

(1978) 03 KAR CK 0005
In the Karnataka High Court
Case No : CrIRPs. 361 & 365 of 1976

Mukund Dalsukhalal Jani - Petitioner

APPELLANT

Vs

Asst Collector of Central Excise and Another

RESPONDENT

Date of Decision : 10-03-1978

Acts Referred:

Customs Act, 1962 — Section 123

Citation : (1978) 2 KarLJ 71

Hon'ble Judges : Sabhahit, J

Judgement

1. These revision petitions are instituted by the convicted accused Nos. 2 and 3 in CM Case No. 2205 of 1971 on the file of the Judicial Magistrate First Class, Chikodi. The relevant facts leading up to the present revision, petitions briefly stated are these:

On the night of 25-6-1966 on credible information that opium was being smuggled, PW. 1 Parameshwar Bhatnagar, Preventive Inspector, Narcotics Dept, Indore, was checking the vehicular traffic on Poona-Ban-galore road, at Police check post near Akkol Cross at Nippani with the assistance of his Sub Inspector PW.2 P.N. Khuran and Police Constables posted on duty there. At about 1 a.m. he stopped the Ambassador car bearing No.MSR 991 on the road. The car was coming from the side of Kolhapur and was proceeding towards Belgaum. He found in the car A1 Kotnis, A2 Mukund and A3 Natwarlal. Of them A1 Kotnis was the steering wheel. On checking the car his attention was drawn to a cavity meant for left steering column at the foot-rest on the front side. On Checking he felt that there was something unusually heavy there. He, therefore, entertaining a reasonable suspicion about the presence of some contraband articles in the car, sent word to Mohan Krishna, then Deputy Superintendent of Central Excise, Nippani town. Thereafter, PW.3 Vaidhyanathan, the Superintendent of Central Excise, Nippani, came there with Central Excise Officers and panchas and took personal search of the three accused, who were present in the car. The luggage was also checked. Thereafter on checking the cavity of the car, he found 115 pellets of gold bearing "Johnson Mat they" foreign markings (MO. 23) and

15 other pellets of gold bearing markings "The Sheffield Smelting Co, Ltd, Sheffield and London" (MO. 24) weighing in all, 1300 tolas. He also found a transistor radio (MO. 5) in the rear seat of the car. It was made in Japan. On being questioned, the three accused failed to produce any proof to show that the said gold was imported legally under any permit granted by the Reserve Bank of India or converted by any declaration filed with the Customs Department for possession. Therefore, on a reasonable belief that the said gold was Smuggled in contravention of the Foreign, Exchange Regulation Act, 1947, attracting the provisions of Sec. 111(d) of the Customs Act, 1962, he seized them all along with the transistor radio, under a panchanama. Since the car MSR 991 was used for transporting the said contraband gold in contravention of the provision of Sec. 115(2) of the Customs Act, 1962, he seized the car also. Thereafter the three accused and the articles seized were taken to his office situated in Nippani, Later on, he interrogated A3 Natwarlal and recorded his statement as per Ext.P4. He also recorded the statement of A2 Mukund and A1 Kotnis as per Exts.P5 and P6 respectively. Then he was convinced that all the three accused were guilty of the offence punishable under Sec. 135(b) of the Customs Act and Rule 126P(2)(ii) of the Defence of India Rules, 1962, and he arrested them and produced them before the Judicial Magistrate First Class, Chikodi. On securing the presence of A4 Manikchand, he interrogated him on 27-7-1966 and recorded his statement as per Ext.P7.

2. The gold pellets and the transistor radio were confiscated by the Collector of Central Excise, Bangalore, as provided under Sec. 111(d) of the Customs Act, 1962, as also the car. Samples from the seized gold were sent to the Mint Master for the opinion regarding the purity and the (origin thereof. Local shroffs also gave their opinion and on obtaining the sanction as per Ext.P12 of the Collector of Central Excise, Bangalore, the Asst Collector of Central Excise, Nippani, filed a complaint against the four accused before the Judicial Magistrate First Class, Chikodi, as per Ext.P19.

3. The learned Magistrate examined in all 8 witnesses and marked Exts. P1 to P19 and MOs. 1 to 30. He also recorded the statement of the accused under Sec. 342 CrIPC and he convicted the accused Nos. 1 to 4 for the offences with which they were charged and sentenced them to undergo RI for a period of two years each and to pay a fine of Rs. 2,000 each in default to suffer RI for six months each for the offence punishable under Sec. 135(b)(i) of the Customs Act, 1962. He further sentenced them to undergo RI for a period of two years each and to pay a fine of Rs. 2,000 each in default to suffer RI for six months each for the offence punishable under Rule 126P(2)(ii) of the Defence of India Rules, 1962. He directed that the substantive sentences should run concurrently against each of the accused, by his judgment and order dated 18-11-1974. Being aggrieved by the said order of conviction and sentence the accused went up in appeal before the Sessions Judge, Belgaum in CrI App Nos. 106, 118, 107 and 108 of 1974. The learned Sessions Judge by his common judgment and order dated 28-7-76 allowed CrIA. 108 of 1974 instituted by A4 Manikchand and acquitted

him of the offences for which he was tried. He also allowed the appeal instituted by A1 Kotnis in CrIA. 106 of 1974 inasmuch as while confirming the conviction he directed that he be released under Sec. 4 of the Probation of Offenders Act. He confirmed the order of conviction and sentence against A2 Mukund and A3 Natwarlal and directed that they should surrender to their bail. Aggrieved by the said order confirming the conviction and sentence passed against them by the learned Sessions Judge, accused Nos.2 and 3 have instituted the present revision petitions. CrIRP.361 of 1976 is by A2 Mukund and CrI RP. 365 of 1976 is by A3 Natwarlal Mansukhlal Sampat.

4. Sri Byra Reddy, the Advocate appearing for the revision petitioner Sampath in CrIRP. 365 of 1976, vehemently argued that the Courts below were not justified in raising the presumption under Sec. 123 of the Customs Act and in presuming that the gold in question was smuggled gold as the facts did not justify that the golds were seized in the reasonable belief that they are smuggled goods by PW. 3 Vaidhyanathan of the Central Excise Dept. He further Submitted that in that case the statements recorded and relied upon by the prosecution clearly revealed that the gold pellets were brought by the accused from a known person in Bombay and since he was not examined in the case and no action was taken against him whatever initial presumption that could arise by the manner in which the gold was carried stood rebutted and hence he submitted that the Courts below were not justified in holding the accused guilty of the offence punishable under Sec. 135 of the Customs Act. He further submitted that the evidence adduced by the prosecution and the statements of the accused on which the prosecution relied upon clearly show that A3 Sampath was not in possession of the gold in the car and hence he submitted that the Courts below erred in convicting him for the offence under Rule 126P(2)(ii) of the Defence of India Rules. The learned Counsel appearing for the revision petitioner in CrIRP. 361 of 1976 adopted the same arguments and submitted that A2 Mukund Dalsukhalal Jani should also be acquitted.

5. As against that the learned Central Govt Pleader strenuously urged that the Courts below were perfectly justified in drawing the presumption under Sec. 123 of the Customs Act as the gold pellets and the radio were seized in the reasonable belief that they were smuggled goods by PW.3 Vaidhyanathan. He further submitted that the accused were in possession of the gold in the car and hence he submitted that the conviction and sentence passed by the learned Magistrate and confirmed by the Sessions Judge was perfectly legal.

6. I was taken through the evidence recorded in the case and the judgments and orders passed by the Courts below. I would presently proceed to appreciate the arguments submitted before me.

7. Section 123 of the Customs Act reads:

"Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they

are not smuggled goods shall be on the person from whose possession the goods were seized."

Sri Byra Reddy argued that before the presumption could be drawn the prosecution has to show that the goods were seized by the Officer in the reasonable belief that they were smuggled goods; and he submitted that on the facts of this case it could not be said that there was any reasonable belief entertained by PW.3 Vaidhyanathan before seizing the gold pellets and the radio. He further Submitted that the prosecution Should show that reasonable belief was inspired in the Officer by some definite material by way of some definite information having direct nexus to smuggling. In the instant case, he pointed out that Prosecution Witness 3 did not have any information with regard to the carriage of the smuggled goods by the accused. In fact PW. 1 was waiting on the information that Some opium was being carried and on suspicion he sent for PW. 3 as he felt something heavy in the cavity of the car and that thereafter PW. 3 Vaidhyanathan came and seized the gold pellets. In the circumstances, he submitted that it could not be said that PW. 3 entertained any reasonable belief that the goods were smuggled goods. In support of the proposition submitted by him, he relied on a decision of the Bombay High Court in the case of M.G. Abrol v. Amichand Vallamji, AIR. 1961 Bom. 227. In that case Justice Shah, as he then was, who delivered the judgment for the Bench has no doubt examined the history of the legislation as it pertains to Sec. 178A of the Sea Customs Act which is similar to Sec. 123 of the Customs Act and stated that the presumption should not be lightly drawn unless it is shown that the goods were seized on a reasonable belief that they were smuggled goods.

8. Speaking on the aspect his Lordship has stated thus in para 6 of the judgment:

" As a matter of fact a perusal of some of the sections of the Act makes it abundantly clear that the Legislature has clearly borne in mind the distinction between "a seizure on suspicion" and "a seizure in the reasonable belief". For instance in Sec. 180 of the Act there is a reference to seizure by a police officer on suspicion of things that they have been stolen. The provision of this section itself makes it abundantly clear that the Legislature did not intend to use the words or rather expressions, "on suspicion" and "in reasonable belief" interchangeably. They had in their mind a clear distinction between these two expressions, and wherever they thought, in pursuance of their policy in enacting the legislation, that one or the other expression should be used, they have done so. Referring to Sec. 178A of the Act, it is necessary to remember that it was only on account of the difficulties pointed out by the Customs Officers to the Govt that it was almost impossible for them to prove in every case of seizure of bullion or precious stones that the articles seized were smuggled and thereby curb the racket, which according to the Customs Officers prevailed in this country, with regard to smuggling of gold and precious stones, that the Govt considered that their difficulties might be removed by introducing a new section in the Sea Customs Act. At first, it appears, the section was so worded that

entirely arbitrary powers were given to the Customs officers in regard to seizure of precious metal and precious stones, and the Govt had made no secret of the object which it had in view while formulating the policy in regard to the amendment which was sought to be made in the Act. By this section the Govt proposed to give absolute authority to Customs Officers to seize precious metal and precious stones, wherever, they suspected them to be smuggled, and immediately call upon the persons from whom they were seized to show that they were not smuggled. Realising, however, the danger of the exercise of such an arbitrary power to the common people in the country, Parliament advisedly amended the proposed section by adding the words "in the reasonable belief that they are smuggled goods" after the words "are seized under this Act" in sub-sec (1) of Sec. 178A of the Act. By adding these words Parliament placed a restriction upon the powers of the Customs Officers to the extent that the person from whom any goods falling within the ambit of Sec. 178A were seized by them could be called upon to prove that they were not smuggled goods only where they were seized in a reasonable belief that they were smuggled goods. The amendment introduced by Parliament in the section, in our opinion, is a salutary one.....The construction, therefore, to be put upon Sec. 178A of the Act is, in our opinion, plain enough and it is that the Customs Officers should seize the goods covered by Sec. 178A in a reasonable belief that they are smuggled goods before the burden of proving that they are not Smuggled goods could lie on the person from whose possession such goods were seized.... A belief in the existence of a thing requires a more solid foundation than in the case of a mere suspicion. It may be based upon some definite information acquired from a reliable source that a certain person is in possession of smuggled goods. The belief again, as required by Sec. 178A of the Sea Customs Act, must be a reasonable one, not a belief of a man who just catches at some slight circumstance which only creates a sort of guess or speculation in his mind that something might exist or might not exist. The belief must be such as any other reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing. In regard to Sec. 178A of the Act the reasonable belief may be based upon some definite information acquired from a reliable source that a certain person is in possession of smuggled goods. The Customs Officer receiving such information again must be confident about the validity and the reliability of the source of information itself."

Relying upon the passage. Sri Byra Reddy emphasised that the belief that the goods are smuggled goods must be based upon some definite information acquired from a reliable source that the goods are smuggled goods. The information must have a direct nexus to the act of smuggling Unless these two conditions are satisfied, he submitted, the belief in the mind of the Officer cannot be considered as a reasonable belief.

9. He further drew support for the submission made by him from the observation made by the Supreme Court in the case of the Income Tax Officer, Calcutta v. Lakshmani Mewal Das, AIR. 1976 SC. 1753. In that case Justice Khanna, who

delivered the judgment for the Bench has observed in para 11 of the judgment thus:

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever, vague, and indefinite or distant remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment."

That was a case under the Income-tax Act, his Lordship was considering the expression "reason to believe and information" while dealing with Section 147 of the said Act.

10. Thus, according to the submission of the learned Counsel Sri Byra Reddy, it is necessary, before the Officer could entertain a reasonable belief that he should receive definite information regarding the goods and further that this information should have a direct nexus or a live link between the goods in question and the act of smuggling. Unless these two conditions are satisfied, he urged, it could not be said that the reasonable belief spoken by the Officer can be upheld as a reasonable belief.

11. The learned Govt Pleader successfully met the submission so made while agreeing with the submission of Sri Byra Reddy that the presumption would not arise unless the goods were seized by the Central Excise Officer on a reasonable belief that they were smuggled goods. He submitted that it is not necessary that there should be a definite information in every case having nexus to the act of smuggling before the Officer could entertain a reasonable belief that the goods were smuggled goods. He rightly submitted that receiving of definite information with regard to the smuggled goods might be one of the sources for entertaining a reasonable belief, but that was not exhaustive. A reasonable belief could be entertained even on other grounds depending on the facts of each case. Hence, he submitted that there is no substance in the submission made by Sri Byra Reddy, the learned Counsel appearing for the revision petitioner, that there should be definite information having direct nexus to the activity of smuggling in every case before a reasonable belief could be entertained by the Officer before seizure of the goods.

12. On going through the Bombay decision in the case of Abrol, AIR. 1961 Bom. 227, I find that it does not support the submission made by the learned Counsel

Sri Byra Reddy that reasonable belief can be entertained only on the receipt of definite information having a direct nexus to the activity of smuggling. In fact, Justice Shah, who delivered the judgment in that case has stated it by way of illustration that a reasonable belief can be entertained on a definite information having direct nexus or link With the activity of smuggling. He has never meant that it is the only source which can justify the reasonable belief in the mind of the Officer The point is made clear in para 6 of the judgment. He has observed:

"It would be necessary, therefore, that before any person could be called upon to prove that the goods seized from him were not smuggled goods, the Customs Officer making the seizure must proceed upon the foundation of a resonable belief inspired in him by some definite materials by way of some definite informatoin or otherwise so that he could be said to seize the goods in the reasonable belief that they were smuggled goods." (emphasis added)

Thus, Justice Shah has made it very clear that definite information with regard to the smuggling may be one of the sources which may serve as the foundation of a reasonable belief, but that not exhaustive for he has hastened to add "by some definite materials by way of some definite information or otherwise".

13. Similarly in the case of the Income Tax Officer, Calcutta, AIR. 1976 SC. 1753, his Lordship Khanna was construing the provisions of Sec. 147, where the expression on definite information was in the section itself. That does not mean that for entertaining a reasonable belief contemplated in Section 123 of the Customs Act there should always be definite information having bearing on the activity of smuggling of the goods in question. That being so, I am unable to accept the submission of the learned Counsel Sri Byra Reddy that there should always be a definite information having direct nexus with smuggling, before a reasonable belief could be inspired in the mind of the Officer. Such a belief could be inspired even "otherwise" depending on the circumstances of each case.

14. In the instant case, PW. 3 Vaidhyanathan has deposed that he went and searched the persons of the accused, their luggage and then the car and he found in the cavity of the car in the front side the gold pellets concealed in a jacket and the lid of the cavity was tightly screwed. When questioned the accused were not able to produce any authority or give any reasonable explanation why the gold was carried in that manner. It is, in these circumstances, that he entertained a reasonable belief that the gold was smuggled gold. The short question, therefore, that arises for my consideration on the facts of this case is Whether it can be said that the Officer entertained a reasonable belief on the facts described by him?

15. The learned Central Govt Pleader invited my attention to a decision of the Supreme Court of India in the case of Pukhraj v. D.R. Kohli, AIR. 1962 SC. 1559. That was a case in which, the entertaining of reasonable belief was examined under Sec. 178A of the Sea Customs Act. His Lordship Justice Gajendragadkar, as he then was, who delivered the judgment for the Bench, has observed thus in

para 8 of the judgment:

"The last contention; raised by Mr. Bobde was that there is nothing on record to show that the seizure of gold from the appellant had been effected by the Officer concerned acting on a reasonable belief that the said gold was smuggled. It would be recalled that Sec. 178A of the Sea Customs Act requires that before the burden can be imposed on the appellant to show that the goods in question were not smuggled, it has to be shown that the goods had been seized under the said Act and in the reasonable belief that they are smuggle goods. The argument is that the question as to whether there was a reasonable belief or not is justiciable and since there is no material on the record to show that the belief could have been reasonable the statutory presumption cannot be raised. In our opinion this argument is not well founded. There are two broad features of this seizure which cannot be ignored. The first feature on which the Officer relied is supplied by the quantity of gold in question. It was found that the appellant was carrying on his person five pieces of gold bullion weighing as much as 290.6 tolas. This large quantity of gold valued at nearly Rs. 30,000 itself justified a reasonable belief in the mind of the Officer that the gold may be smuggled. In this connection, it may be relevant to remember that the said Officer had received positive information in the month of September, 1956 regarding the smuggling of gold by the appellant. That is why he was intercepted by the the Officer on Oct 25, 1956 at the Raigarh railway station at 16-30 hrs. Then the other fact on which the reasonable belief can be founded is the suspicious circumstances of the appellant's journey. The appellant was found travelling without a railway ticket and his explanation as to how he came to be in the said passenger train is obviously untrue. A person carrying a large quantity of gold and found travelling without a ticket may well have raised a reasonable belief in the mind of the Officer that the gold was smuggled."

Thus, the Supreme Court of India has made it very clear that the two features, namely that a person was found in possession of large quantity of gold and was travelling without a railway ticket, are enough to raise reasonable belief in the mind of the Officer that the gold is smuggled. In the instant case, the gold was secreted in the cavity and the lid was screwed. The gold pellets were put in a jacket and the quantity of gold is 1,300 tolas valued at Rs. 2,20,000. The pellets have foreign markings on them. The accused had no proper explanation. They were going in the mid-night in the car. In the circumstances, I cannot have any doubt, whatsoever, that these facts could very well inspire a reasonable belief in the mind of PW.3 Vaidhyanathan that the gold was smuggled gold.

16. In the case of Kewal Krishan v. State of Punjab, AIR. 1967 SC. 737 his Lordship Justice Kapur, who delivered the judgment for the Bench has pointed out that there was nothing to indicate in the cross-examination of the Officer that he did not have a reasonable belief that the goods were smuggled goods. The question that the Officer did not have a reasonable belief was not even suggested to the witnesses and in view of the foreign markings on the gold and

the fact that the witness was not cross-examined on the point, his Lordship upheld that the gold was seized on a reasonable belief. In the instant case also, there is absolutely no cross-examination of PW. 3 Vaidhyanathan on the aspect of his entertaining a reasonable belief that the gold was smuggled gold, though in the chief examination on narrating the circumstances, he has deposed positively that he entertained a reasonable belief that the gold was smuggled before he seized it.

17. In the circumstances, I have no hesitation to hold agreeing with the findings of the Courts below that PW.3 Vaidhyanathan, the Excise Officer was perfectly justified in entertaining a reasonable belief that the gold in question was smuggled gold on the circumstances established in this case, and that Sec. 123 of the Customs Act can very well be invoked by the prosecution to state that the burden shifted on to the accused to show that the gold was not. smuggled gold. If that be so, it is obvious that the accused in this case have not at all discharged the burden imposed on them under Sec. 123 of the Customs Act. That being so the Courts below rightly convicted them for an offence punishable under Sec. 135(b)(i) of the Customs Act, 1962.

18. It was next submitted by Sri Byra Reddy that at any rate, the revision petitioner represented by him could not be convicted for the offence punishable under Rule 126P(2)(ii) of the Defence of India Rules.

19. Rule 126P(2)(ii) of the Defence of India Rules, states:

"Whoever, has in his possession or under his control any quantity of gold in contravention of any provision of this part shall be punishable with imprisonment for a term of not less than six months and not more than two years and also with fine."

20. Sri Byra Reddy submitted that the prosecution evidence itself disclosed that at the relevant time the petitioner, represented by him, was not in possession of the gold. He relied upon the statement of A2 Mukund at Ext.P5 recorded by the Excise Officer, PW.3, in addition to the Statement of A3 Natwarlal Mansukhlal Sampat recorded at Ext.P4 by the Excise Officer. According to the Excise Officer, PW.3, the statements were voluntary and true. The statements reveal that at the relevant time A3 Natwarlal Mansukhlal Sampath was asked to get down from the car and the car was taken ahead by Kotnis and Mukund A1 and A2 respectively and they put the gold pellets in the cavity of the car, put the lid and screwed it, brought back the car and allowed A3 Sampath to get into the car. That is what Sampath himself told in his statement and that is the statement of A2 Mukund also. Relying on these, the learned Counsel Sri Byra Reddy, vehemently argued that A3 Sampath could not be said to be in possession of gold when the same was seized by PW.3 Vaidhyanathan, the Excise Officer and hence he could not be dealt with under Rule 126P(2)(ii) of the Defence of India Rules.

21. Sri Byra Reddy, learned Counsel for the petitioner, invited my attention to Salmond on Jurisprudence, 12th Edn, at page 272, wherein it is stated on the

concept of possession thus:

"Many Jurists have distinguished two such elements. Salmond considered that possession consisted of a corpus poissionis and an animus possidendi. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed."

22. He also invited my attention to the definition of the term "Possession" given in Osborn's Concise Law Dictionary, 6th Edn, at page 257; explaining the term "possession" it is stated:

"Physical detention coupled with the intention to hold the thing detained as one's own. The continuing exercise of a claim to the exclusive use of a material object. Possession has two elements: (i) the corpus or the thing possessed; (ii) the animus possidendi the intention to appropriate to oneself the exclusive use of the thing possessed. Immediate possession is possession retained personally; mediate possession or custody is possession retained for or on, account of another."

23. Relying on these the learned Counsel submitted that since A3 Sampath did not know where the gold was concealed in the car and so cannot be said that he was in possession of the corpus and so one of the ingredients of the offence contemplated under Rule 126P(2)(ii) of the Defence of India Rules, was not proved by the prosecution. As against this, the learned Govt Pleader, submitted that though he was not aware as to where the gold was kept he was generally aware that the gold was in the car.

24. It is now settled that where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove: (a) that each of the accused had either physical or constructive possession of the property or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter vide *Dodo Racho v. Emperor*, AIR. 1937 Sind 154 and in *re Satyanarayana*, AIR. 1953 Mad. 534. On the facts of the present case, it becomes clear that A1 Kotnis and A2 Mukund made A3 Sampath get down from the car while they secreted the gold. According to them A3 Sampath did not even know where the gold was kept. He had neither dominion over gold nor possession. That being so, it cannot be said that A3 Sampath was in possession of gold as contemplated under Rule 126P(2)(ii) of the Defence of India Rules. Hence, I am constrained to hold that the prosecution has failed to prove that A3 Sampath was found in possession of gold. The conviction on that count against A3 Sampath. in the circumstances, has to be set aside and I set aside the same.

25. The case is different so far as A2 Mukund is concerned. It was he who secreted the gold. He was in conscious possession of it. He had both possession of gold and dominion over it. Hence, I confirm the conviction, of A2 Mukund for

the offence punishable under Rule 126P(2)(ii) of the Defence of India Rules.

26. The next question that arises for my consideration is one of sentence. Both the accused are sentenced to RI for two years on each count and to pay a fine of Rs.2,000 for each count. The learned Counsel appearing for the revision petitioners argued that it is a proper case where the provisions of the Probation of Offenders Act should be applied. They submitted that the accused were mere carriers. They were young men. They were first offenders and lastly that the offence took place in the year 1966 and that it would not be just and proper after a period of 12 years now, to send them to jail especially so when they are now settled in life in an honourable way. They urged that there was no prohibition at that time either in the Customs Act or in the Defence of India Rules to apply the beneficent provisions of the Probation of Offenders Act to the offenders in this case. As against that, the learned Govt Pleader submitted that the offenders being involved in an economic offence, do not deserve a kindly application of the beneficent provisions of the Probation of Offenders Act.

27. The Law Commission of India, in its 47th report has considered in detail on the trial and punishment of Socio-Economic Offences in Chapter VII para 48, it lays down thus:

"At the same time, and notwithstanding our hesitation to introduce provisions limiting the discretion of the Court to award punishment below the minimum, we are constrained to recommend provisions as to certain specific matters, having regard to the general complaint voiced in that regard. It has been represented to us, during the oral discussions which we have held with responsible Officers, that a very mild punishment is awarded by the Courts on the ground that- (1) the case is one of first conviction, or (2) that the matter has been already dealt with by severe departmental penalty, or (3) that the convicted person is a young man of 25 years, or (4) that the offender is merely a carrier.

We are of the view that, by themselves, whether singly or together, none of these grounds should be regarded as sufficient for awarding a punishment below the minimum....."

Then again the Law Commission, has recommended that the provisions of the Probation of Offenders Act should be excluded in the case of offenders committing social or economic offences and it may be recalled that subsequently provisions have been made in the Customs Act to exclude the application of Probation of Offenders Act, in the case of offenders committing offences under the Act. The Supreme Court of India has generally approved the recommendations of the Law Commission in its decision in the case of Balakrishna Chhaganlal Soni v. State of W.B, AIR. 1974 SC. 120, The Supreme Court has observed:

"We endorse this approach. It may not be out of place to notice in this context the observations of the Central Law Commission against light sentences on the score that; (i) the case is one of first conviction; (ii) that the matter has been

already dealt with by severe departmental penalty; (iii) that the convicted person is a young man. To the extent to which gold smugglers and other anti-social operators in the field of crime can be given an unhappy holiday in jail, the Courts must help the process on conviction, if judicial institutions are not to be cynically viewed by the community."

28. It is also necessary to note that Sec. 140A is incorporated in the Customs Act by Act No.XXXVI of 1973 in September 1973. The amendment is pursuant to the recommendation of the Law Commission, as stated above. It states:

"Nothing contained in Sec. 562 of the CrIPC, 1898 or in the Probation of Offenders Act 1958 shall apply to a person convicted of an offence under this Act unless that person is under 18 years of age."

It is obvious that the stage of considering the application of the provisions of the Probation of Offenders Act arises only on conviction and not earlier. In the dichotomy of criminal trial, it is at the sentencing stage that Court is called upon to consider the application of Probation of Offenders Act. In the case on hand, the accused were actually convicted by the trial Court by its judgment and order only on 18th day of Nov, 1974 and as stated above by then Sec. 140A was incorporated in the Customs Act as it came into force from 1st Sep, 1973. Therefore, it is manifest that under Sec. 140A of the Customs Act, the Court cannot apply the provisions of Probation of Offenders Act in this case. If that is so, this Court, in revision, cannot also apply the provision's of Probation of Offenders Act in view of Section 140A of the Customs Act. That being so, I agree with the learned Session Judge that this is not a proper case wherein the provisions of the Probation of Offenders Act should be invoked and in that view I reject the submission of the learned Counsel that the offenders should be treated under the provisions of the Probation of Offenders Act.

29. That takes me to the consideration of the actual punishment awarded. I have already held that A3 Sampath is guilty of the offence only under Sec. 135 of the Customs Act. I have set aside the conviction against him under Rule 126P(2)(ii) of the Defence of India Rules. Sec. 135(b)(1) contemplates punishment of imprisonment upto five years and fine, provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than six months. In the instant case, it is in evidence that the accused has been facing the criminal trial and undergoing the mental torture for the last 12 years. It is further in the evidence that the accused is a mere carrier; it is also in evidence that, the accused is a young man, and his Counsel submitted that he has settled in life as a Lawyer after completing his MA and Law course. The Counsel further submitted that it would not be just and proper to send him to jail at this stage and the special circumstances about him should be considered while passing the sentence.

30. The Law Commission of India, in its 47th report, has stated in Chapter VII para 52 thus;

"There is another aspect to be discussed. Criminal responsibility attracts "measures" to meet it. If the punishable act has caused no harmful effects, punishment may be mild. If it has caused some harm but the offender can repair the damage done to society, probation would be appropriate. If the harm is serious, imprisonment, would, of course, be required. These considerations are implicit in most Codes, and are stated explicitly in some of the foreign Codes. In the present context, it becomes desirable to provide that if the harm is nominal, the provision for minimum punishment should not be binding."

31. In fact, the Supreme Court of India in the case of Arvind Mohan Sinha v. Amulya Kumar Biswas, AIR. 1974 SC. 1818 has observed:

"But every contravention of the Customs Act or the "Gold Control" Rules cannot, without more, be assumed to be fraught with consequences of national dimensions. The broad principle that punishment must be proportional to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith."

32. In the circumstances, having regard to the special features of the case of A3 Sampath that he was a mere carrier, that he is a young man who has, subsequently settled in life, that more than 12 years have passed after the date of the offence and that criminal proceedings are still hanging to his embarrassment, I hold that it is not just and proper to send him to jail at this stage. It is no doubt true that imprisonment is compulsory, but he was already in police custody for a day before he was produced before the learned Magistrate. Hence, I reduce the period of imprisonment against A3 Sampath to the period for which he was in police custody and the same is set off under Sec. 428 CrIPC. I confirm the sentence of fine of Rs. 2,000 against him with the default sentence as passed by the learned Magistrate and confirmed by the learned Sessions Judge.

33. So far as A2 Mukund is concerned, he has committed an offence punishable under Rule 126P(2)(ii) of the Defence of India Rules and the punishment for it is imprisonment for a term of not less than six months and there is no provision for reducing the minimum. In the circumstances, I reduce the sentence of imprisonment against A2 Mukund for a period of six months under each count and direct that the substantive sentences shall run concurrently. I confirm the sentence of fine passed against him by the learned Magistrate and confirmed by the learned Sessions Judge along with imprisonment in default.

34. In the result, CrIRP. 365 of 1976 is partly allowed. The accused is acquitted of the offence punishable under Rule 126P(2)(ii) of the Defence of India Rules. The conviction passed against him punishable under Sec. 135(b)(i) of the Customs Act, is confirmed. The sentence of imprisonment against him is reduced to the period for which he was in detention during investigation and the same is set off under Section 428, CrIPC. The sentence of fine of Rs. 2,000 passed

against him for the offence punishable under Sec. 135(b)(i) of the Customs Act with the default sentence is confirmed. CrIRP. 361 of 1976 is dismissed with the modification that the period of imprisonment passed against him shall be reduced to RI for six months on, each count and that the substantive sentences of imprisonment shall run concurrently. The fine levied against him with the default sentence for the two offences is hereby confirmed The accused petitioner shall surrender to his bail.