

(1969) 01 DEL CK 0016

In the Delhi High Court

Case No : Criminal Revision Appeal No. 582 of 1968

Ram Singh

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 13-01-1969

Acts Referred:

Citation : (1970) CriLJ 635 : (1969) 5 DLT 339 : (1969) ILR Delhi 211 Supp

Hon'ble Judges : I.D. Dua, J

Bench : Single Bench

Advocate : G.S. Bakshi and V.D. Misra, for the Appellant;

Judgement

Inder Dev Dua, J.

(1) In this revision, the petitioner challenges his conviction by Shri H. L. Sikka, Sub Divisional Magistrate, New Delhi, u/s 126-P(2)(iv) of the defense of India Rules as amended in 1963 and sentence of six months' rigorous imprisonment and fine of Rs. 200.00, affirmed on appeal by the learned Additional Sessions Judge, Delhi, by means of his order dated 23-12-1968. The circumstances leading to the initiation of this case are stated in the complaint dated 4-8-1965 (Exhibit P.A.) made by the Assistant Collector of Central Excise, Delhi. According to this complaint, on 24-3-1964, Inspector Police, in charge Kotwali Police Station, Chandni Chowk, Delhi, detained Ram Singh s/o Doonger Singh on suspicion that he was carrying contraband gold on his person. On being searched in the presence of the Central Excise Officers and independent witnesses, 13 gold Passas of 10 grammes each were recovered from him. The passas bore inscription of Manilal Chaman Lal & Co., Bombay. On interrogation. Ram Singh S/o. Doonger Singh stated that he had purchased these Passas on the same day from Ram Singh S/o Jaggu Mal Dalal. The latter Ram Singh was also interrogated and on 24-3-1964, he admitted having sold 13 Passas to the former Ram Singh S/o Doonger Singh. These 13 Passas were a part of 16 Passas which had been brought to Ram Singh S/o Jaggu Mal by some one for disposal, the remaining three Passas having been retained by Ram Singh s/o Jaggu Mal for the purposes

of his niece's marriage. On search of the person of Ram Singh S/o Jaggu Mal, three Passas of 10 grammes each with similar inscription were also recovered. Both Ram Singhs were made accused persons, Ram Singh S/o Doonger Singh being accused No. 1 and Ram Singh S/o Jaggu Mal accused No. 2. Then occurs the following averment in the complaint:

"4. That since the accused No. 1 could neither produce a valid permit from the Gold Central Administrator for the acquisition of the 13 Passas of gold nor any proof to the effect that the same had been declared under the gold control rules and accused No. 2 also could not produce a valid permit from the aforesaid authority for the 3 Passas recovered from him, the gold recovered from both was seized under Rule 126-L of the defense of India Rules, 1963. The gold Passas seized from both the accused have since been confiscated by the Assistant Collector, Central Excise Division, Delhi under rule 126-M of the defense of India (Amendment) Rules, 1968 vide his adjudication order C. Nos. Gold 8/64/13588/9 Gold 8/64/13585-87 dated 4th July, 1964

5. The complainant submits that accused No. 1 and accused No. 2 had in their possession or under their control 13 Passas weighing 130 grammes and 3 Passas of gold weighing 30 grammes respectively which they had bought or otherwise acquired or accepted in contravention of the defense of India Rules, 1962 and defense of India (Amendment) Rules, 1963 and hence they have committed an offence punishable under Rule 126(P) (2) (iv) *ibid.*"

(2) Shri Omesh Saigal, the learned Magistrate dealing with the case, discharged Ram Singh S/o Jaggu Mal on 15-12-1965 after recording the evidence led by the prosecution holding that the said accused had with him the quantity of gold permissible under the law. Charge under Rule 126-H(d) of the defense of India (Amendment) Rules was, however, framed against Ram Singh S/o Doonger Singh because, *prima facie*, the case was found to have been made out against him by the learned Magistrate.

(3) The learned Sub-Divisional Magistrate dealing with the case against the present petitioner (Ram Singh S/o Doonger Singh) considered the evidence of the prosecution and observed that there was no doubt about 13 Passas of gold having been recovered by the Inspector of the Central Excise from the present petitioner on 24-3-1964. The plea of the accused that he had only five Passas of gold whereas the remaining Passas of gold were in the possession of two of his brothers was not believed by the learned Sub. Divisional Magistrate on the ground that before the Assistant Collector of Central Excise, this plea had not been taken. The possession of 13 Passas of gold each weighing 10 grammes was held by the learned Sub-Divisional Magistrate to be in excess of the permissible limit of 50 grammes as mentioned in Rule 126-1(7) (b) of the defense of India (Amendment) Rules 1963. The accused questioned the admissibility of his statements recorded by the Central Excise Authorities on the ground that at that time, the police officers were also present, but the learned Magistrate did not express any opinion on this objection on the view that the recovery of gold from

the accused was in excess of the permissible limits. On this basis, the present petitioner was convicted under Rule 126-P(2)(iv) and sentenced as mentioned above.

(4) On appeal, the learned Additional Sessions Judge noted, the following four points argued on behalf of the counsel for the appellant:-

"1. Absence of reliable evidence of the recovery of 13 Passas of Gold from the accused.

2. The confessional statement of Ram Singh accused made before the Excise & Police Officers is not admissible in evidence as the same is hit by Sec. 24, 25 of Evidence Act.

3. The prosecution has failed to produce Durga Parshad, a recovery witness in the case and the presumption for his non-production should be taken against the prosecution, and

4. The defense version which is proved from a reliable evidence smashes the prosecution theory particularly when it is supported by the evidence of Ram Singh Dalal who was coaccused in the case."

(5) After considering the submissions of the counsel for the accused, the Court below felt no doubt that there were contradictions with regard to calling of Ram Singh Dalal, the sending of information to Customs, the manner in which recovery witnesses were called and the manner in which recovery was affected on 13 Passas of gold from the accused and the preparation of the recovery memos. These discrepancies were, however, not considered so serious as to be fatal to the prosecution case because the recovery of 13 Passas was not denied by the accused himself, his plea being that five Passas belonged to him and the remaining 8 Passas to his two brothers. The Court then upheld the broad facts that : (1) the accused was found in possession of 13 Passas of gold, (2) these were recovered from his person, (3) these were recovered in the presence of witnesses and Excise Staff, (4) the same was seized vide recovery memo signed by the P. Ws., (5) at his instance Ram Singh S/o Jaggu Mal was apprehended from whom similar three Passas were recovered and (6) his confessional statement in his own hand. All these facts taken together, according to the lower Appellate Court, establish that the Passas in question were recovered from the possession of the accused. The statement of the accused Exhibit P. W. 2/D which was challenged on the ground that the same was hit by sections 24 and 25 of the Evidence Act was admitted in evidence on the ground that Excise Inspector was not a police officer, and the presence of the S.H.O, was immaterial. Reliance for this view was placed on Jagjit Singh Tanna Singh v. State of Kutch(). Recovery of the gold in question was held to have been amply proved and the defense evidence having been rejected and relying on the confession of the accused-petitioner, the appeal was disallowed.

(6) On revision in this Court, after hearing arguments of both sides on 8-1-1969,

I set aside the accused-petitioner's conviction and acquitted him by a short order, reserving detailed reasons to be given later and it is by means of the present order that I am giving my reasons in support of the order of acquittal. It has been contended before me that mere possession of 13 Passas of gold is not an offence and this is not disputed before me on behalf of the State. Rule 126-P(2) (iv) of the defense of India Rules read as under:

"162Penalties.-(1) "(2) Whoever,- (iv) buys or otherwise acquires, or accepts 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."

(7) It is, Therefore, clear that the Courts below are wrong in convicting the present petitioner under this rule merely for possession of the gold in question. I need not go into the provisions of the rules in question for possession because it is not disputed that mere possession of 13 Passas of gold is not an offence. It is only its acquisition which is an offence. For the acquisition, apart from the confession of the accused-petitioner, there is no other evidence on which reliance has been placed on behalf of the prosecution before me. The question, Therefore, turns on the admissibility of the confession and this controversy lies within a very narrow compass. It is not disputed that the present petitioner was in custody of the police when he made the confession. Section 26 of the Indian Evidence Act, in unequivocal terms, provides that no confession made by any person, whilst in the custody of a police officer, shall be proved as against such person unless it is made in the immediate presence of a Magistrate. Section 25 of the said Act renders improvable against a person accused of any offence a confession made to a police officer. Whereas section 25 renders inadmissible a confession made by an accused to the police, section 26 goes further and enacts that a confession made by a person, while he is in the custody of the police, even to a third person, who may not be a police officer, is inadmissible unless it is made in the immediate presence of a Magistrate. The reason underlying these two sections is obvious, namely, that the influence of the police is presumed to affect the voluntary nature of the confession and, Therefore, its reliability. The law is imperative in excluding what comes from an accused person in the custody of the police if it incriminates him. Courts in this country have been so jealous of the voluntary nature of the confession that they have construed the word "custody" not necessarily to mean custody after formal arrest, but it has been held to extend to a state of affairs in which the accused can be said to have come into the influence of a police officer or has been even under some form of police surveillance or restrictions on his movements by the police. I do not consider it necessary to refer to the evidence for the prosecution because before me, apart from the confession, it is conceded there is no other reliable evidence in regard to the acquisition of the gold in question. It is true that a passing reference has been made at the bar to the evidence suggests that the searching officer who searched the person of the present accused-petitioner, was himself not searched. This suggestion appears to be used for the argument that the

present accused- petitioner's search was irregular and, Therefore, not to be relied upon, but on the view that I have taken of the case in hand, I express no opinion thereon. I also consider it unnecessary to refer to some decided cases cited at the Bar, because the legal position seems to me to be fairly well-settled.

(8) The conviction of the petitioner is thus set aside and as he has already been ordered to be released, no further order to this effect need now be made.