

(1988) 11 RAJ CK 0010

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 242 of 1988

Jagdish Soni

APPELLANT

Vs

A.K. Derashri

RESPONDENT

Date of Decision : 30-11-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 107, 108, 11, 111, 124

Citation : (1989) WLN 171

Hon'ble Judges : G.K. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

G.K. Sharma, J.—This miscellaneous petition u/s 482, Cr.P.C. has been preferred against the order dated 1st Feb., 1988, passed by the CJM (Economic Offences) Jaipur, by which, he has taken cognizance against the petitioner u/s 135 of the Customs Act, 1962 (for short, "the act of 1962) and u/s 85 of the Gold (Control) Act, 1968 (for short, "the Act of 1968" and issued process against the petitioners.

2. The officers of the Customs Unit, Jaipur, received some information and on that basis, they apprehended 2 persons, namely, Sushil Kumar and Ramesh Kumar. Then, on inquiry from them, they admitted that they were carrying gold of foreign marks, in their bodies. Both the persons were brought to Central Revenue Building, Statue Circle, Jaipur. A through search of their bodies and baggage, was conducted, but, nothing objectionable was recovered. Then, they were further persuaded to take out the concealed items, and later on, both the persons took out packets from their rectum which were packed in rubber condoms and carbon papers with adhesive-tapes. Both the packets were found to contain 8 foreign-marked gold-biscuits. The customs officers demanded evidence from both the persons, but, they failed to produce any evidence documentary or otherwise, regarding illicit import/purchase/custody/control of the foreign-marked gold so recovered. Therefore, the customs officers, on a reasonable

belief that the said foreign-marked gold was imported into India in an unauthorized manner, violating the provisions of Section 11 of the Act of 1962, read with Section 13 of the Foreign Exchange Regulation Act, 1947, rendering it liable for confiscation u/s 111 of the Act of 1962, seized the said foreign-marked gold. The statements of Ramesh Kumar and Sushil Kumar were recorded on 22nd June, 1986, when they admitted the recovery of the seized foreign-marked gold from their rectum and stated that they were working for one Jagdish Soni of Sikar, who had given them US Dollars, and under whose instructions, they had brought the said foreign-marked gold from one Kamal of Kathmandu. Then on 23rd June, 1986, the residential-premises of Jagdish Soni, were searched, but, nothing objectionable was recovered. Jagdish Soni was not found there available at the time of the search, and therefore, his business-premises could not be searched for want of keys. The business-premises were, therefore, sealed. On 10th July, 1986, Manoharlal Soni, father of Jagdish Soni, filed an application that his son was out of Sikar, and so, he requested for opening the business-premises. The said business premises were opened on 12th July, 1986, and a search has made, but, nothing objectionable was recovered. Jagdish Soni was summoned for 24th June, 26th June and 7th July, 1986 but he appeared before the Superintendent, Customs, Jaipur, on 14th July., 1986 and tendered his statement u/s 108 of the Act of 1962, wherein, he denied his link or involvement with Sushil Kumar or Ramesh Kumar.

3. The Customs Department felt that Jagdish Soni had failed to explain about his absence at the time of search of His residential as well as business premises. It appeared to them that Sushil Kumar and Ramesh Kumar were engaged in smuggling of foreign-marked gold from Kathmandu to Sikar They were caught red-handed while carrying 1159.4 gms. of foreign-marked gold valued to Rs. 2,40,000/- and they were working for Jagdish Soni of Sikar. Thus, all the three persons appeared to have contravened the provisions of Section 11 of the Act of 1962, read with Section 13(1) of the FERA and Section 3(1) of the Imports & Exports (Control) Act, 1947, rendering the same liable for confiscation under aec. 111 of the Act, of 1962, According to the Customs Department, the seized gold was also liable to be confiscated u/s 71 of the Act of '68, and the three persons were also liable to penal action u/a 74 of the Act of the 1968.

4. On the facts as narrated above, a complaint was filed before the CJM (Economic Offences), Jaipur City, Jaipur. The learned Magistrate took cognizance and issued process against Jagdish Soni, the petitioner and Sushil Kumar and Ramesh kumar. That order of issuing process, has been challenged by the petitioner.

5. Mr. Bajwa, the learned Counsel for the petitioner argued that the relevant sections of the Act of 62, are Sections 107 108 & 124. u/s 107, any officer of the Customs, empowered in this behalf, by the order of the Collector of the Customs, may, during the course of any inquiry, in connection of smuggling of any goods, examine any person acquainted with the facts and circumstances of the case u/s

108, any Gazetted Officer of Customs, shall have power to summon any person whose attendance be considers necessary, either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods. So, while pointing out the different of these two sections, it was argued that both these sections are independent sections, and that, while making an inquiry, the person first has to be examined u/s 107 of the Act of 1962, and if the officer of the Customs thinks that on inquiry u/s 107, it is necessary to record evidence or take some documents for this inquiry regarding the smuggling of goods, then certainly, u/s 108, the officer has power to summon any person. So Section 108 is a subsequent stage. First, the inquiry has to be made u/s 107, and later on, he is empowered to seek attendance and ask anybody to give evidence or produce it. Thus, he argued that the stage for according statement u/s 108 of the Act of 1962, had not arisen in this case. That stage could arise only after 5th Dec, 1986, when the notice u/s 124 of the Act of 1962 had been issued. Thus, even the statements alleged to have been recorded u/s 108 of Act of 1962, could not be recorded.

6. In reply to this argument, Mr. Chaudhary submitted that there is a vital difference between Sections 107 & 108 of the Act of 1962. A statement u/s 107 can be recorded by any Customs Officer whereas one u/s 108 can only be recorded by a Gazetted Officer of the Customs, during the course of an inquiry. According to him, a statement u/s 108 of the Act of 1962 is recorded before a show-cause notice is given u/s 124 of the said Act, and as this notice is issued after completion of entire investigation, it is incorrect to argue that a statement u/s 108 of the Act of 1962 can be recorded only after giving a notice u/s 124 of the Act of 1962.

7. I have considered the arguments of both the learned Counsel, on this point, and have also purchase the various case laws.

8. In Union of India v. Abdul Kader and Ors. 1985 Cr. LJ it has been observed as under:

The stage of recording of statements u/s 108 arises only when an inquiry is started either for confiscation of the goods or for imposing penalty. This is very clear from the wording of Section 108. So far as Section 107 is concerned, it takes care of investigatory emergencies.

In absence of any material to show that any inquiry was stated either for confiscation of the goods or for imposition of penalty by giving a notice as required by Section 124, the Superintendent of Customs held was not authorised to record statements of the accused u/s 108. Nor could the recording of the statement be valid u/s 107 as the Superintendent was not either by general or special order authorised by the Collector of Customs to record statements of accused u/s 107. When the statements were not recorded by a competent officer under the Act, those statements could not be looked into for any purpose.

The Gujarat High Court, while deciding the above case, followed the decision in

the case of the Smt. Krishnawati Vs. Shri Hans Raj, , where in, Hon"ble the Supreme Court has been served that the stage of recording statements u/s 108, arises only when an inquiry is started either for confiscation of goods or for imposing penalty.

9. After going through the record of this case, I find that there is nothing on the record to show that any inquiry was started by giving a notice in writing to the accused persons, for confiscation of the goods or for imposition of penalty. So, when such an inquiry was not started by giving such a notice, the Customs Officer was not authorised to record statement of the accused u/s 108 of the Act of 1962.

10. Mr. Bajwa also argued that Ramesh Kumar and Sushil Kumar, admittedly, are accomplices. The entire case against Jagdish Soni is based on the statements of these two persons (accomplices). There must be some independent corroborative evidence to the statements of Ramesh Kumar and Sushil Kumar, and in the absence of such corroborative evidence, the statement of the accomplices, cannot be acted upon, argued Mr. Bajwa relying on the case of State of Kerala v. Thomas alias Bobby 1986 (12) SCC 411, wherein, it has been observed that turning to the evidence of PW 14 the taxi-driver, it cannot be disputed that on his own showing, he would be an accomplice, and therefore, his evidence cannot be accepted unless it receives independent corroboration.

11. In the present case also, there is no dispute that Ramesh Kumar and Sushil Kumar are two accomplices, and the case against Jagdish is based only on the statement of these two persons. So, in the absence of any independent corroborative evidence no action can be taken on the basis of the statements of the two accomplices, namely, Ramesh Kumar and Sushil Kumar. It was also argued that the statements of Ramesh Kumar and Sushil Kumar are in the form of confession, and that it is the confession of the two co-accused. It is well-settled that confession by a co-accused, is not substantive piece of evidence against the other co-accused persons, in the same trial, argued Mr. Bajwa, relying on the case, of Kashmira Singh Vs. State of Madhya Pradesh, , where in, their Lordships have observed that a confession of a co-accused is not substantive evidence against the other co-accused persons in the same trial, but it can only be used for leading assurance to any substantive evidence, if there be any other substantive evidence to be utilised or acted upon. So, following the case of Kashmira Singh (supra), in the case of Param Hans Yadav and Sadanand Tripathi Vs. State of Bihar and Others, , their Lordships observed that confession of a co-accused is not a substantive evidence against the other co-accused persons in the same case.

12. Alternatively, it was argued that assuming that the statements of Ramesh Kumar and Sushil Kumar were recorded u/s 108 of the Act of 1962, then also no process could have been issued solely on the basis of the statements of the co-accused persons. On this point, he relied on the case of Mulchand Sampatraj Shah and Ors. v. Dayashanker, Assistant Collectors of Customs and Ors. 1987 3

SCC 724, where in, it has been held as under:

... and therefore, it can be safely held that the statement of a co-accused alone cannot be the basis or the foundation to proceed against other co-accused.

13. It was also argued on behalf of the petitioner that when chances of conviction appear to be remote/bleak, proceedings may be quashed. In this context. Mr. Bajwa relied on the case of Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, . The case of Madhavrao (supra) was filed before the Supreme Court as a special appeal directed against the judgment of the Bombay High Court on an application u/s 482 Cr.P.C. The High Court in that case, by its order, had quashed the proceedings against 2 of the 4 accused persons, and while dealing with the legal position, their Lordships of the Supreme Court observed as under:

The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceedings even though it may be at a preliminary stage.

14. In view of my above discussion. I am of the opinion that the trial court has committed error in taking cognizance against the accused petitioner in this case.

15. The miscellaneous petition is, therefore, allowed, and the order passed by the CJM (Economic Offences), dated 1st February, 1988, in Criminal Case No. 36/88, is hereby set aside. The warrant of arrest, issued against the petitioner, is cancelled.