire, except by gift or succession, any notified goods unless they are accompanied by a sale, voucher or evidence of clearance through the customs. Further where the purchase is made from a person not having a fixed place of business the

purchaser is also required to take such reasonable steps as may be specified by rules to ensure that the goods acquired by him are not smuggled goods. The Central Government issued a notification notifying alcoholic liquors as notified goods u/s 11-B of the Act by virtue of a notification dated 3-1-1969. Another notification u/s 123(2) of the Act was also issued on 10-10-1974 by the Central Government. By the said notification, whisky was also added to sub-section (2) of Section 123 of the Act. Ex. P 3 is the copy of the notification.

8A. The only other relevant section is S. 135. It reads :

"135. Evasion of duty or prohibitions :

(i) without any prejudice to any action that may be taken under this Act, if any person -

(a)

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111 he shall be punishable -

(i) in the case of an offence relating to any of the goods to which Section 123 applies and market price of which exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine : provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine, or with both."

The question of dealing adequately and swiftly with the economic offences was considered by the Law Commission of India in its Forty-Seventh Report.

Dealing with the trial and punishment, the Law Commission observed in paragraph 3.13 :

"3.13. These offences, affecting as they do the health and wealth of the entire community, require to be put down with a heavy hand at a time when the country has embarked upon a gigantic process of social and economic planning. With its vastness in size, its magnitude of problems and its long history of poverty and subjugations, our Welfare State needs weapons of attack on poverty, ill-nourishment, and exploitation that are sharp and effective in contrast with the weapons intended to repress other evils. The legislative armoury for fighting socio-economic offences to a developing society could be treated on a level different from ordinary crimes. In a sense, anti-social activities in the nature of deliberate and persistent violations of economic laws could be described as extrahazardous activities, and it is in this light that we approach the problem."

9. It was also observed by the Law Commission that "since the casualty is the

nation's welfare, it is these offences which really deserve the name of "public welfare" offence. The Commission recommended for the Constitution of Special Courts for the trial of these offences presided over by a District Judge of a senior cadre. The Commission further recommend that "only a particular Judge in an area may try these offences, so that he may develop the expertise necessary and also acquire familiarity with the special features of these offences." It was observed :

"The administration and enforcement of these offences requires much more than a knowledge of general criminal law and procedure. It pre-supposes an acquaintance with some of the nuisance, a grasp in depth of the undercurrents of the world of racketeers and other special features of organised crime."

Appeals, in the opinion of the Commission, should only lie to the High Court to secure speedy disposal of the appeals as well as to ensure uniformity in the interpretation of the relevant laws.

10. Therefore, it is necessary to bear in mind, while dealing with the economic offences or "public welfare offences", that they ought to be treated on a level different from ordinary crimes. It is the nation's welfare and economic progress that is the casualty in such crimes. So bearing these things in mind, the legislative armoury has furnished special weapons, such as Section 123 and 11-D of the Act, for fighting these welfare offences which affect the health and wealth of the entire community. It is in this light that the Court should approach in evaluating the evidence in cases relation to Public Welfare Offences. In pursuance of the recommendations of the Law Commission for the establishment of the Special Courts for the effective and speedy prosecution of economic offences, a Special Judge's Court at Hyderabad presided over by an Officer in the cadre of District and Sessions Judge for the trial of economic offences under the specified Central Act arising throughout the State of Andhra Pradesh, was established by the State Government on the recommendation of the High Court. With this background, let me proceed to consider the scope of Section 123 of the Act.

11. There is no dispute that in view of the notification, Exz. P 2 and P 3, alcoholic liquor is one of the notified goods u/s 11-B of the Act and the provisions of Section 123 relating to burden of proof of goods seized under the Act in the reasonable belief that they are smuggled goods, are made applicable to whisky also by Ex. P 2. Therefore, whisky of foreign origin is liable to confiscation u/s 111(p) of the Act.

12. The question then that arises is whether the seizure of M.O.s 1 to 68 made by P.W. 2 was in the reasonable belief that M.O.s. 1 to 68 were smuggled goods. "Belief" is, after all, a condition of mind which can be expressed either through words or through a course of conduct. Belief is purely a subjective matter and it is for the believer himself to express that he entertained that belief. But the question is whether the belief entertained is the reasonable belief ? No doubt the

content and import of the section are very wide. A very heavy and onerous duty is cast on an innocent possessor, who for aught one knows, may have bona fide paid adequate consideration for the purchase of the articles without knowing that the same has been smuggled. The only pre-requisite for the application of the section is the subjectivity of the customs officer in having a reasonable belief that the goods are smuggled. Therefore, Section 11-D provides for precautionary measures to be taken by persons before acquiring notified goods. The belief, however, must rest on some information which is not only relevant, but which is found to be more than a mere gossip or speculation. The formation of the belief should not be based on a mere caprice, speculation or whim. The use of the adjective "reasonable" with reference to the belief that the goods are smuggled, is indicative of the limitation of an otherwise arbitrary power. Therefore, what the Court should scrutinise is only to see whether the belief, on which the concerned officer has acted, was a belief, which could have been entertained by a reasonable and a prudent man. The section was enacted to overrule the normal rule of jurisprudence and it ought not to be construed so as to blunt the sharp edges of the special weapons.

13. The Supreme Court in *Babulal Amthalal Mehta Vs. The Collector of Customs, Calcutta*, while dealing with the scheme and object of Section 178-A of the Customs Act, 1878 which corresponds to Section 123 of the Customs Act, 1962, observed :

"The only pre-requisite for the application of the section is the subjectivity of the customs officer in having a reasonable belief that the goods are smuggled."

Dealing with the requirement of the words "reason to believe" employed in Section 35(1) of the Advocate's Act, 1961, the Supreme Court in *The Bar Council of Maharashtra Vs. M.V. Dabholkar and Others*, observed :

"The requirement of "reason to believe" cannot be converted into a formalised procedural road block, it being essentially a barrier against frivolous enquiries. It is implicit in the resolution of the Bar Council, when it says that it has considered the complaint and decided to refer the matter to the disciplinary committee, that it had reason to believe, as prescribed by the Statute."

Therefore, it is necessary to examine whether the circumstances established in this case are sufficient to raise the reasonable belief u/s 123 of the Act that the goods seized are smuggled goods.

14. To prove that it is so, the prosecution relied on the evidence of P.W. 2, the Superintendent of Customs and Central Excise (Preventive) Hyderabad, P.W. 4 the Chemical Examiner for the State Excise Department, and Exs. P. 9 and P. 11, the confessional statements of A 1 and A 2 respectively recorded u/s 107 of the Act. P.W. 2 deposed that on 13-3-1974 he along with his Inspectors searched the residence of A 2 after serving a search warrant on A-2, the owner of the house. During the search the witness found 56 bottles of Scotch, Whisky in five boxes in the living room on the eastern side of the building and 12 bottles from the dicky

of the car which was parked in the garrage. In all he seized 68 bottles of Scotch Whisky. He found the seals on the bottles intact. When he asked the accused to produce the bills or vouchers to show the legal possession, they stated that they had no documents in support of their legal possession. Therefore, under the panchanama, Ex. P 6, he seized 68 bottles under the reasonable belief that they were smuggled to India. He sent later on, one of the sample bottles to the Chemical Examiner for analysis. P.W. 4, the Chemical Examiner received M.O. 68 whisky bottles, under Ex. P 4 on 19-3-1977, which was labelled as "VAT 68 manufactured by M/s. V. M. Sanderson & Son Ltd., South Philips Ferry Scotland". After examination, he found the sample containing 24.2. U.P. Alcohol colouring matter including organic colouring matter of vegetable origin and the distinctive flavour and bouquet of Scotch Whisky. He opined that it was whisky of foreign origin. The witness further stated in his evidence that the distinction between the foreign whisky and Indian whisky depends upon flavour and tests which are acquired due to storage for a minimum period of two years in charred wooden barrels. According to the witness, due to its storage for two years, the original organic colouring matter gets extracted into the liquor stored which gives the amber colour. The foreign liquor, according to the witness, is free from the added colouring matter, like ceremal. As the liquor under examination was found to contain the organic colouring matter of vegetable origin and due to the absence of the added colour like ceremal and also due to its distinctive colour and bouquet, he opined that it was foreign origin. It is clear from the evidence of P.Ws. 2 and 4 that the following circumstances existed at the time of seizure of whisky bottles by P.W. 2 :

- (i) the whisky bottles had metallic cap seals;
- (ii) they had labels with the inscription that they are Scotch Whisky; and
- (iii) the accused, when questioned whether there were any bills or vouchers in proof of their legal possession, stated that they had no documents to that effect."

It is clear from the panchanama, Ex. P. 6, that A-1 informed P.W. 2 that he purchased the said goods from some unknown persons in piecemeal to make out some profits and the accused were found in possession of large quantity of 66 bottles of whisky. The question is whether these circumstances are sufficient to raise a reasonable belief that the goods are smuggled goods. In my opinion, the aforesaid circumstances are sufficient to raise a reasonable belief that the goods seized the smuggled goods of foreign origin. The Supreme Court in *Balumal Jamnadas Batra Vs. State of Maharashtra*, while dealing with the presumption u/s 123 of the Act, observed :

"The very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into India very recently from another country. The inscriptions on them and writing on the boxes were parts of the state in which the goods in unopened boxes were found from which inferences about their origin and recent import could arise. The conduct of

the accused, including his untruthful denial of their possession, indicated consciousness of their smuggled character of mens rea."

15. In State of Maharashtra Vs. Natwarlal Damodardas Soni, the Supreme Court held that the following circumstances, namely, (a) the gold biscuits in question bore markings which proclaimed their foreign origin; (b) this gold was of 24 carat purity which was not available in India at the material time; (c) these gold biscuits were found concealed and stitched in the folds of a jacket specially prepared for this purpose; (d) the gold was in the shape of gold biscuits and was of huge value, which at the then prevailing market rate, was Rs. 1,85,000 and (e) after the seizure of this gold the accused absconded and continued to be a fugitive from justice till March 14, 1962, irresistibly lead to the conclusion that the gold in question, is a smuggled one. In this case, as in the case referred above, the foreign markings and the seals on the caps of the bottles proclaimed their foreign origin. The accused failed to produce any evidence as to their lawful possession. A large quantity of 68 bottles was seized from the possession of the accused. Therefore, P.W. 2 rightly entertained a reasonable belief that the whisky bottles were of foreign origin. The bottles were also confiscated to the Government u/s 111 of the Act. The accused produced no evidence to prove that they are not smuggled goods. On the other hand he admitted in the statement Ex. P 9, that he purchased the whisky bottles from some unknown persons in Hyderabad who used to come to him. He stated :

"I purchased now and then in piece meal these 56 and 12 bottles of Scotch Whisky from some unknown persons in Hyderabad who used to come to me. There was a goods market and profit in the resale of these bottles so as to eke my livelihood."

No. doubt that the has resiled from his earlier statement, Ex. P. 9 and stated that he made the statement under pressure. Thus the accused failed to discharge the burden of proof cast u/s 123 of the Act.

16. The learned counsel, however, submits that the Notification u/s 123(2) of the Act including whisky was issued on 10-10-1974 while the seizure was on 13-3-1974 and that, therefore the goods in this case were not notified goods by the date of the seizure. The learned counsel relied upon a decision of the Supreme Court in Harla Vs. The State of Rajasthan, . The Supreme Court in that case observed :

"Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is."

Therefore, the Supreme Court was there concerned with the question as to when a law becomes operative. In this case, the notification u/s 123(2) of the Act merely amended the earlier Notification No. 52 (Customs), dated 27th March, 1968, and added three other items including whisky.

17. The provisions of Section 123 are procedural in nature. It relates to burden of proof and raises a presumption in respect of goods mentioned in the section and further the object of the Act, namely, the prevention of smuggling. There is abundance of authority for the proposition that procedural provisions of law can be retrospective. No person has vested right in any course of procedure. He has only the right of prosecution of defence in the manner prescribed for the time being. If there is any change in the mode of procedure, he has no other remedy than to proceed according to the altered procedure. In other words, a change in the law of procedure operates retrospectively and unlike substantive law which is only prospective. (Vide : Colonial Sugar Refinery Co. Ltd. v. Irving (1905) A.C. 369; Anant Gopal Sheorey Vs. The State of Bombay, ; and Narhari Shivram Shet Narvekar Vs. Pannalal Umediram,).

This Court is Rasheed Abdullah v. State of A.P. (6) (1978) II An. W.R. 469 observed :

"Whether the goods seized are smuggled goods or not will have to be decided later in an enquiry that will have to be conducted in accordance with the procedure laid down by the Customs Act. The decision in this case has been rendered by the order of the authorities on 25th June, 1975 when confiscation was ordered. Therefore, the date on which the proceedings relating to confiscation and imposing of penalty have commences appears to be crucial date for fixing the burden of proof."

In that case, the search of the house and seizure of the whisky bottle took place on 27th September, 1974, and the notification u/s 123(2) specifying that section 123 applies to liquors who was made on 10th October, 1974 and the order of confiscation was, however, made on 25th June, 1975. In this case also the order of confiscation was undisputedly made after the notification u/s 123(2) dated 10th October, 1974. Therefore, the contention that the provisions of Section 123(2) are inapplicable to the facts of the case must be rejected.

18. Lastly, the learned counsel submits that the search was made by an unauthorised person, viz., P.W. 2, and, therefore, the search and seizure made by P.W. 2 were illegal. But P.W. 2 was never cross-examined whether he was authorised to search when he was in the witness box. P.W. 2 stated in his evidence :

"On 13-3-1974 at about 16 hours I went to their residence at Chirag Ali Lane with a search warrant. The search warrant was in the name of A. 2. I served it on him."

Thus the accused was served with a search warrant and he was aware, when the search and seizure took place, as to the person that was authorised to search. No objection to the search and seizure was taken and no evidence was adduced during the course of the trial and, therefore, he cannot be permitted to contend at this stage that the search and seizure being made by an unauthorised person were illegal. u/s 465(2) Cr. P.C., the Court shall have regard to the fact whether

the objection or any irregularity in any proceeding was raised at the earliest stage in the proceeding"s in determining whether the irregularity in the proceedings has occasioned any failure of justice. In my opinion, no failure of justice has occasioned even if there was irregularity in the search made by P.W. 2. Even assuming that the search was by an unauthorised person, the seizure under the panchanama, Ex. P. 6, cannot be inadmissible in view of the evidence of P.W. 3 coupled with the admission of A-1 under Ex. P. 9. P.W. 3 who is the panch witness, has spoken to the seizure of the 68 bottles of foreign liquor from the room of A-1 and from the dicky of the car. He has also stated in his evidence that A-1 had made a confessional statement in his presence that he had purchased the foreign whisky bottles from one person and the said person had not passed on any receipt. Therefore, there is no reason why the evidence of P.W. 3 should be distrusted.

19. In *Assistant Collector of Customs v. P. R. Sait* (7) 1972 CrL. L.J. 135, K. Sadasivan, J., held that the search by a person not authorised u/s 105 of the Act was illegal. But the Supreme Court in *State of Maharashtra Vs. Natwarlal Damodardas Soni*, observed :

"Assuming argued, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Asst. Collector of Customs."

In so holding, the Supreme Court relied upon two of its earlier decisions. In *Radhakishan Vs. State of U.P.*, , Mudhalkar, J., speaking for the Court observed :

"So far as the alleged illegality of the search mis-concerned, it is sufficient to say that, even assuming that the search was illegal the seizure of the articles, is not vitiated. It may be that where the provisions of Ss. 103 and 165, Code of Criminal Procedure, are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues."

In that case, the appellant was a postman and was tried for an offence u/s 52 of the Post Offices Act on the allegation that he either stole or secreted five registered letters. He was convicted of an offence u/s 52 of the Post Offices Act, for secreting postal articles. He and his father were living in the same house. Certain undelivered postal articles were recovered from an almirah in the house, the key of which was produced by the father. One of the contentions raised on behalf of the appellant was that the search and seizure was illegal inasmuch as it was in contravention of the provisions of Ss. 103 and 165 of the Code of Criminal Procedure. The contention was rejected by the Supreme Court. Again in *Shyam Lal Sharma, etc. Vs. State of Madhya Pradesh*, . Jaganmohan Reddy, J., delivering the opinion of the Bench, held that even if the search is illegal being in

contravention with the requirements of Section 165, Criminal Procedure Code, 1898, that provision ceases to have any application to the subsequent steps in the investigation.

20. The accused had a full and fair trial. They never raised at any stage any objection to the search and seizure. On the other hand they admitted before P.W. 3 not only the seizure but also stated that the whisky seized was foreign whisky. The burden was on the accused, who seeks that the trustworthy evidence of the prosecution should be ignored, to show that what was seized was not foreign whisky. I have, therefore, no hesitation in rejecting the contention that the seizure was illegal on the evidence on record.

21. There is absolutely no evidence on record to show that A-2, the father of A-1, had anything to do with the possession of foreign whisky bottles. It was A-1 that volunteered to show the whisky bottles in the dicky of the car. A-1 admitted in his statement, Ex. P 9, that he never told his father about his business transaction - purchase and sale of foreign whisky bottles and that he had no interest in the matter. According to him, he purchased the whisky bottles without the knowledge of his father. In the circumstances, the knowledge of the possession of foreign whisky bottles can be attributed to A-2. Therefore, the acquittal of A-2 shall stand. In so far as A-1 is concerned, he knew that the goods are smuggled goods and purchased them from a stranger to make profit. The value of goods is estimated to at Rs. 13,600 so he is guilty of an offence u/s 135(1)(b)(ii) of the Act.

22. The acquittal of A-1 is set aside. A-1 is convicted u/s 135(1)(b)(iii) of the Customs Act, and is sentenced to pay a fine of Rs. 1,000 (Rupees one thousand) and in default to suffer rigorous imprisonment for six months.

23. The appeal is partly allowed.