

(1966) 10 BOM CK 0007

In the Bombay High Court

Case No : Criminal Revision Application No. 289 of 1966

L.R. Melwani

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 12-10-1966

Acts Referred:

Arms Act, 1959 — Section 19
Civil Procedure Code, 1908 (CPC) — Section 132
Constitution of India, 1950 — Article 134, 136, 20, 226
Evidence Act, 1872 — Section 145, 153
General Clauses Act, 1897 — Section 3
Penal Code, 1860 (IPC) — Section 114, 120B, 149, 188, 193

Citation : (1967) 69 BOMLR 421

Hon'ble Judges : Naik, J; Bal, J

Bench : Division Bench

Judgement

Naik, J.—This application is directed against the order passed by the Presidency Magistrate, 26th Court, Mazagaon, Bombay, in Case No. 132/W of 3965 rejecting certain prayers made on behalf of the petitioners, who were accused Nos. 1 and 2 in that case. The Assistant Collector of Customs of the Appraising Department, Bombay, filed a complaint against five persons including the petitioners (who will hereafter be referred to as accused Nos. 1 and 2 respectively) u/s 120B, Indian Penal Code, read with Clauses (57), (75), (76) and (81) of Section 167 of the Sea Customs Act, 1878 and Section 5 of the Imports and Exports (Control) Act of 1947 and also u/s 167(57) and Section 167(75) and 167(75) of the Sea Customs Act, 1878. The material facts as disclosed by the complaint may be set out as follows: Four consignments bearing marks (V.I.P.) were imported by accused No. 3 on behalf of the company by name M/s, Champaklal Ananthram which reached Bombay harbour on December 15, 1959. The manifest showed the four cases as containing Nylon Oriental Georgette. Accused No. 3 purported to import Nylon Georgette under the licence granted to him under Export Promotion Scheme. Accused No. 3 opened a letter of credit for the import of the said Nylon Georgette through the Indian Overseas* Bank Ltd., Bombay. M/s. Larmell

Enterprises of which accused No. 1 is the proprietor and accused No. 2 the manager guaranteed the letter of credit. The guarantee was signed by accused No. 1, L.R. Melwani as the proprietor of M/s. Larmell Enterprises. The complainant has asserted that though the shippers of the said four consignments were shown as four different parties viz. (1) M/s. Y. Lilaram & Co. (Singapore) Ltd. (2) M/s. New Era Traders, (3) M/s. Meridian International Agency and (4) M/s. Traders Syndicate, they are one and the same persons and in fact they negotiated the import documents in respect of the four consignments, through the same letter of credit. The import documents disclosed the contents of the said four consignments as Nylon Georgette quality 633 and each consignment as being of one case bearing marks (V.I.P.) and containing Nylon Georgette quality 633 of the value of Rs. 1,185. M/s. P. Jamnadas & Co., who are the clearing agents, filed one bill of entry on December 16, 1959, in respect of one case. They purported to act as agents of M/s. Champaklal Ananthram. That case was examined on December 26, 1959, and found to contain Nylon Georgette as per the declaration. The bill of entry presented was in respect of item No. 423, On December 29, 1959, M/s. P. Jamnadas & Co., on behalf of M/s. Champaklal Ananthram filed three more bills of entry in respect of the remaining three consignments relating to items Nos. 424 to 426 of the Import General Manifest (hereinafter referred to as the manifest). The markings on these three cases were the same viz., VIP. This duplication of marks aroused the suspicion of the Appraiser. The bills of entry, therefore, were returned to the representative of the said clearing agents viz., M/s. P. Jamnadas & Co. for further action. It is alleged that the accused on finding endorsements regarding duplication of marks on the said bills of entry realized that the same would lead the examining authorities to examine all the cases simultaneously and thus expose their fraud. Therefore, they did not process the said bills of entry further and kept back the same. Further enquiries revealed that the measurements of the three cases out of the said four cases bearing the same marks viz., VIP, were 22 c. ft. each as against the measurement of the fourth case, which was 7 ft. 10 inches c. ft. (This was the case which was already examined). According to the complainant, the measurements were deliberately omitted from the bills of lading to avoid detection by the Customs that the measurements of one of the said four cases all bearing marks "VIP" were much smaller than those of the remaining three cases. It is suggested that this trick was adopted to enable the conspirators to distinguish the smaller case as the case containing genuine goods so that only the small case should be taken for examination on every occasion. It is also suggested that the modus operandi adopted was this: After the examination of the small case containing genuine goods, delivery would not be taken of the small case, but delivery would be taken of one of the three cases also bearing marks VIP and which the conspirators knew contained contraband. It is the case for the prosecution that what was removed on December 23, 1959, was not the small case that was actually examined but one of the three bigger cases. On January 11, 1960, the Customs called upon the clearing agents M/s. P. Jamnadas & Co. and also M/s. Champaklal Ananthram to return the said bills of entry in

respect of the consignments, relating to items Nos. 424 to 426 and the same were returned on January 14, 1960. By a letter dated January 26, 1960, M/s. Champaklal Ananthram were asked to have the cases examined under the three bills of entry. They, however, informed the Customs that apart from the case already examined under the bills of entry for item No. 423 (viz., the small case containing genuine goods) only one more case could be traced. So on January 28, 1960, the remaining case which related to item No. 424 was examined in the presence of accused No. 2 and one Kadam, the authorised representative of accused No. 3. On examination of the said case it was found to contain contraband goods viz., wrist watches, straps, motor car upholstery material, textile goods etc. of a very high value. The other two cases could not be traced at that time. It is alleged that on further enquiries the Customs learned that the said two cases were surreptitiously removed by the accused on or about January 2, 1960, as stated hereafter. Two more consignments were imported from Singapore per s.s. Yamataru Maru. M/s. Larmell Enterprises had an import licence for import of Nylon Georgette under the Export Promotion Scheme. They opened a letter of credit dated October 15, 1959, through the Indian Overseas Bank Ltd., for the import of Nylon Georgette quality 633 in favour of M/s. V. Lilaram & Co., Singapore. Accused No. 2 signed the application and the agreement for the opening of the said letter. Two consignments each comprising two cases and both bearing marks "LE" were shipped at Singapore per s.s. Yamataru Maru on or about November 20, 1959, under the said letter of credit and arrived at Bombay on or about December 10, 1959. These two consignments were manifested as items Nos. 150 and 152 of the manifest for Yamataru Maru. It is the case for the prosecution that one of the said two consignments contained contraband goods which were smuggled by resorting to duplication of marks. The bill of entry was presented in respect of only one of the two consignments which related to item No. 150 of the manifest in the first instance. It is only after the examination of the two cases in respect of the aforesaid bill of entry, the accused filed the bill of entry in respect of the second consignment relating to item No. 152 of the manifest. It is alleged that the accused while taking delivery of the consignment under the first bill of entry took cross delivery and removed the consignment of two cases, which were not the cases examined under the bill of entry for item No. 150 but the other consignment of two cases also bearing marks "LE" and containing contraband goods. According to the prosecution, the delivery of these two cases was taken on December 23, 1959. The second bill of entry relating to item No. 152 was presented on December 26, 1959 and two cases bearing marks "LE" were taken for examination by accused No. 4. It is alleged that there were only the marks "LE" in respect of these two" cases as declared in the bill of entry. There" were no additional words or marks beside "LE". The Customs Examiner, Dolas, examined the two cases bearing marks "LE". Accused No. 5 was the Shed Appraiser in charge of the Customs Examination Centre at Shed No. 2 of Alexandra Docks, where the said two cases bearing marks "LE" were examined. Accused No. 5 put his initials near the said examination report of the Examiner Dolas in token of its correctness. He,

however, did not suggest on the original bill of entry that there were any discrepancies in the marks or there were any additional marks on the cases that were examined. The complaint alleges that the duplicate bill of entry for the same consignment now bears an endorsement "Mark (VIP) addition". This endorsement is in the handwriting of accused No. 5 and is initialled by him. It is the case for the prosecution that the said endorsement was made subsequently by accused No. 5 fraudulently acting in conspiracy with accused Nos. 1 to 4 with a view to falsely make it appear that the two cases bearing marks "LE" had in addition the further marks "VIP". It is suggested that this fraudulent action of accused No. 5 was with a view to facilitate accused Nos. 1 to 4 in removing the two bigger cases containing the contraband goods and bearing marks "VIP" imported by s.s. Ozarda and that on January 2, 1960, they did take delivery of the said two bigger cases containing the contraband and bearing marks "V.I.P." imported by s.s. Ozarda under the pretence that they were taking delivery of the two cases bearing marks "LE" imported by s.s. Yamataru Maru. It is alleged that as a matter of fact, the two cases bearing marks "LE" imported per s.s. Yamataru Maru were not taken delivery of at all and subsequently the marks "LE" on these two cases were fraudulently tampered with and altered to read "EE". It is the case for the complainant that the marks "LE" were tampered with and altered to read "EE" fraudulently by the conspirators with a view to avoid detection by the authorities that the two cases bearing marks "LE" had not been taken delivery of and instead the two bigger cases bearing marks "VIP" imported per s.s. Ozarda had been taken delivery of. It is alleged that the said two cases bearing marks "LE" imported per s.s. Yamataru Maru, which were subsequently altered by the aforesaid acts to read "EE" are still lying with the Bombay Port Trust authorities.

2. It is thus the case for the prosecution that all the five accused were members of the conspiracy which commenced from the beginning of October 1959 and went on till the end of October 1960. Accused No. 3 joined the conspiracy on or about January 2, 1960.

3. Before the filing of the Written complaint, adjudication proceedings were taken up u/s 167(5) of the Sea Customs Act, by the Collector of Customs against accused Nos. 1 and 3 in respect of the case, which was found to contain contraband goods when the same was examined on January 28, 1960. After hearing the parties, the Collector of Customs passed an order directing the confiscation absolutely of the goods u/s 167(5) of the Sea Customs Act. He also imposed a personal penalty of one lakh rupees u/s 167(5) and a further penalty of one thousand rupees u/s 167(37) of the Sea Customs Act on accused No. 3. As regards the firm M/s. Larmell Enterprises of which accused No. 1 is the proprietor, the Collector of Customs stated that although it was apparent that they had directly assisted the importers in their illegal activities and were morally guilty, there was no conclusive evidence against them holding them as falling within the category of "persons concerned in the act of unauthorised importation" they must escape penalty on the principle of benefit of doubt. The Collector, therefore, did not impose any penalty on accused No. 1, the proprietor

of Larmell Enterprises.

4. On behalf of accused No. 1 an application was made before the Presidency Magistrate, 26th Court, Mazagaon, Bombay asking for the following reliefs:

(1) the present prosecution is barred by reason of the fact that the finding of the Collector in favour of accused No. 1 amounted to his acquittal.

(2) the finding operated as an issue estoppel so far as the reception of the same evidence is concerned.

(3) there had been inordinate delay in launching the prosecution. The prosecution, therefore, amounted to abuse of the process of the Court and the same should be quashed.

(4) the copies of statements of various witnesses whom the prosecution intends to examine and also of the documents on which the prosecution proposes to rely including statements of the accused persons as well as notings, note sheets and reports of the Customs Officers made during the course of the investigation be supplied. In the alternative, it was prayed that summons be issued u/s 94, Criminal Procedure Code, directing the Collector of Customs or the Special Prosecutor to produce in the Court the aforesaid state- ments, documents, notings, note-sheets and reports of the Customs Officers before the commencement of the inquiry into the complaint.

5. The trying Magistrate recorded findings against the petitioners on all the points and dismissed the petition. That is why accused Nos, 1 and 2 have now come up in revision asking for the same reliefs from this Court.

6. Mr. Jethmalani, for the petitioners, relied upon Article 20(2) of the Constitution of India for his contention that the prosecution was barred inasmuch as the adjudication proceedings before the "Collector, of Customs were in the nature of criminal prosecution and the order of acquittal in those proceedings would bar a second prosecution under Article 20(2) of the Constitution of India. He did not press that contention before us. He, however, urged with considerable vehemence and ingenuity that the rule of issue estoppel must operate so far as the finding of acquittal recorded by the Collector of Customs is concerned and this finding would bar the prosecution from leading evidence contrary to the finding already recorded. He also pressed the point viz., that the present prosecution would amount to abuse of the process of the Court in view of the delay that occurred in launching the proceedings and in view of the possibility that all traces of evidence in favour of the accused may have been obliterated by reason of lapse of time. He also argued that the accused are entitled to the copies of the statements of witnesses and other relevant documents either on the principle analogous to the one embodied in Section 173(4), Criminal Procedure Code, or on general principles relating to pretrial procedure. In any case, he urged that the accused would be entitled to summons u/s 94, Criminal Procedure Code, for production of the said documents.

7. We propose to address ourselves first to the argument based on the doctrine of issue estoppel. The Privy Council has laid down in broad outline the principle of issue estoppel in *Sambasivam v. public Prosecutor, Federation of Malaya*. [1950] A.C. 458. The facts of that case were as follows: On the morning of September 13, 1948, the appellant, an Indian Tamil Clerk, Avas travelling on foot in the State of Johore in the company of two Chinese. They met a party of three Malays and a fight ensued, in the course of which one of the Chinese was killed, and the appellant was seriously wounded. The other Chinese escaped and had not, apparently, been heard of since. The Malays, who were armed with knives, alleged that they had been fired on by the Chinese and that Sambasivam (the appellant) had drawn and pointed a revolver at one of them before he had been wounded and disarmed. In connection with that incident Sambasivam was later charged with carrying a firearm and being in possession of ten rounds of ammunition. Sambasivam was tried on two charges in the Supreme Court, The second charge related to the possession of ammunition. Both the assessors returned a verdict of not guilty and the learned Judge agreeing with that finding acquitted Sambasivam of that charge. On the first charge relating to the carrying of a firearm, the assessors also found Sambasivam not guilty but Laville J. disagreed with that finding and ordered a retrial. At the retrial, the assessors found Sambasivam guilty of that charge and he was sentenced to death. Sambasivam appealed against his conviction. The Court of Appeal dismissed his appeal. On appeal before the Privy Council, it was held:

That the effect of the omission to inform the assessors at the second trial that the appellant had been found not guilty of being in possession of ammunition and was to be taken as entirely innocent of that charge was to render the second trial unsatisfactory in a material respect.

Lord MacDermott, who delivered the judgment of the Board, considering the legal effect of the verdict of acquittal, observed (p. 479) :

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "*Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition, in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

The dicta in Sambasivam's case were completely and fully approved by the Supreme Court in Pritam Singh and Another Vs. The State of Punjab, . In Pritam Singh's case the accused was acquitted of the charge u/s 19(f) of the Arms Act. Their Lordships held:

...Thus an acquittal of an accused in a trial u/s 19(f) Arms Act, is tantamount to a finding that the prosecution had failed to establish the possession of certain revolver by the accused as alleged. The possession of that revolver was a fact in issue which had to be established by the prosecution before he could be convicted of the offence under e. 19(f). That fact was found against the prosecution and could not be proved against the accused in the subsequent proceedings between the Crown and him, under charge of murder. The evidence against him in the latter proceedings would have to be considered regardless of the evidence of recovery of the revolver from him.

8. The principle underlying the decision in Pritam Singh's case was invoked in a number of cases which came up before the Supreme Court after Pritam Singh's case. The Supreme Court without in any way disapproving of the principle laid down in Pritam Singh's case tried to distinguish the facts, of the cases before it from the facts in Pritam Singh's case and held on different occasions, that the facts found would not justify the application of the said principle. In a recent case in Manipur Administration Vs. Thokchom, Bira Singh, the correctness of the principle in Pritam Singh's case was called into question. On a review of the relevant decisions of the Privy Council, the High Court of Australia and the Supreme Court itself, their Lordship reaffirmed the correctness of the principle laid down in Pritam Singh's case. Their Lordships held:

The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when, the accused is tried subsequently even for a different offence which might be permitted by the terms of 8.403(2). The rule is not the same as the plea of double jeopardy or autrefois acquit. The rule does not introduce any variation in the Code of Criminal Procedure either in investigation, enquiry or trial. It also does not prevent the trial of any offence as does autrefois acquit but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction. The rule thus relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court at a previous trial.

The facts in Manipur Administration's case may be briefly stated as follows: There was an agitation by certain political parties and groups in Manipur in April T960 for establishing responsible Government in the Manipur area. The agitation took the form of picketing of Government offices and the residences of

Government servants and blocking roads in order to paralyse the administration. After this form of agitation continued for some time, the District Magistrate of Manipur promulgated orders u/s 144, Criminal Procedure Code, on the morning of April 25, 1960, banning public meetings and processions and these orders were proclaimed and communicated to the public through loudspeakers. Notwithstanding this order, crowds continued to collect and move on the streets shouting slogans. Bira Singh-the respondent-was said to have been leading this mob. A lathi charge by the police took place but it is stated that because of this the crowd moved a little away and began to pelt stones. The crowd was thereupon directed to disperse, its attention being drawn to the promulgation of the order u/s 144, Criminal Procedure Code, and to the fact that the gathering in a public place in violation of the order made it an unlawful assembly; but this command was not heeded and the stone-throwing continued. There was firing by the police which resulted in injuries to certain persons including some of the police personnel. The first information report in regard to the incident and the offences committed during its course was lodged at the Imphal Police Station at about 7 p.m. that day in which the informant specified the name of the respondent Bira Singh as the leader of this mob. On this a case was registered under ss. 114, 149, 332, 349 and 307, Indian Penal Code, and Section 7 of the Criminal Law Amendment Act. The charge-sheet stated that the respondent was in the crowd between 3 and 5 p.m. on that day, that the crowd was an unlawful assembly, that he was among those who pelted stones which caused grievous hurt to one person and simple hurt to others and also caused damage to the Inter State Police Wireless Station. Along with the respondent certain others were included as accused but the Supreme Court was concerned only with the respondent. The learned Sessions Judge convicted all of them of the offences with which they were charged and sentenced them to varying terms of imprisonment.

9. It may be stated that there was a prior prosecution of Bira Singh. That prosecution was founded on a complaint against him filed on May 12, 1960, u/s 188, Indian Penal Code, in connection with his participation as a member of the same crowd in regard to which the charge which was the subject-matter of the present proceedings. In that complaint the District Magistrate alleged that the respondent had disobeyed the order passed u/s 144 by himself forming himself along with two thousand other persons into an unlawful assembly between the hours of 3 and 5 p.m. on April 25, 1960, by shouting slogans and pelting stones at police officers and this was stated to be on the road in front of the police Wireless Station. Bira Singh in his defence pleaded that he was not present at the scene of the occurrence at all and that he had been falsely implicated by the Police. The Magistrate rejected the defence and accepting the prosecution case convicted him of the offence with which he was charged.

10. Bira Singh went in appeal to the Sessions Court. The learned Sessions Judge allowed the appeal holding that the prosecution had not established that the respondent was present at the place and at the time where the occurrence took

place at which he was said by the prosecution to have been present or that he disobeyed the order u/s 144, Criminal Procedure Code. Referring back to the case in which Bira Singh was charged under Sections 114, 149, 332, 342 and 307, Indian Penal Code, where he was, convicted under the said charges by the Sessions Court, he preferred an appeal to the Judicial Commissioner. The main point which was argued before the Judicial Commissioner was that in view of the acquittal of Bira Singh in the earlier case which involved a finding that he was not present on the scene of the offence on the day and at the time in question, it was not open to the Court in the subsequent trial to allow evidence to be led which might result in a contrary finding nor was it open to the Sessions Court in the subsequent trial to record a finding against the finding reached in the previous trial. It was in that context that the dicta cited at length earlier were pronounced by the Supreme Court,....

11. It is thus clear that the highest Court has now enunciated the principle of issue estoppel according to which if a finding is reached resulting in the acquittal of the accused in an earlier criminal proceeding before the Court of competent jurisdiction, evidence cannot be allowed to be led so as to upset that finding in a subsequent criminal proceeding. Nor can the Court in a subsequent proceeding record a finding contrary to the finding arrived at in the previous proceeding. This principle is not the same as the principle of *autre-fois acquit* or *autrefois convict* laid down in Section 4,03, Criminal Procedure Code. Nor is it the same as the principle of double jeopardy as laid down in Article 20(2) of the Constitution of India. On the principle of *autrefois acquit* or *autrefois convict* and on the principle of double jeopardy a subsequent trial-is completely barred because of conviction or acquittal in the previous trial. The principle of issue estoppel does not bar a subsequent trial but it only prevents the prosecution to lead evidence for the purpose of upsetting the finding reached by the Court in a previous trial. It also prevents the Court in a subsequent trial from recording a finding running counter to the finding arrived at in the previous proceedings.

12. The only question for consideration in the case is whether the finding readied by the Collector of Customs in the adjudication proceedings holding that no penalty could be levied on the petitioners as the case had not been established against them beyond a pale of doubt prevents the prosecution from leading evidence in the present case for the purpose of proving the charges levelled against them and others. In *Manipur Administration's case* at page 91 in explaining the dicta laid down by Lord MacDermott the Supreme Court has set out certain conditions which must be fulfilled for attracting the doctrine of issue estoppel:

- (1) Whether there was an issue of fact in the previous proceedings.
- (2) Whether the issue directly related to an ingredient of the offence charged at a later trial.
- (3) Whether there was a specific finding on that issue of fact.

(4) Whether the earlier trial was a criminal trial before a Court of competent jurisdiction.

13. Mr. Khandalawala, for the State, relied upon the decisions of the Supreme Court in *Maqbool Hussain Vs. The State of Bombay*, ; *Leo Roy Frey Vs. The Superintendent, District Jail, Amritsar and Another*, and *Thomas Dana Vs. The State of Punjab*, In all these cases the question that fell for consideration was whether a subsequent criminal prosecution was barred under Article 20(2) of the Constitution of India by reason of the order passed in the adjudication proceedings u/s 167(5) of the Sea Customs Act. In "*Maqbool Hussain*"s case the Collector of Customs had passed an order confiscating the smuggled gold u/s 167(5) of the Sea Customs Act. The accused was subsequently prosecuted in a criminal trial u/s 23 of the Foreign Exchange Regulation Act, 1947. The Supreme Court held that the Collector of Customs was not a judicial tribunal. It also held that the proceedings for confiscation are proceedings in rem and not in personam; that the Collector did not act judicially in passing the order of confiscation and that the machinery provided was in the nature of administrative machinery. In *Leo Roy*'s case also the order passed was for confiscation of the smuggled gold. Their Lordships of the Supreme Court have observed that in passing the order of confiscation, the Collector of Customs acted judicially. At the same time, they held that this was not sufficient to attract the provisions of Article 20(2) of the Constitution of India which postulate two conditions viz. (1) prosecution for an offence and (2) punishment for the same. Their Lordships relied upon Section 186 of the Sea Customs Act, which provided:

The award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any (punishment to which the person affected thereby is liable under any other law.

They, therefore, held that the levy of penalty or confiscation by the Collector of Customs would not interfere with the subsequent prosecution under the Indian Penal Code or any other law. They also pointed out that the offence u/s 120B, Indian Penal Code, is not an offence under the Sea Customs Act. Their Lordships emphasized that a conspiracy to commit a crime is separate from the actual crime and actually precedes the commission of the crime. In *Thomas Dana*'s case after pointing out that in order to attract the principle in Article 20(2) of the Constitution of India three conditions must be fulfilled viz., that he has been prosecuted; that he has been punished and that he has been prosecuted and punished for the same offence, their Lordships went on to define the term "prosecution". They drew a distinction between "confiscation" and "penalty" and pointed out that in *Thomas Dana*'s case the order was both for confiscation and penalty unlike in the two previous cases viz., *Maqbool Hussain*'s case and *Leo Roy*'s case. Their Lordships pointed out that the word "penalty" is a generic word and it has been used in Chapter XVI in a generic sense. Their Lordships also pointed out (p. 380) :

...When a proceeding by the Revenue Officers is meant, as is the case in most of

the items in the Schedule to Section 167, those officers have been empowered to deal with the offending articles by way of confiscation, or with the person infringing those rules, by way of imposition of penalties in contradistinction to a sentence of imprisonment or fine or both. When a criminal prosecution and punishment of the criminal, in the sense of the Penal law, is intended, the section makes a specific reference to a trial by a Magistrate, a conviction by such Magistrate, and on such conviction, to imprisonment or to fine or both. In this connection, reference may be made to the penalties mentioned in the third column against items 72, 74, 73, 76, 76A, 76B, 77, 78 and 81, which illustrate the latter class of the penalty in column 3, The penalties mentioned in the third column of most of the items of the Schedule to Section 167 of the Act, do not make any reference to a conviction by a Magistrate and punishment by him in terms of imprisonment or of fine or of both....

The Legislature was, therefore, aware of the distinction made throughout the Schedule to Section 167, between a proceeding before Revenue authorities by way of enforcing the preventive and penal provisions of the Schedule and a criminal trial before a Magistrate, with a view to punishing offenders under the provisions of the same section.

14. On the other hand, Mr. Jethmalani pointed out that after all the Supreme Court was dealing¹ with the provisions of the Constitution of India and was interpreting the words "prosecution", "punishment" and "offence" as used in that article viz., 20(2). He conceded that he was not contending that subsequent prosecution was barred under Article 20(2) of the Constitution. It is not, therefore, necessary to consider whether the previous proceedings amounted to prosecution and whether the prosecution related to the same offence. He also drew our attention to the specific observations of the Supreme Court in Thomas Dana's case at page 383 to the following effect:

In view of these considerations, and particularly in view of the decision of this Court in the case of Maqbool Hussain v. The State of Bombay, there is no escape from the conclusion that the proceeding before the Sea Customs Authorities under S.167(S) were not "prosecution" within the meaning of Article 20(2) of the Constitution.

Secondly, Mr. Jethmalani argued that the Supreme Court in the aforesaid case did not pronounce any decision on the meaning of the words "punishment" and "the same offence" as used in Article 20(2) of the Constitution. In that context, he referred to the following observation appearing on the same page as follows:

...In that view of the matter, it is not necessary to pronounce upon the other points which were argued at the Bar, namely, whether there was a "punishment" and whether "the same offence" was involved in the proceedings before the Revenue Authorities and the Criminal Court.

In particular, he relied upon the minority judgment of Subba Rao J. (as he then was) in the same case. In order to appreciate the judgment of Subba Rao J., it is

necessary to refer to the facts of the case: On June 11, 1957, the petitioner (Thomas Dana) arrived at Bombay, later went to Delhi and from there he travelled to Amritsar by car in company with Mr. Leo Roy Frey. On June 23, 1957, he reached Attari Road Lands Customs Station and was arrested u/s 173 of the Sea Customs Act, 1878, on suspicion of having committed an offence thereunder. He was served with a notice by the Collector of Central Excise and Land Customs, New Delhi, on July 7, 1957, to show cause why penalty should not be imposed on him u/s 167(S) of the Sea Customs Act and Section 7(2) of the Land Customs Act, 1924, and why the goods should not be confiscated. By order dated July 24, 1957, the petitioner was adjudged guilty u/s 167(5) of the Act and currency of the value of over 9 lakhs, car worth Rs. 50,000 and other things were confiscated, and he was punished with personal penalty of Rs. 25,00,000. The petitioner was again prosecuted on the same facts before the Additional District Magistrate, Amritsar, on charges u/s 167(81) of the Act and Sections 23 and 23-B of the Foreign Exchange Regulation Act. He was convicted on charges u/s 23 read with Section 23-B of the Foreign Exchange Regulation Act, Section 167(81) of the Act and Section 120B of the Indian Penal Code and sentenced to imprisonment of two years, six months and six months respectively by the Additional District Magistrate, Amritsar. The conviction and sentences were confirmed on appeal by the Additional Sessions Judge, and the revision filed in the High Court was dismissed.

15. His Lordship took the view that all the three conditions viz. prosecution, punishment and offence, laid down in Article 20(2) of the Constitution of India have been fulfilled by the order passed by the Customs authorities. Consequently, it was held that the prosecution would be barred. Since the majority did not accept this view, it is not necessary for us to scrutinize the decision minutely. Mr. Jethmalani relied upon this decision not for raising the plea of double jeopardy under Article 20(2) of the Constitution but for the purpose of preventing the prosecution from leading evidence with the object of upsetting the findings reached by the Collector of Customs. In that connection he pointed out that Subba Rao J. has rightly distinguished the decisions in Maqbool Husmin's case and Leo Boy's case on the ground that in both the cases the question was whether the order of confiscation of goods would have the effect of barring a subsequent prosecution. Mr. Jethmalani referred to the following passage in the judgment of Subba Rao J. (p. 385) :

...The word "offence" is defined in Section 3(38) of the General Clauses Act, 1897, to mean any act or omission made punishable by any law for the time being in force. u/s 4 of the Code of Criminal Procedure, it means any act or omission made punishable by any law for the time being in force. An offence is, therefore, an act committed against law or omitted where the law requires it.

Punishment is the penalty for the transgression of law. The terms "punishment" and "penalty" are frequently used as synonyms of each other,...

The word "prosecuted" is comprehensive enough to take in a prosecution before

an authority other than a magisterial or a criminal Court.

He also referred to another passage (p. 386) :

...The question whether a particular authority in discharging specified duties is a judicial tribunal or not falls to be decided on the facts of each case, having regard to the well settled characteristics of a judicial tribunal.

On the same page there is another observation on which also Mr. Jethmalani relied:

....If the legislature in effect constitutes a judicial tribunal, but calls it an authority, the tribunal does not become any the less a judicial tribunal.

After conceding that the Magistrate, who convicts and punishes a person for the infringement of some of the provisions of Section 167 of the Act, is a judicial tribunal, Subba Rao J. proceeded to pose the question (p. 387) :

...Is it reasonable to assume that when another authority adjudges on similar offences under the same section, it is functioning in a different capacity ?

His Lordship then referred to Section 171A of the Sea Customs Act and pointed out that a proceeding before the Customs Authorities is a judicial proceeding within the meaning of Sections 193 and 223, Indian Penal Code. Mr, Jethmalani strongly relied on the observation at page 388 to the effect: "...The customs Authority has to function as a judicial Tribunal". His Lordship has also stated earlier: "... It is implied in the statute that the judicial procedure is to be followed". It is obvious that some of the observations contained in the judgment of Subba Rao J. may be helpful to the accused in their defence based on the rule of issue estoppel. Certain observations of the Supreme Court in the three subsequent decisions may also lend support to the view pressed before us on the question of issue estoppel. In *Amba Lai v. Union of India* A.I.R [1961] S.C. 264 the Supreme Court held that the proceedings before the Customs authorities are penal in character and that the fundamental principle of criminal jurisprudence viz., that the burden always lies on the prosecution to prove the case beyond a pale of doubt, is applicable to the proceedings before the Customs authorities. In *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, the Supreme Court held that the confiscation or penalty is a quasi-judicial order subject to the writ of certiorari. In *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, the Supreme Court held that although a Customs Officer is not a "Court" or a "Tribunal" he has to act in a judicial manner. In the same case, their Lordships held that the Central Board of Revenue, which hears appeals from the orders of the Collectors of Customs and the Central Government, which hears revision applications from the orders of the Central Board of Revenue, are judicial tribunals. Mr. Jethmalani, therefore, contended that the dicta in *Maqbool Hussain's* case and in some other cases must now be treated no longer as good law. He argued that the Collector of Customs is an authority who deals with important matters like imposition of

substantial penalty as also confiscation of the property. He has to act in accordance with the requirements of the quasi-judicial procedure and he is subject to the control of the appellate and revisional jurisdiction and in the final resort to the control of the Supreme Court. Every case is capable of being taken to the Supreme Court since it has been held in *Indo-China Steam Navigation Company's* case that Article 136 of the Constitution applies to a decision of the Central Board of Revenue in appeal and of the Central Government in revision. Again the authorities are governed by the fundamental principle of criminal jurisprudence and also of natural justice. Mr. Jethmalani, therefore, contended that intrinsically there is nothing in the doctrine so that it must be confined to regular criminal Courts. He then pointed out the incongruity in which the Collector of Customs would land himself by first declaring a person innocent and then lodging a complaint against him u/s 187A of the Sea Customs Act. According to Mr. Jethmalani, the question as to whether the rule of issue estoppel should be made applicable to regular criminal prosecution launched after a contrary decision in the adjudication proceedings will have to be reconsidered in the light of the observations of the Supreme Court in the cases cited above and in particular the observations of Subba Rao J. in *Thomas Dana's* case.

16. Mr. Khandalawala referred to the latest decision of the Supreme Court in *Sachidananda Benerji, Assistant Collector of Customs Vs. Sitaram Agarwala and Another*, in which a distinction has been made between a customs offence and a criminal offence. In particular, he drew our attention to the fact that Subba Rao J., who was the protagonist of the minority view in *Thomas Dana's* case, himself has made the aforesaid distinction. Mr. Khandalawala argued that whereas the petitioners were acquitted by the Collector of Customs in respect of a Customs offence, what they are now charged with is a criminal offence including the offence of criminal conspiracy u/s 120B, Indian Penal Code.

17. Although we feel that the question raised by Mr. Jethmalani about the applicability of the doctrine of issue estoppel to a case where the Customs authorities have held the accused persons as not guilty and the same persons are being tried for a criminal offence arising out of the same facts deserves careful consideration, we do not think that this is a fit case in which the applicability of that doctrine need be discussed in great detail. We notice that Subba Rao J. in delivering the minority judgment in *Thomas Dana's* case was impressed by the circumstance that the facts, on which the charge u/s 167(57) (Customs offence) was based, were the same for which he was being prosecuted u/s 120B, Indian Penal Code and Section 167(57) of the Sea Customs Act etc. Even for the purpose of conspiracy, the facts relied upon were the same; the incident on which the charges were founded was the same viz., that *Thomas Dana* and *Leo Hoy Prey* travelled in the same car from Bombay to Delhi and from Delhi to Amritsar and eventually detained and found to be in possession of numerous contraband articles including foreign currency etc. The judgment of Subba Rao J. in *Thomas Dana's* case mentions the following facts in the opening paragraph (p. 383) :

...The petitioner was again prosecuted on the same facts before the Additional District Magistrate, Amritsar, on charges u/s 167(81) of the Act and Sa. 23 and 23-B of the Foreign Exchange Regulation Act.....and Section 120-B of the Indian Penal Code...

At the end of the judgment again his Lordship emphasised:

...The record discloses that the petitioner was prosecuted before the Customs Authority as well as the Magistrate on the same facts, viz., that he, along with others, attempted to take out of India, Indian currency (as detailed in paragraphs 14 and 17 of the complaint of the Assistant Collector of Customs and Central Excise, Amritsar), in contravention of the law prohibiting such export.

In the present case, the facts on which the petitioners were prosecuted u/s 167(57) of the Sea Customs Act were altogether different from the facts on which they are being prosecuted in the criminal trial u/s 167(57) of the Sea Customs Act and Section 120-B, Indian Penal Code. As, stated earlier, four cases bearing marks "VIP" were shipped by &s. Ozarda which reached Bombay on December 15, 1959. Out of these four cases, admittedly two could not be traced. One was cleared and only one case remained which was 22 c. ft. in volume. This was examined on January 28, 1960, and it was found to contain various kinds of contraband goods including watches, motorcar upholstery etc. The only charge which could be levied u/s 167(57) in reference to these cases was that the petitioners were concerned in the importation of the said prohibited goods. The Collector of Customs held that the evidence about the petitioners' complicity in the importation of the contraband goods was not conclusive. The net of the present prosecution case is cast over a wider field and covers a larger set of facts. According to the prosecution, there was a conspiracy between the first four accused which was set afoot sometime in October 1959 and went on till the end of October 1960, for the purpose of importing contraband goods under the cover of importing the licensed goods. It is pointed out that two consignments had arrived earlier i.e., on December 10, 1959, by s.s. Yamataru Maru marked "LB". According to the prosecution, accused No. 1 was interested in the goods imported under the consignments shipped both by s.s. Ozarda and s.s. Yamataru Maru. The importers of the goods shipped by s.s. Yamataru Maru was accused No. 1 himself. It is the case for the prosecution that although the importers of goods which arrived by s.s. Ozarda were apparently M/s. Champaklal Anantharam, accused No. 1 also had an interest in the same. It is further the prosecution case that the modus operandi for surreptitious removal of the goods which arrived by s.s. Ozarda and the goods which arrived by s.s. Yamataru Maru was the same. In fact, it is alleged that two cases which arrived by s.s. Ozarda were actually cleared under the garb of removing the cases which arrived by s.s. Yamataru Maru. It is further alleged that the two cases which arrived by s.s. Yamataru Maru are still lying in the dockyard and have been kept in a "Pinjra" since the claimants are not clearing the goods. It is also alleged-that with the help of accused No 5 an attempt has been made to tamper with the marks which

were originally "LB" into "LE VIP" or simply "EE VIP". In this connection, it is suggested that one of the two consignments which reached Bombay by s.s. Yamataru contained contraband goods and the other declared goods. The one containing declared goods was examined and was shown as cleared. The remaining consignment was got examined on December 26, 1959 but was not removed but in its place the two cases bearing marks "VIP" which arrived by ss. Ozarda were removed. This clandestine removal was facilitated by accused No. 5, who changed the marks "LE" into "LB VIP" on the bill of entry. The original bill of entry, according to the prosecution, does not contain the changed marks. It is pointed out that the name of the steamer by which the two consignments were brought and which are lying in the "Pinjara", still appears on the cases. The prosecution also relied upon the following circumstances: On February 18, 1960 or February 19, 1960, Keny, an employee of the Customs, noted the two cases lying at the Customs Centre where they were taken for examination. At that time, according to Keny, those cases bore the marks "LB". On March 3, 1960 or March 4, 1960, Keny noticed that the marks "LE" were changed to "EE". He made a report regarding the same to his superior Patil. On March 5, 1960, Patil put those cases in the "Pinjara". On May 7, 1960, Venkatraman, Assistant Director of Inspection, made a preliminary enquiry and submitted a report the same day stating that the two "LE" cases originally examined were left behind. It would thus be seen that the allegations on which the present prosecution has been launched covers a wider canvass of facts as also the period of time, whereas the proceedings in respect of one case which was examined by the Customs and found to contain contraband goods on January 28, 1960, lay within a very narrow compass viz., whether accused No. 1 was concerned in the import of that particular case which was found to contain the contraband goods.

18. Mr. Jethmalani contended that although only one case, which was actually available for examination, was found to contain contraband goods and was the subject-matter of the enquiry u/s 168(5) of the Sea Customs Act, the facts of importation cover the entire consignment shipped through s.s. Ozarda. He argued that the evidence in respect of importation of all the four cases by s.s. Ozarda would be the same as importation of one case which was examined. There is substance in this line of reasoning. But, the point to be noted is that it is not merely the importation of cases by s.s. Ozarda which is the subject-matter of the prosecution in the present case, but it also relates to importation of cases which reached Bombay earlier on December 10, 1959, by s.s. Yamataru Maru. The two importations are sought to be linked together by the circumstance that frantic efforts were made to remove the two cases shipped by s.s. Ozarda under the cover of the marks, used for the goods which arrived by s.s. Yamataru Maru. The link connecting the first four accused with the consignments carried by both the ships is the attempt made for removing the two cases arrived by s.s. Ozarda under the garb of clearing the two cases arrived by s.s. Yamataru Maru. The only connection between accused No. 1 and the goods, which were carried by s.s. Ozarda, was the circumstance that accused No. 1 stood as a guarantee to the

letter of credit opened by M/s. Champaklal Ananthram. The Collector of Customs felt that this connection was too tenuous to establish that accused No. 1 was concerned in the importation of the four cases brought by s.s. Ozarda. The prosecution now seeks to establish the connection of accused No. 1 with the goods brought by s.s. Ozarda by relying on the circumstance that accused No. 1 in the first place was the owner of the goods carried by s.s. Yamataru Maru and in the second place, a successful attempt was made to remove the two cases carried by s.s. Ozarda by substituting these cases for the cases carried by s.s. Yamataru Maru. That connection again is sought to be established on the ground that accused No. 1 has left the two cases uncared for in the dockyard which have now been consigned to the "Pinjra" which he would not have ordinarily done unless he was connected or concerned with all the cases carried by s.s. Ozarda. How far the prosecution would succeed in establishing the facts alleged by it is altogether a different matter. We are not discussing the merits of the evidence. We are only considering the allegations which are contained in the complaint and we are trying to see whether the facts in the case of Customs offence and the facts in this criminal offence are the same. We do not think that the finding reached by the Collector of Customs that accused No. 1 was not concerned with the importations would in any way prevent the prosecution from leading evidence to show the connection of accused No. 1 to those goods on the basis of a comprehensive conspiracy which was set on its legs in October 1959 and went on till the end of October 1960. This is sufficient to dispose of the point of issue estoppel raised by Mr. Jethmalani.

19. The second point relates to the delay in the launching of the prosecution. As stated earlier, although the offence was detected as far back as January 28, 1960, the complaint was not lodged till February 19, 1965. Mr. Jethmalani complained that as a result of this delay accused No. 1 may have lost important evidence because he had been acquitted in the proceedings u/s 167(5) of the Sea Customs Act and, therefore, he could not possibly anticipate that at a later date, a criminal prosecution would be launched. In this connection, it is necessary to bear in mind some important dates, which were given to us by Mr. Khandalawala from the record. Venkatraman, Assistant Director of Inspection, made a report on May 7, 1960 in regard to accused No. 5 after holding an enquiry into the matter. The Departmental enquiry was commenced against accused No. 5 in November 1960. The Enquiry Officer submitted his report in May 1961. The show-cause notice was issued against accused No. 1 on July 15, 1961. Accused No. 1 offered his explanation on August 8, 1961. Champaklal Ananthram submitted his explanation on April 9, 1962. The Collector of Customs held the adjudication proceedings on September 4, 1962 and passed the final order on October 31, 1962. Champaklal Ananthram preferred an appeal to the Central Board of Revenue on January 9, 1963. That appeal was dismissed on October 1, 1963. Champaklal Ananthram preferred a revision application to the Government of India on November 18, 1963 which revision came to be dismissed on February 20, 1964. It may be stated that an order of dismissal was passed

against accused No. 5 in November 1961. He approached the High Court under Article 226 of the Constitution of India in its writ jurisdiction which application was dismissed in August 1963. Accused No. 5 preferred an appeal to the Supreme Court in June 1965, which is still pending. Mr. Khandalawala contended that it would have been impertinent for the Customs to launch a prosecution against the five accused while the proceedings initiated by Champaklal Ananthram were not finally disposed of. He also submitted that it would not have been proper to launch a complaint against accused No. 5, who, according to the prosecution, is one of the conspirators till final orders were passed in the departmental proceedings. The Customs authorities, according to Mr. Khandalawala, were advised not to launch the prosecution till the writ petition filed by accused No. 5 was dismissed as also the revision preferred by Champaklal Ananthram was finally disposed of. Mr. Khandalawala also referred to the fact that sanction proceedings would also take time because according of sanction is not just a formal matter. He stated that sanction of the State Government u/s 196A, Criminal Procedure Code, was accorded on December 7, 1964. He, therefore, argued that there was no delay in lodging the complaint which was actually lodged on February 19, 1965. In our view, the delay in the filing of the complaint is not unreasonable on the facts of the case and the explanation offered by Mr. Khandalawala is satisfactory in that regard.

20. That takes us to the last point. Mr. Jethmalani contended that the accused are entitled to copies of all the statements recorded by the Customs Officers in the course of the investigation including the statements of witnesses and also the statements of the accused persons. He also argued that the accused are entitled to other documents such as notings; note-sheets; Inward registers; correspondence exchanged between the shippers, Traders Syndicate with the Collector of Customs; report of the Assistant Director of Inspection, S. Venkatraman; statements of witnesses recorded in the departmental enquiry against accused No. 5 and correspondence exchanged between the Collector of Customs and shipping agents etc. Mr. Jethmalani submitted a list of documents in respect of which he claimed copies and/or inspection. In the course of the arguments Mr. Khandalawala agreed to supply copies of the following documents even before the commencement of the trial:

- (1) Statements of accused persons,
- (2) Two bills of entry filed by Larmell Enterprises,
- (3) Delivery orders in respect of two consignments which arrived by s.s. Yamataru Maru.

21. He also stated that he may show to the counsel for the accused the correspondence exchanged between the Collector of Customs and the shipping agents in regard to the consignments when the particular Customs Officer is put in the witness box. He also stated that he had no objection in giving copies of the bills of lading dated December 16, 1959, of s.s. Ozarda. He strongly opposed the

prayer for supplying the defence with the copies of statements of witnesses before those witnesses enter the witness box. He agreed that he would supply copies of the statements of these witnesses as soon as the examination-in-chief of each of them is over. He also opposed the request for supplying copies of note-sheets or allowing inspection of the original documents on the ground that they contained opinions and opinions are never relevant. He stated that so far as the correspondence is concerned, he does not propose to examine the Traders Syndicate and the Shippers. The question, therefore, of supplying copies of correspondence does not arise. He pointed out that accused No. 5 has got a copy of the report of the Assistant Director of Inspection in the departmental proceedings initiated against accused No. 5. He refused to supply copies of the statements of witnesses recorded in the said departmental enquiry. At the same time, he pointed out that accused No. 5 must have got copies of the same.

22. Mr. Jethmalani contended that the question is one of principle and the defence should not be made to rely upon the vagaries of the prosecutor for the Customs. He, therefore, invited us to give a ruling on the point. He complained that the undertaking given by the Customs counsel has been given undue importance both by the trial Court and also Tulzapurkar, J. in *Bashir Hussain Peshimam Vs. Gulam Mohomed Ismail Peshimam and Others*, He also argued that if the material called for is relevant and is also necessary and desirable for the trial, then Section 94, Criminal Procedure Code, can be invoked. According to him, the suppression of anything relevant will create difficulties in the way of discovery of truth which is the only object of any trial. According to him exception can be made only in respect of the material which on the ground of public policy is subject to the rule of privilege. He also argued that the interests of the accused in securing the material on which the prosecution does not rely are even greater than securing the material on which the prosecution wants to rely, because *ex hypothesi* that material is more likely to benefit the accused. According to Mr. Jethmalani, after all the demand made by the accused amounts to pre-trial discovery.

23. Mr. Khandalawala pointed out that the case instituted under the Sea Customs Act is one instituted otherwise than on the police report, that is to say, which is instituted on the basis of a complaint lodged by the appropriate Customs authorities. The procedure for such a case is the procedure for the trial of warrant cases as prescribed by Sections 252 to 259, Criminal Procedure Code. Act No. XXVI of 1955 which introduced extensive amendments in the Code of Criminal Procedure made a distinction between the procedure for the trial of warrant cases instituted on a police report and those instituted otherwise than on a police report. To the cases instituted on police report the procedure laid down in Section 251A, Criminal Procedure Code, applies, whereas to cases otherwise than on police report, the procedure laid down in Sections 252 to 259, Criminal Procedure, Code, applies. We will refer to only those provisions of Section 251A, Criminal Procedure Code which are relevant for our present discussion. Sub-section (1) provides that the Magistrate shall satisfy himself, at the

commencement of the trial whether the accused has been supplied with copies of all documents referred to in Section 173, Criminal Procedure Code. Sub-sections (2) and (i) provide that on consideration of these documents and after giving the prosecution and the accused an opportunity of hearing, the Magistrate may either discharge the accused or frame a charge against him, as the case may be. Sub-section (6) provides that in case the accused pleads not guilty the Magistrate shall fix a date for examination of witnesses. Sub-section (7) lays down that on the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. The proviso says that the Magistrate has discretion to defer the cross-examination of any witness until any other witness or witnesses have been examined or recall any witness for further cross-examination. It would thus be seen, that Section 251A, Criminal Procedure Code envisages only one cross-examination of witnesses subject of course to the discretion to be exercised by the Magistrate according to the facts and circumstances of the case. In order to enable the accused to embark upon the cross-examination, on the framing of a charge which may be almost immediate on a consideration of the documents, provision has been made u/s 173(4), Criminal Procedure Code whereby an investigating officer is required to furnish to the accused the following copies:

- (1) first information report recorded u/s 154, Criminal Procedure Code,
- (2) all other documents or relevant extracts thereof on which the prosecution proposes to rely,
- (3) including the statements and confessions recorded u/s 164, Criminal Procedure Code,
- (4) statements recorded under Sub-section (3) of Section 161, Criminal Procedure Code of all the persons whom the prosecution proposes to examine as its witnesses.

24. On the other hand, in a trial instituted otherwise than on a police report, elaborate procedure involving double cross-examination has been laid down. Section 252, Criminal Procedure Code implies that the accused can cross-examine the witnesses before the framing of the charge. Sections 254 and 255 lay down that in case the Magistrate frames a charge he shall record the plea of the accused. Section 256, Criminal Procedure Code lays down that the accused shall have the right of cross-examining the witnesses examined for the prosecution and for that purpose witnesses may be recalled. Prior to the amendment, the procedure for warrant cases was uniform. No distinction was made as to how the case had been initiated. In other words, the procedure for all warrant cases was the same as laid down in Sections 252 to 259, Criminal Procedure Code. That means that the procedure was the same as the one which is today applicable to the cases initiated otherwise than on a police report. It may also be noted that there was no provision similar to the provision now contained in Sub-section (4) of Section 173, Criminal Procedure Code. That

means that there was no obligation on the part of the police officers to supply copies of statements of witnesses to the accused before the commencement of the trial. The only provision in that respect was the one contained in Section 162 as it stood before its amendment. The proviso to this section provided:

...when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872.

The statement of a witness recorded by a police officer u/s 161, Criminal Procedure Code cannot be used for the purpose of corroborating that witness. It can only be used for contradicting him. It was, therefore, implicit in Section 162, Criminal Procedure Code that the Court shall grant the request for referring to the statements etc. or of supplying copies of such statements to enable the accused to cross-examine the witnesses for the purpose of pointing out the contradictions. Now, under the procedure contained in Sections 252 to 259, Criminal Procedure Code, which was applicable to all the warrant cases which envisaged the right of two cross-examinations by the accused, all that was necessary for the accused to do was to ask one question to the witness by way of cross-examination before the framing of the charge. That would immediately entitle him to ask for a copy of the statement. He could then study the statement and utilise the same for contradicting the witness during the second cross-examination after the framing of the charge. The same position would hold good in the committal proceedings. Before the commitment the accused would ask one or two questions in the cross-examination so as to enable him to ask for copies of the statements of witnesses reserving his right for fuller cross-examination in the Court of Session. The procedure for warrant cases initiated on a police report now has done away with two cross-examinations.

25. Mr. Khandalawala contended that since the procedure laid down in Sections 252 to 259, Criminal Procedure Code is applicable to the complaint lodged by the Customs authorities, the accused have a right of two cross-examinations and they would in no way be prejudiced by not having been supplied with the copies of the statements recorded in the course of investigation by the Customs authorities. He also pointed out that there is no provision similar to the provision contained in Sub-section (4) of Section 173, Criminal Procedure Code.

26. Before proceeding to discuss the merits of the rival arguments, it would be necessary to refer to the powers of investigation and enquiry vested in the customs authorities. Section 171A, which was introduced in the Sea Customs Act by Act XXI of 1955, provides:

(1) Any officer of Custom³ duly employed in the prevention of smuggling shall have power to summon any person whose attendance he 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 smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents and things of a certain description in the possession or under the control of the person summoned.

(3) All persons be summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemption u/s 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code.

Sub-section (5) provides that all persons summoned by the Customs Officer to attend shall be bound to state the truth upon any subject in respect to which they are examined or make statements and produce such documents and other things as may be required. Sub-section (4) lays down that every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, Indian Penal Code. In so far as Section 171A of the Sea Customs Act empowers the Customs authorities to record a statement of any witness and in so far as the witness so produced is bound to state the truth, the provisions of the Indian Oaths Act would necessarily apply and the Customs authorities would be empowered to administer oath to the witness. Whether the authorities administer oath or not, the person who is found to have made a false statement is liable to be prosecuted under Sections 193 and 228, Indian Penal Code. This marks a substantial difference between the power of a Customs officer and the power of a Police Officer. Another important point of difference between the statement recorded by a Customs Officer and the one recorded by a Police Officer is that, there is no provision in the Sea Customs Act similar to the one contained in Section 162, Criminal Procedure Code which lays down that a previous statement can be utilised only for the purpose of contradiction. In the absence of such a provision, it is open for the complainant in the Customs case to utilise the previous statement recorded by him for corroborating the evidence given by that witness u/s 153 of the Evidence Act. As a matter of fact, in most of the Customs cases previous statements of the witnesses are adduced for the purpose of corroborating the witnesses' evidence in Court. Thirdly, there is nothing to indicate in Section 171A of the Sea Customs Act, whether the statements of witnesses are required to be reduced to writing. We have come across cases wherein the Customs Officers have gone into the witness box to depose to certain statements made by witnesses which do not find place in the

recorded statements either on the ground that they were made prior to the recording of the statements or on the ground that they were made later.

27. It would thus be seen that the powers of the Customs Officers u/s 171A of the Sea Customs Act are higher than the powers of a police officer conducting an investigation under the Criminal Procedure Code. The research made by the counsel has not yielded to the discovery of the precise reasons which prompted the Legislature to make the provisions to supply copies of statements and other relevant documents transpiring in the course of an investigation by police officers before the commencement of the trial to the accused. One view is that this was a procedural change introduced for the purpose of shortening the duration of the trial by abolishing the right of cross-examination twice. According to this view, no question of principle is involved in making the aforesaid provision. This view seems to have found favour with Tulzapurkar J. in Bashir Hussein's case. Another view which was strenuously urged before us by Mr. Jethmalani, was that this provision was intended to ensure a fair trial. According to him, the provision is in the nature of pre-trial discovery and inspection. Whatever the reason may be, we find it difficult to assimilate the case of a complaint which is lodged by the Customs authorities after elaborate investigation to the case where a private party has lodged a complaint on his own. So far as the private party is concerned, there is no question of supplying to the accused the copies of statement or documents. No investigation has taken place and no statements have been recorded before the lodging of the complaint. The accused, therefore, has to wait patiently till the case is unfolded by the witnesses summoned by the complainant in the course of the deposition. He can cross-examine the witnesses even on the first examination before the framing of the charge on hand, because there is no previous statement which the accused need to study with a view to confront the witnesses in his cross-examination. He can cross-examine the witnesses piece-meal, that is, one by one. When he cross-examines the first witness, he does not know what the second witness is going to say and so on. In fairness, therefore, he must have another right of cross-examining the witnesses after the entire picture has been painted before the Court. Two cross-examinations, therefore, are unavoidable and also necessary in the interest of justice.

28. The position of a complaint lodged by the Customs authorities stands on a different footing. There is a complete investigation which precedes the lodging of the complaint. Statements are recorded by the Customs Officers which statements could be used by the prosecution for corroborating the witnesses. It is open to the Customs authorities to seek to prosecute a witness for giving false evidence on the basis of the statements recorded by them. In other words, a witness must conform to the statements which he had already made before the Customs authorities on pain of being hauled up for prosecution for perjury. The accused has no means of knowing what the witness was going to depose till the witness comes to the end of the examination-in-chief. We were told that after the examination-in-chief is over, it is open to the accused to ask for a copy of the

statement of that witness. We were also told that this was invariably done. In fact, Mr. Khandalawala gave us an undertaking (he had also given a similar undertaking to the trial Court) that he would supply copies of statements of the witnesses as and when the respective examination-in-chief was over. This procedure would be on a par with the procedure that was followed in criminal trials before the amendment of 1955. But, as pointed out above, there was a proviso to Section 162, Criminal Procedure Code, which enjoined upon the Court to supply to the accused copies of the statements to enable him to use the same for the purpose of contradicting the witnesses. There is no provision in the Sea Customs Act similar to the one contained in Section 162, Criminal Procedure Code, before its amendment. Thus the position boils down to this that even for securing a copy of the statement of a witness after his examination-in-chief is over, the accused has to rely upon the good sense of the counsel for the prosecution. Of course, when the prosecuting counsel has tendered the statement for corroborating the witness, then that statement becomes a part of record. In such a case, by making a copy available to the accused, the prosecuting counsel is not in any way conferring any favour upon the accused. On the other hand, there may be cases where the previous statements recorded u/s 171A of the Sea Customs Act may not be tendered for the purpose of corroboration. It is only in such rare cases that the offer to furnish copies may be of some use to the accused. In neither of these types of cases would it be possible for the counsel for the defence to cross-examine the witnesses in detail on the first occasion. There may be cases where the defence counsel may hope for the discharge. In that case, he would be severely handicapped by not being armed with a copy of the statement. Mr. Khandalawala, of course, stated that in case the defence counsel were to intimate to him that they would cross-examine the witness with a view to secure a discharge, he would readily and willingly furnish copy at that stage. This is undoubtedly a generous offer. But the question is whether the fate of the accused should be made to depend upon the goodwill of the prosecuting counsel. Prosecutors may come and go. There may be cases where other counsel decide the question on the basis of certain principles.

29. Obviously, Section 173(4), Criminal Procedure Code in terms does not apply to the Customs cases. But, Section 194(1), Criminal Procedure Code must and does apply. This section runs thus:

(1) Whenever any Court...or any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

It is clear from the wording of this sub-section that the same could be pressed into service at any stage of the investigation, trial, inquiry or other proceeding

under the Criminal Procedure Code by or before a Court or an officer. The only condition laid down for passing an order u/s 94(1) is that the Court must be satisfied that the document is necessary or desirable for any of the purposes mentioned in the sub-section which includes trial. The word "necessary" presupposes that the evidence is relevant under the provisions of the Indian Evidence Act. It also presupposes that the Court must be satisfied that the document is necessary. Finally, it must also be satisfied that the production of the document is desirable. If these conditions are satisfied then there are no fetters on the powers conferred upon the Court u/s 94(1), Criminal Procedure Code. In view of the provisions laid down in Section 94, Criminal Procedure Code, it is not necessary to refer to the pre-trial procedure laid down in other jurisdictions such as common law in England or U.S.A. By pressing into service Section 94(7), Criminal Procedure Code, the object of pre-trial discovery would be amply achieved.

30. The only question, therefore, that falls to be considered is whether in a Customs case the Court should direct the prosecution to produce such of the documents as are considered necessary or desirable for the purposes of inquiry or trial. It was argued by Mr. Khandalawala that the compelling process u/s 94, Criminal Procedure Code should not be resorted to when he has given an undertaking that he is prepared to furnish a large number of documents demanded by the accused except the statements of witnesses with respect to which he has offered that he is ready to produce them after the examination-in-chief is over. The explanation offered by Mr. Khandalawala for the reservation made in respect of the statement of witnesses was that, it is common experience that witnesses are tampered with. If copies of statements of the witnesses fall into the hands of the defence, the defence may make an attempt to tamper with the witnesses. This argument leaves us unimpressed. As stated above, Section 171A of the Sea Customs Act specifically provides that a witness is bound to state the truth when summoned to make a statement and in case he made a false statement he would make himself liable for prosecution for making¹ a false statement. If this safeguard did not deter a witness from resiling from the previous statement, nothing else would deter him. Furthermore, if a witness is so volatile or vacillating that having committed himself to a particular position in his Customs statement he resiles from the same, then the prosecution must thank itself for the result. Mr. Khandalawala did not cite any instance wherein witnesses have actually been tampered with in the Customs cases. We have not come across any case wherein witnesses have resiled from the statements made by them before the Customs authorities. Of course, we have come across a number of cases under the Indian Penal Code and offences under other laws wherein witnesses have resiled from the statements made by them. That is because no prosecution for perjury can be launched against such witnesses for making statements contrary to what they had stated before the police officers. Of course, a prosecution for giving false evidence can be launched against a witness in respect of the statement recorded by a Magistrate u/s 164, Criminal Procedure

Code. Such cases, of course, are not many. Mr. Khandalawala, therefore, again relied upon the ordinary criminal cases for his argument that because witnesses are likely to be tampered with, it may be ensured that copies do not fall into the hands of the accused until the examination-in-chief of the respective witnesses is over. In view of the fact that the Customs authorities have recorded the statements of the witnesses in the course of their investigation and further in view of the fact that their powers are higher than the powers of the police officers to record statements in the course of the investigation under the Criminal Procedure Code and also in view of the fact that such statements could be utilised for the purpose of corroboration of the witnesses, we consider it necessary and desirable that copies of such statements are furnished to the accused before the commencement of the trial. "We may point out here that there is no provision in the Sea Customs Act similar to the provision contained in Section 172, Criminal Procedure Code, under which a police officer is required to maintain a diary relating to the various steps taken by him in the investigation and the need for sending copies of the diary to the criminal Court. Elaborate instructions are given to the police officers under the police manual. The police officers are required to embody the statements recorded by them in a separate diary. There is no provision in the Sea Customs Act, which requires the Customs Officers to keep diaries regarding the steps they have taken in the course of the investigation from day to day. Nor are they expected to embody the substance of the statements in a bound diary nor is it necessary for them to submit these diaries to the Magistrate for perusal. That means that there is no check ensuring the authenticity of the statements recorded. Statements are recorded on loose sheets of paper and in some cases we have heard the charge that the statements have been ante-dated or rewritten. In any case, it is clear that the power enjoyed by the Customs Officers is more or less unbridled by any safeguard ensuring the authenticity of the statements recorded by them. Having regard to all these considerations, we feel that it is necessary and also desirable in the interests of ensuring a fair trial that the prosecution should be compelled to furnish copies of the statements of witnesses whom the prosecution proposed to examine. Mr. Khandalawala argued that the decision as to which of the witnesses are to be examined cannot be taken beforehand and that it is to be taken during the progress of the trial. There is no substance in this line of reasoning. It may be that in some cases the prosecuting counsel may ultimately decide to drop a witness. But, it is unreasonable to suppose that the complainant or his legal adviser has not made up his mind at the time of filing the complaint as to which of the witnesses should be examined. We, therefore, think that irrespective of whether a particular witness may not eventually be examined, copies of the statements of all witnesses whom the prosecution proposed to examine should be made available to the accused. In view of the large powers conferred upon the Customs authorities, the dices are heavily loaded against the accused. He does not know what case he is required to meet. It is true that he has a right to embark upon a second cross-examination of the witnesses after the framing of the charge. But, it is fair that the accused should have a clear and complete

picture of the prosecution before the commencement of the trial. We have not been able to understand what injustice would be caused to the Customs authorities in case they are called upon to furnish copies of the statements of witnesses whom they proposed to examine to the defence. Tulzapurkar J. in Bashir Hussein's case was impressed by the argument that the compelling process u/s 94, Criminal Procedure Code should not be resorted to when there was an offer made by Mr. Khandalawala. In the first place, that offer does not extend to supplying copies of the statements of witnesses before the commencement of the trial. In fact, Mr. Khandalawala vehemently argued that he would neither yield nor relent on that point although he may make concessions in respect of other documents. In the second place, as repeatedly stressed above, the demand made by the accused involves the question of principles and should not be made¹ to depend upon the sweet will of the prosecuting counsel.

31. Mr. Khandalawala contended that it is open to the Legislature to make a provision similar to the one embodied in Section 173(4), Criminal Procedure Code in the Sea Customs Act. He argued that since the Legislature has not chosen to incorporate a similar provision in the Sea Customs Act, it must be deemed to have done so deliberately. This argument found favour with Tulzapurkar J. in Bashir Hussein's case. The learned Judge also referred to the position prevailing in respect of complaints under certain local Acts such as, the Municipal Boroughs Act, the District Municipal Act and the Municipal Corporations Act. We do not think that the comparison is appropriate. There is no provision in any of these enactments which enables the authorities to carry out an investigation in order to record statements in the course of that investigation. Tulzapurkar J. also observed that the Legislature was aware that the Criminal Procedure Code was amended by incorporating Sub-section (4) in Section 173, Criminal Procedure Code. Therefore, if it had meant to incorporate a similar provision, it would not have failed to amend the Sea Customs Act. The learned Judge, therefore, concluded that the omission must have been deliberate. We do not think that the inference that the omission was deliberate, is justifiable. Even the great Homer occasionally nods. There is nothing to show that the Legislature has applied its mind to the question of the amendment of the procedure so far as the investigation of an offence under the Sea Customs Act is concerned at the time when it was considering amendments to the Criminal Procedure Code. We find that there are a number of lacunae and loopholes in the Sea Customs Act. We have already noted that there is no provision prescribing any kind of diaries to be maintained by the Customs Officers for the purpose of investigation. There is no provision in the Sea Customs Act similar to the provision of Section 337, Criminal Procedure Code, which enables the Magistrate or the Sessions Court to grant conditional pardon to an accomplice. We have come across a number of cases where one of the accused has been turned into an approver without granting conditional pardon, because that cannot be done for want of a provision. By doing this, the prosecution may lay themselves open to the charge of having entered into some kind of agreement with the accomplice not to prosecute him.

Even the new Sea Customs Act which prescribes a sentence of five years for the offence similar to the one now punishable u/s 167(57) does not contain a provision similar to the provision u/s 337, Criminal Procedure Code. It is not necessary to dilate on this point any further. In the interests of ensuring a fair trial, we feel that the provisions of Section 94(1), Criminal Procedure Code should be pressed into service provided the conditions laid down, therein are fulfilled viz., that the documents are relevant; that their production is necessary or desirable for the purpose of enquiry or trial. We have given a clear finding so far as the copies of statements of witnesses are concerned.

32. In regard to the other documents referred to in the application, we think that the matter should be left to the trial Court to decide in the light of the observations made by us and in the light of the provisions of Section 173(4), Criminal Procedure Code. We must, however, record a clear verdict in respect of some of the documents referred to in the application. So far as the statements of the accused persons recorded in the course of this investigation are concerned, fairness requires that copies of such statements should be furnished to the accused before the commencement of the trial. Mr. Khandalawala gave a promise that he would furnish copies of such statements before the trial commenced. We do not, however, think that the note-sheet of the Collector of Customs is relevant nor do we think that the correspondence exchanged between the Shippers, Traders Syndicate with the Collector of Customs is relevant unless and until the Shippers or Traders Syndicate go into the witness box for giving evidence for the Customs. We must also hold that the correspondence between the Collector of Customs and the Shipping agents will not be relevant until the authority with whom the correspondence has taken place has gone into the witness box. If there are any other documents which the accused require either for inspection or production, the matter may be considered on its own merit by the trial Court.

33. The result is that the application fails so far as the application of Article 20(2) of the Constitution of India; extension of the doctrine of issue estoppel and quashing of the proceedings on the ground of abuse of process of the Court are concerned. The application succeeds so far as the prayers made in the application in so far as they are based u/s 94, Criminal Procedure Code are concerned. Subject to this modification, the rule is discharged.

34. Mr. Jethmalani, on behalf of the petitioners, as well as Mr. Khandalawala, on behalf of the Customs, asked orally for the certificate that this is a fit case for appeal to the Supreme Court. A certificate under Article 134(7)(c) of the Constitution is hereby granted.