

(1985) 02 DEL CK 0029

In the Delhi High Court

Case No : Criminal Revision No. 195 of 1983

Y.S. Bawa, Supdt. Customs and Central Excise

APPELLANT

Vs

Siri Niwas Jain, New Delhi

RESPONDENT

Date of Decision : 12-02-1985

Acts Referred:

Citation : (1985) 21 ELT 382

Hon'ble Judges : J.D. Jain, J

Bench : Single Bench

Judgement

1. The facts giving rise to this revision petition, which is directed against order dated 18th December, 1982 of an Additional Sessions Judge, succinctly are that way back on the night between 13/14th April, 1971 a raid was conducted on premises No. 4698, Gali Umrao Singh, Pahari Dhiraj, by officials of the Customs Department pursuant to some specific secret information. Shri Phool Chand Jain, father of the respondent - Srinivas Jain was present at the house. There was a small room inside a bigger room which was found locked from outsider. The father of the respondent was asked to open the lock but he told the Customs officials that the said room was in possession of a person who was known to his son Srinivas i.e. the respondent. Eventually the lock of the room was broken open and the father of the respondent when told to cooperate with the Customs officials offered to bring out the incriminating goods contained in two steel trunks and one cardboard, etc. Accordingly, he went inside the room and brought out four packages which on search were found to contain 3,218 wrist watches of foreign origin besides fountain pens, side bars of watches and watch straps etc. Some exercise books containing accounts of smuggled watches were also found besides loose sheets and diaries in which something had been written. After about a couple of hours the respondent too arrived at the house. The recovery proceedings were still in progress. He was interrogated and his statement u/s 108 of the Customs Act (hereinafter called as "the Act") was recorded. The recovered goods were seized and after obtaining the requisite information u/s 137 of the Act a complaint was instituted in February 1972 by the petitioner

against the respondent for his prosecution u/s 135 of the Act. It was, inter alia, averred by the prosecution that the room from which the aforesaid incriminating goods were recovered contained some other luggage belonging to the respondent and neither the respondent nor his father could produce, when asked, any evidence documentary or otherwise to show legal purchase, import or acquisition of the recovered watches, etc. It was further alleged that the respondent had concealed the aforesaid imported contraband goods in his room and the perusal of the documents recovered from his residence showed that he had been indulging in the business of smuggling. So, the accused was said to be guilty of keeping concealing and harbouring the above said goods, which were subsequently confiscated consequent upon adjudication proceedings and a personal penalty of Rs. 20,000/- (twenty thousand) too was imposed on the respondent.

2. After recording pre-charge evidence, a charge was framed against the respondent on 28th August, 1983 to the effect that the aforesaid 3,218 incriminating wrist watches and pens, etc. of foreign origin were recovered from the premises in his possession and that he had acquired their legal possession fully knowing that the possession and dealing in the same was illegal.

3. The prosecution evidence concluded as far back as 12th April, 1978. Therefore, the respondent closed his defense on 27th May, 1978. However, on an application dated 16th September, 1978 having been moved by the prosecution u/s 311 for recalling the prosecution witness Shri N. S. Bhatnagar, who had seized the incriminating articles, to formally tender the seized goods in evidence which the prosecution had failed to do because the keys of the trunks containing the wrist watches, etc. were not then available, the court permitted further cross-examination of Shri N. S. Bhatnagar. However, on 23rd February, 1981 when the watches produced by the prosecution were taken out of the trunks and counted, they were found to be 3,358 in number. Upon this the court called upon the prosecution to explain the discrepancy. However, an application was made by the prosecution that the watches should be counted at the Customs House because they were of various makes. The said application was rejected by the trial Court vide order dated 25th February, 1981 and the court observed that the watches had been counted in the court itself on 23rd February, 1981 and it appeared that the same were not the case property. The court, however, allowed time to the prosecution to sort out the case property. Recounting of the watches was then done on 3rd March, 1981 and the total number of the same was found to be 3,331. Shri Bhatnagar was further examined and cross-examined on 14th April, 1981 and 25th August, 1981 respectively. In view of this development the trial Court amended the charge on 14th September, 1981 by stating that the respondent was found to have acquired 3,331 wrist watches of foreign origin (besides, of course, fountain pens, side bars and watch straps, etc.). Subsequently, an application dated 3rd December 1981 was made by the respondent purporting to be u/s 248(1) of the Code of Criminal Procedure for ordering his acquittal. He inter alia, pointed out that the prosecution had failed to

connect 3,331 wrist watches produced in court to be the same which had been allegedly seized from the house of the respondent both quantity wise and description wise .Further, according to him, there was no valid sanction for his prosecution in respect of 3,331 wrist watches. However, the said application was dismissed by the trial Court vide order dated 11th March, 1982. Feeling aggrieved the respondent filed a revision petition against the said order in the Court of Session. The revision petition was heard by an Additional Sessions Judge who allowed the same vide order dated 18th December, 1982 and discharged the respondent. He inter alia, observed that the case was still at the stage of charge and had not reached the destination i.e. the stage of final order. So, it was open to the prosecution to institute a fresh complaint against the respondent after obtaining a proper and valid sanction in respect of the increased number of watches.

4. I have heard counsel for the parties at length and I find that the mere fact that the number of watches contained in the two trunks produced in court on 23rd February, 1981 was found to be in excess of that for which the prosecution had been originally launched against the respondent was hardly a ground to alter the charge. Indeed, it was never the case of the prosecution that 3,331 wrist watches had been recovered and seized from the possession of the respondent. Pertinently on 25th May, 1981 the trial Court observed that it appeared that it was not the case property which had been seized from the respondent. In other words, the court doubted the genuineness of the wrist watches produced on 23rd February, 1981 to be the case property. That in my view was the most crucial question which had suddenly cropped up for consideration. However, that did not warrant the alteration/amendment of the charge as such and the trial had to be proceeded on the basis of original charges as framed on 28th August, 1973.

5. Faced with this situation the learned counsel for the respondent has canvassed with considerable fervor that the sanction accorded by the Collector (Ex. PB) in this case is bad in law inasmuch as it betrays total non-application of mind by the sanctioning authority. Further, according to him, no extraneous evidence has been adduced to prove that the entire material had been placed before the sanctioning authority and that he had satisfied himself on a consideration of the same that the respondent ought to be prosecuted. It is urged by counsel for the respondent that this court while sitting in revision ought to take notice of this basic flaw in the sanction which goes to the very root of the matter. It is more so because the case has lingered on for more than 13 years and remand of the case shall entail further hardship, harassment and expense to the respondent.

6. On a consideration of the matter I find for of force in the submission made by the learned counsel for the respondent. The order of sanction (Ex. PB) is reproduced below for ready reference :

"Whereas it appears from the records of the case placed before me that adequate grounds exist for prosecution of Shri Siri Niwas Jain S/o Shri Pool Chand Jain resident of 4698, Gali Umrao Singh, Pahari Dhiraj, Delhi in connection

with the recovery of 3,218 wrist watches of foreign origin, fountain pens and watch straps of foreign origin, etc. by Customs Staff on 13/14-4-71 for violation of section 3(2) of the Import Control Order, 1955 issued u/s 3 of the Import and Export Control Act, 1947 read with section 11 of the Customs Act, 1962.

2. Now, Therefore, in exercise of the powers conferred on me by section 137(1) of the Customs Act, 1962, I. R. Prasad, Collector of Customs and Central Excise, New Delhi hereby accord sanction for the prosecution of the said Shri Siri Niwas Jain for offences u/s 135 of the Customs Act, 1962, in a court of Law having jurisdiction."

The learned counsel for the respondent has rightly pointed out that a bare reading of the aforesaid order of sanction betrays total non-application of mind by the sanctioning authority. In the first instance, there is a reference to Section 3(2) of the Imports (Control) Order, 1955 (hereinafter referred to as "the Order") which, as shall be presently seen, has no bearing whatsoever on the facts of the case. It is extracted below for ready reference :

"3. (1) Save as otherwise provided in this Order no person shall import any goods of the description specified in Schedule I, except under and in accordance, with a license or a customs permit granted by the Central Government or by any officer specified in Schedule II.

(2) If in any case, it is found that the goods imported under license do not conform to the description given in the license or were shipped prior to the date of issue of the license under which they are claimed to have been imported then, without prejudice to any action that may be taken against the licensee under the Customs Act, 1962 (52 of 1962), in respect of the said importation the license may be treated as having been utilised for importing the said goods."

7. On a plain reading of this provision it is manifest that it comes into play only if it is found that the goods imported under a license do not conform to the description given in the license. Admittedly it is not the case of the prosecution that any import license had been issued to the respondent but the goods in question did not conform to the description given in the license. Finding himself in this predicament the learned counsel for the petitioner frankly and candidly conceded that reference to clause 3(2) of the Order in the sanction was irrelevant. The irresistible conclusion which may, Therefore, be drawn would be that the sanctioning authority did not take stock of the relevant material and did not apply its mind to all the facts of the case otherwise there could be no question of such a serious aberration creeping in the order of sanction. The conclusion is further by the fact that the sanction order is absolutely silent about the precise nature of offence which appeared to have been committed by the respondent. Section 135 of the Act as it stood at the relevant time covered a wide field of activities for which a person could be prosecuted there under. While clause (a) thereof dealt with fraudulent evasion or attempt at evasion of any duty chargeable on any goods or of any prohibition imposed under the Act or any

other law for the time being in force with respect to such goods, clause (b) dealt with acquisition by the accused of or his being concerned in any way in carrying, removing, disposing, harbouring, keeping, concealing, selling or purchasing or in any manner dealing with any goods which he knew or had reason to believe were liable to confiscation u/s 111. It was, Therefore, incumbent upon the sanctioning authority not only to incorporate all material facts in the sanction but also to spell out precisely the nature of offence for which he was sought to be prosecuted. Unfortunately the order of sanction is conspicuously silent about both. It neither narrates the relevant facts except making a vague reference to the records of the case, nor does it say in what manner the respondent was concerned in the commission of offence punishable u/s 135 of the Act.

8. It is now well settled that grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to a person accused of any offence against frivolous prosecution. It is, Therefore, incumbent on the prosecution to prove that a valid sanction has been granted by the sanctioning authority after it was satisfied that a case for sanction had been made out. In AIR 1948 82 (Privy Council) , it was held by the Judicial Committee that :

"..... it must be proved that the sanction was given in respect of the facts Constituting the offence charged. It is mainly desirable that the fact should be referred to on the face of the sanction..... The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction Where facts are not referred to on the face of the sanction nor is it proved by extraneous evidence that they were placed before the sanctioning authority, the sanction is invalid, and the trial Court would not be a Court of competent jurisdiction."

9. Reference in this context be also made to Jaswant Singh Vs. The State of Punjab, , P.C. Joshi and Another Vs. The State of Uttar Pradesh, and Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, . The gist of these authorities is that if the facts which constitute the charge do not appear on the face of the sanction, it must be established by extraneous evidence that those facts were placed before the authority competent to grant the sanction and that the authority applied his mind to those facts before according sanction. As noticed above, the sanction in the instant case does not specify the acts of the respondent which allegedly constituted contravention of Section 135 of the Act. The evidence aliunde adduced by the prosecution too falls short of proving that all the facts were placed before the sanctioning authority and duly considered by it before according sanction. No doubt, the petitioner, Y. S. Bawa did state during the course of his deposition that the case was put up before the Collector of Customs for his satisfaction and he accorded sanction for the prosecution of the respondent after satisfying himself but as seen above the very mention of clause 3(2) of the Order militates against this assertion of the petitioner; rather it

betrays total non-application of mind by the sanctioning authority. Had the sanctioning authority incorporated even synopsis of the relevant facts Constituting the infraction of Section 135 of the Act it could have been assumed that there was proper application of mind by him but unfortunately the order of sanction is too laconic and brief to warrant an inference that he did consider all the relevant facts attending upon the complicity of the respondent in the commission of crime. Hence, the prosecution is liable to be quashed for want of a proper and valid sanction.

10. It is urged by the learned counsel for the petitioner that the question of validity of the sanction ought to have been raised by the respondent at an early stage of the trial and he, not having raised the same, should not be permitted to do so in this revision for the first time. However, this contention is apparently devoid of any substance because there is no such thing as rule of estoppel which would operate against the respondent-accused in challenging the validity of the sanction at any stage. The burden of proving a valid and legal sanction rests on the prosecution. Hence, it is open to the accused to challenge its validity at any stage of the case especially when the prosecution has not led any evidence to establish that all the facts germane to the grant of sanction were placed before and duly considered by the sanctioning authority. I am fortified in this view of the matter by following observations of the Supreme Court appearing in *B. Saha and Others Vs. M.S. Kochar* :

"The question of sanction under S. 197 can be raised and considered at any stage of the proceedings. In considering the question whether or not sanction for prosecution was required, it is not necessary for the Court to confine itself to the allegations in the complaint. It can take into account all the materials on the record at the time when the question is raised and falls for consideration."

11. That apart, a couple of apparent chasms have developed in the prosecution case which too dissuade me from remanding the case to the trial Court for decision on merits. The serious infirmity from which the prosecution case suffers is the lack of proper identification of incriminating goods viz. wrist watches etc. produced in court. The learned counsel for the respondent has vehemently urged that 3,331 wrist watches produced in court are not the same which had been allegedly seized by the Customs officials from the house of the respondent. This was the precise contention raised by the respondent in his application dated 3rd December 1981 purporting to be u/s 248(1) of the Code of Criminal Procedure. There appears to be considerable merit in this contention having regard to the state of evidence on the record. It bears repetition that application dated 16th September 1978 was made by the prosecution, inter alia, on the ground that the case property viz. wrist watches could not be exhibited as the keys of the trunks were not available when Shri N. S. Bhatnagar who had conducted the raid was examined as a witness. Therefore, only the boxes containing the wrist watches were exhibited. However the learned counsel for the petitioner has made a bold bid to impress upon the court that the wrist watches in question had, in fact,

been exhibited earlier on 22nd November, 1972 when P. L. Gupta (PW 7) was examined. It would not doubt appear from a perusal of the testimony of this witness that the watches in question were exhibited as P100 to P3317. The said watches were taken out from two boxes which bore the seals of the Customs Department "SB-2". However, all that P. L. Gupta said was that the said watches were shown to him for the purpose of valuation but he made it plain that no watch was taken out from any package in his presence and he simply assessed the value of the watches which were shown to him. Thus, the testimony of Shri Gupta does not establish even remotely that the watches which were exhibited during his deposition were the same which had been earlier seized from the house of the respondent. Indeed, Shri Gupta had no knowledge whatsoever of the source from where those watches were produced. As for the subsequent production of the wrist watches numbering 3,331 the confusion has been worse confounded. As would appear from a perusal of the deposition of N. S. Bhatnagar (PW 2) on 3rd November, 1980, 14th April, 1981 and 25th August, 1981, three trunks. Ex. P 95 to P 97, which were locked were produced in court and their locks had to be broken open because the keys thereof were stated to be not traceable. Although Shri Bhatnagar asserted in his examination-in-chief that the three trunks Ex. P 95 to P 97 were the same which had been seized from the premises of the accused but he frankly admitted during his cross-examination that the packages when sent by him in the court for the purpose of counting were not found sealed in the manner mentioned on page 5 of the Panchnama. He explained that it was so because the packages had already been opened in the court as well as the Customs office but he was not present when the same were opened in the Customs office. None of the packages contained the signature slips, which had been affixed thereto at the time of the seizure of the watches, as specified on page 5 of the Panchnama. He admitted that Panchnama Ex. PW7/A was prepared at the time of the valuation of the watches in the Customs House but the packages when produced in court were not sealed in the manner mentioned in Panchnama, Ex. PW 7/A and the packages when opened contained some seals with signature slips. Obviously the original seals could not be there on the aforesaid packages because they must have been re-sealed after the examination of PW 7 on 22nd November, 1972. However, it was incumbent on the prosecution to establish by first - hand evidence that the watches produced in court on 22nd November, 1972 and shown to P. L. Gupta (PW 7) were the same which had been seized from the premises of the respondent. Further, it was imperative for the prosecution to show that the packages Ex. P 95 to P 97 were the same which had been re-sealed after the examination of Shri P. L. Gupta on 22nd November, 1972. However, the requisite evidence is totally lacking. Not only that, Shri Bhatnagar admitted that while counting the wrist watches he did not tally the description of the same as given in annexures "A", "B" and "C" with regard to (a) whether the watches were gents or ladies watches; (b) whether the watches had centre seconds movement; (c) whether they were having golden or stainless steel frames; and (d) what was their make. He admitted that he had prepared the list Ex. PW2/D1 after counting the watches in court but the number

of the wrist watches counted by him for each make as per the list, Ex. PW2/D1, did not tally with the corresponding makes in the annexures to the Panchnama. It is thus manifest that the identity of the wrist watches has not been established beyond reasonable doubt. As for other items of incriminating nature like watch straps and watch side bars etc., suffice it to say that no such articles have been produced in court and it is not known what happened to the same.

12. Yet another infirmity from which the prosecution evidence suffers is that the respondent was put on trial on the charge of having acquired illegal possession of 3,218 wrist watches of foreign origin besides fountain pens, side bars of watches and watch straps etc. However, there is not an iota of evidence on record to show that he had acquired possession of the incriminating goods; the only evidence on this point being his own statements made to the Customs officers u/s 108 of the Act on different dates. A perusal of the said statements, Ex. PW1/A dated 14th April, 1971, Ex. PW1/B dated 15th April, 1971, Ex. PW10/A dated 7th June, 1971 and Ex. PW10/B dated 8th June, 1971 discloses that all that he confessed was that he has let out the room in question to his uncle Shri Aroora Mal at Rs. 400/- per month and that the latter used to keep smuggled watches etc. in the said room and this fact was within his knowledge. However, he categorically disowned any concern with wrist watches in question and he asserted that the keys of the lock on the room were with the two sons, namely Gurbachan and Ramesh of Aroora Mal. He explained that his only interest in the matter was to receive Rs. 400/- per month as rent for the safe custody of the wrist watches. Thus, his statement to the Customs authorities even if taken at its face value falls short of proving the charge on which he has been put on trial. It may, however, be pertinent to note that the petitioner, Y. S. Bawa admitted during his cross-examination that on verification from record he found that the father of the accused was the tenant of that room. Even otherwise the admitted case of the prosecution is that father of the accused and not the accused was present when the search of the room in question was conducted and that they had told the father of the accused to bring out the incriminating articles from inside the room and it was pursuant to their direction that he brought out four packages Ex. P 95 to P 98 and told them that those were the only packages containing incriminating articles. This circumstances too renders the complicity of the respondent in the commission of the alleged offence highly doubtful. Indeed, it was none of my job to evaluate and appraise the relevant evidence on record in this respect but I have chosen to do so in order to satisfy myself whether it would be worthwhile to remand the case and let the respondent suffer further harassment and expense of the trial which has already lingered on for over 13 years. These yawning gaps in the prosecution evidence certainly dissuade me from adopting such a course.

13. To sum up, Therefore, I find no merit in this revision petition. It is accordingly dismissed.