

(1969) 08 CAL CK 0039
In the Calcutta High Court
Case No : Criminal Appeal No. 748 of 1961

Sachidananda Banerji

APPELLANT

Vs

Motichand Verma

RESPONDENT

Date of Decision : 07-08-1969

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 417, 417(3), 423
Sea Customs Act, 1878 — Section 167(81)

Citation : AIR 1970 Cal 428 : (1970) CriLJ 1334 : (1970) 1 ILR (Cal) 141

Hon'ble Judges : K.K. Mitra, J; Das, J

Bench : Division Bench

Advocate : Bejay Bhose, for the Appellant; N.C. Banerjee and Jaharlal Roy, for the Respondent

Judgement

Das, J.—This is an appeal against an order of acquittal passed by a learned Additional Sessions Judge setting aside the order of conviction passed by a learned Magistrate, Alipur.

2. The prosecution case is as follows :

3. On June 19, 1959 at about 3 P. M. the respondent Moti Chand Verma arrived at Dumdum Airport by Quantas Aircraft as a passenger from Singapore. For customs checking, he was taken to the customs enclosure, where the belongings were searched by the customs staff. During the search, the customs officers found that there was false bottom in the record player in his possession. This was opened and underneath was found concealed 261 wrist watches, valued at about Rs. 7630, for which 100% duty was chargeable. A complaint was filed in Court against him by the Assistant Collector of Customs and he was convicted u/s 167 (81) of the Sea Customs Act.

4. The defence was a plea of innocence, upon denial that he was carrying the record player with him. He alleged that the record player was foisted upon him by the customs officers.

5. There was an appeal against the order of conviction and the learned Additional Sessions Judge found that prosecution failed to prove that the record player was part of his luggage and, he therefore set aside the order of conviction and acquitted him. This appeal is directed against the order of acquittal.

6. At the outset, Mr. N. C. Banerjee learned Advocate for the respondent raised a preliminary point of objection regarding maintainability of the appeal, as the right to appeal against an order of acquittal is available to the complainant only. The complainant, before the Magistrate was R. C. Misra, Assistant Collector of Customs and this appeal is filed by his successor in office Sachidananda Banerjee, Assistant Collector of Customs and Mr. Banerjee argues that Sachidananda Banerjee, although successor in office as Assistant Collector of Customs, is not the complainant within the meaning of sub-clause (3) of Section 417 of the Criminal P. C., and as such, this appeal is not competent, Mr. Banerjee has also argued on merits and supported the view taken by the appellate Court.

7. Before we take up the preliminary point, we propose to deal with the merits of the case viz., whether the respondent had the record player as part of his baggage while travelling by air from Singapore. Recovery of the diamonds has not been challenged and has been proved by the evidence of a number of responsible witnesses, On this point two important pieces of evidence are the testimony of P. W. 8, Mrs. Grey, employee under B. O. A. C. who actually escorted the respondent to the customs enclosure for examination of the baggages and the respondent's own admission in the baggage declaration inventory Ex. 2, where he claims the Record, player purchased at Singapore as his baggage. Mrs. Grey stated in her evidence that respondent disembarked from Quantas plane and was carrying the record player Ex. II himself while a porter was carrying his suitcase, Ex. I. She took him to the custom's enclosure for examination of baggages and the inventory was signed by her. In cross-examination she asserted that the respondent did not carry any hand bag with him when she conducted him and that he was carrying a record player. Evidence of P. W. 8 finds corroboration from the evidence of P. W. 1, Mr. Lobo, Preventive Officer, Customs House, Calcutta. He stated that when respondent came to Customs House, he supplied him with the declaration form Ex. 2 and the respondent himself filled it up. He was then asked by the Air Port Inspector Marcelline to search the baggage and he did it in presence of two witnesses, Mrs, Grey and Panna De, besides Mr. Marcelline. He searched the suitcase Ex. I and then the record player Ex. II, which was locked. He opened it with a key supplied by respondent and suspected a false bottom. On removing the venesta wood floor he found 261 wrist watches. A search list was prepared and the respondent also signed it. He denies that the record player was foisted on him or that he did not supply the key with which it was opened. He also stated that tag was attached to Record player and not to the Hand bag. This witness is also corroborated by P. W. 2, P. De, who told that the record player was opened with a key supplied by the respondent. The upper lid was opened with screw driver and the plate gave way leading to recovery of 261 watches. He also told that Ex. 4

inventory was written in his presence and signed by the respondent. He mentions a suitcase and a leather handbag; the latter was handed over to respondent after search. P. W. 4 Marcelline is the Airport Inspector at Dumdum Airport and he told P. W. 1 Lobo to take a declaration, and search the baggages of respondent and he was present during search. He stated that respondent had three packages with him and he identified Exs. I and II, suitcase and record player. The handbag was returned to respondent at the airport. He also corroborates other witnesses that respondent opened the Record player with key in his possession and then he describes how the wrist watches are recovered after removal of venesta floor. He denies that the respondent had only 2 packages with him and he is definite that the record player was with him and he saw him coming with it. He denies the suggestion that the baggage declaration form was filled and obtained from respondent at the Customs House or that he did not produce the key with which the Record player was opened. He was retired when he deposed and there is no reason for him to falsely depose.

8. Prosecution also examined other witnesses to prove the search and the seizure list and they also stated that respondent signed the seizure list. Apart from the oral evidence, the declaration form clearly shows that the record player, purchased by him at Singapore was part of his baggage and the plea that this declaration was taken from him later at the Customs House under threat is unbelievable. The learned Judge was conscious that it was very valuable evidence against him but he felt that, "there are certain points in this case which lead to the conclusion that no conviction can be made only on this declaration form", for- getting that there was unimpeachable oral evidence that he was carrying this record player while disembarking from the plane and that he produced the key with which it was opened. It is true that the learned Magistrate, while examining the respondent u/s 842, Criminal P. C., did not draw his attention to this declaration form but then there was thorough cross-examination of different witnesses on this point and it was suggested that it was taken from him under threat at the Customs House. The explanation was therefore on record and the learned Magistrate considered the defence suggestion and rejected it. There is there-fore no question of any prejudice to defence in the absence of a specific question on the point and the learned Judge is not right in holding that respondent was deprived of the opportunities to give any explanation. The second point accepted by the learned Judge in favour of appellant is the delay in producing the respondent before Magistrate after arrest. The plane touched airport at about 3 P. M., then was the search in the customs enclosure in the manner already discussed and the respondent was put under arrest at 4.30 P. M. and taken to Customs House between 4.30 P. M. and 5 P. M. Search list Ex. 3 shows search completed at 4.30 P. M. And he was produced before the Magistrate on the next date. We do not see any delay in production before Magistrate in violation of the statutory provisions, so as to draw any inference that the declaration was taken at the Customs House under threat or by force and there is clear evidence from Airport officers that the baggage

declaration form was filled up and signed before search.

9. The learned Judge has pointed out that the respondent had one registered and another unregistered package according to the ticket and baggage check and no record player and he therefore discredits the evidence regarding the record player, obviously holding the handbag as the unregistered package. This was considered by the learned Magistrate who held that the record player, in view of the evidence on record, was carried as an unregistered baggage, in avoidance of rules. Ex. VI, ticket and baggage check docs not show the number (Pieces) of unregistered baggages but shows merely the weight. P. W. 8 stated that packages weighing less than 5 lbs. are carried by passengers themselves as unregistered baggage. Weight of the unchecked baggage is 4 kg. which is 8.8 lbs. and the learned Magistrate, points out that the weight points to the existence of more than 1 package. Any passenger smuggling prohibited goods would obviously attempt to avoid detection, and preplan for the purpose of a handbag and record player coming as one unregistered package is not such an improbability as to undo the oral evidence from so many responsible officers at the airport and the statement of the passenger in his own declaration, Ex. 2 at the airport before search.

10. The learned Judge has referred to the non-production of the key but the key was not seized at all. The learned Judge has referred to absence of any tag with the record player and has concluded that the accused was not in possession of the record player. The conclusion is obviously unwarranted, as the record player is a baggage brought in the plane. All that the respondent contends is that he did not bring it but there is no doubt it came by the plane without a tag and absence of a tag does not lead to the conclusion that respondent did not bring it. It contained smuggled watches and hence meticulous care was taken to avoid detection and this explains absence of the tag, just as there was avoidance of mentioning the third package, namely, the handbag. The learned Judge referred to non-production of the manifest and drew adverse inference, forgetting the evidence that the manifest does not disclose the weight of the package. P. W. 4 Marcelline made it clear that no Airlines except that of Thailand and Union of Burma showed number of packages and their weights in the manifest. Prosecution therefore had no occasion to produce the manifest and there is no scope for drawing adverse presumption.

11. Referring to weight, the learned Judge held that the weight of a record player like Ex. II would be more than 28 lbs. No weights were taken and we do not know how the learned Judge came to take this view on appeal.

12. The evidence that the respondent was carrying the record player is overwhelming; this evidence is further strengthened by the baggage declaration at the Customs in the Airport before search and there is no scope for any doubt, far less reasonable doubt--that the record player was brought by the respondent from Singapore and 261 watches were kept concealed in it underneath a false venesta wood floor.

13. We are not unmindful that this is an appeal against acquittal--that the respondent had not only the initial presumption of innocence but having been acquitted on appeal by the Sessions Judge this presumption was reinforced. In the case reported in *Sher Singh and Others Vs. State of Uttar Pradesh*, , the learned Judges pointed out that the powers of a High Court in an appeal from acquittal are in no way different from those in appeal against conviction. The High Court can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the lower court and reject the evidence accepted by it, unless the lower Court relied on demeanour. High Court however will pay due attention to the grounds on which acquittal is based and repel these grounds satisfactorily. We have pointed out during the discussion of the evidence that the appellate Court's approach to evidence was perverse and that he drew presumption in law where none was available. The evidence regarding the appellant's possession of the record player is overwhelming and a different conclusion is not possible on the evidence on record.

14. The learned Judge's order acquitting the respondent should therefore be set aside and the order of conviction passed by the learned Magistrate restored.

15. We may now consider the point of law raised by Mr. Banerjee regarding the admissibility of the appeal. The complaint initiating the proceeding was filed by R. C. Misra, then Assistant Collector of Customs on November 7, 1959 and the Magistrate convicted respondent by an order dated June 28, 1961. There was an appeal against order of conviction and the learned Judge acquitted the respondent by an order dated August 8, 1961. By this time R. C. Misra was transferred and this appeal was filed by his successor in office, Sachidananda Banerjee on November 18, 1961. Special leave to appeal was applied for and granted by the Court. Mr. Banerjee, learned Advocate for respondent has submitted that right to appeal u/s 417, Criminal P. C. on special leave is open to the complainant alone and the appellant being somebody other than R. C. Misra, this is incompetent. His argument is that Sub-section (3) of Section 417 enables the High Court to grant special leave on the application of the complainant and therefore no leave can be granted, on application of Sachidananda Banerjee, as he is not the complainant in the case.

16. Sub-section (3) of Section 417, Criminal P. C. reads as follows :--

"417 (3). If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

17. This provision was enacted by the amendment of 1955 (Act 26 of 1955). This sub-section read with Sub-section (5) provides for an appeal against acquittal only in cases where special leave to appeal is granted. Paragraph 5 of the petition for leave mentions that R. C. Misra has since been transferred elsewhere out of Calcutta and therefore this application for leave is prayed for by his

successor in office, Banerjee. Leave was granted by the Bench admitting the appeal in 1961, presumably on being satisfied that Banerjee, as successor in office, was the complainant within the meaning of Sub-section (3) of Section 417, Criminal P. C. and was competent to ask for special leave to file appeal. There is therefore no scope for reopening the issue by this Court again.

18. We are also of the view that the word "complainant" in Section 417, Criminal P. C. is not used in any restrictive sense and that where the statute provides for complaint by a public servant with the sanction of his superior officer, as a condition precedent to cognisance by a Magistrate, it is the public office that counts and the successor-in-office of that officer is also the complainant within the meaning of Section 417, Sub-section (3), Criminal P.C. and is equally competent to file the appeal. There is good deal of difference between a private complaint and complaint by a public servant under the provisions of a statute. The complainant in the latter case is really the office and not the individual and the individual comes into the picture only because the office speaks through the individual. To take a very rigid view of the word complainant by restricting it to the same individual is to take an absurd, unreal and unworkable view, and it does not help the cause of justice. A criminal proceeding almost always takes several years, including often two appeals and if this rigid view prevails, no appeal against acquittal will lie where the holder of the office retires or dies or is transferred. It is absurd to suggest that the office remains but the officer, retires or is transferred and carries away with him the right of appeal. Equally absurd would be to hold that though retired, or transferred and not the holder of the office, he still preserves the right to appeal, even though only the holder or the office is competent to file the complaint.

19. Section 187A provides for cognisance by a Magistrate on the complaint of the Chief Customs Officer or by any Assistant Collector of Customs, authorised by him. The authority granted is Ex. 7 and the authority comes from the Chief Customs Officer to the Assistant Collector of Customs, incidentally to R. C. Misra, as he happened to be the Assistant Collector. So long therefore the office remains, it is the holder of the office who becomes the complainant and the appeal by Banerjee, Assistant Collector, is competent.

20. Mr. N. C. Banerjee, learned Advocate for the respondent submits that the word "complainant" within the meaning of Section 417 (3), Criminal P. C. is the man who sets the law in motion and therefore the successor-in-office is not the complainant -- the statute authorising complaint by a person authorised by the Chief Customs Officer means the person who filed the complaint and not anybody else, including the successor.

21. In support of this view Mr. Banerjee has referred to a decision reported in *Nanilal Samanta Vs. Rabin Ghosh*, , corresponding to Criminal Appeal No. 10 of 1962, *Nanilal Samanta Vs. Rabin Ghosh*, and un-reported decision in Criminal Appeal No. 429 of 1961 (Cal), *Jugal Kishore v. Syama-charan* and Criminal Appeal No. 779 of 1965 (Cal). In *Nanilal Samanta Vs. Rabin Ghosh*, , A. C. Ray J.

pointed out that the word "complainant" means the person who was examined as complainant u/s 200 and none else is so, however much he is interested in the prosecution. In view of the provisions of Section 417 (3), if the complainant dies before presentation of the appeal, no other person, not even his legal heirs, may have that right. The same view was taken in Jugal Kishore's case, Criminal Appeal No. 429 of 1961 (Cal), and in the reported decision in Nanilal Samanta Vs. Rabin Ghosh, where it was pointed out that there is no inherent right of appeal against acquittal on special leave. These are decisions where the complainant is a private party, whose examination u/s 200, Criminal P. C. was essential and where question of sanction did not arise. They are therefore no authority for the proposition that where a complaint is required to be filed by a public servant with sanction from his superior, upon retirement, death or transfer of the officer, his successor in office is incompetent to appeal, not being a complainant within the meaning of Section 417 (3), Criminal P. C.

22. Criminal Appeal No. 779 of 1965 (Cal), Chairman, Raigunge Municipality v. H. Agarwalla, is another single Bench decision where also the learned Judge relied on Criminal Appeal No. 10 of 1962 (Cal) and Criminal Appeal No. 429 of 1961 (Cal), and held that no extended meaning can be given to the word "complainant", so as to enable any other person, however interested he may be in the prosecution of the accused and further there was no right to present such an appeal in the legal representative of a deceased complainant. It was further held that the successor in interest of a complainant is not a complainant within the meaning of the terms of Section 417. (3) of the Criminal Procedure Code. That was a decision where the Chairman of a Municipality filed the appeal after the Administrator ceased to function and the learned Judge also found that the Chairman of the Municipality is not a successor in interest of the Administrator. This decision unfortunately failed to give due importance to the fact that the complainant in these earlier cases were private parties and that the instant complaint was filed by a public officer under provisions of Section 187 (a) under authority of the Chief Customs Officer and that no Court could take cognizance unless the complaint was under such authority.

23. In the instant case R. K. Misra filed this complaint under the authority of the Chief Customs Officer and by the time this matter was heard in appeal, R. K. Misra was transferred and Sachidananda Banerjee took charge as Assistant Collector of Customs. By virtue of the provision of Section 187 (a) of the Sea Customs Act it is the holder of public office who is authorised to lodge the complaint and no cognizance shall be taken by a Magistrate unless the holder of this authority lodges the complaint. It is not R. K. Misra or Sachidananda Banerjee who is competent to file the complaint and it is the office they hold that authorises them to lodge the complaint. Proviso (aa) of Section 192, Criminal P. C. provides that where the complaint is made by a Court or by a public servant purporting to act in the discharge of his official duties, it is not required to examine the complainant. There is no doubt that the Chief Customs Officer or the Assistant Collector of Customs is a public servant and their examination u/s

192 is not necessary nor has R. K. Misra been examined in the instant case. This makes fundamental difference between a private complaint and a complaint by a public servant and the cases relied on by Mr. Banerjee, except Criminal Appeal No. 10 of 1962 (Cal) deal with private complainants where on the death of such complainants their heirs filed an appeal against acquittal. Those decisions, therefore, are no authority for the proposition attempted to be propounded by Mr. Banerjee. The provision of the Sea Customs Act authorises the holder of the office to lodge a complaint and it is of little importance who is the person holding that office. Therefore, on the transfer of such officer the present incumbent is the "complainant" under the provisions of Section 417 (3), Criminal P. C. The Act provides for authority from the Chief Customs Officer and the authority really is given to the holder of the office and therefore, on the transfer of the officer, his successor in office is competent to file the complaint or file the appeal and it cannot be said that he is not competent to file the appeal. A similar point was considered by the Supreme Court in *The State of Bombay Vs. Parshottam Kanaiyalal*, in connection with sanction for prosecution under the P. F. A. Act. Section 20 of the Act provides that no prosecution under this Act shall be instituted except by or with the written consent of the State Government... High Court held that the written consent did not in terms mention the person in whose favour the sanction or written consent was given. Supreme Court held that the consent is for launching a prosecution and not "in favour" of a complainant authorising him to file the complaint. Emphasis is on the consent for filing the complaint, not on the person filing it. It was also held that "the specification of the name of the complainant is not a statutory requirement --the consent being to a specified prosecution." The reason behind this provision for "consent" is apparent, viz., the authority competent to initiate proceeding should apply its mind to the facts and satisfy itself that a prima facie case exists for prosecution. This authorisation is therefore for a Specified prosecution and specification of the name of the complainant is not a statutory requirement and the provision for appeal by the complainant in such cases of public servant covers cases of successor to the complainant holding the office. This objection must therefore be overruled. It is well known that sometimes a complaint with its appeal takes a fairly long time and by that time the public servant may either be transferred or may retire or even die. It is unthinkable that a retired officer would be asked to file the appeal u/s 417 (3); it is equally unthinkable that the officer who has been transferred and often diverted to another kind of job would be asked to come over for filing the appeal. We wonder if in such a case, objection against the competence to file appeal may not be taken, as the person is no longer in office as holder of the office. This objection, therefore, is overruled. We hold that Sachidananda Banerjee, Assistant Collector of Customs is competent to file this appeal and leave to appeal has already been granted to him.

24. We have already found that the view taken by the learned Sessions Judge is untenable and that there is clear evidence that the respondent committed the offence. We have found that the evidence against appellant is overwhelming and

also that the learned Judge's approach is perverse and the grounds advanced for an order of acquittal are palpably wrong. This is a case where watches were smuggled into India secretly under the wooden plank of a record player and the respondents therefore deserve deterrent punishment.

25. We, therefore, set aside the order of acquittal and restore the order of conviction and sentence passed by the learned Magistrate. The respondent is sentenced to rigorous imprisonment for three months.

K.K. Mitra, J.

26. I agree.