(1994) 03 P&H CK 0072

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 363-DBA of 1989

Asstt. Collectof of C. Ex. and Customs — APPELLANT

Vs

Sanjeev Kumar — RESPONDENT

Date of Decision : 30-03-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Customs Act, 1962 — Section 11, 110, 111, 112, 123
Gold (Control) Act, 1968 — Section 2, 68, 85

Citation : (1994) 55 ECR 668 : (1995) 79 ELT 49 : (1994) 3 RCR(Criminal) 208

Hon'ble Judges : S.S. Grewal, J;A.S. Nehra, J

Bench : Division Bench

Advocate : D.D. Sharma, for the Appellant; R.S. Cheema and M.S. Sidhu, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Nehra, J.—This appeal is directed against the judgment dated 20-3-1989 passed by the Chief Judicial Magistrate, Sangrur, by which the respondents have been acquitted of the charges u/s 85 of the Gold (Control) Act, 1968 and Section 135 of the Customs Act, 1962.

Briefly stated the case of the complainant-appellant is as under :-

2. The appellant filed this complaint in his official capacity as a public servant in the discharge of his official duties. Sanjeev Kumar respondent is the son of Padam Sain. Padam Sain was running the business of dealing in gold ornaments in the name and style of M/s. Padam Sain Devinder Kumar, Sunam". On 2-7-1982, the preventive staff of Central Excise Division, Patiala, apprehended Sanjeev Kumar respondent in Tarkhana Mohalla, Sunam, as per the information that he deals in gold biscuits of foreign origin. His personal search and the search of his personal hand-bag was taken in the presence of independent witnesses. As a result of that search, four gold biscuits of foreign origin, weighing 464 grams, valued at Rs. 75,632/-, with foreign marking as "Johnson-No-London-999-0.10

Tola" on the two biscuits and "Swiss Bank-999. O. 10 Tola" on the other two biscuits, were recovered from the front pocket of the pant of Sanjeev Kumar. A sum of Rs. 7/- of Indian currency was also recovered from Sanjeev Kumar respondent. As a result of search of the clothbag being carried by Sanjeev Kumar, one metal-box was recovered. The metalbox, on opening in the presence of independent witnesses, was found to be containing gold ornaments weighing 239 grams, valued at Rs. 37,284/- and Indian currency worth Rs. 3220/- was also recovered. The purity of the abovesaid gold biscuits and gold ornaments was 24 carats and 22 carats respectively, as per the test report.

3. It was also alleged in the complaint that Sanjeev Kumar respondent had failed to produce any evidence for legal acquisition/possession or in any way concerned in carrying gold biscuits/ornaments/Indian currency. Therefore, he was arrested u/s 68 of the Gold (Control) Act, 1968. Later on, he was released on bail by the Court of learned Sessions Judge, Sangrur. Sanjeev Kumar respondent has also confessed in his written statement dated 2-7-1982, which he had tendered before the Superintendent (Prev.), Central Excise Division, Patiala, the recovery of aforesaid four gold biscuits of foreign marking, 239 grams of gold ornaments and Indian currency worth Rs. 3227/-. He had further admitted that he had brought these gold biscuits of foreign marking from Brij Lal respondent who was a Goldsmith, Sarafan Bazar, Ludhiana, at the instance of his father Padam Sain. Sanjeev Kumar respondent further admitted in his statement dated 4-7-1982 that they used to get their gold ornaments manufactured out of the gold biscuits of foreign origin from one Shri Mohinder Paul Billu, Goldsmith of Sunam, respondent.

4. It was also alleged in the complaint that Sanjeev Kumar respondent had acquired/carried and dealt with the aforesaid gold biscuits of foreign origin and the aforesaid gold ornaments were made out of the gold of foreign origin and the currency notes as its sale proceeds in contravention of Section 11 of the Customs Act, 1962. Therefore, the aforesaid gold ornaments and the Indian currency were seized u/s 110 of the Customs Act. Sanjeev Kumar has been punished by imposing P.P. Rs. 75,000/- under the Gold (Control) Act, 1968, and Rs. 75,000/- under the Customs Act, 1962, P.P. Rs. 10,000/- under the Customs Act, 1962, on Mohinder Paul, respondent No. 2, and P.P. Rs. 10,000/- under the Customs Act, 1962, on Brij Lal respondent in departmental adjudication u/s 112 of the Customs Act, 1962 and the seized property has been confiscated u/s 111 of the Customs Act, 1962 in the said departmental adjudication. Respondents Nos. 1 to 3, by acquiring/possessing/dealing in gold of foreign markings, gold ornaments of foreign gold, have contravened the provisions of Section 135 of the Customs Act, 1962 and Section 85 of the Gold (Control) Act, 1968. Hence, it was prayed that the respondents be summoned, tried and punished in accordance with law.

5. Charge was framed against the respondents, to which they did not plead guilty and claimed trial.

6. The complainant-appellant, in support of his case, examined PW-1 Ram

Parkash, PW-2 Shivdev Singh, and PW-3 Kulwant Singh. Raghbir Chand PW was given up as having been won over.

7. The respondents, when examined u/s 313 of the Code of Criminal Procedure, termed the case of the complainant-appellant to be false and claimed to be innocent.

8. The version of Sanjeev Kumar respondent is that he had been falsely implicated in this case; that the Customs Staff had recovered gold ornaments and cash amount from his house, the details of which are given in Exhibit PB; that property, namely, gold ornaments and money belonged to his parents, for which the appellant had filed the complaint; that the gold biscuits were not recovered from him; that the Customs Officers had obtained his signatures on blank papers under pressure, coercion and threats and that he is innocent. Mohinder Pal and Brij Lal, respondents, simply pleaded their innocence.

9. In defence, the respondents examined Narain Dutt DW-1. This witness belongs to Sunam. He deposed that he knew Sanjeev Kumar respondent for the last 6 1/2 years, that it was the month of July, that he had come to his house for taking lunch that in those days, he used to live in Tarkhana Mohalla, Sunam; that there he saw a number of persons having assembled under a neem tree and some ornaments were lying scattered there; that some gold biscuits and currency notes were also lying there and 4-5 officers of the Customs Department were also present; that when he reached there, he enquired about it and he was told that some persons had escaped after throwing these articles at that place; that, after some time, Sanjeev Kumar, respondent No. 1, was brought there by the Customs Officers; that they had one tin box of gold ornaments with them; that they made enquiries from Sanjeev Kumar as to whether the articles scattered there belonged to him, but Sanjeev Kumar respondent had told them that those gold ornaments/biscuits did not belong to him. DW-2 Lal Chand also deposed that he knew Sanjeev Kumar respondent; that he had gone to their house for repairing the electric light when 2-3 officials of the Customs Department had come there; that Sanjeev Kumar respondent was in the house and his house was searched and that the Customs Officers had taken away the tin of ornaments and Sanjeev Kumar with them. The respondents also placed on the file Exhibit D-l which is a copy of judgment dated 24-4-1987 passed by the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Sanjiv Kumar etc. v. Collector, Customs and Central Excise, Chandigarh, regarding this very occurrence.

10. The learned counsel for the appellant has contended that the appellant has examined two witnesses, namely, PW-1 Ram Parkash and PW-2 Shivdev Singh; that both of them proved the recovery of two biscuits of gold of foreign marking of "Johnson-No-London-999-0.10 Tola" and two biscuits of foreign marking of "Swiss Bank-999-0.10 Tola" and that since these biscuits had foreign markings, therefore, presumption arises that these were smuggled biscuits of gold. He further submitted that besides this evidence, Sanjeev Kumar respondent, from whom biscuits were recovered has also given the statement Exhibit PG dated

2-7-1982 and statement Exhibit PG, dated 4-7-1982, admitting that these gold biscuits were recovered from him and that these statements were made by Sanjeev Kumar respondent before the Customs Officers and they were admissible in evidence. It was also submitted by the learned counsel for the appellant that Brij Lal respondent was responsible for supplying the smuggled gold to Sanjeev Kumar respondent; and that, therefore, he is also liable to be convicted. It was also submitted by the learned counsel for the appellant that since Mohinder Pal respondent used to prepare the gold ornaments of the smuggled gold biscuits at the instance of Sanjeev Kumar respondent, therefore, Mohinder Pal respondent is also liable to be convicted and sentenced. On the other hand, the submission made by the learned counsel for the respondents is that that there is basic flaw in the case of the complainant, for which the respondents are entitled to acquittal. In this context, the learned counsel for the respondents made reference to Section 2(j) of Gold (Control) Act, 1968, in which ''Gold'' has been defined as under :-

"''Gold'' means gold, including its alloy, (whether virgin, melted or re-melted, wrought or unwrought), in any shape or form, of a purity of not less than nine carats and includes primary gold, article and ornament."

11. Reference was also made to Section 2(r) of Gold (Control) Act, 1968, which defines "primary gold" as under :-

""Primary gold" means gold in any unfinished or semi-finished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires."

12. It was submitted that the gold ornaments, allegedly recovered from Sanjeev Kumar respondent have not been proved to be gold within the meaning of Section 2(j) of the Gold (Control) Act, 1968, as the complainant has utterly failed to prove whether the purity of the gold biscuits was got tested from an expert person or whether the purity of the gold biscuits was found to be not less than nine carats.

13. It was further submitted by the learned counsel for the respondents that, according to the allegations made in para No. 3 of the complaint, the purity of gold biscuits was got tested and it was found to be 24 carats, but the complainant has failed to examine any witness who has tested the purity of gold biscuits and proved the purity of gold biscuits. Reference in this context was made to the statement of Kulwant Singh PW-3, examined by the complainant. He specifically deposed that he had not tested the purity of gold biscuits or ornaments. Since this witness has not supported the case of the complainant, therefore, he was declared as hostile. The other witness, who had allegedly tested the purity of gold biscuits and ornaments, namely, Raghbir Parsad, was given up by the complainant as having been won over. PW-2 Shivdev Singh admitted in his cross-examination dated 25-4-1988 that Goldsmiths are experts in testing the purity of gold. The gold, allegedly recovered from Sanjeev Kumar, was not got tested from any Government Laboratory nor was it subjected to any

scientific test. In other words, the complainant has not examined any expert witness, who might have tested the purity of gold biscuits or who could have upheld that the purity of gold biscuits, allegedly recovered from Sanjeev Kumar, was more than nine carats so as to qualify as "gold" within the meaning of Section 2(j) of the Gold (Control) Act, 1968.

14. No doubt, the statements of Sanjeev Kumar respondent, Exhibits PD and PE, dated 2-7-1982 and 4-7-1982 respectively, are admissible in evidence, but in his statement also there is no mention if the purity of gold biscuits was tested by any expert or if it was found to be 24 carats.

15. It was further submitted by the learned counsel for the respondents that PW-1 Ram Parkash and PW-2 Shivdev Singh were not the expert witnesses nor they have deposed if they themselves had tested the purity of gold biscuits, allegedly recovered from Sanjeev Kumar respondent.

16. It was further submitted by the learned counsel for the respondents that since the complainant has failed to lead any evidence to prove that the purity of gold biscuits, allegedly recovered from Sanjeev Kumar, was more than nine carats, therefore, the complainant has failed to prove its case. In this context, reference was made to a judgment of the Karnataka High Court reported as Central Excise Department, Bangalore v. P. Somasundaram, 1980 Criminal Law Journal 533. Relying upon the earlier reported judgment, the Division Bench of the Karnataka High Court held that the burden is on the prosecution to prove that what has been seized from the accused is gold and only on satisfactory proof of that fact, a presumption u/s 123 of the Customs Act would arise, and not otherwise. Even for the purposes of establishing the offence u/s 85(ii) of the Gold (Control) Act, 1968, the burden is on the prosecution to establish that what was seized is in fact gold.

17. It was further contended by the learned counsel for the respondents that the alleged recovery was effected by the party led by Shivdev Singh; that no other official of the party led by Shivdev Singh has been examined, who could have proved the alleged recovery of gold biscuits and gold ornaments from Sanjeev Kumar respondent; that only PW-1 Ram Parkash has been examined that he was not present at the time when Sanjeev Kumar respondent was allegedly apprehended by Shivdev Singh, although Shivdev Singh PW-2 deposed in his cross-examination that Ram Parkash was called through Darbara Singh Constable before taking search of Sanjeev Kumar respondent and that if it had been so, the Panchnama Exhibit PC and Annexure-I Ex. PA would have been signed by Ram Parkash. Both these documents are not signed by him, which circumstance goes to prove that Ram Parkash was not present at the time of alleged recovery of gold biscuits and gold ornaments from Sanjeev Kumar respondent or when the documents Exhibits PA (Annexure-I) and Panchnama Exhibit PC were prepared by PW-2 Shivdev Singh.

18. It was further submitted by the learned counsel for the respondents that the

witnesses are also discrepant as to when and where the statement of Sanjeev Kumar respondent was recorded. PW-1 Ram Parkash deposed that he had recorded the statement of Sanjeev Kumar on the same day, i.e. on 2-7-1982, while the statement of Sanjeev Kumar respondent, Exhibit PE, was recorded on 4-7-1982. In the cross-examination, he deposed that the officials had stayed at Sunam upto 6 p.m. on that day. Then they had gone back to Patiala and Sanjeev Kumar respondent was taken alongwith them. Sanjeev Kumar respondent was interrogated at Patiala in the night at about 10 p.m. This fact is deposed by him in his statement recorded on 21-10-1986. In his further cross-examination dated 25-4-1988, Ram Parkash deposed that on 2-7-1982 the statement of Sanjeev Kumar was recorded at Sunam and, subsequently, statement was recorded at Patiala. Similarly, PW-2 Shivdev Singh is also discrepant about the place and date on which the statement of Sanjeev Kumar respondent was recorded. In his statement dated 25-4-1988, Shivdev Singh PW-2 deposed that the statement of Sanjeev Kumar respondent was recorded only once at Sunam on 2-7-1982. He could not depose if the statement of Sanjeev Kumar respondent was recorded subsequently or not. Therefore, the witnesses could not be consistent as to where the statement of Sanjeev Kumar respondent was recorded and on which date and whether it was recorded once or twice. These discrepancies make the statements of the witnesses of the complainant to be doubtful.

19. In view of the aforesaid discussion, we hold that the prosecution has not been able to prove if gold biscuits, allegedly recovered from Sanjeev Kumar respondent, were gold within the meaning of Section 2(j) of the Gold (Control) Act, 1968. Therefore, it has failed to prove the charge against Sanjeev Kumar respondent.

20. So far as Brij Lal respondent is concerned, there is no direct evidence against him if he deals in gold biscuits of foreign markings. Even the statement of Brij Lal respondent, which he had allegedly made to the Customs Officers, has not been proved. No circumstance has come against Brij Lal respondent in the statements of PW-1 Ram Parkash and PW-2 Shivdev Singh.

21. So far as Mohinder Pal respondent is concerned, there is no evidence against him if Mohinder Pal used to prepare ornaments of gold biscuits. The statement of Mohinder Pal respondent was proved as Exhibit PK and Mohinder Pal respondent has specifically deposed that he had not prepared ornaments of gold at the instance of Padam Sain Saraf. Therefore, there is no evidence against Mohinder Pal respondent also.

22. On the basis of the aforesaid discussion, we reach the conclusion that the prosecution has failed to prove its case against the respondents. There is no merit in the appeal and the same is dismissed.