

(1980) 11 MAD CK 0014

In the Madras High Court

Case No : Criminal App. No's. 543 and 544 of 1977 (Transfer Criminal App. 830 of 1978 and Cr. R.C. 579 of 1977)

Assistant Collector of Customs, Madras (Prosecution)
Preventive Department

APPELLANT

Vs

Leslie Bertram D'silva and Another

RESPONDENT

Date of Decision : 24-11-1980

Acts Referred:

Customs Act, 1962 — Section 111, 135(1)

Citation : (1984) 15 ELT 118

Hon'ble Judges : Maheswaran, J

Bench : Single Bench

Advocate : G. Krishnan, Central Government Prosecutor, for the Appellant; S. Natesan, for Abdual Ghani, M.A. Abdual Rack and K.P. Jagadeesan, for the Respondent

Judgement

1. Leslie Bertram D'Silva, the appellant in C. A. No. 830 of 1978 (hereinafter referred to as the first accused) was a co-pilot in Air Ceylon

aircraft No. 4 R-ACN. That aircraft on a scheduled flight No. AE 323/324 from Colombo arrived at the airport at Meenambakkam at about

11.20 A.M. on 31-7-1975. After the passengers have left the aircraft, P.W. 1, Sriramamurthi a customs officer on duty at the airport went on

board the said aircraft and saw the first accused handing over a white paper parcel to Duraiswamy Traffic Assistant, Air Ceylon, Madras

(hereinafter referred to as the second accused) who, on seeing P.W. 1, the Customs Officer, kept the parcel in the cockpit. This act of

Duraiswamy aroused the suspicion of the Customs Officer, P.W. 1, who went to the cockpit and took the parcel which was found to be heavy.

P.W. 1 also examined a leather bag of the first accused and saw a blue cloth bag

which was also found to be heavy. P.W. 1 brought the first accused and the second accused and the parcel, the blue cloth bag and also the leather bag to the search room. They were searched in the presence of independent witnesses and in the presence of the first accused and the second accused. The white paper parcel contained a blue cloth bag and the blue cloth bag contained seven bars of gold without any markings and they were found to weigh 1833 grammes. The blue bag in the leather bag contained three gold bars, one of which weighed 160 grammes and bore the markings ""D. L. SOA/G"" written in a piece of paper and attached to the bar with an adhesive tape. The other two bars have no markings and found to weigh 195 grammes and 79 grammes. There was also a white slip of paper with some marks and a blue paper packet containing two travellers' cheques for the value of U. S. Dollars 20 each and the passport of Leslie Bertram D'Silva, the first accused, and also his vaccination certificate. A letter written in Tamil and no code was also found kept underneath it. On interrogation, the first accused admitted that the two cloth bags containing gold bars numbering 10 were given to him by one Peris of Colombo at Colombo airport and that Peris told him that the gold bars were sent by one Ameen and that they should be handed over to the second accused, Duraiswamy. The gold bars and the cloth bags including other articles, were seized under a mahazar duly attested by witnesses on the reasonable belief that the gold bars were smuggled. The value of the gold bars was Rs. 1,13,350. P.W. 1, Sriramamurthi, searched the second accused in the presence of witnesses and recovered Indian currency to the value of Rs. 221 and also an American dollar and an Airmail letter addressed to one Krishnamurthi of Singapore. They were recovered under a search list. P.W. 5, Subramaniam, inspector in charge of Rummaging Division, Customs House, Madras, received a phone call on 31-7-1975 at 11.45 A.M. that gold bars have been recovered from Air Ceylon aircraft. He proceeded to the airport and deputed P.W. 2, Ethiraj, a senior grade Preventive Officer, to investigate the case and record a statement from the copilot Leslie Bertram D'Silva and during the course of investigation, P.W. 2 found that A. 3 was residing at No. 43, Mookkar Nallamuthu Street and in that house there was a phone with the number 27273 installed. A statement from the first accused was taken at

the airport by P.W. 2 and in the Customs House a statement was taken from the second accused by P.W. 2. The third accused was brought to the

Customs House. On seeing A. 3, the second accused stated that A. 3 was the person who has given his name as Khan and also his telephone

number and that he was the person to be contacted by him on receipt of gold at the airport. The house of the third accused was also searched and

certain incriminating documents were found. They were also seized under a mahazar.

2. A notice to show cause as to why the ten bars of gold should not be confiscated u/s 111(d) of the Customs Act and why penalty should not be

imposed on the accused was issued. Replies were duly sent by all the three accused. The Assistant Collector of Customs passed an order of

adjudication and confiscated the gold and imposed a penalty of Rs. 1,00,000 on each of the three accused. The Additional Collector of Customs

passed an order sanctioning prosecution and a complaint was laid against all the three accused.

3. The Chief Metropolitan Magistrate convicted A. 1 u/s 135(1)(a)(i) of the Customs Act and sentenced him to undergo rigorous imprisonment for

nine months and also to a fine of Rs. 500. He also ordered set-off of "the period of detention undergone by him during the investigation and the trial

of the case." He found A. 2 not guilty of the offence with which he was charged and acquitted him. He also acquitted A. 3. The Assistant Collector

of Customs has preferred C.A. No. 543 of 1977 against the order of acquittal of A. 1 and A. 2 in so far as M.O. 3 series are concerned. Criminal

Appeal No. 544 of 1977 is preferred by the Assistant Collector of Customs questioning the adequacy of sentence imposed on A. 1. The first

accused has filed Criminal Appeal No. 830 of 1978 challenging his conviction and sentence. Criminal R.C. No. 579 of 1977 is filed by the

Assistant Collector questioning the order u/s 428 of the Code of Criminal Procedure setting off the period of detention.

4. The facts narrated show that the aircraft No. 4 R-ACN of Air Ceylon arrived at Meenambakkam Airport, Madras at about 11.20 A.M. on a

schedule flight AE 323/324 from Colombo on 31-7-1975. P.W. 1, Sriramamurthi, went on board the said aircraft and saw the first accused

handing over a white paper parcel to the second accused, Duraiswamy who has been acquitted. When P.W. 1 approached the cockpit, the

second accused threw the paper packet on the floor. The evidence of P.W. 1 shows that he detained A. 2 and also took the bag of A. 1 and

examined the bag in the presence of A. 1, A. 2 and the captain of the aircraft and also in the presence of two independent witnesses,

Vijayaraghavan P.W. 4, who was Aviation Superintendent in Indian Oil Corporation, and Leonard Periera, District Manager, Air Ceylon, in the

first class compartment of the aircraft. They were taken to the customs search room at the airport. Examination of the paper packet revealed

presence of blue cloth bag which contained seven gold bars which are M.O. 3 series. Thereafter, he examined the blue cloth bag recovered from

the leather bag. M.O. 4 is the blue cloth bag and it contained three gold bars which are M.O. 5 series. M.O. 8, the leather bag, belonged to A. 1.

M.O. 4 was found inside M.O. 8. M.O. 8 also contained a letter written in Tamil. These gold bars were seized under a mahazar Ex. P. 5 duly

attested by witnesses. P.W. 1 in cross-examination says that he went into the cockpit and followed A. 2 and caught hold of the hand of the second

accused and he dropped the packet. Ex. P. 5 the mahazar would show that Duraiswamy, the second accused, on seeing the Customs Officer,

kept the parcel handed over to him by the first accused in the cockpit. The learned Magistrate came to the conclusion that the story treated out by

P.W. 1 that he caught hold of the hands of A. 2 from behind and A. 2 dropped the paper parcel cannot be true. We shall advert to the case of A.

2 a little later. It is pointed out for the first accused that an inspection of the aircraft was made by the Magistrate who had made reference to this

inspection in paragraph 8 of his judgment. He summarises his conclusion in the following words :

In my opinion, P.W. 1 Thiru Sriramamurthi could not have seen the first accused handing over the paper packet to the second accused and it is

impossible for him to catch hold of the hand of the second accused before he actually dropped the packet.

Relying on this conclusion of the Magistrate, learned counsel for the first accused contended that P.W. 1 is a witness who cannot be relied on.

From this circumstance alone, one cannot come to the conclusion that P.W. 1 is a witness on whose evidence reliance cannot be placed. If his

evidence, so far as recovery of gold bars is concerned, finds sufficient corroboration in the evidence of other witnesses and from other

circumstances, there is no reason to discard his evidence. P.W. 4, Vijayaraghavan, Aviation Superintendent, Indian Oil Corporation, stated that P.W. 1 and another official requested him to be present to witness a search of leather bag of a pilot on 31-7-1975 and that in his presence, the leather bag was opened and a blue cloth bag was recovered and the blue cloth bag was heavy and it contained three gold bars. He again stated that the blue bag was opened and it was found to contain three gold bars. (Obviously the deposition has been recorded by mistake. It should be noted that the paper packet containing the blue cloth bag contained seven gold bars.) But his evidence shows that this preliminary examination was made in the first class compartment of the aircraft where P.W. 4 has gone to make entries in the log sheet in regard to the filling up of the aircraft with fuel. But the evidence of P.W. 1 in cross-examination, on the other hand, would show that he did not call for any independent witness at the time of preliminary examination. P.W. 4 states that he was also present at the time when the search was made of the entire bag in the customs search room. What is contended before me now is that P.W. 1 earlier in his chief examination has stated that he examined the bag in the presence of A. 1, A. 2 and the captain of the aircraft and also in the presence of two independent witnesses, Vijayaraghavan, Aviation Superintendent, Indian Oil Corporation, and Leonard Periera, District Manager, Air Ceylon, but in cross-examination he has categorically stated that since he made only preliminary verification he did not call for any independent witnesses to be present inside the aircraft and therefore P.W. 1 is not a witness who speaks the truth, and reliance cannot be placed on his evidence. My attention was also invited to the evidence of P.W. 4, Vijayaraghavan, who according to the learned counsel for the first accused, is an unreliable witness. There is no reason to hold that P.W. 4 is an unreliable witness. He is an independent witness and he has nothing to do with the officials of the Customs Department. There is clear evidence of the fact of search of the persons of A. 1 and A. 2 and the examination of the bag and the paper packet in the search room and for the recovery of M.O. 3 series and M.O. 5 series, Ex. P. 5 is the mahazar under which these material objects were recovered. The mahazar is attested by P.W. 4, Vijayaraghavan, and by one Leonard Periera, P.W. 4 speaks to the recovery and corroborated the evidence of P.W. 1, Sriramamurthi, who made

the search. It should further be noted that A. 1 to A. 3 are alleged to have made confession statements. While according to the prosecution, these statements were voluntary the accused would contend that these statements were procured under duress and coercion. Ex. P. 8 is the statement made by Leslie Bertram D'Silva, the first accused. Ex. P. 9 is the statement of Duraiswamy the second accused. We are not concerned with the statement made by A. 3 as no appeal against the acquittal of A. 3 has been filed. P.W. 2 Ethiraj, who was working in the "Rummaging Division" of the Customs office stated that a phone call was received from the airport on 31-7-1975 at about 11-45 A.M. that there was seizure of gold at the airport. He and Inspector Subramaniam went to airport along with other officers and at about 2.00 P.M. A. 1 gave a statement, Ex. P. 8, in English signed by him and then he returned to the Customs House and at about 6.00 P.M. A. 2 gave a statement Ex. P. 9 voluntarily. Most unfortunately the Chief Metropolitan Magistrate holds that the prosecution has failed to prove that the statements, Exs. P. 8 and P. 9 are voluntary. No acceptable reasons are furnished by the Magistrate for holding that these statements are not voluntary. One of the reasons is that at the end of the confession statement the first accused has stated that he "committed this mistake due to the circumstances in which he was placed", and the second accused has stated that he "knows that it is an offence to help in the smuggling of gold in the aforesaid manner" and that normally persons do not make such confessions and that by itself clearly indicates that the statements are not voluntary. Though the learned Magistrate holds that the mere fact that all the accused used identical words to convey the same meaning, it cannot be said that they are involuntary statements", still he comes to conclusion that these statements are not voluntary. He finally says that on a careful consideration of the entire evidence he is inclined to hold that the prosecution has failed to prove that the statements Exs. P. 8 and P. 9 are voluntary. The Customs Official P.W. 2, who has taken the statement, has denied that A. 1 was threatened with force before he gave the statement. He also denied the suggestion that there was inducement. He further repeated the suggestion that he told A. 1 that it would be better for him to make a statement. P.W. 2 no doubt admits that he put some questions when A. 1 made the statement but that he could not remember what questions he put. But there is no reason to disbelieve the evidence of P.W. 2.

The wealth of details given in Ex. P. 8 and Ex. P. 9 very clearly shows that the statements were voluntarily made by A. 1 and A. 2. Because P.W.

2 is a Customs Official, it does not necessarily mean that his evidence should be rejected outright. P.W. 2 is a competent officer to prove the

statements, Exs. P. 8 and P. 9, which were made to him by A. 1 and A. 2. I am unable to agree with the view of the Chief Metropolitan

Magistrate that the confessions were not voluntarily made by A. 1 and A. 2. These confession statements corroborate the evidence of P.W. 1 and

P.W. 4 about the recovery of M.O. 5 series.

5. It is contended for the defence that P.W. 4 is not a reliable witness at his evidence contradicts the evidence of P.W. 1. While P.W. 4 would say

that the blue bag was heavy and it contained gold bars and that the gold bars were covered with adhesive tape paper, P.W. 1 would say that the

blue bag was found to be heavy and because it was heavy, he thought that it may contain contraband articles. It is no doubt true that P.W. 1 does

not say that on preliminary examination, he found three gold bars inside the blue bag, but then on a detailed examination in the search room, of the

blue bag which was inside the leather bag, it was found to contain three gold bars, M.O. 5 series, which were seized by P.W. 1, Sriramamurthi.

There is clear evidence that the blue bag was found inside the leather bag of the first accused. P.W. 4 was present at the search room also and he

witnessed the seizure of the three gold bars. There cannot, therefore, be any doubt about the seizure of the gold bars and the discrepancy in the

evidence of P.W. 1 and P.W. 4, even if any, would not in any way affect the prosecution case that the gold bars, M.O. 5 series, were recovered

from the blue cloth bag which was found inside the leather bag of the first accused. The mahazar, Ex. P. 5 was also recorded in the presence of the

first accused.

6. It is next contended for the defence that P.W. 4 now states that a mahazar was prepared by Sriramamurthi and he attested the same, that P.W.

1 did not tell him as to what happened before he signed in the mahazar, but the mahazar, Ex. P. 5, shows that the attestors ascertained from A. 1

and A. 2 whether the narration was correct and that the statement that witnesses so ascertained from A. 1 and A. 2 as to the correctness of fact

was ""sneaked"" into the mahazarnama, and therefore, P.W. 4's evidence is in

conflict with the narration in Ex. P. 5 and P.W. 4 should not be believed. In the first instance, it should be noted that Ex. P. 5 was recorded by P.W. 1, Sriramamurthi. It is not clearly understandable as to how P.W.'s evidence is in conflict with the recitals in Ex. P. 5. It may be that P.W. 4 in his evidence omitted to state that he and other attestors ascertained from A. 1 and A. 2 about the correctness of the facts. But that by itself will not be a circumstance to discredit the testimony of P.W. 4. It is then commented upon that none of the members of the crew were called in as witness and that one Vijayaraghavan, P.W. 4, who is an unreliable witness has been examined by the prosecution to prove the case. There is nothing in the evidence of P.W. 4 who is an independent witness to discredit his testimony. The fact that the members of the crew of the aircraft have not been called in as witnesses also would not affect the case of the prosecution as there is evidence of the independent witness, P.W. 4, to prove the search and recovery and as there is a statement of the first accused to corroborate the search and recovery. It is then pointed out that if the prosecution story that that two parcels, namely, a paper packet and a blue cloth bag, were entrusted to A. 1 by somebody in Colombo to be handed over to A-2 in the airport and who was in turn to hand then over to A-3 is true, the blue cloth bag and the paper packet should have been in one place in the aircraft and there was no reason for the paper packet and the blue cloth bag being separately kept. There is no rule that gold smuggled into India should be brought in one parcel or should be kept together. It might be that for the sake of convenience they were separately kept.

7. As these gold bars, M.O. 5 series, were recovered from the blue cloth bag which was inside the leather bag of the first accused, the trial

Magistrate was correct in convicting the first accused u/s 135(1)(a)(i) of the Customs Act. The conviction therefore is confirmed.

8. As regards the appeal, C.A. No. 543 of 1977, against the acquittal of A. 1 and A. 2 in regard to the seizure of M.O. 3 series, seven gold bars,

in the paper packet, I must hold that there are no grounds to interfere with the order of acquittal, for the simple reason that the gold bars, M.O. 3

series, were not recovered from the possession of A. 1 or A. 2. The evidence of P.W. 1 is that after disembarkation of all the passengers, he went

on board the aircraft and that it would be 11.30 A.M. when he saw A. 2, Duraiswamy, the Traffic Assistant in Air Ceylon, receiving the paper

packet from the first accused and then he approached the cockpit and A. 2 immediately, threw away the paper packet on the floor of the cockpit

and he took possession of the paper packet and found it to be heavy. In cross-examination, he admitted that he went from behind and caught hold

of A. 2's hand and immediately he dropped the packet in the cockpit and that he picked up the parcel. The Chief Metropolitan Magistrate, who

made an inspection of the aircraft, has made the following observations for holding that Sriramamurthi, P.W. 1, could not have been seen the first

accused handing over the paper packet to the second accused. He observes :

It is not disputed by the prosecution that if a person was standing just near the wooden door leading to the cockpit, any person standing in

between the two rows of the first class compartment cannot see anyone sitting inside the cockpit. So, in my opinion, P.W. 1, Thiru Sriramamurthi,

could not have been the first accused handing over the paper packet to the second accused and it is impossible for him to catch hold of the hand of

the second accused before he actually dropped the packet.

This finding of the Magistrate was recorded after the inspection and there is no reason to take a different view and otherwise. In view of the

contradictory and conflicting evidence of P.W. 1 as regards the recovery of the paper packet containing seven gold bars, it would not be safe to

rely solely on the statements of A. 1 and A. 2 to convict then of the offences alleged to have been committed in respect of the transport of M.O. 3

series. Therefore, the appeal, C.A. No. 543 of 1977, preferred by the Assistant Collector of Customs has to be dismissed.

9. As regards C.A. No. 544 of 1977, the memorandum of grounds of appeal raises only five grounds, which may be extracted so as to appreciate

the scope of the appeal. The grounds are :-

1. The judgment of the learned Judge in so far as it relates to the sentence is contrary to law.

2. The learned Judge failed to note that gold is involved in this case and hence he ought not to have shown any leniency.

3. The learned Judge failed to appreciate that the economic offences have to be viewed with all seriousness and the economic offender should be

punished deterrently.

4. The learned Judge failed to appreciate the scope of the Supreme Court judgment reported in *Balkrishna Chhaganlal Soni Vs. State of West Bengal*, .

5. The other reasons assigned by the learned Judge in awarding the sentence are untenable, unconvincing and unsound.

The learned Magistrate has stated that the first accused was in remand in connection with this case for nearly 279 days and that the period of

detention undergone during the investigation and the trial of the case shall be set off against the term of imprisonment imposed on him and as he has

already undergone 9 months and 9 days, he need not undergo any further imprisonment in respect of his conviction and he has to pay only the fine

of Rs. 500 which has been imposed on him in addition to the term of imprisonment. In awarding the sentence, the Magistrate has taken into

consideration the old age of the first accused and also the fact that he has to support a large family, including his old mother. I cannot say that these

are grounds which are totally irrelevant for imposing the sentence which the Magistrate did, I am not disposed to differ. Therefore, this appeal also

has to be dismissed.

10. In Criminal R.C. No. 579 of 1977, the Assistant Collector off Customs challenges the order of the Magistrate in setting off the sentence u/s

428 Cr. P.C. According to the revision petitioner, the detention which the first accused underwent, under the COFEPOSA Act is only preventive

detention and therefore the period which he underwent should not be set off u/s 428 Cr. P.C. The memorandum of grounds of revision shows that

the respondent first accused was detained under the COFEPOSA Act on 24-12-1975 and was released on 24-3-1977. Neither the grounds of

revision, nor the learned Prosecutor for the Central Government furnished me with any particulars about the detention of A. 1 under the

COFEPOSA Act. (The particulars are gathered only from the docket of the records of the lower court). The judgment shows that the first

accused respondent was arrested on 31-7-1975 and he was actually released on bail on 3-9-1975. Therefore, he was in detention with references

to this case for about 34 days. While he was on bail, he was arrested under the COFEPOSA Act on 24-12-1975. It is also seen from the records

that the complaint was filed on 10-6-1976. At the time of filing of the complaint, the respondent first accused was already in prevention detention

(under the COFEPOSA Act). He was produced before the Magistrate on 23-7-1976. This date is gathered from the lower court records. The

Magistrate furnished copies of the complaint and adjourned the case for trial on 5-8-1976 and remanded A. 1 to A. 3, till then. The first accused

respondent was released from preventive detention on 24-3-1977, and the judgment of the lower court in this case was pronounced on 20-4-

1977, convicting the respondent first accused to rigorous imprisonment for nine months. Therefore the entire period from 23-7-1976, the date on

which he was produced before the Magistrate to 24-3-1977, the date on which he was released from preventive detention, must be treated as

part of the period during which the first accused-respondent was under detention as an undertrial prisoner in this case as there could be no bar to

"preventive and punitive detentions continuing simultaneously" (See observations of the Supreme Court in Government of Andhra Pradesh and

Another Vs. Anne Venkatesware and Others, . So calculated, the period of 245 days plus 34 days i.e. 279 days has to be set off and the learned

Chief Metropolitan Magistrate is correct in setting off this period. This revision therefore has to be dismissed. In the result, all the three appeals and

the revisions are dismissed. The conviction and sentence imposed on A. 1 are confirmed.