

(2020) 01 BOM CK 0053
In the Bombay High Court
Case No : Criminal Appeal No. 1048 Of 2002

Union Of India

APPELLANT

Vs

Jasmine Jayantilal Thadeshwar And Ors

RESPONDENT

Date of Decision : 08-01-2020

Acts Referred:

Customs Act, 1962 — Section 100, 101, 102, 102(1), 102(3), 104, 106, 108, 135, 135A
Imports And Exports (Control) Act, 1947 — Section 5
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 0053

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

Bench : Single Bench

Advocate : Anuradha A Mane, Spenta Havewala

Final Decision : Dismissed

Judgement

1. This is a case where the customs authorities are impugning an order of acquittal dated 27-03-2002 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai acquitting respondent no.1, of offence under various provisions of Customs Act 1962 and Imports and Exports (Control) Act 1947.

2. At the outset, I have to note that since respondent no.1 is not represented, Ms Spenta Havewala, Advocate was appointed as Amicus Curaie. I have to note Ms Havewala was of immense assistance.

3. It is the prosecution's case that on 2-1-1990, on the basis of specific information that respondent no.1/accused, who was likely to carry contraband gold on his person, officers of appellant kept watch at Panchayatwadi Street, Mumbai. Pursuant thereto, the officers of appellant apprehended respondent no.1 and on his personal search, the officers recovered 9 pieces of gold weighing 504.900 gms approximately. Respondent no.1 admitted that the said 9 pieces of

gold were made from smuggled foreign marked gold biscuits with the intention of removing foreign marking. Since respondent no.1 could not produce any receipt or document for possession of the said 9 pieces of gold, all those 9 pieces of gold were seized in the reasonable belief that the same were made of smuggled foreign marked biscuits and liable for confiscation under the provisions of Customs Act 1962.

4. During the course of investigation, residential premises of respondent no.1 at 302, Madhupuri Building, Baptista Road, Vile Parle (W), (residence) was searched and strips and corners of contraband gold of different shapes and sizes numbering 25 pieces weighing 60.350 gms were seized in the reasonable belief that the same were converted from smuggled foreign marked gold biscuits.

During further investigation, statement of respondent no.1 was recorded, when he admitted possession of contraband gold prepared or manufactured from smuggled gold and that it was supplied to him by one Ajmuddin Khan @ Moinu, whose business was to convert foreign marked gold biscuits into strips of pieces and in the process to remove the foreign markings. On 7-12-1990, the seized property was sent to India Government Mint, Mumbai. After completion of investigation, necessary sanction for prosecution of accused was sought and thereafter complaint under Section 135 of Customs Act and under Section 5 of Imports and Exports (Control) Act 1947, was filed on 25-7-1996.

5. Evidence before charge was recorded of P.W.-1 and P.W.-2, but they were not cross-examined. But after framing of charges they were cross-examined. Accused pleaded not guilty to the charges framed and claimed to be tried. The stand of accused is of total denial.

6. After considering the evidence and the records and proceedings, the Learned Chief Metropolitan Magistrate, Esplanade Mumbai, by the impugned judgment and order dated 27-3-2002 was pleased to acquit accused/respondent no.1.

7. To drive home their point, prosecution led evidence of 6 witnesses and they were Eruma Kattuprambil Lazar Anthony (P.W.-1), Pravin Tukaram Shikhare (P.W.-2), Jayesh Bhimrao Shirsat (P.W.-3), Suresh Laxmandas Pherwani (P.W.-4), Nirmala Sampatlal Solanki (P.W.-5) and Laxmidas Sunderdas Ferwani (P.W.-6). Total of 13 documents and writings were exhibited and one certificate was marked article (C). List of Exhibits are as under:

"1. Article "A" (Exhibit P-10):- Panchnama & Annexure

2. Exhibit P-1:- Panchnama

3. Exhibit P-2:- Panchnama

4. Article : 'B' (Exhibit P-13):- Assay Report

5. Exhibit P-3:- Assay Certificate

6. Exhibit P-4:- Letter issued by Govt. Mint.

7. Exhibit P-5:- Copy of Summons
8. Exhibit P-6:- Further statement of accused
9. Exhibit P-7:- Copy of summons
10. Exhibit P-8:- Sanction (with R & P)
11. Exhibit P-9:- Complaint (with R & P)
12. Exhibit P-10:- (Article "A") Panchanama & Annexure
13. Exhibit P-11:- Panchnama
14. Article "C":- Certificate issued by Goldsmith
15. Exhibit P-12:- Three bags containing gold (returned to the Dept. for safe custody)
16. Exhibit P-13:- (Article "B") Report dt. 18.02.91".

8. Prosecution's case can be split into two parts. First one is seizure of alleged contraband gold from person of accused and the second part is house search of accused and seizure of 28 pieces of gold in the form of strips and corners from the house of accused.

In both the parts, it is prosecution's case that gold allegedly found in possession of accused on his person and in his house, was prepared or made after removing foreign marking on them. According to prosecution, since the assay reports pointed out that the pieces of gold recovered from accused contained certain fineness, accused had smuggled or imported gold in India in contravention of the provisions of the Customs Act.

9. At the outset, I have to note that prosecution has totally failed to prove that accused was responsible or in any way responsible for fraudulent evasion of duty or he had been instrumental in the importation of the gold. Prosecution has also failed to prove that accused knew or had reason to belief that the gold found in his person are liable to confiscation. There is no evidence in that regard because the gold seized admittedly did not have any foreign marking. 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 2-11-1990 at Panchayatwadi Road, 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.

10. 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.

11. 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.

12. 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 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."

13. 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."

14. None of the witnesses P.W.-1 to P.W.-3 say anything about having appraised accused of his right and asked whether he wanted to get his 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.

15. From the evidence of P.W.-3 - Jayesh Shrisat, it appears that panchnama of 9 pieces of gold weighing around 504 grams was prepared and the panchnama is at Exhibit P-10. Panch witnesses have not been produced to testify. The prosecution, therefore, relies on the evidence of P.W.-3. In the cross-examination of P.W.-3 it appears that 9 pieces of gold recovered from accused were not gold bars, but they were pieces of different sizes and there was no marking on the

pieces. Therefore, the onus is on the prosecution to prove that what was seized from the possession of accused, was contraband gold. The prosecution has not led any evidence to prove that the said 9 pieces of gold were prepared or manufactured from smuggled foreign marked gold of foreign origin. The prosecution relies upon the statement of accused recorded under Section 108 of the Customs Act. The prosecution also relies on the assay reports of analysis to submit that purity of gold or fineness of gold was 97%. Ms Mane Learned Special PP. relied on Apex Court's judgment in Ramesh Chandra Vs. State of West Bengal AIR 1970 Supreme Court 940 to submit that because the arrest is made only after recording of statement under Section 108 of the Customs Act, the statement recorded is that of a witness and not of accused and that is why courts have held that the statement recorded before a Customs Officer is admissible in evidence. But the legal position is statement recorded under Section 108 cannot be used as substantive evidence against accused. It has to be corroborated.

16. Various courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. For this, I find support in State of Maharashtra Vs. Harshad Vaherbhai Patel & Ors. 2012(1) Bom.C.R.(Cri)500 and unreported judgment of this court in Shri Malki Singh Vs. Suresh Kumar Himatlal Parmar in Criminal Appeal No.228 of 1999 delivered on 29-11-2019. 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."

17. The prosecution has merely tendered on record the Mint report which does

not contain any detail to co-relate with the assay carried out by the Mint is of the gold that was actually seized from respondent. This is provided that the gold seized has been legally seized. The prosecution has not established on record by bringing original extracts from the register containing entries of sample seized by P.W.-3 on examination of contents of Exhibit P-10 Panchnama. It is clear that no specific identification number or any other information has been given to the gold samples. There is no evidence to show as to in whose custody the gold was until it was sent for assay. There are various other omissions mentioned in the impugned judgment, which for sake of brevity, I am not reproducing.

We have to keep in mind that what was seized is only strips and few small gold corners without foreign marking. It was for prosecution to bring evidence to the effect that only foreign gold can contain this level of purity. I also do not find any inventory of samples as required under Section 106 of Customs Act 1962. Therefore, in the absence of proper identification of samples, co-relation with the Mint report and lack of any expert opinion about the strips or corners found in possession of accused and recovered from him, the seized gold cannot be held to be gold imported illegally and respondent cannot be convicted of the charges under Section 135 of the Customs Act.

18. Coming to the second part of department's case about effecting seizure of gold from the house search, admittedly, accused was not present when the search was effected. When the search effected, there were two persons present, a lady by name Tejal, who was wife of the brother of accused and another person Pramod, who was the brother of accused. Both these persons have not been called to testify. The weight of alleged gold recovered from the premises was around 60 gms and its value in local market was about Rs.20,000/-. It would be pertinent to note that accused was assisting his father and brother in jewellery business.

Exhibit P-10 is panchanama of search taken of the house. The only panch witness Nirmala Solanki (P.W.-5) has turned hostile. According to P.W.-5, she was sitting on the second floor and merely signed on the panchanama and she did not know what its contents were. The other panch witnesses has not been examined. Moreover, prosecution has not tendered on record a copy of the house search warrant issued by Daya Shankar, Asstt. Commissioner in favour of P.W.-1. Therefore, there is no copy of search warrant produced on record to substantiate oral claim of the witness that a house search was conducted. Daya Shankar, has also not been examined to substantiate that he actually issued the search warrant.

19. Further, prosecution has not produced any evidence to prove that the house premises exclusively belonged to the ownership of respondent and it was under his exclusive control and possession. The documents relied upon by prosecution indicate that the house was shared by the brother, father and mother of respondent. Consequently, the evidence brought out by prosecution in respect of house search, cannot be accepted.

20. A disconnect between gold seized and the gold assayed by P.W.-6, also is evident. It seems certain samples that were sent to Mint were small in quantity and could not be assayed were sent to P.W.-6 (Goldsmith). P.W.-6 says that his report was prepared by his staff and he only signed the same. P.W.-6 also says he does not remember the contents of panchnama reduced into writing by the officers. In any event, that panch witness has not been examined. P.W.-6 says the gold was brought in sealed packet by the officer and it was opened in his presence. There is nothing to indicate that packet was the same packet which contained the same gold that was seized from the house of respondent.

21. 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."

22. 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 rightly observed that the prosecution had failed to prove its case.

23. 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.

24. Appeal dismissed.