

(1975) 07 GUJ CK 0011
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Manharlal Ambalal Soni

RESPONDENT

Date of Decision : 07-07-1975

Acts Referred:

Customs Act, 1962 — Section 135, 135, 135(b), 135(H)
Gold (Control) Act, 1968 — Section 71(1), 85, 85

Citation : (1976) 17 GLR 427

Hon'ble Judges : M.P. Thakkar, J

Bench : Single Bench

Judgement

M.P. Thakkar, J.—20 bars of gold each weighing 10 tolas (200 tolas) bearing foreign Mark Johnson Mathew London 999,0-10 tolas were found from the possession of respondent Manharlal Ambalal Soni. In connection with this find the respondent was prosecuted for an offence u/s 135 of the Customs Act, 1962 (hereinafter referred to as the Customs Act) as also for an offence u/s 85 of the Gold (Control) Act, 1968 (hereinafter referred to as the gold control Act). The learned chief metropolitan Magistrate, Ahmedabad, by his judgment and order dated December 16, 1974 came to the conclusion that the respondent was guilty of both the offences and convicted the respondent u/s 135 of the Customs Act and u/s 85 of the gold control Act. For the offence under the Customs Act the learned chief metropolitan Magistrate did not impose any substantive sentence of imprisonment but imposed a sentence of fine of Rs. 1,000/- (ID. S.I. for two months). In regard to the offence under the gold central Act the learned chief metropolitan Magistrate imposed a substantive sentence of Rule I. For 15 days and a fine of Rs. 500/- (I.D. S.I. for 15 days). The State of Gujarat felt aggrieved by reason of the fact that the sentence imposed was considered extremely inadequate. The state has, therefore, invoked the revisional jurisdiction of this Court by way of Criminal Revision Application No. 234 of 1975. The Assistant Collector of Customs, Ahmedabad, has filed a similar application invoking the revisional jurisdiction of this Court which has been registered as Criminal Revision Application No. 120 of 1975. This Judgment will dispose of both the

aforesaid applications, one preferred by the state and the other preferred by the assistant Collector of Customs, Ahmedabad.

2. Counsel for the respondent urged that he proposed to assail the order of conviction though the respondent had not preferred any appeal. When a notice for enhancement of sentence is issued, it is open to the respondent to show that the conviction itself is not sustainable. I will, therefore, first deal with the submissions urged on behalf of the respondent in regard to the merits of the order of conviction.

3. u/s 135(b) of the Customs Act any person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111, is liable to be punished in a case where the offence relates to goods value whereof does not exceed one lakh of rupees with imprisonment for a term which may extend to two years, or with fine, or with both, under Clause (ii) of Section 135(b) of the Customs Act. In the present case, at the material time, the value of 200 tolas of gold did not exceed one lakh of rupees. Section 135(b)(ii) will therefore, be attracted, if it can be shown that the respondent had acquired the possession of or was in any way concerned in keeping or concealing of goods which he knew or had reason to believe were liable to confiscation u/s III of the Customs Act. Now, Section 111(d) of the Customs Act provides that any goods brought from a place outside India which are imported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force shall be liable to confiscation. It will be observed that Clause (d) of Section 111 refers to any prohibition imposed by the Customs Act or any other law which may be in force at the material time and at the material time Foreign Exchange Regulation Act 1947 was in force Section 8 of that Act provides that Central Government may by notification in the Official Gazette order that subject to such exemptions, if any, as may be contained in the notification no person shall except with the general or special permission of the Reserve Bank and on payment a fee prescribed in that behalf, bring into India any gold and gold has been defined by Section 2(f) to include gold in the form of coin, whether legal tender or not, in the form of bullion or into whether refined or not and jewellery or articles made wholly or mainly of gold a notification as contemplated by Section 8 of the Foreign Exchange Regulation Act, 1947, was issued by the Central Government on 25th August 1948 the said notification as amended upto 31st July 1958 has been published in the exchange control manual (Sixth Edition) 1971 used the Reserve Bank of India, and it is found at page 189 of Appendix B-I. The notification bears number 12(11)F 1/48, dated 25th August 1948 it prohibits bringing into India from any place outside India of any gold or gold bullion, gold sheets or gold ingot, whether refined or not is that fore, clear that there was at the material time restriction against the importation into India of gold ingot or gold bullion, whether refined or not under the foreign exchange regulation Act, 1947. In view of if, prohibition such goods will be liable to

confiscation u/s 111(d) of the Customs Act and, therefore, the possession of such articles would be punishable u/s 135 of the Customs Act.

4. The question then is whether the respondent was found in possession any such contraband article. The evidence of P.W. 2, P.K. Dave, Inspector of Customs at Ahmedabad shows that he had carried searching the presence of panchas at the residential premises old, Jamnadas Soni the father of the respondent, on 14th May 1970. On the inside of the door a cloth bag (theli) was found hanging. In the cloth bag (theli) there were two packets, each containing 10 bars of gold. Each bar of gold was weighing 10 tolas each ingot (lagdi, marked if Mathew London 999.0-10 tolas. One Govindbhai Soni was called to act as a panch and a panchnama was drawn. The panchnama the was 24 carat gold and that it was valued at Rs. 41,800/- time a time. An inquiry u/s 108 of the Customs Act was made. The respondent appeared before the superintendent of central excise I statement which is recorded at exhibit 9. The respondent stated therein that he was the son of Ambalal Jamnadas Soni who was invalid since more than three years. He stated that his father was not doing any business or activity his invalidity. The respondent was serving fears, whrncle who to business as a chokshi. He admitted that 20 bars of gold each weighing 10 tolas were kept in a cloth bag (theli) which was suspended behind the door and that the said cloth bag (theli) was kept by him there. He stated hawker (fern) whose name he did not specify) had entrusted to him golden his further statement he stated that the hawker who had packets to him was Babulal Shankerlal residing at Surat. The said Shankerlal had told the respondent that he would give him Rs. 100/- for keeping the packets at his house and that having regard to his strained financial circumstances he has accepted the proposal. He admitted that he had committed an offence under the Customs Act and the gold control Act and prayed for merely. The respondent assumed the posture that his statement had been recorded under duress. Such a suggestion was made to P.W. 2, P.K. Dave, inspector of Customs in the cross-examination but Dave repelled the suggestion. Now, it was argued by counsel for the respondent that the possibility that his father ambalal jamnadas may have kept the gold in the house has not been excluded by the prosecution. The evidence shows that Ambalal Jamnadas Soni, the father of the respondent was invalid at the material time. This is admitted by the respondent in his statement, exhibit 9, made before the Customs Officer. The respondent has admitted before the Customs Officer in exhibit 9 that the cloth bag (theli) containing the packets of gold was suspended behind the door by the respondent himself. Ambalal Jamnadas soni being invalid at the material time could not have moved out of the house and suspended the cloth bag (theli) behind the door. The admission made by the respondent before the Customs Officer, exhibit 9, justifies the conclusion that it was in the possession of the respondent and not his father. The learned Chief Metropolitan Magistrate did not believe that the statement, exhibit 9, was obtained under duress. I am also not prepared to believe that the statement was obtained under duress. There is no material on the basis of which such a conclusion can be reached. Under the

circumstances concur with the view taken by the learned Chief Metropolitan Magistrate that the contraband gold was found from the possession of the respondent. Having regard to the circumstances and probabilities no other conclusion is possible. It is not possible to accede to the argument that the father of the respondent who at the material time was invalid might have been responsible in this connection.

5. The next question is as to whether the gold which was found from the possession of the respondent was contraband gold imported from abroad. On this point there is the evidence of P.W. 5, Arun Vaman Chavathe who was at the material time holding the post of deputy chief assayer in the office of the Mint Master at Bombay. His evidence shows that he had assessed during his tenure as assayer about one lac samples of gold. It cannot, therefore be gainsaid that he was an expert and was qualified to give evidence in regard to the gold which was assessed by him. A sample of the gold seized from the possession of the respondent was forwarded to the office of the mint master by the superintendent of Customs at Ahmedabad. The sample was received at Bombay end on October 15, 1970. The accompanying letter was endorsed by the bullion registrar whose signature was identified by P.W. 5. The sample in question was given muster No. 8732. It was entrusted to P.W. 5 for analysis. P.W. 5 analysed the sample and forwarded his report which disclosed that the gold in question was of the fineness of 998.8 per thousand. He has deposed that gold of this fineness is not manufactured in India and that the gold in question was manufactured in a foreign country. He submitted his written report which is at exhibit 22, on the basis of his report and on the basis of the report of Mr. Khadilkar who has also independently analysed the sample and reached the same conclusion, the mint master issued a certificate to the effect that the gold was of the fineness of 998.8 per thousand. P.W. 5 identified the signature of the Mint Master V.J. Joshi. He also identified the signature on the forwarding letter. His evidence further shows that the result of this analysis is noted down in the register maintained in that behalf. It is known as gold report book. P.W. 5 has produced the relevant entries from that register and has identified the writing of Mr. Matre who has made the entry. Nothing has been elicited in the cross-examination of this witness. His evidence clearly shows that the gold which was seized from the possession of the respondent was contraband gold. As this conclusion can be safely reached without making recourse to the presumption u/s 123 of the Customs Act the question whether or not, in the facts and circumstances of the present case, the presumption arises recedes to the background. Reliance was placed by the counsel for the respondent on Assistant Collector Customs, Baroda and Anr. v. Mukbujusein Ibrahim Pirjada 10 G.L.R. 692, in support of the contention that the presumption u/s 123 of the Customs Act cannot be drawn against the respondent. Now, the aforesaid decision cannot help the respondent because what has, been laid down in the said decision is in the context of the fact that the goods in question were seized by the police authorities (not by the Customs authorities) from the accused. The Customs authorities obtained the custody

from the police authorities subsequently and not directly from the accused. It was in view of these circumstances that the High Court came to the conclusion that Section 123 of the Customs Act was not attracted. In the present case the seizure has been made directly from the respondent by the Customs authorities. A presumption u/s 123 of the Customs Act can certainly be raised under the circumstances though as observed earlier in the present case there is sufficient evidence to hold against the respondent even without calling into aid the presumption u/s 123 of the Customs Act. It was also contended by counsel for the respondent that the Customs Officer who seized the goods could not have entertained reasonable belief that they were smuggled goods and, therefore, that presumption would not arise. There is no substance in this contention. Having regard to the inscription of foreign markings on the gold, the Customs Officer could have legitimately entertained a reasonable belief that it was smuggled gold. It is not possible to conceive that the Customs Officers would have believed that it was some yellow metal on which false inscription of foreign country was made in order to deceive some one. A Customs Officer deals with such questions day in and day out. He would be justified in entertaining a reasonable belief that it was smuggled gold. I, therefore, see no substance in this contention urged on behalf of the respondent.

6. Counsel then argued that the sanction to prosecute the respondent was, not a valid sanction, the only ground on which the order of sanction to prosecute the respondent, exhibit 2A dated 28th May, 1973, is challenged is that the Collector of Customs D.N. Mehta had not taken more than one day to examine the relevant file containing the case papers and, therefore, he could not have applied his mind to the material aspects. It is not possible to assume that a high officer like the Collector of Customs must have Acted in a cavalier fashion. The evidence of P.W. 2 majmoodar shows that the papers were placed before the Collector of Customs on May 16, 1973 and that he had signed the order on May 17, 1973. Merely because the order was signed on the very next day, it would not be possible to draw an inference that the Collector has not applied his mind. In fact, in such a matter one would expect the Collector of Customs to take a decision as soon as possible after going through the relevant papers. And merely because he passed the order on the very next day, it cannot be inferred that he has Acted in an irresponsible manner without applying his mind. There is no material on the basis of which such an inference can be drawn. I, therefore, see no substance in this contention.

7. It was then argued that the complaint under the gold control Act required to be instituted by a Gold Control Officer having jurisdiction over the area in which the offence is committed or any person authorised by him in writing in this behalf u/s 97 of the gold control Act and that the Assistant Collector of Customs at Ahmedabad who had instituted the complaint was not an officer who had jurisdiction in regard to the area in which the offence was committed. Now, Section 97 of the gold control Act empowers the Gold Control Officer to authorise any officer to institute complaint in this behalf the Collector of Central Excise at

Ahmedabad has accorded his sanction a superannuates 2-B dated 28th may 1973. Surely the Collector of Central excise at Ahmedabad was the person who had jurisdiction over the area in which the offence was committed (the offence was committed in Ahmedabad itself). The evidence in this behalf was given by P.W. F, A.K. Mehta, Assistant Collector of Customs, Ahmedabad no suggestion has been made to him that the Collector of Customs at Ahmedabad did not have jurisdiction over Ahmedabad itself. It was argued that the Collector of Customs at Baroda had jurisdiction. But there is no material on the basis of which it can be held that in regard to Ahmedabad the Collector of Customs at Baroda had jurisdiction and not the Collector of Customs at Ahmedabad. No such point was argued before the trial court and no such suggestion was made to any of the witnesses. I, therefore, see no substance in this argument.

8. Under the circumstances the order of conviction recorded by the learned Chief Metropolitan Magistrate cannot be successfully assailed concur with the view taken by the learned Chief Metropolitan Magistrate and confirm the order of conviction. This brings us to the question of sentence. Now, so far as the offence u/s 85 of the gold control Act is concerned, for the possession of primary gold the offender is liable to be punished with a minimum term of imprisonment of not less than six months. Yet the learned Chief Metropolitan Magistrate has imposed substantive sentence of imprisonment of 15 days only. For the purpose of sentence, the learned Chief Metropolitan Magistrate appears to have accepted as go spell truth all that the respondent stated in his statement recorded u/s 342 viz. That the contrail and gold was entrusted to him by Babulal Shankerlal of Surat and that he was only to get Rs. 100/- in this connection. Now, the evidence of P.W. 2, Customs Inspector, P.K. Dave, shows that no such person was found at Surat. The respondent has not given the address of said Babulal Shankerlal in statement, exhibit 9, made before the Customs Officer. No person of the name of Babulal Shankerlal is, in fact, shown to be inexistence. It appears that he exists only in the imagination of the respondent. Besides, the story narrated of the respondent that he had kept these contraband goods in view of the fact that he had been promised Rs. 100/- to keep the same is extremely unnatural and improbable. It is not possible to believe that anum known person would have kept gold worth Rs. 41,800/- with the respondent. Nor is it possible to believe that the respondent who was serving at the shop of a chokshi would have kept contraband gold for the sake of Rs. 100/- now it must be realized that economic offences like smuggling shake and wreck the entire national economy sympathy for those who are virtually the enemies of the people is difficulty comprehend it is unnecessary to fall on the shoulders of such an offender and join within in the sobbing when parliament (which represents the will of the people) views these offences with gravity and alarm one cannot be excused for projecting ones own philosophy to the contrary and in virtually nullifying the will of the parliament by refusing to faithfully enforce the law. Misplaced sympathy in such matters shakes the faith of the people in the judicial system and tarnishes its image. Merely because big smuggler shide behind the skirt of these small operators or linkmen

and the big guns escape, these offenders cannot be treated with ultra and uncalled for sympathy the big operators cannot operate if the small operators do not extend their willing hand. The chain has to be broken and a sentence which would deter the particular offender as also those who are likeminded must be imposed the sentence imposed by the learned chief metropolitan Magistrate is extremely inadequate. Under the circumstance the prayer for enhancing the sentence must be granted the sentence imposed for an offence u/s 135(b) of the Customs Act 1962 punishable u/s 135(H) of the said Act is enhanced by imposing a substantive sentence of two years. Over and above the sentence of fine the sentence of fine and in lieu of fine is confirmed. So also the substantive sentence imposed by the learned chief metropolitan Magistrate u/s 85 read with Section 71(1) of the gold control Act of 1968 is enhanced to one of two years Rule I. the sentence of fine of Rs. 500/- and in lieu of fine is confirmed. The substantive sentences imposed under the Customs Act and the Gold (Control) Act, 1968 will run concurrently. The respondent shall surrender to custody forthwith the revision application is allowed and the rule is made absolute to the aforesaid extent. Since the revision application preferred by the State of Gujarat is allowed, no separate orders are necessary on the revision application preferred by the Customs Department.