

(1979) 01 KAR CK 0004
In the Karnataka High Court
Case No : Criminal Appeal No. 194 of 1978

Superintendent of C. Ex., Mangalore

APPELLANT

Vs

K. Abubaker

RESPONDENT

Date of Decision : 22-01-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377 (2)
Customs Act, 1962 — Section 123, 135

Citation : (1979) CENCUS 493 : (2000) 123 ELT 525

Hon'ble Judges : R.G. Desai, J; M.S. Nesargi, J

Bench : Division Bench

Advocate : S.A. Hakeem, for the Appellant; B.V. Acharya, for the Respondent

Judgement

M.S. Nesargi, J.—In this appeal filed u/s 377(2) of the Code of Criminal Procedure, the appellant has prayed that the sentence passed by the II Add. Chief Judicial Magistrate, Mangalore in C.C. No. 204/76 against the respondents who were accused 1 and 2 in C.C. No. 204/76 be enhanced as the same is inadequate taking into consideration the gravity of the offence committed by them.

2. The prosecution case held proved by the learned Magistrate is that at about 5 p.m. on 8-12-1972 P.W. 1 got creditable information that contraband gold was being transported in a lorry bearing No. MYX 8249 and he intercepted the same. He was accompanied by the staff. Accused 1 was driver and accused 2 was the cleaner. P.W. 1 found a cavity underneath the seat of A-1. That cavity contained a cloth jacket in which there were two packets one containing 500 pellets and another packets containing 300 pellets of primary gold of 10 tolas bearing foreign markings. They were seized under a panchanama as P.W. 1 reasonably suspected that the same had been smuggled. He subsequently questioned respondents 1 and 2 and each one of them voluntarily gave statements and their statements were recorded. One Ramesh, a jeweller, was summoned and was asked to assay the said pellets. He being the competent assayer assayed the

same. It is not known as to by applying what method he did the same. He opined that it was gold of foreign origin and certified as per Ex. P-4. On 9-12-1972 P.W. 1 got a piece from the biscuit out of the batch of 500 and another piece from one biscuit out of the batch of 300 cut away, put in a packet and sealed in the presence of the said Ramesh. He then sent the packet by insured post to Mint Bullion Department in Bombay for assay. Ultimately the Mint Master issued a certificate admittedly basing on the report of P.W. 4 Harischandra, an assayer working in the said Department, opinion that the said pieces were of 998.7 ct. purity. Investigation was completed by P.W. 1 and a charge sheet was filed.

3. The prosecution examined 5 witnesses in proof of its case.

4. Sri S. A. Hakeem, learned Additional Central Government Standing Counsel, vehemently contended that the value of 800 pellets of gold seized was about 25 lakhs of rupees at that time and by now it is much more and as such, the gravity of the offence committed by the two accused is serious and hence the learned Magistrate was not right in imposing the sentence of rigorous imprisonment for one year for the offence u/s 135 of the Customs Act and the sentence of rigorous imprisonment for 18 months and to pay a fine of Rs. 1000/- each, in default to undergo simple imprisonment for two months for the offence punishable u/s 8 read with Section 85(iii) of the Gold (Control) Act.

5. Sri. B. V. Acharya, learned Advocate appearing on behalf of the accused-respondents argued that u/s 377(3) of the Code of the Criminal Procedure, the accused are entitled for acquittal and this is a fit case for acquittal inasmuch as the prosecution has failed to establish that the packets said to have been seized from the cavity underneath the seat of A-1 were gold. He, in this connection itself, pointed out that the accused have preferred CR.R.P. No. 199/78 as against the conviction and sentence passed against them by the said Magistrate and the revision petition is pending.

6. To establish that 800 pellets seized by P.W. 1 on 8-12-1972 by about 5 p.m. are gold, the prosecution has reliance on the evidence of P.Ws. 1 and 4 only. It has also sought support from the two statements said to have been voluntarily made by Accused-1 and 2 to P.W. 1, within a reasonable time after P.W. 1 detected the existence of these pieces in the said cavity. It is evident that the prosecution has sought the assistance of Section 70 of the Gold (Control) Act in this behalf.

7. P.W. 1 has made it clear in his evidence that he seized 800 pellets in two batches under a panchanama in the presence of the panches and secured the assayer by name Ramesh. It is said that Ramesh had died at the time when the case was taken up for trial and got the same assayed next day, namely, 9-12-1972. He has further sworn that he then got a piece cut away from one of the pellets out of the batch containing 500 pellets and also another piece from one of the pellets, out of the batch containing 300 pellets, put them in a cover, sealed the same and sent the cover by insurance post-insured the same for Rs.

200/- to the Mint Bullion Department at Bombay. P.W. 4 has stated that two pieces were received in the melting Department of the Mint Bullion Department, Bombay, numbered them as 14185 and 14186 and sent him for assaying the same. He assayed them and found that each piece was of 998.7 purity. He has further sworn that on the basis of his finding the Mint Master issued his certificate which are at Exs. P.7 and P.8.

8. This Court has consistently held that the prosecution has to establish that the pieces that were seized were gold so as to attract the provisions of Section 123 of the Customs Act, and then the burden shifts on the accused to rebut that presumption. In CR.A. No. 313 of 1977 disposed of on 16-1-1979, a Division Bench of this Court has gone in detail into this aspect of the matter and after considering various decisions rendered by the Supreme Court and the Kerala High Court in V.P. Syed Mohammed Vs. Assistant Collector of Central Excise, reiterated the same. The presumption that arises u/s 123 of the Customs Act is only in regard to the articles attracted by Section 123 of the Customs Act being smuggled articles and not in regard to the nature of the Articles. It is the duty of the prosecution to establish that a particular article is an article to which the provisions of Section 123 of the Customs Act are attracted.

9. The evidence of P.W. 1 establishes, when accepted, that he got cut a piece from one of the pellets out of the batch containing 500 pellets and also another piece from one of the pellets out of the batch containing 300 pellets, put them in a cover, sealed them and sent them by insured post to the Mint Bullion Department, Bombay. No one has been examined from the said Department to speak to the fact that the said cover was received in the same condition in the said Department when it was received by the said Department. On the other hand, we find from the records that the covering letter written by P.W. 1 while sending the insured packet separately is got marked by the prosecution. That does not disclose that P.W. 1 had enclosed the sample seals-samples and the seals fixed to the cover despatched by P.W. 1 so as to enable the Mint Bullion Department to compare the same with the seals available on the insured packet received by them. The only presumption that arises is that the insured packet despatched by P.W. 1 must have reached the Mint Bullion Department, Bombay. But, that does not help the prosecution in establishing that it reached in the same condition as it was when despatched by P.W. 1 and there was no material for the authorities in the Mint Bullion Department, Bombay to compare the seals on the sealed cover with the sample seals, because the seals had not been sent by P.W. 1. In the result, the connection between pellets said to have been seized by P.W. 1 at 5 p.m. on 8-12-1972 and the two pieces said to have been sent by P.W. 1 to the Mint Bullion Department, Bombay, by means of a insured packet is not established. It is also not satisfactorily established that the very two pieces are sent to P.W. 4. That the two pieces that he assayed, were 998.7 cart purity would not advance the case of the prosecution any further in establishing that 800 pellets seized by P.W. 1 at about 5 P.M. on 8-12-1972 were gold and they were of 998.7 cart purity. Moreover, it is understandable why P.W. 1 chose to

send a piece out of the batch of 500 pellets and a piece out of the batch of 300 pellets. Even if the prosecution had succeeded in linking the two pieces assayed by P.W. 4 with the two packets from which those two pieces are said to have been sent away, the prosecution has failed in regard to the remaining 499 pellets out of the batch of 500 pellets and the remaining 299 pellets out of the batch of 300 pellets.

10. When it is seen that the prosecution has failed to establish that the pieces seized from the cavity underneath the seat of the driver of the said lorry (A-1) were gold, no question of either accused-1 or accused-2 committing breach of any of the provision of the Customs Act or the Gold (Control) Act arises.

11. Before concluding this judgment we have got to observe that the learned Chief Judicial Magistrate ought not to have admitted in evidence the certificates said to have been issued by Ramesh (Ex-P-4) as Ramesh was not examined. Merely because P.W. 1 has identified the signature of Ramesh on the certificate, it is not admissible as the same does not fall under Sections 32 and 33 of the Indian Evidence Act, Ramesh being dead by the time the trial took place.

12. In view of the foregoing reasons, the contention of the appellant that the sentence passed by the learned Magistrate on the respondents-accused calls for enhancement has to fail and the contention of the accused-respondents that they are entitled to be acquitted succeeds. Hence, we allow the appeal, set aside the conviction and sentence passed on the respondents (K. Abubakar and K. Abdul Rahiman) - accused 1 and 2 in C.C. 204/76 by the learned Chief Judicial Magistrate, Mangalore, and acquit them.