

(2020) 01 BOM CK 0054
In the Bombay High Court
Case No : Criminal Appeal No. 513 Of 2002

Union Of India

APPELLANT

Vs

Iqbal Kasam Memon And Ors

RESPONDENT

Date of Decision : 08-01-2020

Acts Referred:

Customs Act, 1962 — Section 100, 101, 102, 102(1), 102(3), 104, 108, 135, 135A
Imports And Exports (Control) Act, 1947 — Section 5(A), 6
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 41(2), 42, 43, 50, 50(1)
Evidence Act, 1872 — Section 25

Citation : (2020) 01 BOM CK 0054

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Anuradha Mane, Pallavi Dabholkar, Shanay Shah

Final Decision : Dismissed

Judgement

1. This is a case where the customs authorities are impugning an order of acquittal dated 4-10-2001 passed by the learned Addl. Chief Metropolitan Magistrate, 47th Court Esplanade, acquitting respondents of offences under various provisions of Customs Act 1962 and Imports and Exports (Control) Act 1947.
2. At the outset, I have to note that since respondents were not represented on 6-1-2020, I appointed Mr. Shanay Shah, Advocate as Amicus Curaie. I have to note the immense contribution made by Mr. Shah.
3. With the assistance of the counsels, I have perused the records and proceedings, evidence and impugned judgment and in my view judgment impugned does not call for any interference.
4. It is the prosecution's case that secret information was received by DRI, Bombay on 8-3-1991, that respondent no.1, was dealing in foreign marked gold and he would come to Yusuf Meher Road and Mohammed Ali road between 15.30

hrs and 16.00 hrs and would receive from one person about 10 foreign marked gold bars. Accordingly, the officers of DRI kept surveillance at the place indicated and intercepted respondent no.1 as per the description received by them. On inquiry, respondent no.1 admitted that he was carrying 10 foreign marked gold bars in his pant pocket. Considering the location as unsafe to conduct further inquiry and recover the gold bars, respondent no.1 was taken to the office of customs department at Construction House, Ballard Estate, for further inquiry and in the presence of panchas, 10 foreign marked gold bars were recovered from the person of respondent no.1 under seizure panchnama. During interrogation, it was found that respondent no.1 was carrying on his business at Room Nos.19/20, 4th floor, Cothol Chakala Lane, Borabazar, Fort, Bombay (the said premises), through his servant Narayn Singh, who is respondent no.2 (original accused no.3). Respondent no.1 further revealed that on that day at about 17.30 hrs., respondent no.2 would be carrying / receiving some gold bars as well as cash at the said premises from one Manoj Punamiya, (accused no.2, who was discharged) who would send it through his servant Madanlal Mali - respondent no.3 (original accused no.4). Accordingly, officers of DRI rushed to the said premises and intercepted respondent no.2 at about 17.30 hrs, while he was going towards Borabazar on his motor cycle bearing MH01-D-84. Thereafter, respondent no.2 led them to the said premises and on his personal search 10 foreign marked gold bars were recovered. During the extensive search of the said premises, in one specially made cavity in the wall of the said premises 5 gold bars of 10 tolas each and Indian currency of Rs.3,00,000/- were found concealed inside the cavity in the wall. While search was going on in the said premises, respondent no.3 arrived at the said premises. Respondent no.3 revealed that he was working with original accused no.2 Manoj Punamiya and at his instance he came to deliver 10 foreign marked gold bars to respondent no.1, which was given to him by original accused no.2 Manoj Punamiya. Foreign currency equivalent to Rs.1,69,000/- was also found. The said 10 foreign marked gold bars and the foreign currency were recovered from the person of respondent no.3 and these properties were taken charge under a panchnama and thereafter, statements of the accused were recorded by the officers of appellant under the provisions of Section 108 of Customs Act, 1962. It is prosecution's case that after completion of investigation, necessary sanction for prosecution of accused was sought and thereafter, a complaint under Section 135 of the Customs Act read with Section 5(A) of the Imports and Exports (Control) Act 1947, was filed.

5. Original accused no.2, Manoj Punamiya was discharged and the court proceeded to frame charge against original accused nos.1, 3 and 4, who are respondent nos.1, 2 and 3, respectively in this appeal. All accused pleaded not guilty and claimed to be tried. Their case is of total denial. After considering the evidence, records and proceedings, the Trial Court passed the impugned order and judgment dated 4-10-2001 acquitting all accused.

6. To prove their case, prosecution led evidence of three witnesses, namely, Mr.

Dinkar Krishna Savekar, Superintendent of DRI, (P.W-1), Mr. A.V. Redekar, Inspector of Customs, Central Excise, (P.W.-2) and Mr. Ajit Pandurang Patil, Intelligence Officer, DRI (P.W.-3). All three are officers of appellant. None of the panch witnesses, as noticed in few other cases heard and disposed by me, have been produced to testify. I have to also note that only the statement under Section 108 recorded by the prosecution of respondent no.3 has been exhibited. Other statements are not even produced. Even the sanction to prosecute has not been produced. I should add that, even the complaint has not been proved and exhibited. The following are the list of exhibits :

1. Exhibit P-1 - Panchnama
2. Exhibit P-2 - Search authorisation
3. Exhibit P-3 - Forwarding letter to the Mint and 4 assay report (colly marked)
4. Exhibit P-4 - (colly marked) Letter to RBI dated 11-3-1991
5. Exhibit P-5 - letter received from RBI dated 11-4-1991 and 4-5-1991 (colly marked)
6. Exhibit P-6 - 3 deposits memo (colly marked) Article "A" - 2 telephone bills and one photograph
7. Exhibit P-7 - Summons
8. Exhibit P-8 - Statement of Madanlal
9. Exhibit P-9 - Panchnama (2 pages)

7. Trial court has very rightly recorded the shoddy manner in which appellant has prosecuted this matter. Even to say that it was an absolutely amateurish attempt, would be charitable to appellant. 25 foreign marked gold bars, cash of Rs.3,00,000/- and foreign currency equivalent to Rs.1,69,000/- was the subject matter. The complaint, it is recorded in the impugned order, was not presented before the court and is not even proved through complainant R.B. Tiwari or any other responsible officer. The complaint, therefore, is not even exhibited. Even in the memo of appeal, it is not denied that the complaint was not proved and exhibited.

8. There is a sanction dated 2-4-1993 in the records and proceedings, but the same is not brought on record as exhibit. It is settled law that a sanction for prosecution is not an idle formality. The sanction is a solemn and sacrosanct act, which has to be by due application of mind after satisfaction by perusal of the relevant materials. It was the duty of the prosecution to have the sanction exhibited. A Division Bench of this Court in Union of India Vs. Ashok Sukhdeo Singh Chavan 1990 SCC Online Bom 48, has explained the importance of sanction. Paragraphs 18 and 19 of the said judgment read as under:

"18. Sanction for prosecution is undoubtedly not an idle formality. It is a valid protection afforded to public servants as a check against frivolous or vexatious

prosecutions. Grant of sanction is a solemn and sacrosanct act which has to be by due application of mind after satisfaction by perusal of the relevant materials. Sanction could be ordered only on proof of certain circumstances which will have to be proved by evidence placed before the sanctioning authority. Satisfaction of the sanctioning authority on the basis of sufficient materials is a fact that has essentially to be proved before court. It is for the court to draw a conclusion in that respect on the basis of materials placed before it. Except on a valid sanction, Court cannot assume jurisdiction to try a case under the Prevention of Corruption Act. Once it is found that there is no valid sanction, the assumption of jurisdiction is illegal because it is a matter affecting jurisdiction of the Court on account of the prohibition contained in Section 6 against taking cognizance without sanction.

19. The satisfaction that has to be entertained by the Court regarding the existence of a valid sanction must be on the basis of the materials placed before it by the prosecution. That can be had in two ways. First is by production and proof of the original sanction which itself contains the facts constituting the offence as well as the grounds of satisfaction. Second is by adducing evidence aliunde to show the facts placed before the sanctioning authority and the satisfaction arrived at by it. In the case before us Exh. 14 itself shows that the sanction was accorded after considering the material on records and being satisfied of the facts constituting the offence. Application of the mind is clear from the order itself. Further evidence in that respect is, therefore, not necessary. Such evidence is necessary only in cases where the order of sanction is not self evident."

9. It is rather unfortunate that this sanction was also not proved through witnesses. and. consequently,. the. sanction. is. not. exhibited. Therefore, one could safely state that the prosecution itself is vitiated.

10. Therefore, the complaint is not proved and exhibited and the sanction also is not proved and exhibited. On these grounds alone, the appeal has to be dismissed.

11. As noted earlier, none of the panch witnesses have been called to testify and, therefore, the seizure panchnama is also not proved. This would mean that seizure itself has not been proved.

12. For proving the offence under Section 135, prosecution must prima facie establish a case of legal seizure of contraband gold from the conscious possession of accused. For that purpose, at the outset, prosecution must prove that the seizure effected from the person of accused on 8-3-1991, was legal. Before prosecution seizing any gold in person, there are certain formalities to be followed as mentioned in Section 102 of the Customs Act, 1962. Section 102 reads as under:

102. Persons to be searched may require to be taken before gazetted officer of customs or magistrate.-

(1) When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of the customs shall, if such person so requires take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

(2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate.

(3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses.

(5) No female shall be searched by any one excepting a female.

Search, seizure and arrest of respondent under the provisions of Customs Act without appraising his right under Section 102 of the Customs Act, would become suspect and if there is any conviction based on possession of such search and seizure under the provisions of Customs Act, the same will have to be set aside. This is because sub-Section 1 of Section 102 mandates that When any officer of customs is about to search any person under the provisions of Customs Act, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate. These are necessary safeguards available to an accused against the possibility of false involvement and therefore, the procedure prescribed has to be meticulously followed. The communication of this right has to be clear, unambiguous and individual. Accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. I find support for this view in many decisions rendered by the Apex Court and other High Courts under the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act 1985 and in particular *State of Rajasthan Vs. Parmanand and Anr.* (2014) 85 ACC 662. The only difference between Section 102 of the Customs Act and Section 50 of the Narcotic Drugs and Psychotropic Substances ACT, 1985, (NDPS Act) is under Section 50 of NDPS Act the person has to be searched either in the presence of a nearest Gazetted Officer of any of the departments mentioned in Section 42 of NDPS Act or a Magistrate, but under the provisions of Customs Act, accused has to be taken without unnecessary delay to the nearest gazetted officer of customs or magistrate. I find support for this view in the judgment of Learned Single Judge of this court in *Yusuf Suleman Vs. V. M. Doshi* 2001(4)

Mh.L.J. 76 Paragraphs 15 and 16 of the said judgment read as under:

15. Lastly, it was contended by Ms. Kaushik that Section 102 of the Customs Act was not complied with and, therefore, the conviction and sentence recorded against the appellant even under the provisions of Customs Act is liable to be quashed and set aside.

16. Sub-section 1 of Section 102 of the Customs Act mandates that when any officer of customs is about to search any person under the provisions of the Customs Act, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. The wording of Sub-section 1 of Section 102 is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory. The only difference is that whereas under Section 50 of the N.D.P.S. Act if the accused so requires he has to be searched either in the presence of a nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or a Magistrate but under the provisions of Customs Act the accused has to be taken without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. As stated earlier in respect of the similar provisions of the N.D.P.S. Act the Apex Court has held that the accused has to be apprised of his right and asked whether he wants his search to be taken in the presence of a Gazetted Officer or a Magistrate and the search, seizure and arrest of the accused without appraisal of his right to the accused becomes suspect and his conviction is liable to be set aside. On the same analogy, the search, seizure and arrest of the appellant under the provisions of the Customs Act without appraisal of his right to the accused under Section 102 of the Customs Act would become suspect and the conviction based on such search and seizure is liable to be set aside. In these circumstances, the conviction and sentence recorded against the appellant even under the provisions of the Customs Act is liable to be quashed and set aside.

13. Apex Court in State of Punjab Vs. Baldev Singh 1999(6) SCC 172, though that judgment was rendered under the provisions of NDPS Act, held that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. This court in Yusuf Suleman's case (Supra) has held that the wording of Sub-section 1 of Section 102 is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory.

14. The provisions of Section 102 of The Customs Act, 1962 ("the said Act") accord a protection to the suspect prior to a search being taken under section 100 or 101 of the said Act. Such protection is with the view to ensure that such search is taken with good cause and to lend credence to the evidence derived from such search. The expression "if such person so requires" in Section 102

necessarily implies that to enable him to exercise his legal rights under Section 102, he should be made aware of such rights.

It is the obligation of the officer of customs to apprise the suspect of the rights available to him under Section 102, viz. to be taken to the nearest Gazetted Officer of customs or magistrate. This is a necessary sequence to be complied with for enabling the suspect exercise his rights; and the failure to do so will render such valuable rights conferred to the suspect under Section 102 illusory and a mere farce. The choice, whether to be taken to the nearest Gazetted Officer of customs or a magistrate, lies with the suspect and in the event such choice is made known by him to the officer of customs, he shall be searched only in that manner. It is not up to the officer of customs to make this choice or elect before whom the accused is to be taken. Therefore, even assuming that the officer taking the search is a Gazetted Officer, it is still imperative for him to comply with his obligation to apprise the suspect of the legal rights available to him under Section 102. Also because, upon exercise by the suspect of his right to be taken before a Gazetted Officer or magistrate, the provisions of Section 102(3) come into play, which, in my opinion, is a check on the misuse of power and also provides an additional measure of protection to the suspect. Section 102(3) provides that once the suspect is taken either before the Gazetted Officer or the magistrate, whichever the case may be, such Gazetted Officer or magistrate is empowered to forthwith discharge the person if he sees no reasonable ground for search, or otherwise direct that the search be made. In my opinion, the suspect will be denied of this additional degree of protection / opportunity if a Gazetted Officer himself takes search and does not apprise the suspect of his rights under Section 102 thereby the procedural requirements of Section 102(3) not being complied with.

15. The Hon'ble Supreme Court has, in *Vijaysinh Chandubha Jadeja vs. State of Gujarat* (2011) 1 SCC 609 - para 32, observed that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

It was submitted before constitutional Bench of Hon'ble Supreme Court read as under:

"14. Adopting the same line of arguments, Mr. P.P. Malhotra, the learned Additional Solicitor General, appearing on behalf of the Government of NCT of Delhi maintained that it is clear from language of Sections 41(2), 42 and 43 of the NDPS Act that the legislature has dealt with gazetted officers differently, reposing higher degree of trust in them and, therefore, if a search of a person is conducted by a gazetted officer, he would not be required to comply with the rigours of Section 50(1) of the Act. It was argued that the view expressed by this Court in *Ahmed* (supra), is incorrect and, therefore, deserves to be reversed."

But the Hon'ble Supreme Court has considered who will be a more appropriate authority between a Gazetted Officer and a Magistrate. In paragraph 32 Supreme Court stated as under :

"32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

16. In *Customs vs Mohammad Bagour* Unreported judgment of Delhi High Court in CRL.LP.No284/2011 dated 25-11-2011., also it was held that, the compliance with the procedural safeguards contained in Sec. 50 of NDPS Act, is intended to protect a person against false accusation and frivolous charges, as also to lend creditability to the search and seizure conducted by the empowered officer. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and credit worthiness to the search and seizure proceeding and it would also strengthen the prosecution case. But if the search is carried out by the Gazetted officer belonging to a department which is effecting a seizure, he may have bias in favour of the department, whereas no bias can be attributed to a Magistrate or a Gazetted Officer belonging to another department. Associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid. Para 24 of *Mohammad Bagour* (supra) reads as under:

"24. The Trial Judge has recorded that notice Ex PW5/B served upon the respondents/accused was not in compliance of provisions of Section 50 of NDPS Act, as it was partial notice and as the respondents/accused had offered to be searched in the presence of a Gazetted Officer of a custom besides a Magistrate. The purpose behind Section 50(1) NDPS Act, is to avoid criticism of arbitrary and high handed action against authorised officer. It has to be borne in mind that a Gazetted officer belonging to the department which is effecting a seizure may have bias in favour of the department, whereas no such bias can be attributed to a Magistrate or a Gazetted Officer belonging to the other department. Thus, associating a Gazetted Officer with the raiding party makes such officer impliedly interested in the success of the raid."

17. None of the witnesses P.W.-1 to P.W.-3 say anything about having appraised accused of their right and asked whether they wanted to get their personal search in the presence of a Gazetted officer or a Magistrate. Therefore, on this ground alone, the search of the person of accused or seizure of gold has to be held as illegal.

18. As stated earlier, only the statement of respondent no.3 is exhibited. Though respondent no.3 is supposed to have confessed his involvement in the offence, I

would still not consider the same as valid confession. This is because, P.W.-2 A.V. Redekar, in his evidence says that Madanlal Mali, respondent no.3 appeared before Shri Shidhore. Shri Shidhore interrogated Madanlal in Hindi and Madanlal gave replies in Hindi. P.W.-2 says that statement of respondent no.3 was reduced into writing in Hindi and P.W.-2 himself scribed the statement. But the statement which is at Exhibit 8 is in English. Moreover, in his cross-examination, P.W.-2 says that it is not true to say that he scribed the statement in English and asked accused to sign it. It is for anyone to see that the statement is in English but at the end of the statement, there is an endorsement in Hindi, allegedly made by respondent no.3 that it was a voluntary statement and there was no force or threat or any other inducement given to him.

19. As regards alleged seizure, P.W.-1 says that he does not know whether panchnama was drawn or not. P.W.-1 does not allege that three panchnamas were drawn at their office as he did not participate in recovery panchnama of foreign marked gold bars from accused, which was carried out by Mr. Patil on that day. Mr. Patil is P.W.-3. P.W.-3 says it is true that panch witnesses were not knowing English but he has explained the panchnama to them in Hindi and panch witnesses told him they knew Hindi language. Therefore, the seizure itself has not been proved and the alleged confession under Section 108 also has not been proved. It is for this reason, courts have repeatedly held that in the absence of corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation, could not be relied upon. Paragraph 8 of judgment in the matter of Shri Malki Singh Vs. Suresh Kumar Himatlal Parmar Unreported judgment in Criminal Appeal No.228 of 1999 delivered on 29-11-2019 in. Paragraph 8 of Malki Singh's judgment reads as under:

"8. It is no doubt true that under Section 104 of the Customs Act 1962, the Customs Officer is vested with power to arrest if he has reason to believe that any person has committed an offence punishable under Section 135 or 135A of the Customs Act. Under Section 108 of the Customs Act, the Customs Officer is also vested with power to summon persons to give evidence documents and all persons so summoned are bound to attend, on being summoned. The statement made to the Custom Officer is not hit by Section 25 of the Indian Evidence Act, 1872, the position of law being very well settled that the Custom Officers are not police officers and resultantly, a statement made to the Custom Officer is not hit by Section 25. At the same time, the position of a retracted confession is also well settled:-without any independent corroboration it cannot sustain a conviction and retracted confession may form basis of conviction without corroboration if it is found to be perfectly voluntary, true and trustworthy. The Court is duty bound to examine whether the statement referred to as a confessional statement meets the test of truthfulness and being voluntary in nature. In absence of any independent material brought on record by the appellant, the Chief Metropolitan Magistrate was perfectly justified in acquitting the accused no.2. In absence of any evidence corroborating the statement of the accused no.2 made before the Custom Officer on 24th March 1996 under Section

108 of the Customs Act, the statement in isolation do not warrant conviction, particularly when it is retracted with a plea of coercion."

20. The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka* (2007) 4 SCC 415 in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless they are proved guilty by a competent court of law. Secondly, accused having secured their acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Trial Court has rightly observed that the prosecution had failed to prove its case.

22. In the circumstances, in my view, the opinion of the Trial Court cannot be

held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

23. Appeal dismissed.