(1969) 09 DEL CK 0017

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No. 53 of 1969

Gulam Sarwar APPELLANT

Vs

The State and Others RESPONDENT

Date of Decision : 11-09-1969

Acts Referred:

Citation : (1970) ILR Delhi 482

Hon'ble Judges : M.R.A Ansari, J

Bench : Single Bench

Advocate : Harjinder Singh, D.R. Sethi and K.L. Arora, for the Appellant;

Judgement

M.R.A. Ansari, J.

(1) This is a petition filed under Article 227 and 228 of the Constitution of India and under S. 561-A of Criminal Procedure Code for quashing the criminal proceedings now pending against the petitioner in the court of Shri N. C. Jain, S.D.M., New Delhi.

(2) The petitioner is a Pakistani national. He was arrested on 8th May, 1964 under S. 104 of the Customs Act 1952. He was ordered to be released on bail by the High Court of Punjab on 18th May, 1964. Before his release he was detained under S. 3(2)(g) of the Foreigners Act. Subsequently a case was filed against the petitioner in the court of the Sub-Divisional Magistrate New Delhi under S. 5 of the Registration of Foreigners Act 1939 and he was co

(3) The petitioner''s contention is that the offences for which he is charged in the impugned proceedings are the same, as those for which he was convicted by Miss K. Sen Gupta, S.D.M. ''New Delhi and that he could not Therefore be tried again for the same offence. He is invoking the provisions of S. 403 Criminal Procedure Code . as well as S. 561-A Criminal Procedure Code . On the other hand it is the case of the respondents that the offences for which the petitioner is now being prosecuted are not the same as and are different from the offences for which the petitioner was already convicted. It Therefore, becomes necessary

to examine in some detail the facts and circumstances of the several proceedings that have been taken against the petitioner ever since he was arrested on 8th May, 1964.

(4) According to the affidavit of Shri Chuttan Lal Goyal, Under Secretary to the Govt. of India Min. of Home Affairs, New Delhi, filed in Crl. Writ No. 219-D/1965 in the High Court of Punjab, one Fazal Ahmed alias Pala Singh was arrested by the Customs- cum-Police Authorities on 21-4-1964 in a flat in G.B. Road, Delhi and he was found to be in possession of a sum of Rs. 10,380.00 in Indian Currency notes and some incriminating documents. On interrogation he disclosed that he was carrying on smuggling of gold between India and Pakistan Along with another person by the name of S. K. Kapoor. This latter person, whose real name was Ziaullah was arrested on the same day in a compartment of the Frontier Mail at Delhi Main Railway Station. This person was found to be in possession of some incriminating documents. On information given by Ziaullah another Pakistani national by the name of Abdul Hakim alias Jagdish was also arrested and he was also found to be in possession of some incriminating documents. The documents found in possession of Abdul Hakim enabled the Customs and Police authorities to arrest the petitioner herein on 8-9-1964 at a shop in Connaught Place, New Delhi. The interrogation of all these arrested persons revealed that a conspiracy in which all these persons including the petitioner were parties, came into existence in the year 1962 with the object of smuggling gold into India and Pakistan and that as a result of this conspiracy gold in very large quantities was smuggled into India from Pakistan between January 1962 and 8th May, 1964. The petitioner himself confessed before the Customs authorities that he had smuggled into India 52 kilograms of gold and handed it over to one Sat Narain. On getting this information, the Customs-can-police authorities seized 44 kilograms of gold from the said Sat Narain and also recovered from him Rs. 80,000.00 being the sale proceeds of the remaining 8 kilograms of the smuggled gold.

(5) Of the several proceedings launched against the petitioner after his arrest, under the circumstances stated above, his detention under S. 3(2)(g) of the Foreigners Act and his conviction under S. 5 of the Registration of Foreigners Act 1965 are not quite relevant so far as the issue for determination of the present petition is concerned, because even according to the petitioner, the present criminal proceedings which he is seeking to challenge are not barred by these earlier proceedings. It is only the proceedings in criminal case No. 862/3 of 1965 and the proceedings in the criminal case filed against the petitioner and 17 other persons on 17th January, 1967 that have to be examined because according to the petitioner the present criminal proceedings are barred by virtue of his conviction in these two cases. According to the complaint filed in the case before Miss K. Sen Gupta, the petitioner had entered into a conspiracy with his co-accused in that case for the purpose of smuggling gold into India and sending the sale proceeds out of India and the period during which this conspiracy was entered into included January 1964 to 8th May, 1964. In furtherance of this

conspiracy; the petitioner and his co-accused in that case had smuggled into India large quantities of gold. The petitioner and his co-accused were, Therefore, charged with offences under (1) S. 120-B, Indian Penal Code . read with S. 135 Customs Act and 23(1) (2) Foreign Exchange Regulations Act and also under the substantive sections of the said two Acts namely, S. 135 Customs Act and 23(1) (a) of the Foreign Exchange Regulations Act. The petitioner, herein, was actually convicted under S. 120-B, Indian Penal Code . read with S. 135 of the Customs Act and S. 23(1)(a) of the Foreign Exchange Regulations Act. The petitioner was not charged under the substantive sections namely : S. 135 of the Customs Act and S. 23(1)(a) of the Foreign Exchange Regulations Act. He may Therefore be deemed to have been discharged of these specific offences. It may be recalled that the petitioner had already been convicted on 29th May, 1965 for the substantive offence under S. 135 of the Customs Act for having smuggled 52 kilograms of gold into India. That was in Criminal Case no. 862/3 of 1965, before S.D.M. New Delhi (Shri Dharam Dutt). The offence for which the petitioner was convicted by Miss K. Sen Gupta, S.D.M. New Delhi on 31-1-1969 was for the offence of criminal conspiracy under S. 120-B read with S. 135 of the Customs Act and S. 23(1)(a) of the Foreign Exchange Regulations Act.

(6) In the complaint filed in the proceedings which are now pending before Shri N. C. Jain, S.D.M. New Delhi the petitioner is accused of having committed offence punishable under:

1.S. 120-B, Indian Penal Code . read with S. 135 of the Customs Act. 2. S. 167(81) of the Sea Customs Act and Sec. 23(1-A) of the Foreign Exchange Regulations Act. 3. Section 135 of the Customs Act. 4. Section 167(81) of the Sea Customs Act. 5. Sec. 23(1-A) of the Foreign Exchange Regulations Act. 6. Section 135 of the Customs Act and S. 167(81) of Sea Customs Act read with S. 109 and/or 114 Indian Penal Code . and 7. S. 23(1-A) of the Foreign Exchange Regulations Act read with S. 109 and/or 114 Indian Penal Code .

(7) According to this complaint the petitioner and the other accused in that case had entered into a Criminal conspiracy during the period commencing from January 1961 and extending up to 1964 or there-about for smuggling gold into India and sending sale proceeds out of India in contravention of law. The complaint has not referred to any specific acts of smuggling by the petitioner. The substance of the accusations against the petitioner both in the criminal case filed on 17-1-1967 as well as in the present case appears to be the same, namely, that the petitioner entered into a criminal conspiracy with a number of other persons for smuggling gold into India for sending the sale proceeds outside India in contravention of law. The only difference between the accusations in the earlier case and the accusations in the present case appears to be that whereas the period of the conspiracy in the earlier case is stated to be between January 1964 to 8th May, 1964 the period of the conspiracy in the present case is said to be between January 1961 to 8th May, 1964. If the criminal conspiracy which is the subject matter of the earlier case as well as the present case is one and the

same, the fact, that in the earlier case, the conspiracy is said to have taken place between January 1964 and 8th May 1964 and in the present case, the conspiracy is said to have commenced even from January 1961 is in my view not of much consequence. But if on the other hand, the conspiracy which was the subject matter of the earlier case was a different conspiracy from the one which is the subject matter of the present case, then, of course, the difference is material.

(8) The other difference that is apparent from the complaints in the two cases is that in the earlier case the petitioner is stated to have conspired with 17 other persons who were the co-accused in the earlier case and also some other unknown persons and in the present case, the petitioner is stated to have conspired with 45 other persons who are the co-accused in this case and also with others who are unknown. It is Therefore to be considered whether the petitioner was a party to two different conspiracies or was a party only to one and the same conspiracy.

(9) In the complaint filed in Criminal case No. 862/3 dated 5-4-1965 it is stated in para 12 as follows :

"THE complaint is in respect of one of the items of smuggling committed in pursuance of a criminal conspiracy to which the accused was a party. Despite the best efforts inquiries in the main conspiracy case about which this learned Court and other courts have been informed from time to time could not be completed because of the magnitude of the work involved. Since the accused is in judicial custody and has been persistently pressing for early filing of the complaint and since there has been a direction from the court of A.D.M. (III) also for early filing of the complaint this complaint has been presented today without prejudice to the filing of the complaint in the main case after completion of the enquiries which are in progress."

(10) From the averments made in this complaint it would appear that there was only one conspiracy to which the petitioner was a party. In the last para of his judgment in this case, namely, Crl. Case no. 862/3 of 12-4-1965 the learned Magistrate has observed as follows:

"THE recovered gold is to await disposal as Customs Officers have reserved the filing of Complaint against some other accused relating to the same transaction".

(11) This observation of the learned Magistrate indicates that the criminal conspiracy to which the petitioner was a party and the smuggling of gold by several persons on that occasion were part of the same transaction.

(12) The next document which throws some light upon this aspect of the case is the affidavit which Shri Chuttan Lal Goyal, Under Secretary to the Govt. of India, Ministry of Home Affairs. New Delhi filed in the Punjab High Court in connection with criminal Writ no. 219-D/1965 already referred to. This affidavit is dated 5th January 1966. In paragraph 5(b)(i) of this affidavit it is stated as follows:

"ON the 21st of April, 1964 a Pakistani national by the name of Fazal Ahmed alias

Pala Singh was arrested.... His interrogation disclosed that he was a Pakistani national and had entered into India clandestinely to work as a carrier in a Pakistani syndicate headed by Abid Hussain alias Ramesh etc............"

In para 5(b)(ii) it is stated as follows:

"THE said Ziaullah alias Kapoor alias Chiman Lal Bedi was arrested and interrogated. At the time of arrest he too was found to be carrying a coded message for the members of his syndicate residing in Amritsar." In paragraph 5(b)(iii) it is stated as follows : "In consequence of the disclosure made by Ziaullah alias S. K. Kapoor, still another Pakistani national who was staying in India under the assumed name of Jagdish alias Jivan Lal was traced in a Hotel in Darya Ganj. He disclosed his real name as Abdul Hakim son of Abdul Rahim, a resident of Lahore. At the time of his arrest a code and its key were recovered from him. This code was utilised by syndicate for the transmission of message about the arrivals of gold from Pakistan and the smuggling out of India of the sale proceeds of the said smuggled gold. The said Abdul Hakim alias Jagdish alias Jiwan Lal also had in his possession a note book which indicated that his syndicate had successfully smuggled into India gold worth over Rs. 1 (one) crore during the period from January 1964 to 21st August, 1964. Abdul Hakim alias Jagdish disclosed that he was carrying on the smuggling of gold from Pakistan into India and the sale proceeds thereof outside India on behalf of the syndicate headed by Abid Hussain alias Ramesh alias Darshanlal."

(13) In paragraph V of the affidavit it is stated as follows:

"THE matter is being looked into. Further enquiries revealed as under: (a) that the conspiracy to which the petitioner was the party to smuggle gold into India from Pakistan came into existence in the year 1962. (b) that the syndicate smuggled gold into Pakistan from the Sheikhdom of Dubai and Afghanistan. (c) that the said gold was then smuggled into India by the carriers syndicate comprising the residents of the border villages on the Pakistan side. (d) that the said gold was received at the border by the carriers syndicate comprising the residents of the border villagers on the Indian side with Amritsar District of Punjab State of the Union of India. (e) that the same ''carriers'' syndicate brought the said gold to Delhi where a Pakistani representative was stationed to supervise its further disposal. During the period of conspiracy the syndicate''s representatives in Delhi were Abdul Hakim alias Jagdish, Fida Hussain alias Chiman Lal and Gulam Sarwary alias Saroop Kumar. The financiers of the syndicate namely, Abid Hussain alias Ramesh etc. and Mohd. Afzal and Mohd. Ashraf came to India at regular intervals to settle accounts and to make appraisal. (f) that the syndicate with a view to ensure secrecy about their operations had smuggled even carriers into India from Pakistan for the transport of gold from one place to another within India. These carriers are Fazal Ahmed alias Pala Sing and Sarwar alice Girdhar Lal etc. (g) that members of this syndicate to begin with stayed in the various hotels of Delhi under assumed names and later rented palatial buildings in fashionable colonies. (h) that the syndicate avoided making contacts with their conspirators in India from the telephone installed at the premises of the hotel but utilised the coin boxes installed on the public call offices. (j) that the syndicate had its ramifications in Amritsar Delhi, Bombay, Calcutta and Madras, Lahore, Karachi and London. (k) that the members of the syndicate in connection with their operations travelled by air under assumed names. (o) that this syndicate had smuggled into India From the period January 1962 to 8th May, 1964 large quantities of smuggled gold thereby, defrauding the Govt. of India of the import duty payable thereon. The total amount of gold smuggled by this syndicate can be well nigh judged from the fact that the account books, seized from the possession of Abdul Hakim alias Jagdish at the time of his arrest on 21st April. 1964 disclosed the value of gold to be over rupees one crore during the period from 1st January, 1964 to April 21, 1964. (q) that it is estimated that more than 30 persons are involved in the conspiracy of smuggling of gold into India and the sale proceeds outside India by the syndicate. (r) that the petitioner is one of the said conspirators. At another place in the affidavit it is stated as follows : "The petitioner Ghulam Sarwar has been systematically causing the smuggling of large quantities of gold from Pakistan during the period January 1964 to 8th May 1964.... Here he is prosecuted only in respect of 52 kilograms of gold which he caused to be smuggled into India and which he received and handed over to Sat Narain for disposal. He is to be prosecuted in regard to remaining acts of smuggling gold into India and foreign exchange outside India. The smuggling by and through him, has been and is a big conspiracy in which the petitioner has played an important part. The whole matter is under enquiry by the customs department. These enquiries I submit are expected to be completed soon when a complaint for the contravention of the provisions of the Customs Act, Foreign Exchange Regulations Act read with section 120-B Indian Penal Code . etc. would be filed against the petitioner and others.... The whole conspiracy essentially needs to be investigated in its minutest details and the presence of the petitioner is absolutely essential and necessary for that purpose."

(14) These averments in the affidavit filed by the Under Secretary which I have extracted at some length would go to show that the petitioner was a party to a single conspiracy organized by a single syndicate in 1962 with the object of smuggling gold into India and the sale proceeds thereof, outside India and that it was in pursuance of this conspiracy that the petitioner had smuggled gold into India on several occasions including 52 kilograms of gold on or about 8th May, 1964.

(15) The investigation into this conspiracy in its minutest details referred to in the concluding portions of Shri Goyal''s affidavit obviously resulted in the filing of the complaint in the court of Miss. K. Sen Gupta, S.D.M. New Delhi against the petitioner and 17 others for the offence of criminal conspiracy under S. 120-B Indian Penal Code . read with Sec. 135 Customs Act and S. 23(i)(a) Foreign Exchange Regulations Act and also for the specific offences under S. 135 Customs Act and section 23(1)(A) Foreign Exchange Regulations Act.

(16) In paragraph 13 of this complaint it is stated as follows:

"ENQUIRIES made by the Customs Officer have revealed that all the accused aforesaid and Sat Narain and others unknown persons, between the period commencing from January 1964 and extending up to 8th May, 1964 or thereabout were parties to a Criminal conspiracy with the illegal object of smuggling gold into India and sending the sale proceeds thereof outside India."-

(17) This complaint does not refer to the existence of any other criminal conspiracy prior to January 1964 and in the light of the affidavit of Shri Goyal, the conspiracy referred to in this complaint appears to be the same which according to Shri Goyal came into existence in 1962. In the complaint filed in the impugned proceedings it is stated in paragraph 12 as follows:-

"ENQUIRIES made by the Customs staff have revealed that all the above-named accused and Shri Sat Narain deceased and the said Fazal Ahmed alias Pala Singh and others, unknown entered into the criminal conspiracy during the period commencing from January 1961 and extending up to 1964 and thereabout etc."

(18) Except stating that the conspiracy commenced from January, 1961 it is not stated that this was not the same conspiracy as was referred to in the affidavit of Shri Goyal or in the complaint filed in the Court of Miss K. Sen Gupta on 17-1-1967. The combined reading of the affidavit of Shri Goyal, the complaint filed on 17-1-1967 and the complaint filed in the present impugned proceedings will clearly indicate that there was only one conspiracy to which the petitioner was a party and that the petitioner was not party to two different conspiracies. The whole investigation into this conspiracy started with the arrest of Fazal Ahmed alias Pala Singh and the information given by him and according to the information given by this person, there was only one conspiracy. The fact, that, in the earlier case of conspiracy in which the petitioner was convicted there were only 18 accused whereas in the present impugned proceedings there are 46 accused, does not necessarily justify the inference that there were two different conspiracies. Shri Goyal estimated the number of the conspirators at more than 30. In the complaint filed in the Court of Miss Sen Gupta, the number of conspirators was not limited to the 18 accused in that case but it was stated that there were other unknown persons also who were parties to the conspiracy. In the complaint in the present impugned proceedings also it is stated that in addition to the 46 accused there were others unknown. It would thus appear that a very large number of persons were involved in this conspiracy, some of whom were prosecuted before Miss Sen Gupta and some others in the present impugned proceedings.

(19) In the light of the affidavit of Shri Goyal, Under Secretary to the Government of India and also in the light of the averments made in the complaint filed on 12-1-1967 and in the complaint filed in present impugned proceedings, I am not prepared to attach any weight to the affidavit of Shri H. K. Kochhar, Assistant Collector of Customs filed in the present writ proceedings to

the effect that there were two criminal conspiracies; one organized by Ch. Allaudin of Lahore and the other by Abid Hussain and that the petitioner was a party to these two conspiracies. Shri Goyal has affirmed that he was conversant with the facts of the case and it must be presumed that the fads stated by him in his affidavit must have been based upon the investigation made by the Customs and Police authorities. Shri Kochhar in his affidavit does not allege that the facts stated by Shri Goyal were not true. Shri Kochhar''s affidavit does not indicate that some fresh facts or evidence had come to light since the filing of Shri Goyal''s affidavit which would disprove the correctness of the facts as stated by Shri Goyal. It appears to me that the story of the existence of two separate conspiracies organized by two separate syndicates has been invented only for the purpose of this petition.

(20) The meaning, and scope of the word "Criminal Conspiracy" as defined in S. 120-A Indian Penal Code . was examined by the Calcutta High Court in Abdul Rehman v. Emperor ILR (1935) 740 and it was held that the offence of criminal conspiracy did not come to an end on the date when there is an agreement between two or more persons to an illegal act but that a criminal conspiracy may come into existence and may persist so long as persons Constituting the conspiracy remain in agreement and so long as they are acting in regard to any furtherance of the objects for which they entered into the agreement. In that case it was found that the conspiracy had come into existence in 1920 and continued till 1931 and also that during the interval of time several persons dropped to the conspiracy and several more joined the conspiracy; but nonetheless it was held to be a single conspiracy.

(21) The same principle has been enunciated by the Supreme Court in S. Swamirathnam Vs. State of Madras, wherein it was held;

"WHERE the charge, as framed, discloses one single conspiracy although spread over several years, there is only one object of the conspiracy and that is to cheat members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies"

(22) This decision of the Supreme Court was followed by the Bombay High Court in Abdul Kaddar Saleh Mohamad v. The State, 1963-65 Bombay Law Reporter 864 and it was held as follows:

"SEC.120-B of the Indian Penal Code applies to those who are members of the conspiracy during its continuance. Sec. 120-B cannot be exclusively read to mean whoever has been or had been party to a criminal conspiracy shall be punished as if the offence was committed. It has to be treated as a continuing offence and whoever is a party to conspiracy during the period for which he is charged is liable under that section."

(23) Their Lordship also quoted with approval the following passage from an

American Case namely: United States v. Kissel : 218 U. S.601 54L d. 1168

"BUT when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies rather than to call it a single one. . . . A conspiracy is constituted by an agreement it is true, but it is the result of the agreement rather than the agreement itself just as a partnership although constituted by a contract is not the contract but is a result of it. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

(24) The question now for consideration is whether on the facts as found by me, the petitioner will be entitled to invoke the jurisdiction of this court under Article 227 and 228 of the Constitution of India read with S. 561-A of Criminal Procedure Code . for quashing the criminal proceedings that are now pending against him in the court of Shri N. C. Jain, S.D.M. New Delhi.

(25) The scope of the powers of the High Court under S. 561-A Cr. P.C. has been explained by the Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, in the following terms:

"THE inherent power of High Court under S. 561-A Criminal Procedure Code cannot be exercised in regard to matters specifically covered by the other provisions of the Code. The inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory .stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction."

(26) Their Lordships proceeded to indicate some of the categories of cases where the inherent jurisdiction to quash proceedings can be exercised. But it is obvious that their Lordships did not intend to restrict the scope of the inherent jurisdiction of the High Court under S. 561-A, Criminal Procedure Code . to the categories of cases mentioned by them. The categories mentioned by their Lordships are in my view, only illustrative and not exhaustive. This is clear from the following observations of their Lordships:

"WE may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to an abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice "

(27) In my view the scope of the inherent powers of the Court under S. 561-A Criminal Procedure Code . will include the power to quash any criminal proceeding pending in. any subordinate Court on the ground that such proceedings violate the principle of Autrefois acquit or autrefois convict. In the present case, the petitioner was convicted by Miss Sen Gupta. S.D.M. Delhi on an offence under S. 120-B. Indian Penal Code . read with 135 Customs Act and S. 23(1)(a) Foreign Exchange Regulations Act. In the light of my finding that the petitioner was party to only one conspiracy, he cannot be again tried in the present criminal proceedings for the same offence. With regard to the specific offence of smuggling, the petitioner was already convicted in Criminal Case No. 682/3 of 1965 under S. 135 of the Customs Act for having smuggled into India 52 Kilograms of gold on or about 8th May, 1964. It was probably for this reason that the petitioner was not charged with the specific offence under S. 135 of the Customs Act and S. 23(i)(a) of the Foreign Exchange Regulations Act by Miss Sen Gupta. The petitioner, Therefore cannot be tried again in the present impugned proceedings for the offence of smuggling of 52 kilograms of gold into India on or about 8th May, 1964. The present impugned proceedings are Therefore quashed so far as the offence of criminal conspiracy u/s 120-B Indian Penal Code . read with S. 135 Customs Act and section 23(i)(a) Foreign Exchange Regulations Act is concerned. The present impugned proceedings are also quashed so far as the specific offence u/s 135 of the Customs Act and S. 23(1)(a) of the Foreign Exchange Regulations Act for the smuggling of 52 kilograms of gold into India on or about 8th May, 1964 are concerned. If the petitioner is accused of any other specific acts of smuggling, there is no bar against the continuation of such proceedings. The learned S.D.M. before whom the impugned proceedings are now pending will carry out these directions.

(28) In the result the petition is allowed to the extent indicated above.

