(1984) 06 GAU CK 0009

Gauhati High Court

Case No: Govt. Criminal Appeal No. 29 of 1979

State of Assam on The Complaint of the Asstt. Collector of Customs and Central Excise	APPELLANT
Vs	
Gopi Kishan Taperia	RESPONDENT

Date of Decision: June 6, 1984

Acts Referred:

- Constitution of India, 1950 - Article 20(3), 21
- Criminal Procedure Code, 1973 (CrPC) - Section 100, 100(1), 100(4), 100(5), 100(6)
- Customs Act, 1962 - Section 100, 101, 102, 103, 103(4)

Citation: (1985) 1 GLR 193

Hon'ble Judges: T.N. Singh, J; T.C. Das, J

Bench: Division Bench

Advocate: D.N. Choudhury, for the Appellant; T.N. Phukan, for the Respondent

Judgement

T.N. Singh, J.

State is the Appellant before us challenging an order of acquittal by which a charge u/s 135 of the Customs Act, 1962 (for short the Act) was held as not proved against the Respondent beyond all unsellable doubt. Prosecution being for a socio-economic offence wo cannot overlook that acquittal in such cases have to be carefully scrutinised. The merits of the grievance of the Appellant requires careful, but judicious consideration. Because, we must consider that although such offences eat into the vitals of national economy an innocent person is not convicted and also remember the settled law that an acquittal does not weaken the presumption of innocence.

2. Prosecution was launched against the Respondent on complaint made by Assistant Collector of Customs and Central Excise, Tezpur, Under Section, 135 of the Act wherein it was stated that on 8.7.76 the Customs Preventive Officers of Tezpur

along with local officers of North Lakhiropur having made a search of the premises occupied by Respondent recovered therefrom foreign made wrist watches (altogether 44 in numbers) and also one Yashika camera and two cassettes tape recorders, both of Japanese origin. Respondent having failed to produce documentary evidence as to wherefrom he received the laid goods or even about the source thereof departmental proceeding under the Act was started against him in the course of which the seized particles were confiscated u/s 111 of the Act and a penalty of Rs. 2,000/- was also imposed on him u/s 112. Considering, however, the gravity of the offence the Collector of Customs and Central Excise, Shillong, who was the competent authority to accord sanction, had accorded sanction in terms of Section 137 of the Act for Respondent''s prosecution u/s 135 of the Act. On this complaint learned Chief Judicial Magistrate, Lakbimpur, framed charge against the Respondent u/s 135(1)(b)(ii) of the Act for "Illegally posseting" be and foreign made writ watcher tape accorded and carnern. Respondent pleaded not guilty to the charge whereupon trial proceeded.

3. Prosecution examined as many as 7 witnesses in the course of trial. All of them except P.W. 3 were officers of Customs Department. Some documents were also exhibited by the prosecation in support of their case (Exts. 1-4).,The inventory of goods seized was proved n" Ex. 3 and the search warrant as Ex. 4 while the sanction for prosecution was marked is Ex. 2 and the comprint itself as Ex. 1. Respondent did not adduce any evidence but denied in his statement u/s 313 Code of Criminal Procedure that the seized goods were recovered from bit possession. He asserted that he had not kept those goods. From the cross-examination of the prosecution witnesses the defence case appears to be that one Khagen Das, who was in Inspector of Customs Department, was the owner of the house and the goods seised belonged to him and that Respondent was falsely implicated to shield said Kbagen Das.

4. On a discussion of the prosecution evidence trial court found that the real owner of the bouse was Khagen Das who was an employee of the Central Excise Deptt. Respondent took one room on rent from him on the first floor of his building. The best person to identify the room taken on rent by the Respondent was the owner himself who was present at North Lakhitapur on the date of the search. None of the witnesses visited the place on any prior occasion and the prosecution having failed to explain why Khagen Das could not be examined as he was a material witness in the case it bad failed to establish the identity of the room occupied by Respondent and therefore possession of the seized goods could not be attributed to Respondent even though official witnesses deposed that the contraband goods were recovered from his possession.

5. Learned Senior Govt. Advocate, Assam, Mr. D.N. Choudhury. has assailed the acquittal in this case mainly on two grounds. Firstly, contends learned Counsel, the order of confiscation of the goods u/s III and imposition of penalty u/s 112 on the

Respondent in respect of the seized goods bad sealed Respondent''s fate. Secondly submits learned Counsel, recovery of contraband articles from the possession of the Respondents was erroneously rejected by the trial court. Prosecution evidence, according to Mr. Choudbury, though it consisted mainly of official witnesses, conclusively proved possession by the Respondent of the seized goods, A special rule of evidence was enacted in Section 123 which was ignored by the trial court and it illegally acquitted the Respondent.

6. This Court in a recent decision in the case of State of Assam v. Bipul Bardhan (Criminal Revision No. 95191, decided on 13.2.84) in dealing with the provisions of the Act observed that it was a hybrid enactment which invested powers in the Custom authorities as well as in the criminal courts to fight effectively the evil of smuggling and related activities prohibited by the Act. Chapter XIV and XV of the Act deal with confiscation of goods and imposition of penalties and invest powers in the appropriate authorities to take action at the administrative level against the person indulging in any offensive activity. In Chapter XIV provision is made by Section 111 for confiscation of improperly imported goods etc.'"' and by Section 112 for imposition of "penalty" in respect thereof. In virtue of Section 122 of this Chapter officials of Customs Department are invested with the powers of "adjudication of confiscations and penalties". Also in this chapter is to be found the provision in Section 123 as respects "burden of proof in certain case". Procedure for taking action under'' this chapter is described in Section 124 but the important provision of this Chapter of which notice must be taken is that of Section 127. It is provided therein "that the award of any confiscation or penalty under this Act by an officer of custom:, shall not prevent the infliction of any punishment to which person affected thereby is liable uader the provisions of Chapter XVI of the Act. This provision was construed in Bipal Bardhan (Supra) and it was held that the legislature intended the criminal courts and the custom authorities to act in two separate water-tight compartments that their jurisdiction was mutually exclusive because in |one case "adjudication" terminated in award of confiscation or penalty while in the other case trial in a criminal court was meant for "infliction of punishment". We have, therefore, no doubt that in the instant case we cannot accept as conslusive of the guilt of the Respondent the fact of "confiscation" and penalty" in respect of the seized goods in the proceedings u/s 111 and 112 of Chapter XIV of the Act. We are also clear in our mind that the doctrine of issue of estoppel cannot be invoked in this case to aid the prosecution. It is true that Lord Macdermott speaking for the Board in Sambasham v. Public Prosecutor Federation Malaya (1950 AC 458) observed that a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is binding and conclusive in all subsequent proceedings between parties to the adjudication. But, as pointed out in Masud Khan Vs. State of Uttar Pradesh, the plea of issue of estoppel is not the same as the plea of double jeopardy or autrefois acuit. It was emphasised by their Lordships in Masud Khan that the principle applies to two criminal proceedings, the earlier as well as the subsequent proceedings must

be criminal prosecution. In the instant case, apparently this not being the case, the doctrine, in our opinion, obviously has no application.

7. Before we deal with the legal aspects of Mr. Choudhury''s second contention we consider it appropriate to discuss briefly the evidence adduced in this case by the prosecution to prove possession of the contraband goods by the Respondent. The Assistant Collector of Customs and Central Excise, Tezpur who deposed as P.W. 1 staled that be was not present at the time of search but he came to know from Ex. 3 (seizure list) that the articles in question were seized on a search being conducted in Respondent''s house and therefore after obtaining the requisite sanction (Ex. 2) be filed the charge report" (Ex. 1) and instituted the case against Respondent for keeping foreign made articles illegally in his house without permission. He also deposed that on 8. 7. 76 the preventive officers (P.Ws. 2, 4, 5, 6, 7 and one N.D. Chatterjee) had searched Respondent''s house in the course of which they recovered foreign made/wrist watches and a camera valued at Rs. 8.500/-. the search warrant (Ex.4) was issued by P.W. 5. who was the Superintendent of Customs and Central Excise, Tezpur, He was also personally present at the time of search according to his evidence. He deposed that be came with other officers who came from Tezpur to conduct the search and took the help of p.ws. 4, 6 and 7 who were the Inspectors of the Deptt. posted at Lakhimpur. According to him nobody had pointed out Respondent''s residence. The "informer" gave them the location of the bouse which belonged to one Khagen Das who was an Inspector of their Department. They did not take permission from Khagen Das tp enter into the house. He denied the suggestion that the goods seized belonged to Khegen Das and the Respondent was falsely implicated. The officer who prepared the seizure list or the inventory of goods seized (Ex. 3) was P.W. 2 (B.K. Hozarika) who deposed that they came to make the search on orders of P.W. 5 (K. Bharali). He did not know on what basis they were deputed to make the search. His evidence is that the time of making the search be came to know that the house belonged to one Khagen Das who was serving at the Central Excise Inspector it North Lakhimpur. He did net know the neighbours of the Respondent In which the search was made. He did sot see Khagen Das In his residence at the time of search. He also denied the suggestion that the seised goods belonged to Khagen Das who was their colleague and the Respondent was falsely implicated to shield him. He had searched Respondent''s bouse on 8.7.76 and had prepared the seizure List (Ex. 3) on which he proved his own signature as also the signature of accused and of Manik Chand (P.W. 3). In cross-examination he has stated that all the officers made the search together but they were "not all witnesses to the search". The other officers accompanying P.Ws. 2 and 5 are P.Ws. 4, 6 and 7. The evidence of P.W. 4 is that he was an Inspector of the department at Lakhirapur on the date of search. But be had no occasion to go there (where the search was made) before that date. He did not know the neighbours of the Respondent and also did not know if Khagen Das and his uncle lived in the same compound. He also denied the suggestion that the seized goods belonged to Khagen Das and

Respondent was falsely implicated. S.N. Dutta (P.W. 6) deposed that he was outside the house when the goods were recovered and when ho was called be went into the house. He was also an Inspector of the department posted at Lakhimpur on that date but he did not go previously to the house from where the goods were recovered. He did not know the neighbourhood though he asserted that the house where the goods were found belonged to one Khagen Das who was on Inspector of their department. His categorical evidence is that immediately after they reached the locality, they came to know that Respondent. had taken that house on rent. He admitted in his cross-examination that there were respectable families residing near the house but denied the suggestion that the seized goods belonged to Khagon Das and were recovered from his house, P.W. 7(L. Bhattacharjee) gave evidence that he did not go previously to the house where the search was made, P.W. 5 (Kanakeswar Bharali) told him that they had receded a secret information at Tezpur and had therefore come to make the search. He did not know if the secret information involved Khagea Das but asserted that he knew that the house belonged to Khagen Das. His evidence is that at the time of occurrence Khagen Das was not present in the office and that be was perhaps under orders of transfer.

8. Chapter XVI of the Act encompasses provisions relating to offences and prosecution, By Section 135 "evasion of duty or prohibitions" is punished and it is provided that without prejudice to any action that may be taken under the Act in view of Clause (ii) a person may be punished with imprisonment for a term which may extend to 3 years or with fine or with both Sub-section (1)(b) of Section 135 under which the Respondent was charged may be quoted.

(1) Without prejudice to any action that may be taken under this Act, if any person-

(a)* * * *

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111.

9. Chapter XIII of the Act which spans across Sections 100 to 110 deal exclusively with provisions for searches, seizure and arrest. Power to search premises is provided by Section 105 which empowers a duly authorised person to search for goods, documents or things which he has reason to believe are liable to confiscation and which are secreted in any place. Sub-section (2) thereof is in the following term:

(2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches, so far as may be, apply to searches under this Section subject to the modification that Sub-section (5) of Section l65 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs the words "Collector of Customs" were substituted.

What is the object of the provisions of Chapter XIII? We have no doubt that these provisions have a special significance because the penal provisions of Section 135, especially of Sub-sections (1)(b) are galvanised only when contraband goods, to respect of which offence can be said to be committed, are recovered. For the purpose of prosecution as it will be necessary to prove the fact of such recovery those have to be seized. ""'Possession" obviously is an essential ingredient of the offence and the prosecution must prove it to secure conviction of the person concerned. To collect evidence of possession the investigating agency requires statutory powers to search any place or person and to seize incriminating articles in respect of which the ingredient of possession has to be established. There can not be any doubt, therefore, that the provisions relating to search and seizure are of enabling nature but what is noteworthy is the effect of exercise of powers invested thereunder. In the process of exercise of the powers of search and seizure by State officials in virtue of these provisions there is impingement upon legal and constitutional rights of citizens such as of rights of residence, movement, privacy and property. In order that these rights are not interfered with in an arbitrary manner and not unduly impaired or indented, these provisions inhere inbuilt safeguards. If these safeguards have to retain any meaning or content infraction thereof must be viewed seriously. the moot question in the present case therefore is, to what extent the expressions "so far as may be" of Sub-section (2) of Section 105 made inapplicable the relevant provisions of Chapter VII of the Code of Criminal Procedure, 1973.

10. We do not think that Section 123 of the Act has any relevance in this context. Because, that Section does not deal in any manner with search or seizure. It only contemplates that after search when seizure in respect of "smuggled goods" from the possession of any person is made the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. No legal presumption thereunder is contemplated in respect of lawful search and seizure to dispense with proof of ""'possession" by the person cerned of the seized goods. Legal presumption there under islated only to the (sic) of the goods seized. As conviction such canes depends on the factum of possession legislatundvisedly made specific provision in Chapter XIII the Act searches and seizure and made relevant provisions of the Code of Criminal Procedure applicable because, the Act does not provide a special ocedure for prosecution under the Act. As in the instant can infraction of certain provisions of Sections 93 and 100 Code of Criminal Procedure 1973 is said to be writ large on the proceedings we may nvell refer thereto. Search warrants are contemplated u/s 9 of which Sub-section (2) reads as follows:

(2) The Court may, if it thinks fit, specify in the warn the particular place or part thereof to which only the such or inspection shall extend; and the person seared charged with the execution of such warrant shall then -such or inspect only the place or part so specified.

(Emphasis added)

Provision of Section 100 Code of Criminal Procedure are to be read as supplementing the of Section 103 of the Act as both these provisions deal of the same subject. We extract below Sub-sections (4), (5) and 6) thereof.

(4) Here making a search under this Chapter, the officer other person about to make it shall call upon two or more independent and respectable inhabitants of the locity in which the place to be seached is situated or of ay other locality if no such inhabitant of the said loality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of dl things seized in the course of such search and of the paces in which they are respectively found shall be prepaed by such officer or other person and signed by such witnesses'', but no person witnessing a search under this Section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this Section, signed by the said witnesses shall be delivered to such occupant or person, (Emphasis added)

11. We may refer in this context to the search warrant (Ex. 4) and also to the seizure list (Ex. 3), P.W. 5 had authored P.W. 2 by Ex. 4 in terms of Section 105 of the Act to search for "foreign made amuggled fountain pen, wrist watches, camera, contraband goods etc. and if found to seize and take possession thereof and the place to be searched was indicated therein as "residence of Gopi Kishan Taperja (Respondent) situated in the first floor of the bouse owned by Khagen Das in bazar area of North Lakhimpur town", Ex. 3, caption inventory of goods seized" among other particulars state place data of seizure which was mentioned at" residential premises of Gopal Kishan Taperia, North Lakhimpur, on 8.7.70". On this document signature of the Respondent Ex. 3(3) and 3(4) also of P.W. 3 Manik Chand Exts. 3(5) and 3(6) have been proved in this case. The evidence of P.W. 3 is that the residence of Respondent was adjacent to his residence. On date of occurrence when be was in his shop which was at distance of about half a furlong from Respondent''s house he called from there by the custom officials. On arrival at Respondent''s house he was asked to put his signature on a document which be did. He proved his signatures Exs. 3(5) and 3(6) on the seizure list. He categorically stated that be was not present at the time of search. His signature was later on obtained on a document His further evidence is that in front Respondent''s house there, was the residence of one V.K. Barua and near him was the residence of one Sonamani Bora who were both well known contractors. One Prof. Tarun Boro also resided in that neighbourhood in front of his house.

12. Although Mr. T.N. Phukan, learned Counsel for the Respondent strenuously contended that for making the search it was necessary for the customs officials to obtain the permission of the owner of the house, namely, Khagen Das, we are not convinced that such a requirement is contemplated in law. He has drawn our attention in this connection to a decision reported in Pagla Baba and Another Vs. The State, which, in the (sic) opinion, has no application to the facts of the instant cases (sic). The contention which was upheld by the Division Bench in that case was that Appellants were entitled to the right of private defence became of unlawful entry into their promise by the police for their arrest and on the basis of an unlawful search warrant for seizure of their property. We do not read anything in Section 100 to suggest that before an entry is made into any premises for the purpose of making search therein the permission of the owner of such premises must be obtained. We find it difficult to read the expressions ""on demand as permitted" occurring in Sub-section (1) and (b) respectively of Section 100 to mean the requirement canvassed by Mr. Phuken. However, in our opinion, on the facts of the case there is much room to hold that as a result of non-compliance with the provisions of Section 93(2) and Sub-section (4) and (5) of Section 100 the evidence of seizure of the contraband goods has been tendered doubtful. According to Section 93(2) it was incumbent on P.Ws. 2 and 5 to be satisfied that the place where the search was conducted way actually the "residence of the Respondent. In this case the only evidence of prosecution witnesses is that the search was conducted in the house which was owned by one Khagen Das, What was specified in Ex. 4 was not the house owned by Khagen Das but the "residence" of Respondent situated in the first floor of the bouse owned by said Khngen Das. From u reading of subjections (4), (5) and (6) of Section 100 it also appears clear to us that when a search is made in any premises and any goods are seized in course of such search there shall be present at such search witnesses who shall sign the list of the things seized in course of such search. In the instant case P.W. 3 is said to be the seizure list witness but his own evidence is that he was not present at the time of search. Ex.3 (seizure list) bean his signature as well as the signature of Respondent and P.W. 2 who made the search and the seizure. Indeed, these sab-sections do not require that the occupant of the place where from anything is seized should also sign the seizure list. Although Ex. 3 shows, as alluded, the place of search as ""residential premises" of the Respondent his signature thereon cannot, according to us, be considered therefore as an admission of this fact as contended by Mr. Choudhury. Acceptance of his submission would be violative of Article 20(3) of the Constitution apart from the fact that the requirement of sub Section (5) of Section 100 is not fulfilled by the said recital and signature According to us, Sub-section (sic) does not require the "occupant" to sign the seizure list because he may be the accused in any particular case which will such cases attract Article 20(3). As held by this Court in Bhanda Garh Vs. State of Assam, it is the seizure list witness who must prove the seizure to fulfil the mandate of Section 100(5). In the instant case P.W. 3 did not prove as alluded, the seizure Although P.W. 2 deposed about the seizure be nont being the seizure list witness but the officer

making the seizure and preparing the seizure list by his evidence seizure of the contraband goods from the alleged place (Respondent''s residence) could not be proved. In the instant case we are also inclined to bold that infraction of Sub-section (4) of Section 100 has also to be seriously viewed, Because, the search was conducted in a locality where there wire available independent and respectable inhabitants" at the time of search which according to P.W. 2 commenced at about 6.45 a.m. whereas P.W. 3 was summoned from a shop which was not in that locality.

13. Learned senior Public Prosecutor, Mr, Choudhury placed reliance on the decision reported in State of Maharashtra Vs. P.K. Pathak, , In that case smuggled goods were recovered from a toney at the sea shore and also from the bushes on an is land where they were bidden which had to be ranched by a mechanised vessel which took an hour and a half to reach the place. Their Lordships held that the evidence of custom officers to prove the search and recoveries could not be rejected as "in the circumstances it would neither be practicable nor reasonable to expect any person of the locality to witness the search". The further fact in that case however, was that besides custom officials there was another witness who, however, was not of the locality but was taken to the site to witness the search. Besides. the discovery was made at the instance of the accused themselves.

14. According to us, therefore, the expressions "so far as may be" of Sub-section (2) of Section 105 of the Act have to be .[read only to mean that such of the safeguards enjoined in the relevant provisions of Chapter III of Code of Criminal Procedure. 1973, as are not practicable to be afforded in the facts and circumstances of any particular case, may be dispensed with. Indeed, whether the evidence of search and seizure was rendered doubtful as a result of breach of any particular safeguard would, in our opinion, be the moot question to be considered in such cases. It will apparently be u case of weight to be attached to the evidence of possession adduced by the prosecution. If it was found that in the course of search seizure was made (of articles of which possession is sought to be attributed to the accsued) in breach of any safeguard which could in the facts and circumstances, of the case be reasonably afforded to the accused, his possession of the articles would be rendered doubtful. Burden, in our opinion, will lie on the prosecution to prove why the minimum safeguards enjoined by the relevant provisions could not be afforded to the accused in a particular case. Prosecution''s failure to discharge the burden shall render doubtful the evidence of seizure made to attribute possession of the articles in question to the accused, This petition anergics obviously from the constitutional imperative of Article 20(3) and Article 21 to ensure a fair trial. Indeed, in Bhanda Garh (supra) this Court held that for infraction of procedural safeguards accused was entitled to benefit of doubt. In the context of Sub-sections (4), (5) and (6) it would therefore be necessary for the prosecution to prove the circumstance why presence at search of independent and respectable inhabitants of the locality could not be obtained but in no case, in our opinion, seizure in such search of anything can be proved unless a written record thereof as and m the manner

contemplated under Sub-section, (5) is kept. That a seizure must therefore, be made in presence of witnesses (who in a particular case may not belong to the "locality, ") is also the positive and irreducible mandate of these provisions which, in our opinion, cannot be dispensed with under any circumstance.

15. Mr. Choudhury has drawn our attention to another decision of their Lordships reported in State of Maharashtra Vs. Natwarlal Damodardas Soni, . We do not read anything in that decision to suggest that the view taken by us is not correct- What was urged in that case was that the search which resulted in seizure of gold being made, not by the custom authorities but by the police in terms of Section 165 Code of Criminal Procedure the police ought to have "reason to believe" that a cognizable offence in respect there of had been committed before making the search. The contention was negatived by quoting with approval a passage from an earlier decision of the court rendered in Radhakishan Vs. State of U.P., a part of which wo amy profitably extract below:

It may be that whore provisions of Sections 103 and 165 Code of Criminal Procedure. are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues.

This Court also in Uma Sankar Upadhaya (1983) 1 GLR 30 in dealing with the decision of their Lordship in Bai Radha''s case (AIR 1970 SC) and K.L. Subbayya Vs. State of Karnataka, held that the underlying concept of those cases postulated the constitutional requirement of reasonable procedure" which enjoined a positive duty on the court to carefully and judicially screen the evidence of search and seizure in the light of the relevant legal provision in a case where on the evidence of articles seized the accused was liable to be convicted for any offence.

16. For the foregoing reasons we have no manner of doubt that in the instant case the prosecution fulled to establish the essential ingredient of "possession" to bring home the guilt to the Respondent u/s 135(1)(b) of the Act. Prosecution failed to prove that the premises serched was the residence of the Respondent. Evidence of seizure of the contraband goods in course of the. search made by P.W. 2 is rendered doubtful, according to us, for non-compliance with the provisions of Section 93(2) and Sub-sections (4), (5) and (6) of Section 100 Code of Criminal Procedure. Prosecution has failed to prove the circumstance due to which presence of any "independent and respectable residents of the locality" could not be procured. Indeed, it also failed to prove that the seizure was made in presence of any witness as P.W. 3 deposed that be was not present at the time of seizure.

17. In the result we find ourselves in complete agreement with the opinion of the trial court that the Respondent is entitled to the benefit of doubt and accordingly we hold that this appeal is meritless and it must, therefore, fail.