

(1988) 03 MAD CK 0008

In the Madras High Court

Case No : Criminal R.C. No. F63 of 1984/Crl. R.P. No. 859 of 1984

B. Chainraj

APPELLANT

Vs

The Assistant Collector of Central Excise, (Preventive)
Madras-34

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 240, 241, 246, 281, 313

Citation : (1988) LW(Cri) 403

Hon'ble Judges : David Annoussamy, J

Bench : Single Bench

Advocate : K.M. Srirangam, for the Appellant; P. Rajamanickam Central Govt. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

David Annoussamy, J.—This is a revision petition by the accused. The accused is a pawn broker. On 23rd March, 1980 at about 3 p.m.

the then Inspector of Central Excise P.W. 1, along with another Inspector, P.W. 2, and other officers, visited the shop of the accused The accused

was present. In pursuance of a search warrant, Ex.P10, a search was conducted. Accounts were checked in the presence of accused and two

witnesses. The accused was asked whether he had in his possession any other ornaments not covered by the accounts and intended for trade

purposes. The accused admitted that he was having some gold ornaments for sale and produced a cardboard box M.O.1 containing those

ornaments. The accused did not have any licence under the Act to deal with gold ornaments, and those ornaments were not also covered under the

Pawn Brokers Act. The version given to them by the accused was that those

ornaments were not his personal or family property and that those ornaments namely M.Os.2 to 14 series were acquired from various brokers for trade purposes. So, those ornaments M.Os.2 to 14 series along with M.O.1 containing also primary gold bits, were seized under Ex.P1. A voluntary statement was recorded from the accused under Ex.P7. A show cause notice Ex.P4 was issued on 2nd July, 1980 and the accused sent a reply under Ex.P5 with annexures. Adjudication order was passed on 17th April, 1982 under Ex.P6 imposing a penalty of Rs. 7,000 and confiscating M.O.2 to M.O.14 series, giving an option to the accused to redeem the said items on payment of Rs. 20,000. Thereafter, P.W.1 filed a complaint before the Magistrate. Charges under Ss. 8(1)(i) read with S. 85(1)(ii), 6(2) read with Ss. 85(1)(viii) and 27(1) read with S. 85(1)(ix) of Gold Control Act were framed. The accused pleaded not guilty to the offences. The Magistrate after perusing the evidence came to the conclusion that the third charge under S. 27(1) read with S. 85(1)(ix) of the Act was not proved and acquitted the accused under that charge, but found that other charges were proved. He sentenced the accused to pay a fine of Rs. 1,000 for the first charge and Rs. 2,000 for the second charge. On appeal, the Principal Sessions Judge, Madras Division, confirmed both the conviction and sentence by judgment dated 25th July, 1984.

2. The learned counsel for the revision petitioner contended that the appellate court has not gone into his plea and has simply accepted the judgment of the trial Court and put forth again the same plea in respect of the second charge, namely that the ornaments belonged to his family and were not in the shop for the purpose of sale or any other transaction. But, this plea is given a lie to by the statement made by the accused before the Inspectors P.Ws. 1 and 2 to the effect that the ornaments were in his shop for the purpose of sale. It is true that in his reply to the show cause notice, the accused attempted to say that these jewels belonged to Bhikamchand's family, and have been left with the accused by his mother, who expired in February, 1979 and that he was keeping them in his shop in the iron-safe for the sole purpose of safe custody. But, that Bhikamchand was not examined by the accused for the purpose of substantiating his version. Further the list of the ornaments seized would show, that they are almost all new items and they are described as follows:

- (1) New Gold Kodi chain.
- (2) New gold jimikies.
- (3) New gold rings with stones.
- (4) New gold dollar plain with stones.
- (5) New gold kasu with hooks.
- (6) New gold ear rings,
- (7) New gold studs with stones.
- (8) New gold ear studs with lolack.
- (9) New gold bangles.

This description was never challenged by the accused. Therefore, the evidence of the Inspectors along with the retracted confession of the accused

has to be given effect to, since the explanation given by the accused in his reply notice is not found to be acceptable.

3. The next question which arises in this case is whether the Magistrate has committed any irregularity in the procedure and if so such an irregularity

has occasioned any failure of justice. In the first place, it is found that the examination of the accused and the plea of "guilty" are recorded in the

same series of sheets. This is not proper. The record of examination of the accused has to be made in accordance with the provisions of S. 281 of

Crl. P.C. The plea of guilt has to be recorded under the provisions of S. 240 and 241 of the Code. The manner prescribed for record not being

the same in both the cases, each should be recorded in a separate sheet. However, this irregularity did not cause any prejudice to the accused.

4. Secondly, it is seen that in this case the accused has been thoroughly questioned by the Magistrate before charges were framed and witnesses

cross-examined. As many as 19 questions dealing with all the vital aspects of the case appearing in the depositions of witnesses have been put.

This is not what the Magistrate is expected to do. In the trial of a warrant case instituted on a police report, there is no provision for the

examination of the accused in Chapter XIX. Under Sub-S. 2 of S. 246, Crl.P.C. the Magistrate can only ask the accused whether he has any

defence to make. If the accused comes forward with a case at that stage, it would be sufficient to record it in the docket sheet summarily.

5. Of course, S. 313, Crl. P.C. gives the power to the Magistrate to examine the

accused at any stage. The purpose for which the examination has to be done under that section is in order to enable the accused personally to explain any circumstances appearing against him in the evidence. The word "personally" would show that this is in addition to what his counsel would have already done by way of cross-examination. Therefore, it would be premature to examine the accused to explain personally any circumstances when he has not exhausted the opportunity to cross-examine the witnesses.

6. As per S. 313, Crl. P.C, answers given by the accused may be used in the case as well as in other cases. Therefore, it is not proper to extract answer from him before he is charged and knows what charge he has to meet. Prejudice may occur to the accused not only in this case but in other cases as well on account of untimely questioning by the court. The Magistrate has however got inherent powers to examine the accused even prior to the charge. But such examination would be done solely for the purpose of knowing whether a charge, and if so what charge, should be framed against the accused. The need for such examination would arise very rarely. If no such purpose is to be met no examination should be made at that stage. The accused should be simply heard.

7. Further the phrase "put such questions as the Court considers necessary" found in sub-S. 1(a) of S. 313, Crl. P.C. shows that the facultative examination under this provision of law is not expected to extend to all the aspects of the case. Therefore, even after the cross-examination of the concerned witnesses, the examination of the accused under S. 313(1)(a), Crl. P.C. has to be limited to what the Magistrate considers necessary at that stage.

8. To sum up. the examination of the accused prior to the charge under the inherent powers of the court will be exercised only in exceptional cases and that too to the extent necessary for the purpose of charge framing. The facultative examination of the accused under S. 313, Crl. P.C. can take place only after the cross-examination of the concerned witnesses is over. The examination under sub-S. (1)(b) of S. 313 , Crl. P.C. will take place when the the cross-examination of the entire prosecution witnesses is completed.

9. In the present case, the Magistrate has taken the wrong step to question the

accused thoroughly before the cross-examination of any witness.

However, it has not been shown that in this case a prejudice has occurred to the accused and that a failure of justice has resulted therefrom.

10. As far as sentence is concerned, the learned counsel for the revision petitioner would argue that it is excessive. The learned counsel for Public

Prosecutor for the Excise Department leaves the matter of sentence to the Court. The sentence in respect of both the offences is fixed as Rs. 1,000

(Rupees one thousand only). Barring this modification this revision is dismissed.