
(1990) 08 BOM CK 0101

In the Bombay High Court

Case No : Criminal Revision Application No. 433 of 1988

Superintendent of Customs

APPELLANT

Vs

Haribhai Vallabhbhai Tandel

RESPONDENT

Date of Decision : 20-08-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245(2)
Customs Act, 1962 — Section 108, 135

Citation : (1991) ECR 209 : (1991) 51 ELT 302

Hon'ble Judges : B.V. Chavan, J

Bench : Single Bench

Advocate : Shri P.R. Namjoshi and Mrs. Teja Katdare, for the Appellant; Shri A.K. Desai, Shri N.M. Patel, Shri B.M. Parikh, Shri N.A. Wazibdar and Shri M.R. Suryawanshi, for the Respondent

Judgement

1. This is a criminal revision application filed by the Superintendent of Customs, Valsad, Original Complainant (hereinafter the Complainant) against the Order dated 29th August, 1988, passed by the Judicial Magistrate First Class, Daman, in Criminal Case No. 9 of 1988 discharging Respondent Nos. 2 and 4/Original Accused Nos. 2 and 4 (hereinafter the Accused Nos. 2 and 4) from the complaint.

2. The relevant facts, giving rise to the present revision application, are these :

The Complainant filed a complaint against all the Respondents for an offence punishable u/s 135 of the Customs Act, 1962. The allegations were that during the period from 30-12-1981 to 26-1-1982, 3810 totals of gold of foreign origin was sold by the Accused No. 1 to Accused No. 2 and several others on various dates. It was found in the course of investigation that an account was maintained by the Accused No. 1 Haribhai Vallabhbhai Tandel which showed disposal of gold from time to time. The said Accused No. 1 was arrested in New Delhi on 20-4-1982. His statement came to be recorded u/s 108 of the Customs Act, 1962. In the course of search of Accused No. 1, some documents were seized which revealed that the Accused No. 1 had delivered 2632 gold biscuits valued at

Rs. 4,95,41,125/- to Accused No. 2 and the sale proceeds thereof were transferred to Dubai to Havala transaction through the Respondent No. 4 at the instance of the Respondent No. 1. The documents also disclosed that during the period 16-11-1981 to 24-12-1981 the Accused No. 1 had sold the said gold worth Rs. 1,51,27,525/- and the accounts were settled by means of Havala entries. The Accused No. 1 in his statement u/s 108 of the Customs Act, 1962 disclosed facts connected with smuggling of gold and sale thereof to various parties. He also disclosed full account of disposal of the said goods. In the search, certain pieces of papers containing various accounts, finding of telephone numbers in the dairy maintained by the Respondent No. 1/original Accused No. 1 and various telephone numbers written in the said dairy were found. On the basis of this investigation, the complainant filed originally Criminal Case No. 38 of 1986. Process was issued against all the Respondents. Accused No. 4 filed a criminal miscellaneous application along with others challenging the issue of process. The learned Single Judge of this Court sitting at Goa Bench decided the said Writ Petition on 25th September, 1987. It was held that the order issuing process was liable to be quashed and set aside. Accordingly, the order issuing process was quashed and set aside. However, the learned Judge also observed that there was no bar to file a fresh complaint for the same offence against the Petitioner therein, if there was sufficient evidence to warrant it and if so desired by the Customs Authorities.

3. According to the Complainant, thereafter, a comprehensive complaint containing independent evidence against each of the Accused was filed on 24th February, 1988 in the Court of the Juridical Magistrate First Class, Daman alleging commission of the offence u/s 135 of the Customs Act, 1962 and Section 85 of the Gold (Control) Act, 1968 read with Section 120B of the Indian Penal Code, 1860. After filing of the complaint on behalf of the Accused Nos. 2 and 4, there were two separate applications u/s 245(2) of the Code of Criminal Procedure for discharging them from the case, as the complaint did not disclose prima facie evidence against them for issuing process. The Learned Judicial Magistrate First Class, after hearing the parties, passed the impugned order dated 29th August 1988 discharging the Accused Nos. 2 and 4 from the proceedings. It is this order of discharge of the Accused Nos. 2 and 4 that is challenged in the present proceedings.

4. Shri Namjoshi, learned Counsel appearing on behalf of the Complainant pointed out that so far as the Accused Nos. 2 and 4 are concerned, the material against them consisted of the identity by the Accused No. 1 and the finding of other material including telephone numbers in the diary of the Accused No. 1. He, therefore, urged that this evidence was enough to frame charge against the Accused and, therefore, the Order passed by the learned trial Judge deserves to be set aside.

5. It may be mentioned that so far as the original complaint dated 29th August 1986 is concerned, this Court, in the writ petition referred to earlier, came to the

conclusion that the learned Magistrate could not have issued process against the Accused, as the case made out in the complain was exclusively based on the statement of the co-accused No. 1 recorded by the Customs Authorities u/s 108 of the Customs Act. In taking this view, the learned Judge sought support from a number of authorities including that of the Supreme Court in *Romesh Chandra Mehta Vs. State of West Bengal*, and *Hira H. Advani Etc. Vs. State of Maharashtra*, respectively.

6. In the present case, which is practically based on the same allegations that were the subject matter of the earlier decision in the criminal writ petition decided by this Court on 25th September, 1987, the learned Judicial Magistrate has come to the conclusion that the complicity of the Accused No. 2 was dependent on the sole link consisting of the statement given by the Accused No. 1 and the smuggling of gold together with the various entries found in the documents seized from the Accused No. 1 when he gave his statement u/s 108 of the Customs Act. So far as the other circumstances appearing in so far as the Accused No. 2 are concerned, the learned Magistrate held that mere unsatisfactory explanation given by the Accused No. 2 of his trips to Dubai, London and Brussels as well as his initial denial that he had visited the house of Tandel at Daman and he was acquainted with Sukar Narayan Bakhia along with the diaries seized for his possession containing telephone number of the Accused No. 1 and other things, these circumstances merely raise suspicion but mere suspicion cannot take the place of proof, as held by this Court in the earlier writ petition dealing with the said material. He, therefore, came to the conclusion that so far as the Accused No. 2 is concerned, the key to understand the part played by the Accused No. 2 in the alleged smuggling of gold activity consisted in the statement of the Accused No. 1 to the Customs Authorities. Same was the position so far as the Accused No. 4 is concerned. It is settled law and which has been exhaustively dealt with by Dr. Couto J. in the earlier criminal writ petition decided on 25th September 1987 that a statement of an accused recorded by the Customs Authorities u/s 108 of the Customs Act, 1962 cannot be the basis for launching the prosecution, as Section 30 of the Evidence Act provides that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession, as against such other persons as well as against the persons who makes such confession. It is held that such a confession statement by one of the Accused against co-accused who is tried jointly along with him alone cannot be the basis or the foundation to proceed against other co-accused. Such confession can be used only in support of other evidence and cannot be made the foundation of a conviction. The learned Judge was aware that the statement of law referred to a situation where whether a conviction should be made was under consideration and he observed that nonetheless, the same considerations are relevant and apply at the stage of issuing process for if the only foundation or basis for the complaint is the statement of a co-accused and no other evidence exists for

launching the prosecution, it is obvious that the case, as made out, cannot lead in any event to a conviction. With respect, I agree with the learned Single Judge of this Court and in the absence of any other fresh material on the basis of which it can be held that either process could be issued or charge could be framed against the Accused Nos. 2 and 4 independently of the statement of Accused No. 1, I think that the learned Judicial Magistrate First Class was perfectly right in taking the view that he has taken on the pleas of Accused Nos. 2 and 4 and discharged them u/s 245(2) of the Code of Criminal Procedure.

7. The result is, the order passed by the Learned Judicial Magistrate First Class, Daman dated 29th August, 1988 deserves to be confirmed and the present revision application will have to be dismissed. Accordingly, Criminal Revision Application is dismissed. Rule stands discharged. The stay granted by this Court of further proceedings stands vacated.