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(1975) 12 MAD CK 0006

In the Madras High Court

Case No : Criminal R.C. No. 939 of 974 and Criminal R.P. No. 332 of 1974

Union of India (UOI) — APPELLANT

Vs

V.P. Selvarajan and others — RESPONDENT

Date of Decision : 19-12-1975

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 342
Customs Act, 1962 — Section 131(b)(1), 135(b)(i)
Foreign Exchange Regulation Act, 1973 — Section 8(1)
Imports and Exports (Control) Act, 1947 — Section 5

Citation : (1976) LW(Cri) 50

Hon'ble Judges : Ratanavel Pandian, J

Bench : Single Bench

Advocate : K.M. Srirangan, for the Appellant; K.P. Jagadeesan, for the Respondent

Final Decision : Allowed

Judgement

Ratanavel Pandian, J.—The Assistant Collector of Customs, Preventive Department, Madras, the complainant in C.C. 408 of 1973 on the

file of the Chief Presidency Magistrate, Madras, is the revision Petitioner herein and be has filed this petition seeking the enhancement of the

sentence awarded by the lower Court to Respondents.

2. The complaint against the Respondents-accused, who are father and son respectively, was for an offence u/s 135(b)(i) of the Customs Act and

Section 85(ii) of the Gold Control Act, 1968, on the allegation that on 23rd November, 1969, at about 7-30 p.m., at Waltax Road, Madras, each

of the Respondents was found to be in possession of SO bars of gold of foreign origin concealed in cloth pouches around their waists, without a

valid permit, licence or any other document entitling them to possess the said

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gold bars. According to the prosecution, the market value of the said

100 gold bars on the date of seizure was Rs. two lakhs. The prosecution case, as spoken to by the prosecution witnesses, was briefly as follows:

At about 7-30 p.m. on 23rd November, 1969 Thiru Bilakrishnan (P.W.1), the Preventive Officer attached to the Customs Office, was keeping

watch on Waltax Road near Shanthi Bhavan, as per the instructions of bis Inspector. He found accused 1 and 2 alighting from a taxi opposite to

the said hotel. He stopped and questioned them, as to whether they had any contraband goods in their possession. As they replied in the negative,

he took both of them inside the said hotel with two independent witnesses Alexander (P.W. 2) and one Chinnan. Kannan (P. W. 3), the Inspector

of Customs, was also present at that time. He first searched the person of accused-2 and found a cloth pouch around his waist. He examined the

pouch and it was found to contain 25 bars of gold of foreign origin in each of the two brown-paper-packets with foreign markings, totalling 50

bars. Thereafter, he searched the first accused. He also had a cloth pouch around his waist and on examination, it was found to contain two

brown-paper-packets, each with 25 bars of gold of foreign origin with foreign markings. M.O.1 is the cloth-pouch found with accused 2 and

M.O. 2 series are the 50 bars of gold found in his possession .M. Os. 3 and 4 are the cloth pouch and gold bars found with accused-1. P.W. 1

seized M.O. 1 in M.O. 4 series, under the mahazar Ex. P-1, attested by Alexander (P.W. 2) and one Chinnan. P W. 2 corroborated the version

given by P.W. 1 in all material particulars. Kannan (P.W. 3) the Inspector of Customs, deposed that he has also attested the mahazar Ex. P-1. He

further stated that the gold bars (M O 2 series and M.O. 4 series) were sent for Chemical analysis. The Chemical Examiner sent bis report Ex.P-5

stating that each of the 100 bars answered the test for gold and that the percentage of purity was 99.86. P.W 1 stated that accused 1 and 2 gave

the voluntary statements Exs.P-2 and P-3 respectively, admitting the seizure of the gold bars from them. P.W.3 deposed that subsequently the

accused sent the letters Exs. P-7 and P-8, stating that statements Exs. P-3 and P-4 were obtained from them by coercion and inducement .Exs. P-

9 and P-10 are the show-cause notices issued to the accused by the Customs authorities. They sent the replies, Exs. P-11 and P-l2. The Assistant

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Collector of Customs passed the adjudication order under the original of Ex. P-l3, confiscating all the 100 bars of gold and imposing a penalty of

Rs. 2,500/- on accused-1 and Rs. 1,100/- on accused-2 under the Customs Act. He also passed the order Ex. p-14, levying a penalty of Rs.

2,500/- on accused-1 and Rs. 1,0007 on accuted-2 under the Gold Control Act. Thereafter, the Assistant Collector has filed the complaint, after

obtaining sanction orders Exs. P-15 and P-16 under the Customs Act and Gold Control Act respectively.

3. When questioned u/s 342, Code of Criminal Procedure accused-1 stated that there was a crowd in front of the hotel Shanthi Bhavan, that the

Customs Officers enquired them and also others, that the Customs Officers told them that it was accused 1 and 2 who brought the gold bars and

took them to the Customs House and that they obtained the statement Ex P-3 from Mm by force. Accused-2 also gave a very similar statement.

To a charge framed against them u/s 131(b)(1) of the Customs Act read with Section 8(1) of the Foreign Exchange Regulation Act and S. 85(ii) of

the Gold Control Act, both the accused pleaded not guilty. Accused-1 and 2 recalled P. Ws. to 1 to 3 and further cross examined them, but did

not examine any witness on their side.

4. After considering the evidence and records in the case, the lower Court held that the prosecution had proved the guilt of accused 1 and 2 under

both the charge and accordingly convicted them of the said offence .But, on the question of sentence, the lower Court took a lenient view and

sentenced accused-1 to imprisonment till the rising of the Court and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for three

months for the offence under S. 135(b)(i) of the Customs Act read with Section 8(1) of the Foreign Exchange Regulation Act and so suffer

imprisonment till the rising of the Court and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for three months for (he offence u/s

85(ii) of the Gold Control Act, and sentenced accused-2 under 6,135(b) (i) of the Customs Act read with Section 8(1) of the Foreign Exchange

Refutation Act to suffer imprisonment till the rising of the Court and to pay a fine of Rs. 250/- in default to suffer rigorous imprisonment for one

month and u/s 85(ii) of the Gold Control Act to undergo imprisonment till rising of Court and to pay a fine of Rs. 250/- in default to suffer R.I. for

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one month, since M. Os. 1 to 4 had already been confiscated to the State by the Customs Authorities, no separate order has passed by the lower

Court.

5. Now, the complainant has filed this revision petition for enhancement of the sentences awarded by the lower Court. According to the revision-

Petitioner, the lower Court should not have taken such a lenient view on the mere ground that the accused were carrying the said gold bars to earn

some monetary benefit only, because the value of the gold carried by them was worth Rs. two lakhs and further, the offence committed by them is

an economic offense and therefore calls for a deterrent punishment.

6. Mr. K.M. Srirangan, appearing on behalf of the Central Government Prosecutor has vehemently urged before me that the view of the learned

trial Magistrate that ""having regard to the nature of the offence and the circumstances under which it was committed, I am of the opinion that a

lenient view should be taken in respect of both the accused"", is quite contrary to the object of the Customs Act and the Gold Control Act and to

the principles of punishment? according to which the gravity of the violation of these economic enactments and the severe trauma inflicted by such

violation on the health and wealth of the contrary call for a deterrent punishment, and thus the sentence awarded by the trial court is not

commensurate with the gravity of the offence committed by the Respondents-accused. In support of the above contention, he relies on the

observations of the Supreme Court in Abdul Aziz Aminudin Vs. State of Maharashtra, and Balkrishna Chhaganlal Soni Vs. State of West Bengal, .

In the former decision, the offence of which the accused was convicted was one u/s 5 of the Imports and Exports (Control) Act, 1947, and while

confirming the sentence of three months'' rigorous imprisonment and fine of Rs. 2009 imposed on the accused, the Supreme Court observed that

the said sentence was not severe in the circumstances of the case since, according to their Lordships, it appeared to be a deliberate offence of

securing the import licence with a view to misapply the goods imported. In Balkrishna Chhaganlal Soni Vs. State of West Bengal, Krishna Iyer, J.,

rejecting the plea of the learned Counsel for the accused in that case, for elimination of imprisonment on the ground that gold of consideration value

had been confiscated and the accused had gone out of business and that the

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possibility of further mischief was absent and some jail term had also

been undergone by him, etc observed as follows:

The new horizons in penal treatment with hopeful hues of correction and rehabilitation are statutorily embodied in India in some special enact-

menu; but crimes professionally committed by deceptively respectable members of the community by inflicting severe trauma on the health and

wealth of the nation and the numbers of this neo-criminal tribe are rapidly escalating form a deterrent exemption to human softness in sentencing.

The Penal strategy must be informed by social circumstances individual factors and the character of the crime. India has been facing an economic

crisis and gold smuggling has bad a disastrous impact on the State''s effects to stabilise the country''s economy. Smugglers, hoarders, adulterators

and others of their like have been busy in their underworld because the legal hardware has not been able to halt the invisible economic aggressor

Inside. The ineffectiveness of prosecutions in arresting the wave of white-collar crime must disturb the Judges'' conscience. While we agree that

penal treatment should be tailored to the individual in the extreme category of professional economic offenders, incarceration is peculiarly potent,

When all is said and done, the offences for which the Appellant hat been convicted are typical of respectable racketeers who, tempted by the

heavy pay-off, face the perils of the law and hope that they could smuggle on a large scale and even if struck by the court they could get away with

a light blow.

7. Mr. K.P. Jagadesan, appearing for the Respondents, has not challenged the convictions awarded by the trial Court, but would submit that the

sentences imposed by it cannot be said to be manifestly inadequate warranting an interference by this Court. He would add that the offence,

according to the prosecution, has been committed by these accused in November, 1969, and nearly six years have elapsed and therefore they

need not be sent back to jail at this stage.

8. The first Respondent is the father of the second Respondent. According to the prosecution, on 23rd November 1969 at about 7-30 p.m. at

Waltax Road, Madras, they alighted from a taxi and when searched by P.W. 1 in the presence of P. Ws. 2 and 3, each of them was found to have

a cloth pouch (M. Os. 3 and 1 respectively) around his waist, containing two

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brown paper packets, each with 25 bars of gold, totalling 30 bars (in

respect of each accused) (M. Os. 2 and 4 series respectively with accused 2 and I) of foreign origin with foreign markings. The market value of the

gold in the possession of each of the accused was Rs. one lakh on the date of the seizure. The trial Magistrate, after having convicted each of the

Respondents-accused u/s 135(b)(i) of the Customs Act, read with Section 8(1) of the Foreign Exchange Regulation Act and under S.SS(ii) of the

Gold Control Act, sentenced accused-1 to imprisonment till the rising of the Court and to pay a fine of Rs. 500/- on each count, and accused-2 to

imprisonment till the rising of the Court and to pay a fine of Rs. 250/- on each count. There cannot be any doubt, in any view, that the offence

committed by both the Respondents is of a very grave nature. Section 135(b)(i) of the Customs Act provides for punishment with imprisonment for

a term of five years and with fine and Section 85 of the Gold Control Act (before the amendment under Act 36 of 1973) provides for punishment

with imprisonment for a term which shall not be less than six months but not more than three years and also with fine, provided the Court may, if it

is satisfied that the special circumstances of the case so require, impose a sentence of imprisonment for a term which may be less than six months.

A reading of Section 85 of the Gold Control Act would show that only in cases where the circumstances to require, the sentence may be for a

term less than six months. The observation of the trial Court that ""the accused (Respondents) appear to have carried the gold bars in order to earn

some monetary benefit"" does not seem to be correct. It is true that both the Respondents have stated in their confessional statements under Exs.P-

3 and P 4 that they carried these gold bars on behalf of one Mahavir, for their monetary benefit. But they have retracted from the said confessional

statements and have sent two letters Exs. P-7 and P-8, stating that no gold bar was seized from either of them and no statements were given by

them. Subsequently, when they replied under Exs.P-11 and P-12 to the show-cause notices under Exs. P-9 and P-10, they have completely

denied the seizure of the gold and the making of the voluntary statements. In the trial Court when they were examined u/s 342, Cr.P.C., both of

them have completely denied the seizure as well as the voluntary nature of the confession statements. It is the common case that both the

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Respondents have retracted from their confessions and have not come forward with any defence that they acted merely as carriers, It is well-

settled that in criminal prosecutions the accused need not come forward with a specific defence. But, the Court should take into consideration the

nature of the offence the circumstances in which it was committed, the degree of deliberation shown by the offender, etc, while awarding the

sentence. But. in the instant case, the conduct of the Respondents and the clandestine manner in which they were carrying the gold bars, concealing

them on their body, are well enough to saddle the Respondents with the necessary knowledge of the character of the goods in their possession and

the gravity of the offence they committed. Under these circumstances the admissions made by the Respondents in their retracted confessions Exs.

P-3 and P-4 that they carried the gold as carriers for monetary benefit, cannot be said to be a mitigating circumstance for awarding a lesser

sentence. In my view, no special circumstance exists in this case for invocation of the proviso to Section 85 of the Gold Control Act. As observed

by me in The Assistant Collector of Central Excise, Erode v. Achal Singh 1975 L W (Cri.) 163 where the very same question of law arose, to use

a discretionary power in awarding sentence of imprisonment for a term less than six months, it is imperative that the Court must be satisfied that the

special circumstances of the ease require the taking of such a lenient view, and the term ''special circumstances of the case'' is wider than the term

''special ''reasons''. The circumstances also must be special in the sense that they should be different from the normal. While using the

circumstances for imposing a lenient sentence, the primary consideration should be whether the circumstances are special to the case. The special

circumstances should be of such a nature which should have relation to the offence and not to the offender. At this juncture, I may point out that the

Parliament has now introduced, by Act 36 of 1973, Sub-S.(2) and (3) to Section 85 of the Gold Control Act. In Sub-S.(3) they have setout

certain guidelines to the Court while giving reasons for reducing she sentence for a term less than six months under Sub-Ss.(1) and (2). As per the

said amendment, the facts that the accused is a first offender, that the accused has suffered a penalty, that bis goods have been confiscated or any

other action has been taken against him for the same act and that the accused was not the principal offender and was acting as a mere carrier of

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goods or otherwise was a secondary party to the commission of the offence, and the age of the accused, shall not be considered as special and

adequate reasons for giving such a lesser sentence. 1 am mentioning about this new amendment only for the purpose of showing how seriously the

Parliament views these economic offences. However, since the offence in question has been committed in the year 1969, we have to see whether

there is any circumstance requiring the Court to invoke the proviso to Section 85 of the Gold Control Act as it stood then. In my view, there is

none. The Supreme Court, in Kapur Chand Pokhraj Vs. The State of Bombay, while dealing with the question of enhancement of sentence passed

by the High Court of Bombay for the contravention of the provisions of the Bombay Sales-Tax Act, held that in the circumstances of that case, the

High Court was justified in enhancing the sentence, observing that the sentence should depend upon the gravity of the offence and not upon the fact

that the accused pleaded guilty, or attempted to defend the case. The Parliament, having regard to the nature of these socio-economic offences,

which, when committed, would have an adverse impact on the concept of Welfare State has thought it fit to prescribe a minimum sentence of six

months'' imprisonment and a maximum sentence of three years'' imprisonment and also fine, in the absence of any circumstances requiring the

imposition of a lesser sentence for the offence under the Gold Control Act. It admits of no doubt that a deterrent sentence is wholly justifiable when

the offence is the result of deliberation and preplanning and when it is a menace to the safety health and well-being of the nation. To my mind, there

is absolutely no doubt that these Respondents have committed this crime with a pre-plan and deliberation.

9. It is true, as contended by the learned Counsel for the Respondents, that these offence were committed in November 1969 and the prosecution

was launched only in the year 1973, i.e., four years afterwards, after obtaining sanction under Exs. P.15 and P-16 dated 2nd January 1973. But,

this delay of three years on the part of the prosecution to lay the complaint before the Court cannot be taken advantage of as a circumstance to

mitigate the sentence, by resorting to the proviso to Section 85 of the Gold Control Act. Having regard to the gravity of the offence committed by

the Respondents, and following the observations of the Supreme Court in Balkrishna Chhaganlal Soni Vs. State of West Bengal, . I am of the view

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that a deterrent sentence is called for for the charge under S. 135(b)(i) of the Act as well as for the charge u/s 85 of Customs the Gold Control

Act.

10. The imposition of the very lenient sentence made in this case by the trial Court, in the absence of any special circumstances attracting the

proviso to Section 85 of the Gold Control Act, is nothing but a mockery of the penal provisions in the enactment(sic), and in fact, it amounts to an

evasion of the statute.

11. Accordingly, while confirming the convictions of the Respondents, I enhance the sentence of imprisonment awarded against each of the

Respondents, to one of rigorous imprisonment for a period of six months, for the offence u/s 135(b)(i) of the Customs Act read with Section 8(1)

of the Foreign Exchange Regulation Act and similarly enhance the sentence of imprisonment for the offence u/s 85(ii) of the Gold Control Act to

one of rigorous imprisonment for a period of six months, in respect of both the accused, and retain the sentences of fine imposed on them under the

respective charges, The above sentences of imprisonment are directed to run concurrently. The revision petition is accordingly allowed.

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