

(1987) 01 RAJ CK 0012

In the Rajasthan High Court

Case No : Criminal Miscellaneous Application No. 172 of 1981

Umesh Chandra

APPELLANT

Vs

K.G. Sooji

RESPONDENT

Date of Decision : 12-01-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 482
Customs Act, 1962 — Section 135
Evidence Act, 1872 — Section 145, 165
Penal Code, 1860 (IPC) — Section 161

Citation : (1989) WLN 513

Hon'ble Judges : N.C. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

N.C. Sharma, J.—Umesh Chandra, an accused in criminal case No. 287 of 1980, pending in the court of the Chief Judicial Magistrate (Economic Offences), Jaipur by this petition invoked the inherent powers of this Court u/s 482 Cr.P.C. to quash the order of the Chief Judicial Magistrate dated May 6, 1981, whereby the said Magistrate had thought it proper to send the seized 7 biscuits shaped gold bars to the Mint for examination whether they were of pure gold.

2. Facts and circumstances leading to the filing of this petition are that on January 11, 1972, at about 08.10 hours the Central Excise Party headed by Superintendent (Preventive), Central Excise, Ajmer apprehended a man with contraband gold at Nasirabad Railway Station while alighting from 72 down train. At the same time, a clue was received that another boy of a given name and description was also in possession of some contraband gold. But by this time 72 down train had already left Nasirabad Railway Station. Immediately the Superintendent (Preventive) Shri B.D. Dhawan left Nasirabad with two members of his party for Ajmer Railway Station just at the time of arrival of 72 down train there. The boy was the petitioner and he was apprehended by the Preventive Party. The petitioner was taken to the First Class Gent Waiting Room at Ajmer

Railway Station and in the presence of two witnesses named Asulal and Hanuman Singh, personal search of the petitioner was made by the Officer in the Waiting Room. Out of a cloth neoli which the petitioner had tied underneath the pant around his waist, there were found 7 biscuits shaped gold bars in addition to currency notes worth Rs. 2000/-. Each of the two gold bore the makings "arges Ten tolas Chiasses Founder ASA 999-O and each of the remaining 5 gold biscuits bore the markings "Jehmson Mathey 999-O ten tolas. Apart from that a printed letter of M/s. Manakchand Madanlal, bullion merchant, Tilak Marg, Neemuch was also recovered from the pocket of the petitioner and was seized. The gold bars were of 24 carret purity. On demand by the Custom Officer the petitioner could not produce any documentary or legal evidence for the lawful purchase or acquisition or possession in respect of the said contraband gold and also to show their legal importing in India. Shri KG. Sooji, Assistant Collector Customs and Central Excise Jaipur after performing the statutory formalities filed a criminal complaint in the court of Railway Magistrate, Jaipur against the petitioner for the offence u/s 135(b) of the Customs Act, 1962 and Section 185 of the Gold Control (Central) Act, 1963.

3. The petitioner was summoned by the Chief Judicial Magistrate (Economic Offences), Jaipur to whose court the case was transferred and he was charged under the aforesaid sections of the Customs Act and Gold Control Act. The accused denied charges and claimed to be tried. The petitioner has stated that in the criminal case, evidence on behalf of the complainant and defence had already been recorded and the case was thereafter fixed for final arguments by the Chief Judicial Magistrate. On May 6, 1981, while the case was being argued before the Chief Judicial Magistrate he passed the impugned order whereby he observed that the question about the purity of the gold bars seized in the case had not been ascertained by examination in the case, For a just and proper decision of the case he though it proper that the seven biscuits shaped gold bars seized in the case may be sent to the Mint for a report about the purity of the gold contained in them and for a report about it. It is against this order that Umesh Chandra has come before this court.

4. I have heard Mr. K.K. Mehrish for the petitioner and Mr. B.P. Gupta for the complainant-non-petitioner. One of the contentions advanced by Mr. Mehrish was that Section 311 of the Code of Criminal Procedure, 1973 does not confer any power upon the trial court to call for the report or opinion from experienced persons and that also suo moto. He argued that evidence of both sides had been completely recorded in the case and the case was fixed for final arguments and it that stage it was not permissible to the prosecution to fill up any gap or lacuna in its case by getting the purity of the alleged gold bars examined. The impugned order of the Chief Judicial Magistrate, according to the submission of Mr. Mehrish has caused a serious prejudice to the petitioner. It was urged that the burden was on the prosecution to prove that the articles seized from the possession of the petitioner was gold and it would be filling the lacuna which the prosecution has left in the evidence adduced by it and which the trial court is now trying to

fill up by the impugned order. The next contention of Mr. Mehrish, although the same has not been taken in his petition, was that the Custom Authorities had also initiated proceedings for confiscation of the seized articles and in that connection, the petitioner had gone in appeal before the Collector of Customs (Appeals). That appeal was decided by the Collector of Customs (Appeals) on December 31, 1984 i.e. after 3-1/2 years of the filing of the present petition. It was urged that in that appeal, the Collector of Customs has held that it was an extremely doubtful matter whether the seizure of the alleged gold articles was made from the petitioner and the Collector taking all factors into account gave to the petitioner benefit of doubt both under the Customs Act and Gold Control Act and he confirmed the order of confiscation of these golden articles without imposing any penalty on the petitioner. On the basis of this appellate order of Collector Customs (Appeals), New Delhi, Mr. Mehrish contended that doctrine of issue-estoppel applied and it should be held that the alleged golden bars were not seized from the possession of the petitioner and more so when the witness as to the seizure memo have denied the seizure of these articles in their presence.

5. In reply to these contentions, Mr. Gupta urged that Section 311 of the Criminal Procedure Code places no limitation on the powers of the Court arising out of a stage of the proceeding and when the Chief Judicial Magistrate has for the just decision of the case thought it proper to get the articles examined from the mint authorities and to have their report, the exercise of the power has a legal sanction from the said provision of the Code and this court should not interfere in the exercise of that power which the Chief Judicial Magistrate undoubtedly possessed. The fact that the case has reached at the stage of final arguments is immaterial. With regard to the second contention Mr. Gupta urged that the appellate order in confiscation matters does not preclude the trial at this stage proceeding further.

6. I have given my earnest consideration to the rival contentions of the learned Counsel for the parties. The main thrust of the arguments of Mr. Mehrish was that the provision contained in Section 311 Cr.P.C. was not meant to be urged for the purpose of enabling the prosecution to fill up any lacuna in its evidence. Mr. Mehrish placed reliance on a Single Bench decision of this court in the case *State v. B.B. Saxena* reported in 1972 RLW 465 for this proposition. The facts in *B.B. Saxena's* case were that B.B. Saxena was functioning as Income tax Inspector "C" Ward, Ajmer. One Saligram Mittal had made the complaint against Ramchand son of Chander Das about evasion of Income tax. Departmental inquiry in that respect was entrusted to B.B. Saxena. The prosecution case was that B.B. Saxena contracted Ramchand and asked for illegal gratification. Ramchand did not agree to pay the amount which B.B. Saxena demanded and accordingly a trap was arranged and laid. In this trap currency notes were recovered from the possession of B.B. Saxena and a criminal case was launched against him and he was charged u/s 161 IPC read with Section 13(2)(v)(i)(d) of the Prevention of Corruption Act, 1974. In support of its case the prosecution examined in that

case nine witnesses. The accused was also examined u/s 1342 of the Old Cr.P.C. and the accused examined four witnesses in defence. Arguments though not completed were heard on March 29, 1972. Thereafter to some more dates were fixed. On April 29, 1972, an application was made by the public Prosecutor u/s 1540 of the Old Code to summon Sub-Post-master Assembly Hostel Office Jaipur, along with relevant register, recall Surendra Singh DW 2. Sub Post master works Ajmer, summon dealing clerk of Ajmer GPO with duty register and recall Ramchand PW 6 along with his Radio Repair Register for March and April, 1971. This application was rejected by the special Judge on the ground that the prosecution wanted to take second innings to plug the leap holes of its case and lapses of cross-examination after having heard the defence case. The State came in revision before this Court and urged that u/s 1540 of the old Cr.P.C. the Court could have summoned or recalled any witnesses at any stage. It was also urged that the second part of Section 1540 of the old Code was mandatory. His Lordship Mehta, J., stated that if our Criminal Jurisprudence, statutory law, as laid down in Section 1540 of the old Code conferred extensive powers upon the Court to summon or re-examine or recall any witness and that had been left to the discretion of the Court. The second part of Section 1540 the Court to summon and examine or recall and examine a witness if it was essential for it to do so for the just decision of the case. The learned Judge took point out that the Special Judge was not moved to exercise powers under the first part of Section 1540 Cr.P.C. by the prosecution in that case and more over the exercise of power under the first part had been left at a discretion on the part of the Court and it was not meant to be used for the purpose of enabling the prosecution to fill up any lacuna in its evidence. As regards the applicability of second part of the old Section 1540 Cr.P.C. it was observed that the Special Judge in that case did not observe that to summon and examine or to recall and re-examine witnesses was necessary for the just decision of the case, and that on the other band, the Special Judge stated that the prosecution wanted to take second innings to plug the leap holes, which were far from bona fide In such circumstances, it was held that it could very well be assumed that the prosecution by making an application u/s 1540 Cr.P.C. virtually wanted to rebut the defence evidence which was not permissible. In the present, case before me, the Chief Judicial Magistrate (Economic Offences) Jaipur has categorically stated in his order that in order to arrive at a correct decision of the case, he considers it proper to obtain a report about the purity of the articles seized from the mint.

7. It would be useful to refer to the decision of their Lordships of the Supreme Court in the case of Jamatraj Kewalji Govani Vs. The State of Maharashtra, In the decision, their Lordships of the Supreme Court examined the scope of Section 1540 of the old Criminal Procedure Code. His Lordships Hidayatullah, J. stated that Section 1540 of the old Code gave power to the Court to summon a material witness or to examine a person present in Court or to recall a witness already examined. It conferred a wide discretion of the Court to act as the exigencies of the justice required. Another aspect of this power and complimentary to it is to

be found in Section 165 of the Indian Evidence Act which provides that the Judge may, in order to discover or obtain, proper proof of relevant facts ask any question he pleases in any form at any time, of any witness, or of the parties, about any fact, the relevant or irrelevant, and may order the production of any document or thing and neither, the parties nor their agents shall be entitled to make any objection to any such question or order, nor without the leave of the Court, to cross examine any witnesses upon any answer given in reply to any such question. These two sections between them confer jurisdiction on the Judge to act in the aid of justice. His Lordship further stated that Section 1540 of the old Code was intended to be wide as the repeated use of the words "any" through out its length indicated the Section in two parts. The first part gave a discretionary power but the latter part was mandatory. As the Section stood there was no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the court is bona fide of the opinion that for the just decision of the case, the step must be taken. Despite the wide amplitude of the powers u/s 1540 of the old Code, two matters have to be kept distinctly apart. The first aspect was that the prosecution could not be allowed to rebut the defence evidence unless the accused brings forward something suddenly and unexpectedly. This aspect was laid down by Thindal CJ. in *Reg. v. Froest* (1840) 4 St. Tr. 85 at page 86. The second aspect was that the court should exercise the power to reach a just decision. In *Amar Chand Agarwalla Vs. Shanti Bose and Another, etc.*, their Lordships of the Supreme Court laid down that there was no limitation as to stage to which trial may have reached in exercising powers u/s 1540 of the old Code.

8. If we look to the scheme of the Customs Act which corresponds to Section 167(81) of the Sea Customs Act that they make a clear distinction between dutiable goods or goods which are chargeable to duty and on which duty has not been paid and goods the import or export of which is subject to any prohibition under the Customs Act or any other law. It is in respect of these two classes of goods that Section 135(I)(a) provides for three situations, namely, (a) where the goods are dutiable and duty is not paid, (b) where the import or export of goods is prohibited under the Customs Act, and (c) where the import or export of goods is prohibited under other law. The words "any goods" and "such goods" must refer to the goods, the import and export of which is prohibited by the laws referred to in the second and third part of the section. One of the requirements about the offence is the nature of prohibited goods. It has to be established that the accused knowing that the goods were of the character prohibited, but the Act specified in this section. It has been laid down by Karnataka High Court in *Central Excise Department Vs. P. Somasundaram*, that burden is on the prosecution to prove that what had been seized from the accused was gold. Thus, nature of the goods seized was an important thing to be considered in the case. The fate of criminal proceeding cannot be left entirely in the hands of the parties. The Court has also a duty to see that essential questions are not, so far as possible, left unanswered. As I have already stated that the Supreme Court

has laid down that there is no limitation on the power of the Court arising from the stage to which the trial may have reached for examination of a witness, provided the court is bonafide of the opinion that for the just decision of the case the step must be taken.

9. Mr. Mehrish then urged that Section 311 of the new Cr.P.C. authorises the court to summon and person as witness but it does not authorise it to send the articles for examination to the suit for report. In this connection, it may be mentioned that Section 145 of the Evidence Act makes the opinion of expert relevant. This Section provides that when a court has to form opinion, inter alia upon a point of science, the opinion upon that point of persons specially skilled in such science are relevant facts. The evidence of expert in metallurgy can only be recorded when articles are sent to him for examination and report. This always happens whether the examination is of injuries sustained in an incident or it has to be decided as to whether a particular shot was fired by a particular gun or, where identity of bad writing or finger impression have to be ascertained. In all such cases, the relevant articles are sent to the expert who examines them medically, or otherwise and makes his report. After a report is made by the expert, he is called upon to testify in Court. At that stage the adversary gets full opportunity to cross-examine him. What in fact, therefore, the Chief Judicial Magistrate has taken is the first step towards the calling an expert to give opinion as to whether the seized articles were of pure gold. I am therefore, of the view that the Chief Judicial Magistrate while holding that in order to arrive at a correct decision of the case it was just and proper that the articles should be sent for examination so the court was perfectly justified to do so in exercise of his powers u/s 311 of the Criminal Procedure Code which can be exercised at any stage of the proceedings and I am not ready to hold that the powers have been exercised in a mala fide manner or to plug loop-holes.

10. As regards the second contention raised by Mr. Mehrish, I would like to refer to the decision of their Lordships of the Supreme Court in *Maqbool Hussain Vs. The State of Bombay*. In that case the question which arose for determination was whether by reason of the proceedings taken by the Sea Customs Authorities for confiscation of the gold, the appellant in that case could be said to have been prosecuted and punished for the same offence with which he was charged in the court of the Chief Presidency Magistrate, Bombay. In that context, after reviewing the various provisions contained in the Sea Customs Act including the confiscation provisions. His Lordship Bhagwati, J. stated that the Sea Customs Authorities are not a Judicial Tribunal and the adjudging of the confiscation, increased rate of duty or penalty under the provision of the Sea Customs Act do not constitute a judgment or order of a court or judicial Tribunal for the purpose of supporting a plea of double jeopardy. It, therefore, follows that when the Customs Authorities confiscated the gold in question, neither the proceedings taken before the Sea Customs Authorities constitute a prosecution of the appellant nor did the order of confiscation constitute punishment inflicted by a court or judicial Tribunal on the appellant. The appellant could not be said by

reason of these proceedings before the Sea Customs Authorities to have been prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate. Dealing specifically with the provisions relating to confiscation, his Lordship observed that even though the Customs Office not invested with the powers of adjudging confiscation, increased rates of duty or penalty, the highest penalty which can be inflicted is Rs. 1000/-. Confiscation was no doubt one of the penalties which the Customs Authorities could impose but that was merely in the nature of proceedings other than proceedings in personam, the object being to confiscate the offended goods which have been dealt with contrary to the provisions of the law and in respect of the confiscation also an option is given to the owner of the goods to pay in lieu of confiscation such fine as the Officer thinks fit. All this is for the enforcement of the levy of and safeguarding the recovery of Sea Customs duty. Proceedings before the Customs Officers are not assimilated in any manner what ever to proceedings in court of law according to the provisions of the Civil or the Criminal Procedure Code. Their Lordships approved the decision of the Bombay High Court in *Mahadeo Ganesh v. Secretary of State* AIR 1922 Bom. 30.

11. I may dispose of certain decisions referred to by Mr. K.K. Mehrish in support of his second contention. The first decision relied upon by him is in the case of *Pritam Singh and Another Vs. The State of Punjab*, This decision has no application what so ever to the facts of the present case for the clear reason that in that case the principles of *res judicata* were clearly attracted in the subsequent trial. *11 Hazara Singh Vs. State of Uttar Pradesh*, the plea regarding doctrine of issue-estoppel was rejected by the Supreme Court. In that case the plea was raised in this matter that by reason of the acquittal of Nandlal Sehgal the evidence given in the case concerning him must be totally rejected and evidence of the approver so far as it concerned to Nandlal Sehgal must be eliminated. In other words the argument was that the fact of Nandlal Sehgal weakened if not destroyed the approvers evidence so far as it concerned the appellant Payara Singh also. Their Lordships of the Supreme Court observed that it was true that Nandlal Sehgal was acquitted by the High Court because the evidence of the approver was not correct so far as Nandlal Sehgal was concerned, but there was no finding that the approver has implicated Nandla Sehgal falsely. Elucidating the principle of issue-estoppel his Lordship Ramaswaroop, J. stated that where in a former occasion and a finding has been reached in favour of the accused, such a finding would constitute an estoppel or judicate against the prosecution, not as a bar to the trial in conviction of the accused for a different or distinct offence but a precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence. Suffice it to state that in confiscation proceedings, there has been no trial of the petitioner for the their Lordships of the Supreme Court reported in *Maqbool Hussain Vs. The State of Bombay*, already above.

12. The petition filed by Umesh Chand has no merit in it and it is here by dismissed.