
(1970) 02 BOM CK 0028

In the Bombay High Court

Case No : Criminal Revision Application No. 801 of 1969

State of Maharashtra

APPELLANT

Vs

Laxmansingh Jalamsingh

RESPONDENT

Date of Decision : 09-02-1970

Acts Referred:

Customs Act, 1962 — Section 111, 123, 123(1), 135

Citation : (1970) 02 BOM CK 0028

Hon'ble Judges : Vamadalal, J

Bench : Single Bench

Advocate : Mehta, for the Respondent

Judgement

1. This is an application in revision by the State for enhancement of the sentence passed upon the accused by the learned Presidency Magistrate, 14th Court, Girgaum, Bombay. The accused was convicted by that learned Magistrate of an offence u/s 135(b) of the Customs Act, 1962, and sentenced to a fine of Rs. 2000, but was acquitted of the offence under Rule 126P(2)(ii) read with Rule 126-I sub-rule (10) of the Defence of India Rules, 1962, with which also he had been charged.

2. The facts of the case are that, in consequence of information received by them, the police kept a watch outside a building named Bihari building somewhere at Cotton Green on the evening of the 1st March 1967, and they noticed the accused coming out of that building at about 7.15 p.m. with a cloth bag in his hand. On suspicion, the police stopped the accused and took him to the police station where he was searched in the presence of panchas, and it was found that in a cavity in the sole of the sandal which he had worn on the left foot there were 10 gold biscuits with foreign markings, and in the heel of the same sandal there was one more gold biscuit also with foreign markings. In a similar cavity in the sole of the sandal on his right foot, however, only some papers were found. All the 11 gold biscuits and the pair of sandals as well as the papers were taken charge of by the police under a panchanama which is Ex. K in the trial

court proceedings. The accused's room on the ground floor of the same building was also searched, but nothing incriminating was found there, except that three other pairs of sandals with similar cavities in their soles were found in that room. On the 2nd of March 1967, the accused, along with the property seized, was handed over to the customs authorities. The accused was thereafter tried and was convicted and sentenced as stated above. From the acquittal of the accused in respect of the offence under the Defence of India Rules, the State preferred an appeal which was, however, summarily dismissed by my brother Bal on the 7th of September 1969. The State also filed the present revision application for enhancement of the sentence passed upon the accused for the offence u/s 135(b) of the Customs Act, 1962, of which he was convicted by the trial court.

3. The accused has, at the hearing of this revision application, challenged his conviction itself as he is entitled to do under the law, and for that purpose Mr. Mehta has advanced three arguments before me. They are as follows :-

1. The accused did not have the gold on him, or in other words, the prosecution evidence is false;

2. There is no evidence led by the Prosecution to prove that the 11 gold biscuits in question were goods which had been imported contrary to the prohibition in force the import of gold since the year 1947, or in other words, that it was, as is popularly called, smuggled gold; and

3. There is no evidence led by the prosecution to prove that the accused knew or had reason to believe that it was gold which had been imported contrary to such prohibition, or in other words, that it was smuggled gold.

4. I shall now proceed to deal with each of these contentions of Mr. Mehta as, in the event of his succeeding in any one of them, the accused would be entitled to an acquittal and the question of enhancement of the sentence would not arise at all.

5. As far as the first contention of Mr. Mehta which is based on the facts proved by the evidence in this case is concerned, there is no substance whatsoever in the same, and indeed, it was argued by Mr. Mehta in a lukewarm manner. There is, in my opinion abundant evidence to prove that gold was recovered from the sandals worn by the accused himself, though it would have been better if the police had seized the same on the spot by calling panchas there and then, instead of taking the accused to the police station and making a search of the person of the accused there and in the presence of panchas, as they have done in the present case. I am, however, not prepared to infer from that little infirmity in the mode of investigation by the police that the gold was not in fact recovered from the cavity in the sole as well as the heel of the sandal worn by the accused on his left foot. There is no reason to disbelieve the evidence of the police officer as well as the panch and the panchanama (Ex. K) in respect of the same, and indeed, Mr. Mehta has not been able to point out any infirmity in regard thereto. I have no hesitation in rejecting this contention of Mr. Mehta either.

6. As far as the second contention of Mr. Mehta is concerned, in my opinion, the same must however succeed. In order to bring home a charge u/s 135(b) of the Customs Act, 1962, the property of which the accused person is alleged to have been in possession, or which is alleged to have been carried concealed or otherwise dealt with, must be proved to be properly liable to confiscation u/s 111 of the said Act. The burden of proving that fact is on the prosecution and, as the Supreme Court has laid down in the case of *Amba Lal Vs. The Union of India (UOI) and Others*, section 106 of the Evidence Act has no application to proceedings under the Customs Act (paras 5 and 8). Reliance was however sought to be placed by the Assistant Government Pleader on the provisions of section 123(1) of the Customs Act, 1962, which, it may be stated, are verbatim the same as the provisions of section 178A(1) of the Sea Customs Act, 1878. In that connection it is pertinent to note that the gold biscuits in the present case were not seized by the Customs authorities themselves under the Customs Act, but were seized by the police and were handed over by the police to the Customs authorities on the day following the seizure thereof. The same question arose in a similar situation before the Supreme Court in the case of *Gian Chand and Others Vs. The State Of Punjab*, in regard to the said section 178A(1) and the Supreme Court has taken the definite view that when police officers seized the goods, the accused lost possession which vested in the police and that when possession was thereafter transferred by virtue of the provisions contained in section 180 of the Customs Act, 1878, there was no fresh seizure under that Act. It was, therefore, held by the Supreme Court in the said case that the terms of Section 178A which required a seizure under the Act were not satisfied, and consequently, that provision could not be availed of to throw the burden to proving that the gold was not smuggled on the accused (para 8). The legal position, as emerging from these two decisions of the Supreme Court, therefore is that on the facts of the present case it was for the prosecution to prove by evidence that the gold biscuits which were seized from the accused were property which has been imported contrary to the prohibition in force relating to the import of gold. Mr. Mehta has sought to contend, relying on certain observations made by the Supreme Court in its unreported judgment dated 2nd April 1968 in Cr. Appeals Nos. 195 and 203 of 1962 and 6 of 1963, that the mere fact that the gold had foreign markings on it did not prove that it was smuggled gold, for it could have been imported before the present restrictions on the import of gold came into force, as was observed by the Supreme Court in that case. It is true that the mere fact that there are foreign markings on the gold seized in the present case cannot necessarily lead to the conclusion that it was smuggled gold, but I would prefer to follow the view by the Supreme Court in another case on the same point, and that is, in the case of *Issardas Daulat Ram and Others Vs. The Union of India (UOI) and Others*, in which a similar contention was rejected by the Supreme Court on the ground that if the gold in question had been imported prior to 1947, it would be extremely improbable that the gold would remain in the same shape of bars as was the position in that case, and with the same fineness as when imported, after the passage of such a

length of time. I respectfully agree with the view taken by the Supreme Court on this point in Issardas" case and I consider it to be extremely improbable that, after the lapse of 20 years the gold biscuits in the present case would have been retained in the same shape as they were, if they had been imported prior to the coming into force of the prohibition relating to the import of gold in 1947. The prosecution is, however, bound to prove that these gold biscuits had been imported after 1947 without the necessary permissions of the Reserve Bank required under the relevant provisions in force relating to the import of gold. It is not as if there has been an absolute bar on the import of gold and gold is permitted to be imported with the permission of the Reserve Bank. There is no reason why I should assume that the gold biscuits in question, by whoever they were imported and whenever they were imported, were imported without the necessary permission of the Reserve Bank. As already stated above, the Supreme Court had held that section 106 of the Evidence Act has no application to matters under the Customs Act and, under the circumstances, it will be for the prosecution to establish this fact before it can bring home the offence u/s 135(b) of the Customs Act read with section 111(d) of the same Act. It is precisely because the legislature realised the difficulty of proving this fact that it has inserted Section 178A in the old Sea Customs Act of 1878, and has enacted Section 123 in the present Customs Act of 1962. Unfortunately for the prosecution, however, since the seizure of the gold was not made by the Customs authorities themselves and the gold could not therefore be said to have been seized under the Act, the prosecution is unable to avail itself of the said section 123, as laid down by the Supreme Court in the decision referred to above.

7. The only question that survives for my consideration, therefore, is there any evidence on record to show that the 11 gold biscuits in question had been imported contrary to prohibition relating to the import of gold in force since 1947, that is to say, without the necessary permission of the Reserve Bank in the behalf. The learned Assistant Government Pleader has relied strongly on one sentence in the evidence of Pandurang Sarnobat, Inspector of Central Excise, who has in his examination-in-chief said "the gold taken charge of was smuggled gold." It is true that there is no cross-examination of the said witness on that point with the result that it stands unchallenged. I am, however, unable to accept the ipse dixit of the said Pandurang that the gold in question was smuggled gold, without his stating why he said so, because it is inherently improbable that he should know that whoever imported these particular 11 gold biscuits, and whenever he imported the same, had not obtained the necessary permission of the Reserve Bank. In any event, even though Pandurang has gone so far to say that the gold was smuggled gold, I cannot accept his bald statement that the gold in question was smuggled gold as conclusive on the point. I am, therefore, unable to hold that, by that single statement in the evidence of the said Pandurang Sarnobat, the prosecution has established that the 11 gold biscuits in question in the present case were smuggled gold, that is to say, gold imported contrary to the prohibition in force relating to the import of gold within the terms

of section 111(d) of the Customs Act, 1962. In that view of the matter, the offence u/s 135(b) of the Act has not been proved by the prosecution and the accused is entitled to an acquittal in respect of the same. Having regard to this conclusion at which I have arrived, it is not necessary for me to consider the third contention of Mr. Mehta that there is no evidence to show that the accused knew or had reason to believe that the said gold biscuits were smuggled gold, and I do not propose to deal with the same.

8. In the result, I set aside the conviction of the accused u/s 135(b) of the Customs Act as well as the sentence passed upon him by the trial court in respect of that offence. The revision application filed by the State must, therefore, be dismissed. I order that the fine, if paid, be refunded to the accused.