

(1988) 08 CAL CK 0006
In the Calcutta High Court
Case No : Criminal Appeal No. 97 of 1980

Assistant Collector of Customs

APPELLANT

Vs

Rasiklal Chimanlal Shah

RESPONDENT

Date of Decision : 11-08-1988

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 165
Customs Act, 1962 — Section 107, 108, 123, 123(1), 123(2)
Sea Customs Act, 1878 — Section 178A

Citation : (1995) 77 ELT 835

Hon'ble Judges : Jitender Nath Chaudhuri, J; Amal Kumar Chatterjee, J

Bench : Division Bench

Advocate : Anjan Mukherjee and Purnima Das, for the Appellant; Dilip Dutta and Susanta Banerjee, for the Respondent

Judgement

Amal Kumar Chatterjee, J.—In this appeal by an Assistant Collector of Customs by special leave against an appellate order of acquittal of the respondent, who was convicted by a learned Magistrate u/s 135(1)(b)(ii) of the Customs Act, the relevant facts as alleged by the prosecution are as follows.

2. On the 18th February, 1964 at 4.55 p.m., the respondent arrived at Dum Dum Airport by air from Imphal and he was led to the customs enclosure by a Preventive Officer, Calcutta Customs, L.M. Mazumdar (P.W. 1) where he was asked to make a baggage declaration in the prescribed form. He did so and on search of his person by the said preventive officer in presence of two witnesses including P.K. Mukherjee (P.W. 27), 11 pieces of diamonds and some other articles were found which were seized under a search list Ext. 2 as it was reasonably believed to be smuggled goods. His statement Ext. 3 u/s 107 of the Customs Act was recorded and he was taken to the Customs House where M.L. Wadhawan (PW 19) who was then Superintendent, Preventive Services, further examined him and recorded a statement, Ext. 80. He made a further statement Ext. 52 on the following day i.e. to say 19th February, 1964. On the same date

L.N. Majumdar (PW 1) received an authorisation, Ext. 4 from M.L. Wadhawan (P.W. 19) to search the residence of the respondent at 285-E, Bowbazar Street and 7 pieces of diamonds were recovered and seized under search list Ext. 8 as these were also reasonably believed to be smuggled goods. On the same date, another preventive officer, Calcutta Customs, Bikash Roy (P.W. 2) on the basis of another authorisation Ext. 20, from the said Superintendent, Preventive Services searched a locker bearing No. 235 of Indian Overseas Bank Ltd. standing in the name of the respondent and his son Surindra Kumar Shah and 5 pieces of diamonds were found and seized under a search list, Ext. 21 as these were also reasonably believed to be smuggled goods. Ultimately a complaint was filed in the court of a competent Magistrate against the respondent and others. The respondent did not deny the recovery of diamonds from his person at the Airport and from his residence and locker but took the plea that these were not smuggled goods but he inherited the same from his father who was a jeweller. His further defence was that he had taken several pieces of diamonds to Imphal for disposal but as the broker could not be found, he came back to Calcutta with the same.

3. The learned Magistrate on consideration of evidence adduced before him has found the respondent guilty of the offence punishable u/s 135(1)(b)(ii) of the Customs Act and sentenced him to suffer rigorous imprisonment for one year and also to pay a fine of Rs. 5,000/- in default to suffer rigorous imprisonment for six months more.

4. On appeal the learned Judge held that there was no evidence that there was any reasonable belief that the diamonds recovered from the respondent at the Airport were smuggled goods and as such the rule of evidence as contained in Section 123 of the Customs Act was not attracted and the respondent could not be called upon to prove that the goods were not smuggled. Regarding the recovery of diamonds from the residence and the locker, the learned Judge took the view that the evidence on record fell short of proving that the respondent was in possession of the same. Accordingly it was found that none of the three counts of charge could be substantiated by the prosecution and the respondent was acquitted.

5. In this case undoubtedly there is no evidence, direct or circumstantial, to prove that the diamonds in question were smuggled into the country but since this is an article to which the provisions of Section 123 of the Customs Act apply, the prosecution wanted to succeed by proving that the diamonds were recovered from the possession of the respondent in the reasonable belief that those were smuggled goods and thereby throw the burden of proving the contrary upon the respondent in accordance with the provisions of Section 123 of the Customs Act.

6. So far as the recovery of diamonds on the 18th February, 1964 at the Airport is concerned, it may be noted that the seizing officer L.N. Majumdar (P.W. 1) did not depose expressly, that he had a reasonable belief that the diamonds were smuggled though he made an endorsement to this effect in the search list, Ext.

2. The learned Judge was of the opinion that a statement in the search list could not be regarded as substantive evidence but could at best corroborate the testimony of the seizing officer in court. This is no doubt the correct position of law but even though the seizing officer may not say in his deposition in so many words that he had a reasonable belief that the goods seized by him were smuggled goods, still his evidence read in its entirety may support an inference that he did entertain a reasonable belief that the goods were smuggled into the country and in such situation the endorsement made by him in the search list would of course corroborate the inference from his testimony. The evidence of L.N. Majumdar (P.W. 1) discloses several facts which unmistakably suggest that he had a reasonable belief that the diamonds were smuggled goods. In the first place, it is found that although the respondent correctly declared the diamonds when he was asked to fill in the baggage declaration Form Ext. 1, still the said officer proceeded to search the person of the respondent, suggesting thereby that he was not satisfied with the truth of the declaration made by the respondent regarding acquisition of the offending goods. It is further in his evidence that the respondent had a gold watch strap on his hand which, however, was not seized though some other gold ornaments which were found in the person of the respondent were seized. This is also suggestive of the reasonable belief of seizing officer regarding the contraband nature of the diamonds. It is true that his evidence was that the gold watch strap was not seized under orders of the Deputy Collector of Customs but even then if such an order is communicated to a seizing officer, then certainly he will at once have a reasonable belief that the goods which he was asked to seize were smuggled while others were not so. Further it is in the evidence of the same officer L.N. Majumdar (P.W. 1) that he was asked by the Superintendent of the Preventive Services M.L. Wadhawan (P.W. 19) to keep a watch on the arrival of the respondent from Imphal. All these evidence considered together can lead to only one conclusion, namely, that the serving officer L.N. Majumdar (P.W. 1) had a reasonable belief that the goods seized by him were smuggled goods which is corroborated by the endorsement made to that effect in the search list, Ext. 2.

7. Now, even assuming that the seizing officer L.N. Majumdar (P.W. 1) did not himself have any reasonable belief that the diamonds were smuggled goods, a question arises whether the law is that it must be the seizing officer himself and not any of his superior officer who must entertain such belief. A plain perusal of Section 123 of the Customs Act would show that it contains no indication whatsoever that the seizing officer himself must entertain the reasonable belief. However, the learned advocate for the respondent has cited and the learned lower appellate court has also referred to the decision of Madras High Court in *Nathella Sampathu Chetty and Another Vs. Collector of Customs, Madras*, and another decision of Bombay High Court in *M.G. Abrol and Another Vs. Amichand Vallamji and Others*, , in a bid to support his contention that it must be the seizing officer himself who should entertain a reasonable belief that the goods were smuggled. In both these cases Their Lordships were considering the

provisions of Section 178A of Sea Customs Act, 1878 which are comparable to that of Section 123 of the Customs Act, 1962. It is no doubt true that in these cases there are some observations tending to show that the seizing officer himself should entertain the reasonable belief but it is abundantly clear that the real question for adjudication before their Lordships in both the cases was the point of time when the reasonable belief should have been formed to attract the provisions of Section 178A of the Sea Customs Act, 1878. Their Lordships held that even though the section did not prescribe any particular time at which the reasonable belief should exist at the time of seizure. Therefore, these decisions are by no means any authority for the proposition that it must be the seizing officer himself and not his superior officer who should entertain the reasonable belief contemplated by Section 178A of the Sea Customs Act, 1878, or for the matter of that by Section 123 of the Customs Act, 1962. The learned advocate for the respondent on being asked by us has not been able to show any appropriate authority on this point either by this court or by the Supreme Court. He has, however, stated that the provision of Section 165 Code of Criminal Procedure which empowers a police officer to search for anything necessary for the purpose of an investigation has been interpreted by this court (reference not supplied) to mean that the seizing officer himself must have reasonable ground for believing that the goods are necessary for the purpose of an investigation. This analogy does not apply to Section 123 of the Customs Act because the language of the two sections is materially different. Section 165, Cr. P.C. specifically provides that whenever a police officer has reasonable grounds for believing that anything necessary for the purposes of any investigation may be found in any place etc., such officer may search or cause search to be made. On the other hand, Section 123 of the Customs Act is couched in wider terms and merely provides that whenever goods to which the section applies, are seized in the reasonable belief that they are smuggled goods, the burden of proving otherwise shall be upon the person from whose possession the seizure is made and in any other case on the person who claims to be the owner of the seized goods. The section does not provide, either expressly or even by implication, that the seizing officer himself must entertain the reasonable belief and in the circumstances the section cannot be so interpreted save by importing words into it. When the legislature in its wisdom has not put any such restriction, there is absolutely no reason why it should be held that it is the reasonable belief of the seizing officer alone which is necessary to attract the provisions of Section 123 of the Customs Act.

8. For reasons stated above it must be held that requirement of Section 123 of the Customs Act, 1962 regarding existence of reasonable belief will be quite satisfied not only if the seizing officer himself but even if any of the superior officers entertain such belief but in any case at or before the actual seizure is made. Now turning to the evidence of M.L. Wadhawan (P.W. 19) it appears that it has been elicited in his cross-examination that before he deputed an officer for keeping watch at Dum Dum, he had the impression that the respondent was a

smuggler on the basis of information received by him and he wanted to detect and prosecute him. It is also in his evidence that even for sometime before the seizure they were looking for the respondent. Such evidence can only fairly suggest that this witness no doubt had a belief that the respondent was in possession of smuggled goods and accordingly directed one of the subordinate staff L.N. Majumdar (P.W. 1) to keep a watch who actually seized the offending diamonds. It has not been argued on behalf of the appellant either in this court or any of the courts below that even though M.L. Wadhawan (P.W. 19) might have entertained a belief, it was not a reasonable one so as to attract the provisions of Section 123 of the Customs Act, 1962. Indeed the witness was not also cross-examined on this point nor any suggestion was given to the effect that the belief entertained by him was not reasonable. Therefore, there is no doubt that at least M.L. Wadhawan (P.W. 19) had reasonably believed that the respondent was in possession of smuggled goods even before its actual seizure at the Airport on 18-12-1964. Thus it is found that eleven pieces of diamond were recovered from the possession of the respondent at Dum Dum Airport on the 18th February, 1964 in the reasonable belief that these were smuggled.

9. There was no controversy regarding the prosecution evidence about recovery of seven pieces of diamonds from the residence of the respondent and five pieces of diamonds from the locker referred to previously, both on the 19th February, 1964. The respondent, however, was acquitted of charge on these two counts by the learned lower appellate court as it was not satisfied that the respondent even though he claimed to be the owner of the diamonds was not proved to be in possession of the same. We are unable to appreciate the view taken by the learned Judge. If a person claims to be the owner of certain things it must follow that he is also in possession of it, at least for the purpose of Section 123 of the Customs Act, 1962 because otherwise a person owning smuggled goods will be enabled to put it in a locker or in a house owned by him jointly with another and thereby avoid the law with impunity which is an absurd situation. Of course such a question can no longer arise because Section 123 of the Customs Act, 1962, was suitably amended in 1973 expressly providing that if any person claims to be the owner of goods seized in the reasonable belief that they were smuggled, the burden of proving the contrary shall be upon such owner. The learned lower appellate court has noted the amendment but it was of the opinion that since the occurrence took place well before such amendment, it could not be applied to the facts of the instant case. Here too the learned Judge was clearly erroneous because Section 123 relates to procedural matter, or adjective law as it is said, and any amendment thereto must be given retrospective effect unless otherwise is expressly provided. Reference may be made in this connection with profit to the decision of the Supreme Court, in the case of *Balumal Jamnadas Batra Vs. State of Maharashtra*, . In that case a large number of Cigarette lighters and flints believed to be smuggled goods were seized on the 21st April, 1967 and a notification u/s 123(2) of the Customs Act, 1962, was made on the 26th August, 1967 under which the provisions of Section 123 of the Customs Act were made

applicable to such goods. In these circumstances it was held that the provision of Section 123(1) of the Customs Act only laid down a procedural rule and they could be applied when the case came up for trial and it was immaterial that the recovery was made before the notification. In the case on hand the trial before the learned Magistrate commenced in March, 1966 and concluded on the 7th September, 1979. Therefore, the amendment of Section 123(1) having been made during the trial, it can certainly be applied and since the respondent claimed to be owner of the diamonds recovered on the 19th February, 1964, the prosecution can no doubt take advantage of the statutory presumption, provided of course that the goods were reasonably believed to be smuggled at the time of seizure.

10. Now, therefore, what calls for adjudication is whether the diamonds seized from the residence and the locker on the 19th February, 1964 were reasonably believed to be smuggled goods at the time of seizure and if this question is answered in the affirmative, then the onus will lie upon respondent to prove the contrary because he has admitted his ownership of these diamonds. It has already been noticed that the residence and the locker were searched by L.N. Majumdar (P.W. 1) and Bikash Roy (P.W. 2) respectively under authorisations Exhibits 4 and 20 given by M.L. Wadhawan (P.W. 19) although neither L.N. Majumdar (P.W. 1) nor Bikash Roy (P.W. 2) has deposed expressly that they had reasonably believed that the diamonds seized by them were smuggled goods. Still if it is found that their superior officer M.L. Wadhawan (P.W. 19) had such belief then it would be held that the goods were seized in the reasonable belief that those were smuggled goods and the presumption embodied in Section 123(1) of the Customs Act would operate. The testimony of M.L. Wadhawan (P.W. 19) that he had the impression that the respondent was a smuggler and that he wanted to detect and prosecute him has already been pointed out. Reference may also be made in this connection to Exhibit 80, one of the statements of the respondent recorded u/s 108 of the Customs Act on the 18th February, 1969, that is to say, on the date preceding seizure of diamonds from the residence and the locker of the respondent. In this statement made before M.L. Wadhawan (PW 19) the respondent made an endeavour to explain acquisition of diamonds by him by stating that he inherited several pieces of diamonds from his father and also had with him two pieces of diamonds belonging to his wife. This statement also discloses that the respondent had admitted that for the time being he was unable to account for all the pieces of diamonds. He has further stated that he took the diamonds to Imphal to show to a broker named Jamuna Das for the purpose of disposal who however could not be found in spite of prior intimation and he returned to Calcutta with the same. The learned trying Magistrate has rightly observed that it was unbelievable that the respondent would carry so many precious stones for examination by a broker with unknown residential address and who did not meet him in spite of prior intimation. The same grounds must have weighed with M.L. Wadhawan (P.W. 19) to form a reasonable belief on the 18th February, 1964 that the diamonds were smuggled goods. In this state

of evidence, it can be safely held that this officer had enough reason to believe that smuggled diamonds were in possession of the respondent and since he was in charge of detection and prosecution of customs cases, he gave authorisations Ext. 4 and Ext. 20, to L.N. Majumdar (P.W. 1) and Bikash Roy (P.W. 2) respectively for search of the residence and the locker of the respondent. Therefore, it is now for the respondent to prove that the diamonds recovered from him whether from his person at the Airport or from his residence and locker were not smuggled goods.

11. The learned Advocate for the respondent has then raised a two dimensional argument. It was first contended that even before taking recourse to the statutory presumption u/s 123(1) of the Customs Act, it was incumbent upon the prosecution to discharge an initial onus, which was always upon it, to prove that the diamonds were smuggled goods. The other dimension is that there is enough material on record to show that the respondent had succeeded in proving that the diamonds were not smuggled goods. Regarding the first contention there is no merit whatsoever for the simple reason that a rule of evidence in the shape of a presumption is enacted only with the view to relieve a person from proving what is to be presumed and if in spite of such a rule, an initial onus still remains, it would amount to a negation of the rule itself. That this is the correct view will appear from the decision of the Supreme Court in *Kewal Krishan v. State of Punjab* AIR 1967 SC 737, where a similar contention was raised and rejected by Their Lordships in a case under Sea Customs Act, Section 178A of which laid down a rule of evidence comparable to that contained in Section 123(1) of the Customs Act. Their Lordships had, inter alia, observed that when goods were seized in the reasonable belief that they were smuggled goods, then the burden of proving that they were not smuggled goods was on the person from whose possession the goods were seized, and not on the prosecution, to show that the goods were not of Indian origin. Thus *Kewal Krishan's* case (supra) is a complete answer to the contention raised on behalf of the respondent that in spite of the presumption u/s 123(1) of the Customs Act, the prosecution had an initial onus to prove that the diamonds in question were smuggled goods.

12. Regarding the argument that the respondent had successfully rebutted the presumption, suffice it to say that there is nothing on the record save a bald assertion that the diamonds were inherited by him from his father who was a jeweller. There might be some force in this contention if there was anything on the record to show or even to suggest that these very diamonds were possessed by his father at any time. Not only there is nothing on the record to lend assurance to such a probability but on the other hand the respondent himself had failed to account for his possession in this way as expressly admitted by him in his statement, Ext. 80. Therefore, there is least difficulty in coming to a finding that the respondent could not discharge his onus of proving that the diamonds were not smuggled goods.

13. The learned Advocate for the respondent has also argued that this being an

appeal from an order of acquittal this Court should not interfere unless it is satisfied that there was gross failure of justice. Even on the basis of this test, it appears to us that there is enough ground for this Court to set aside the impugned judgment. It has been held above that the learned lower appellate court came to a finding that the diamonds recovered from the residence and the locker were not proved to be in possession of the respondent in spite of his clear and repeated assertion that the diamonds belonged to him and recorded no finding whatsoever as to whether there was any reasonable belief that these diamonds were smuggled goods at the time of seizure. In other words the judgment of the lower appellate court was far from reasonable or even perverse which makes out a case for interference in appeal by this Court.

14. The last argument advanced on behalf of the respondent was that since many years have elapsed, the judgment of acquittal by the learned lower appellate court should not be upset as it would violate the right to speedy trial guaranteed by Article 21 of the Constitution of India. In this connection reference has been made to the decision of the Supreme Court in *The State Vs. Maksudan Singh and Others*, . In the instant case the respondent was convicted by the learned trying Magistrate in September, 1979 and acquitted by the learned lower appellate court in December, 1979. Therefore, Special Leave to appeal was granted by this Court in April, 1980 and in the same month the appeal was admitted. Ultimately the appeal was heard in May, 1988. Therefore, it is no doubt true that a long time has passed since the trial was commenced before the learned Magistrate sometime in March, 1966 and it has to be decided whether by reason of passage of time, the Appellate Order of acquittal, even though found, to be unreasonable and perverse, should be confirmed. The decision of the Supreme Court referred to above does not really come to the aid of the respondent. In that case a police report was submitted in December, 1962 and charge was framed in September, 1962 and thereafter the progress of the case was very tardy because the orders passed therein were challenged in appeal or revision from time to time. Ultimately in 1979 the accused persons made an application before the High Court to quash the proceedings which was allowed, one of the reasons being that the prosecution was commenced in 1963 and was still going on in 1979 with examination of only four witnesses during this period. It was stated in that case that the prosecution was not in a position to know the addresses of the witnesses who were mostly Government officials and upon this the High Court observed that if they did not know the addresses of their own witnesses and if the prosecution was not in a position to conclude its evidence, it would be an abuse of the process of the Court to allow the prosecution to go on any further. The High Court quashed the proceedings and on appeal by Special Leave the Supreme Court did not consider it proper to interfere because the trial did not make much headway even though more than 20 years had passed. It was further observed by the Supreme Court that there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage. The words "trial stage" used by Their Lordships in the judicial wisdom are not to be

overlooked and therefore this cannot be regarded as an authority for the proposition the appeal before us should end in dismissal. In the Supreme Court case, as pointed out, the whereabouts of the witnesses were not known and since a trial could not be allowed to continue indefinitely, quite understandably the proceedings were quashed while in the case before us no such consideration does arise.

15. The majority view of the Full Bench of Patna referred to above does not also appear to be a decision which can be appropriately applied to the present case. In that case certain accused persons were acquitted by a trial court of a charge of murder in August, 1976, the alleged occurrence having been taken place in April, 1971. Against the order of acquittal the Government came up in appeal by Special Leave against some of the acquitted accused persons which did not reach a hearing before September, 1984. At the time of hearing before a Division Bench, a preliminary objection was taken that the Government appeal against acquittal was not maintainable because of the grave delay from the date of occurrence and reliance was placed upon an earlier Bench decision of the same Court in Ramdaras Ahir's case, 1985 Cr. LJ 584. In view of the constitutional and legal issues involved, the Division Bench referred the matter to a larger Bench for a decision and Their Lordships holding the majority view refused to examine the issue of delay generically in all cases including technical offences but restricted themselves within the narrow parameters within which the issue arose, namely the reversal of a clean acquittal on a capital charge and consequent dislodging of a double presumption of innocence after unexplained, callous and inordinate delay of more than 10 years. In view of this express observations by Their Lordships limiting the scope of the decision, it cannot be taken as laying down a general proposition that in all cases, delay for whatever reason it may be, constitutes violation of the constitutional guarantee in Article 21 of the Constitution. Their Lordships had also pointed out that the judgment in Ramdaras Ahir's case (supra) must be deemed as an integral part of the judgment of the Full Bench and noted the finding in Ramdaras Ahir's case that a callous and inordinately prolonged delay of 10 years or more which in no way arises from the accused's default or is otherwise not occasioned due to any extraordinary and exceptional reasons, in the context of the reversal of a clean acquittal of a capital charge would plainly violate the constitutional guarantee of a speedy trial under Article 21. Thus, it is clear that Their Lordships were only considering the violation of constitutional guarantee in case of a trial or rather reversal of an acquittal on a capital charge and excluded from consideration trial for technical offences as in the present case. Furthermore, it has been stated by the learned advocate for the appellant and not controverted by the learned advocate for the respondent that in the case before us, repeated revisional applications made by the respondent to this Court against orders taking cognizance and framing charge contributed much to the delay in concluding the trial. Therefore, this Full Bench decision cannot be applied as there is no parity of reasoning and this court does not wish to withhold interference on that ground.

16. On the above premises the order of acquittal passed by the learned lower appellate court is reversed and the accused-respondent is found guilty of the offence punishable u/s 135(1)(b)(ii) of the Customs Act and he is sentenced to suffer rigorous imprisonment for the period already spent by him in jail and also to pay a fine of Rs. 5000/- in default to suffer rigorous imprisonment for six months. He is directed to pay the fine before the learned Magistrate within three weeks from this date in default of which the learned Magistrate shall take appropriate step according to law.

Jitendra Nath Chaudhuri, J.

17. I agree.