

(1990) 04 BOM CK 0037
In the Bombay High Court
Case No : Criminal Appeal No. 852 of 1982

S.G. Rajadhyakshya

APPELLANT

Vs

Leela Daulatram Uttamchandani.

RESPONDENT

Date of Decision : 05-04-1990

Acts Referred:

Customs Act, 1962 — Section 108, 135(1)

Citation : (1991) 51 ELT 3

Hon'ble Judges : I.G. Shah, J

Bench : Single Bench

Judgement

1. The State has come in appeal against the order of acquittal passed in favour of the original accused of the offence under Sections 135(1)(a)(ii) and 135(1)(b)(ii) of the Customs Act and u/s 5 of the Imports and Exports (Control) Act passed by the Additional Sessions Judge, Greater Bombay, in Criminal Appeal No. 399 of 1981.

2. Briefly stated the facts giving rise to this appeal are as under.

The accused was tried and convicted of the offence under Sections 135(1)(a)(ii) and 135(1)(b)(ii) of the Customs Act and Section 5 of the Imports and Exports (Control) Act and she was sentenced to suffer imprisonment till rising of Court and fine of Rs. 40,000/- on each of the first two counts and she was also sentenced to imprisonment till rising of the Court and to pay a fine of Rs. 2000/- u/s 5 of the Imports and Exports (Control) Act. Being aggrieved by the said order of conviction the accused preferred an appeal to the Court of Sessions at Greater Bombay and the learned Additional Sessions Judge acquitted the accused allowing the appeal.

3. The prosecution case was that the accused had arrived at Bombay Air-port from Manila by Air France flight on the night between 11-1-1981 and 12-1-1981, that on arrival she presented her baggage at the customs counter and baggage consisted of two suit-cases and one wheeler bag, that on examination of the

baggage, the Customs Officer found some dutiable and restricted goods in the baggage, that the officer asked the accused to make a declaration about the baggage as they suspected her, that the accused however told that she has nothing to declare except the personal effects in her baggage and jewellery on her person, that the Customs Officer in the meanwhile felt that the accused had kept a black handbag on the floor surreptitiously and, therefore, she was asked to declare the contents of that handbag and she is alleged to have stated that there was nothing to declare in the same, that the cursory examination of the handbag by the officer disclosed that there were two Rado wrist watches at the bottom under other items, wrapped in tissue papers and these watches were not declared by the accused, that the officers, therefore, called the panches and carried out the examination of the entire baggage, that the accused was once again asked to make a fresh declaration in the presence of panaches but she again stated that she had nothing to declare apart from her personal effects in the baggage and jewellery which was on her person, that thereafter the black handbag was examined further and on emptying the contents of the handbag it was noticed that its base was unusually uneven and, therefore, the officers suspected concealment, that the accused was again asked whether there was anything concealed under the said base of the bag but she denied to have concealed anything, that as the customs officers were not satisfied with her reply, they got opened the base of the hand bag through one of the officers and in between the two pieces of cardboard which were glued together at the base, 8 pieces of diamond, gold and platinum and pearl were found concealed, that the jewellery and other dutiable goods recovered from the baggage, the value of the jewellery and other dutiable goods were estimated at Rs. 79,815/- market value. The Customs Officers prepared a panchanama of the search and thereafter a notice was served u/s 108 of the Customs Act on the accused and statement of the accused was recorded. After obtaining necessary sanction to prosecute the accused, the complaint was filed before the Trial Court and on the strength of evidence led before the Trial Court the accused was convicted and sentenced as stated earlier. Being aggrieved by the said order of conviction, the accused preferred as appeal to the Court of Sessions and the Court of Sessions found the prosecution had failed to establish the guilt of the accused and keeping with said finding acquitted the accused. Being aggrieved by the said order of acquittal, the State has preferred this appeal.

4. On behalf of the State, it is contended that the learned Additional Sessions Judge was in error in holding that no offence was proved against the accused. It was contended that learned Additional Sessions Judge had without any cogent reason brushed aside the statement under Sec. 108 of the accused. It was also contended that the learned Additional Sessions Judge was in error in holding that form No. 37 was framed under the regulations prescribed by the Board and that it was mandatory on the part of the Customs Officers to issue the said form to each passenger and get the declaration in respect of the articles forming part of the baggage imported by the passenger. It was also contended that form No. 37

is not a mandatory form required to be get filled in from every passenger and infact the said form is not actually used at the air-port and, therefore, the learned Additional Sessions judge erred in concluding that the mandatory form provided under the regulations having been not got filled in from the accused, the accused had no opportunity to declare the articles which were contained in the handbag.

5. Now, it is an admitted position that some jewellery was found in the handbag carried by the accused. It is also an admitted position that Rado Wrist Watches were also found in the said handbag. There is some dispute about the position in which the jewellery was found in the hand bag. The prosecution alleges that the said jewellery was found concealed in the lining of the base of the hand bag while according to the accused the said jewellery was not concealed at all but was in the handbag. As far as the watches are concerned, there is no dispute that they were found in the hand bag and could be seen by cursory glance.

RESUMED : 6-4-1990

6. In the statement of the accused recorded u/s 313 before the Trial Court, which is admittedly admissible under the provisions of the Customs Act, the accused is alleged to have stated that on the night of 11-1-1981 and 12-1-1981, she came by Air France with the baggage consisting of two suit-cases, one whether bag and black handbag and as soon as she entered the baggage hall, officer asked her at the gate whether she had anything to declare and she told that she had personal effects and jewellery to declare and then he asked her to go to counter No. 6. She, therefore, went to collect her baggage and as there was crowd at counter No. 6 she was directed to go to counter No. 2 with her baggage and the officer at the counter asked her whether she had anything to declare and she informed him that she had personal effects and jewellery and when she was asked to open the two suit cases which she did, the officer then told her that she would be required to pay Rs. 2500/- as duty. But another officer came and told the first officer to charge Rs. 4,000/- as duty. She also stated that the officer Kingsford also came there and he opened the hand bag and took out a pearl necklace and thereafter all other articles of jewellery which were in the purse, and he asked her why she has not declared those jewellery articles. She also stated that she told him that though she had a desire and wanted to declare the same she was not given an opportunity to do so and that she was wearing the jewellery and one wrist watch also. Two wrist washes were also found in the purse. The officer stated that those were dutiable items and she informed that she was prepared to pay the duty but Kingsford ripped open the lining of the purse but nothing was found concealed inside. She also stated that she did not see the officers D'Silva or D'souza but after some time D'Mello came there. It is tried to be contended on behalf of the State by Shri Gupte, learned advocate that the learned Additional Sessions Judge has in fact accepted the entire statement that was made by the accused in her written statement u/s 313 of the Criminal Procedure Code in preference to the evidence that was led before the Court and

relying on the said statement and the fact that no form was provided to the accused for making a declaration the defence of the accused was plausible and, therefore, the accused was acquitted. It was also contended on behalf of the prosecution before me that in the statement of the accused recorded u/s 108 of the Customs Act, the accused actually has confessed that she had brought the jewellery and had not disclosed the same. She also confessed about the concealment of two wrist watches in the handbag. The statement shows that she stated before the Customs Officer that after completing the immigration, she was allotted counter No. 6 and at the counter No. 6 however she was directed to go to the counter No. 2 for examination of her baggage and at counter No. 2 for examination of her baggage and at counter No. 2 the very Customs Officer and also other officers asked her whether she had any gold or gold jewellery or diamond jewellery on her person or kept or concealed in her baggage and she had declared pearl necklace, gold bangles, diamond ring and diamond ear-rings which were on her person and one gold Omega wrist watch which was worn by her. She further stated that the officers had a cursory look in her purse in which they noticed two Rado wrist watches and immediately they called for two panch witnesses and the said handbag was examined in detail by the aforesaid officers and during the course of search the officers found a pearl necklace, diamond ear-rings, diamond bangles, diamond ring, gold pendant, platinum chain with diamond, gold pendant and a gold chain concealed in between the lining of the bag and from cardboard sheets of the said handbag and besides it some dutiable goods were found from her bag out of which personal effects worth Rs. 1000/- were given to her under free allowance and rest of the goods valued at Rs. 4350/- CIF were detained under panchanama for departmental adjudication. She also stated that the diamond studded jewellery and watch valued at Rs. 26,490/- were given to her on TBRE form and all the diamond studded jewellery found concealed in her purse were taken over and seized under a panchanama in the reasonable belief that they were smuggled into India and liable for confiscation under the provisions of Customs Act, 1962. She also stated that the copy of the panchanama was also furnished to her and all her jewelleries were detained for assessment and valuation by jewellery appraiser under P.O. seal No. 177 and also called upon her to put her signature on the panchanama. She further stated that the diamond jewellery found concealed in her hand bag belongs to her and that she had brought those jewelleries to be worn on the wedding of her cousin or niece which was scheduled to take place shortly and that she had concealed the said jewellery inside the hand bag as she was afraid that by declaring it to the customs officers she would be put to some inconvenience of getting the jewellery assessed and valued as she had on her earlier trip to Bombay in 1975 a very bad experience. She also stated that at that time it took almost six months to get release her jewellery. She is also alleged to have stated that she had no intention to take it back to Manila after her stay in India for 3 months. She also gave the approximate value of the entire jewellery and wrist watches at Rs. 1,22,500/-. She also stated that she was aware that had she declared the personal jewellery of more than Rs. 50,000/- she would have to execute a bond

and face the problem of getting it counted and valued at the customs and it was only because she wanted to clear fast through customs as she was to go to meet her Guru Shri Swami Gangeshwar as it was his 100th birth anniversary on that day. On behalf of the state, it was tried to be contended that the learned Additional Sessions Judge was in error in holding that the said statement was not voluntary. It was also contended that the learned Additional Sessions Judge had discarded the said statement and had accepted the statement of the accused under Sec. 313 of Criminal Procedure Code and in fact there was absolutely no circumstance on the face of which one could come to the conclusion that statement recorded before the Customs Officer was not voluntary statement and that she was actually forced to sign the statement which was written down by the customs officer, Shri Gupte who appears on behalf of the State tried to contend that the details which have been given in the said statement of the accused indicates that the said statement is a truthful one and learned Chief Metropolitan Magistrate was right in holding that the said statement could be relied upon as corroborative place of evidence to the evidence led by prosecution witnesses and on the other hand the learned Additional Sessions Judge was in error in discarding the said evidence. It appears that the learned Additional Sessions Judge has discarded the said statement of the accused recorded u/s 108 of Customs Act as he found on the strength of the evidence that the accused was surrounded by at least four customs officers and she was interrogated and questioned till about 6 a.m. in the morning, she must have been confused and terrified. Now it is true that merely on the basis of the said two circumstances one cannot infer that the statement alleged to have been given by the accused is untrue. It is true that the said statement recorded by the customs officers is clearly retracted by the accused but even if it is retracted statement, it could be relied upon if it was corroborated by other evidence. On behalf of the accused, it was tried to be contended before me that the corroboration must be in the material aspect and if no such corroboration is available statement given by the accused should be brushed aside and it cannot be of any use and assistance to the prosecution. Now, as far as this part is concerned, the supreme Court has laid down that conviction could be based on the retracted statement of the accused under Sec. 108 even if it is generally corroborated. In 1972(2) CLJ 933 Percy Rustomji Basta v. The State of Maharashtra, the Supreme Court has observed thus :

"It was also contended that even in the decisions reported in AIR 1931 CIJ 231 and 1934 CLJ 1313, it has been laid down that the statement of the accused u/s 108 of the Customs Act even if it is retracted could be used against the accused if it is corroborated generally."

As against this on behalf of the accused, it was tried to be contended that if the statement itself indicates that there are certain insertions which could not have been at the behest of the accused, the entire statement must be discarded. Reliance was tried to be placed on the following lines included in the said statement of the accused in the present case :

"Rest of the goods valued at Rs. 4,350/- CIF were detained for departmental adjudication. Diamond studded jewellery and watch valued at Rs. 26,490/- were given to me on Tourist Baggage Re-export Rule form. All the diamond studded jewellery found concealed in my purse was taken over and seized under panchanama in the reasonable belief that they were smuggled into India and hence liable for confiscation under the provision of Customs Act, 1962."

On behalf of the state, it was contended by Shri Gupte that the statement though is recorded in the narration form it is actually the replies given by the accused to the questions that were put and therefore, the said answers recorded in the statement when the accused had replied in affirmative has created the said anomaly on the basis of which one could say that the accused could not have made a statement referred to above. Shri Gupte, however, tried to contend that there are number of other details in the statement which could not have been known to the customs officers at all it clearly indicates that whatever was stated by the accused was actually written down in the form of the statement. It was also contended that merely because there were some four officers of the customs department who were examining the baggage and questioning the accused, it could not be inferred that the accused could not have been in the state of mind to give correct statement before the Customs Officers. Now, it does appear that there are certain statements made by the accused in respect of the earlier travel to India in 1975. Similarly there are statements in respect of the birth anniversary of her guru which could not have been imagined by the Customs Officers. Shri Gupte appearing for the State also contended that her past experience in respect of the customs department which finds place in the statement could be only known to her and nobody else and the said statement definitely indicates about the truthfulness of the same and the learned Additional Sessions Judge was in error to conclude that the said statement was not voluntary and truthful. Now, as far as the position of law is concerned, the statement u/s 108 of the Customs Act, even it is retracted definitely can be considered by the Court if it is found to be voluntary and truthful. At the most, it would require some corroboration. In the present case I do find that the view taken by the learned Additional Sessions Judge while rejecting the said statement on the basis of the circumstances which I have discussed earlier, cannot be said to be correct approach. The said statement recorded by the Customs Officers definitely could be taken into consideration and I do not find that in the said statements there are circumstances on the basis of which one could conclude that it is not voluntary and is untruthful.

7. On behalf of the state, it is also tried to be contended before me that much stress has been laid on the fact that there is evidence to show that the accused was not provided with form No. 37 for making a declaration and that learned Additional Sessions Judge erred in holding that seeking of declaration in form No. 37 was mandatory, under the regulations framed under the Act. On behalf of the accused, it is also tried to be contended before me that form No. 37 is provided in the Customs Manual Volume I in Appendix C and the form itself shows that

under Sec. 81 the said form is provided. It is also contended that the learned Additional Sessions Judge was right in holding that the filling of the said form and, therefore, giving of the said form to the passenger arrived by air is mandatory as instruction No. 1 in the form reads that each passenger will be supplied with one form only, for declaring the particulars in respect of articles forming part of the baggage imported by him. I have gone through the entire Customs Manual Volume I and I am unable to conclude that the said form is actually provided either under the Rules or Regulations framed under the powers delegated either under Sec. 81 or 157 of the Customs Act.

Therefore, I am inclined to conclude that the said form could not be said as one prescribed under the rules or regulations. At the most one can hold that the form for declaration of the baggage is provided in the Manual as per Appendix C. On behalf of the State, it was tried to be contended that as per the guidelines given by the Government of India, form No. 37 is not required to be used at the airport and reliance was tried to be put on guidelines which are given in para IV : 1.6 under the heading "Baggage Declaration Form - Revision of" and para IV : 1.7 under the heading "Systematic Approach". Reliance is also placed on guideline given in para IV : 1.5 under the heading "Oral Declaration". Now, under the heading "Oral Declaration" it is provided that by the orders contained in the CBR letter No. 431/10/55, Cus. IV, dated 6th July, 1955, it was decided to clear the air passengers (arriving at Santacruz) on oral declaration and the written declaration was done away with. It further provides that in order to acquaint the passenger with the regulations, placards were made available by the Baggage Examining Officers, to the passengers to enable them to make oral declaration regarding contents of their baggage, and passengers were however required to make written declaration in cases when they carried dutiable goods and when they had unaccompanied baggage, either to arrive later or had arrived earlier. Under the heading of "Baggage Declaration Form - Revision of" the guideline provides that from August 1961, the Government of India reintroduced a revised International Passengers Baggage Declaration Form (with some modifications) to be used whenever a written declaration had to be taken from the incoming and outgoing passengers. This revised Baggage Declaration Form was not put to use as a matter of routine. The same was to be used for the clearance of passengers whose bona fides were doubted or in respect of whom prima facie offence or adjudication proceedings were indicated. However, no such prescribed baggage Declaration Form is presently being used and the same is used only for clearance of unaccompanied baggage. The present system of baggage clearance is to obtain oral declaration from the passengers and record the same itemwise on a separate declaration form under the signature of the Passenger and to effect clearance based on such declarations. It is further provided under the heading "Systematic Approach" as under.

"On import : From August, 1961, Government of India in pursuance of the demand of the jet age, accepted in principal that every possible steps should be taken, while keeping in view the safety of revenue, to decrease the formalities

relating to passenger clearance on import and to avoid superfluous documentation vide letter No. MF (DR) F.No. 9/35/59-Cus. VI, dated 24-7-1961. Accordingly, following instructions were issued in supersession of all previous ones :

That the revised International Passengers Baggage Declaration Form (as mentioned earlier) be used for taking written declaration :

- (i) When the passenger was a suspect and it was considered desirable to get his declaration in writing; and
- (ii) When there was a prima facie offence and adjudication proceedings had to be initiated; and
- (iii) In all other cases the declaration be oral.

On Export : No written declaration is to be taken in respect of outgoing passengers except when :

- (i) the passenger was a suspect and it was considered desirable to get his declaration reduced to writing;
- (ii) there was a prima facie offence and adjudication proceedings had to be initiated."

Relying on this Shri Gupte on behalf of the State tried to contend that considering the inflow of the passengers at the air-port, the system of getting a declaration form filled in was abandoned long back in 1955 and, therefore, one cannot say that getting the declaration filled in in form No. 37 is mandatory provision. As against this on behalf of the accused it was contended that even if it is assumed for a moment that the provision in respect of the form No. 37 is not a mandatory one, at least it is clear even from the guidelines relied upon by the learned counsel appearing for the State that if passenger was suspected and it was considered desirable to get his declaration in writing, form was required to be filled in. It was also contended that in the present case there is evidence to show that the accused was suspected and prima facie offence and adjudication proceedings were to be initiated against her and, therefore, in the present case at least it was incumbent even as per the guidelines given to the customs officers to ask the accused to fill in the declaration form No. 37 and if evidence is clear on the point that this procedure was not adopted and no form was given to the accused for being filled in, the customs officer must be held to have failed even to follow the guide-lines that were given by the Government of India. It was also contended that one cannot understand as to why, when the customs officers definitely had become suspicious about the accused, did not ask her to fill in the form of declaration so that she could have been pinned the declaration and then there would remain no scope for argument that the accused was not given an opportunity to make a declaration which she desired to make and before she could make a declaration her search was taken. Reliance was also placed on the ruling reported in *Navgujarat Paper Industries Vs. Superintendent of Central*

Excise and Others, Star Chemicals (Bombay) Ltd. Vs. Union of India and others, . The first decision is of Gujarat High Court wherein relying on the decision of the Supreme Court Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., , it was held that even if a trade notice amounts not more than executive instructions, it would be binding on the department and department would be estopped from contending that what was mentioned in the trade notice should not be adhered to. Latter decision referred to above is from this Court wherein Lentin J. also held that the trade notice regarding classification of a product is binding on the Department and the department would be estopped from contending to the contrary. Relying on these decisions Shri Jagatiani tried to contend before me that in the present case also even if it is held that the guidelines which are given are only instructions given by the Govt. of India to officers of the Customs department, the customs department is estopped from contending that the said instructions are not binding on them. It was contended that once it is found that the accused in the present case was definitely suspected it was incumbent on the customs officers to give form No. 37 to the accused for filling up the same and if they have failed to do so, they have committed breach of the instructions at least. It is also contended that the said breach of instructions should also reflect further on the entire procedure that was followed by the customs officers including the recording of the statement of the accused u/s 108 of the Customs Act. Now, it appears that in the two decisions cited by Shri Jagatiani there were trade notices and they provided for classification of parts and acting upon the said classification the manufacturer of certain items had relied upon the said trade notice and, therefore, it is held that once it was held that once it was made clear to the people by issuing the trade notice whatever was stated in the trade notice had binding effect on the department and they could not go back on the same. It is on the principle of estoppel that in the said matters the Court concluded that department could not go back on the said trade notice and they would be estopped from contending otherwise. In the present matter the instructions which were given are only guidelines and once they are considered as guidelines they cannot be considered as instructions having a mandatory effect. At the most they could be considered as directive and in the present case if the accused would have been provided with a declaration form and thereafter her search would have been taken, much controversy in respect of the declaration could have been avoided but if there is satisfactory evidence on record to show that she was repeatedly asked to declare if she had any items which were dutiable one cannot find fault merely because she was not asked to fill in the form No. 37. There is sufficient evidence in the present case to show that the accused was asked to make declaration repeatedly and she all the while stated that she had nothing except the personal effects and jewellery which she was wearing on her person. Under these circumstances, I do not give much importance to the fact that the form was not got filled in from the accused. Merely on this count, therefore, it would not be proper to hold that the contention of the accused that before she could make that declaration she was searched and then she was found to be in possession of some jewellery

which was not declared by her. There is evidence of the panch witness Rego who is an officer of Air India who has stated in his deposition that on the night between 11th January, 1981 and 12th January, 1981 he was called to act as a panch and he was taken to customs counter in the baggage hall and accused was present there and she was asked if she had any jewellery etc. and she stated "No". He also deposed that accused was wearing some jewellery and that the accused was asked to declare if there was any such jewellery in her bag. The accused, according to him, was having some suit-cases and purse and then the purse was examined by officers and in the said purse watches were found and thereafter it was noticed that surface of the bottom of the purse was uneven and bottom was ripped open and on opening the bottom some jewellery as claimed by the prosecution was found. He has also deposed that even before ripping opening of the bottom she was asked if there was anything concealed in the bottom and the accused also again replied in the negative. Therefore, even in the presence of the panch witness before the jewellery was actually found in the purse lying underneath the lining of the bottom, the accused was asked to make a declaration and she had at that time also denied that she had anything to declare. The Trial Court had accepted the evidence of Mr. Rego and I do not find any substantial reason to hold that the said finding of the Trial Court was not correct. Under these circumstances, merely because a declaration in writing in form No. 37 was not taken, it cannot be said that the entire seizure should be discarded as unreliable. It is also difficult to accept on the face of evidence of Mr. Rego that the accused had no opportunity to make a full declaration of the articles which she possessed as contended by her.

8. On behalf of the accuse, it was tried to be contended before me that the entire approach of the Trial Court is biased and that is apparent from the tenor of the judgment and the observations made by the Trial Court and it definitely indicate that he had developed some prejudice against the accused because of her wealth. There is some substance in this contention. No doubt, certain observations made by the learned Chief Metropolitan Magistrate were actually uncalled for. But that by itself is not sufficient to discard the findings given by the Trial Court if they are substantiated by the evidence on record.

9. There is no dispute that some jewellery as claimed by the prosecution and two wrist watches were found in the hand purse of the accused. The contention of the accused in respect of the said articles in her statement u/s 108 of the Customs Act recorded by the customs officer is that she had not declared those articles as they were personal effects and jewellery and she had bad experience in the past when she visited this country in 1975 and she was required to wait for a long period for six months for clearing the articles when she wanted to go back and take the same back to Manila where she was residing. Implicit in this statement is that she had concealed the said ornaments in the purse within the lining is correctly put forth by the prosecution. Once it is established that the articles which were found in the purse including the jewellery were not declared by her she would be committing an offence as claimed by the prosecution. It is in fact

not necessary to consider whether the said jewellery was for the personal use or otherwise. As a matter of fact I would even accept that the said jewellery was for personal use of the accused but once it is found that she had not declared the same to the customs officer and when the said jewellery was found when she was searched on suspicion she would be committing an offence both u/s 135(1) (a)(ii) and 135(1)(b)(ii) of the Customs Act as well as u/s 5 of the Imports & Exports (Control) Act. No doubt, the learned Chief Judicial Magistrate was in error in saying that the said jewellery was probably brought for the purpose of sale or leaving the same in India. It may or may not be. What we are concerned with is whether she had tried to import the said jewellery in India without declaring the same as required by the provisions of law. Whether the said ornaments were in fact ornaments or not also is not very material. But as a matter of fact even the learned Chief Metropolitan Magistrate has erred in holding that pendent being only a square piece of gold could not be considered as an ornament. It is admitted position that it had a hook and the said piece of pendent could be put in chain. If that is so, even if there was a marking on it of 2.5 grams it would not make any difference. It would still remain an ornament and one cannot question as to why she had such type of an ornament with her. It also appears that the learned Chief Metropolitan Magistrate was very much impressed by the fact that some certificate in respect of pendant was found also in the purse and on the basis of the same he concluded that it would be easy for her to dispose of the said piece of gold in the market in Bombay. It also appears that he inferred from that the accused had brought these articles not for personal use but for either giving it to her relatives in India or selling the same. It was not necessary at all to consider that aspect in the present case. The learned Additional Sessions Judge on the other hand was in error in rejecting the entire evidence led by the prosecution without any substantial and cogent reason for the same. As stated earlier, the view taken by the learned Additional Sessions Judge that filling in of form No. 37 was mandatory and on the basis of which, he has concluded that a mandatory provision was not complied with and, therefore, the contention of the accused that she was actually searched before she could make a full and complete declaration was possibly true and, therefore, the prosecution had failed to establish the guilt of the accused is not correct.

10. On behalf of the accused, it was tried to be contended before me that in the case where the accused is acquitted and in appeal against the order of acquittal the Appellate Court should be slow in disturbing the finding of innocence of the accused which is buttressed by the finding given by the Lower Court. There is no quarrel with the said proposition but if the entire approach of the Lower Court is not based on material which ought to have been taken into consideration and is based on wrong consideration of the provisions it cannot be said that no interference is called for. In the present case I have already found that view taken by the learned Additional Sessions Judge that form No. 37 is mandatory is erroneous and once it is held that the said finding is erroneous then there is no other alternative but to disturb the other findings arrived at based on the same.

The learned Additional Sessions Judge in the present case was in error even in discarding the statement u/s 108 given by the accused. Hence I find that there are sufficient reasons in this matter to interfere with the order of acquittal and restore the order of conviction passed by the learned Chief Metropolitan Magistrate. Hence the order.

ORDER

11. Appeal is allowed.

Order of acquittal of the accused is set aside and order of conviction and sentence passed by the Trial Court is restored.

At this stage on behalf of the respondent/accused it is tried to be contended that as there was no profit motive attachable to the accused sentence of fine imposed by the Trial Court of Rs. 40,000/- on each count of the offence under the Customs Act and Rs. 2,000/- under Import and Export (Control) Act is too harsh and it should be reduced. It appears that the learned Chief Metropolitan Magistrate has considered in detail on the point of sentence and as a matter of fact has been lenient as he has not imposed a harsh substantive sentence on the accused, I do not see any reason to interfere with the same. Hence appeal of the State is allowed and order of conviction and the sentence passed against the accused by the Trial Court is restored. The respondent is given three months time to pay the fine.