(1973) 01 KL CK 0039

High Court Of Kerala

Case No: Criminal R.P. No. 426 of 1972

V.P. Sayed Mohammed		APPELLANT
	Vs	
Assistant Collector of Central Excise		RESPONDENT

Date of Decision: Jan. 5, 1973

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 342

Citation: (1973) KLJ 253

Hon'ble Judges: K. Bhaskaran, J

Bench: Division Bench

Advocate: K.K. Hamsa and K. Sikhivahanan, for the Appellant; George Vadakkel and K. Prabhakaran, Central Government Pleaders, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. Bhaskaran, J.

This criminal revision is by the accused who has been convicted under S. 135 (b) of the Customs Act and S. 85 (ii) of the Gold Control Act, and sentenced to pay a fine of Rs. 500/- under S. 135 (b) of the Customs Act, in default to undergo simple imprisonment for six months, no separate sentence having been awarded for the offence under the Gold Control Act. Various grounds have been taken in the criminal revision petition challenging the validity of the orders that have been passed by the courts below. The main argument by Sri. V.K. Hamza, the learned counsel for the revision petitioner, however, is that inasmuch as the prosecution has not succeeded in proving that the article seized is gold, the conviction and sentence cannot sustain, As a decision on this point would be sufficient to dispose of this revision petition, it may not be necessary for me to go into the other grounds raised in the petition.

2. The facts of the case are rather simple. In the early hours of 9 81969, the accused alighted from the Kerala Express at Trichur Railway Station. The Inspector of Customs suspected him to carry contraband goods in a steel trunk, and on inspection found it to contain 28 gold bars of foreign origin, each weighing 10 tolas, and currency notes worth Rs. 1,380/-. The gold bars were seized, and later the Collector of Customs and Central Excise passed an order of adjudication under which they were confiscated. He has also sanctioned the prosecution of the accused, Exts. P-4 and P-5 respectively being orders sanctioning the prosecution under the Customs Act and under the Gold Control Act. The is the case as stated by the prosecution.

3. Before the trial court the accused pleaded not guilty. On the side of the prosecution pws.1 to 3 were examined and Exts. P-1 to P-3 were marked (Exts. P-4 and P-5 were marked after remand of the case by the appellate court).

4. The prosecution proceeds on the basis that the article seized from the accused was gold, and that it was gold which was liable to be confiscated under S. 111 of the Customs Act. As a general rule, the burden of proving that what has been seized is smuggled gold will be on the prosecution. But the contention of the learned Central Government Pleader is that because of the presumption under S. 123 (1) of the Customs Act, there is a deviation from the normal rule, and no burden is cast on the prosecution to prove the nature of the goods seized if the seizure was claimed to have been made under the reasonable belief that they were smuggled goods. S. 123 reads as follows:

123. (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

On a proper analysis it can be found that the following conditions are to be satisfied for the presumption under S. 123(1) to arise: (1) there should be a seizure under the provisions of the Customs Act; (2) the seizure must have been from the possession of the person proceeded against; (3) the seizure must have been in the reasonable belief that the goods seized are smuggled goods; and (4) the seizure must be with respect to the goods to which S. 123 applies, i.e., any of the goods like gold, diamonds, watches, etc., which are enumerated in sub-s. (2) of S. 123. The contention of the learned counsel for the revision petitioner is that if any one of these conditions is not satisfied, the presumption under S. 123 will not arise. In this case the seizure was from the accused, and was also purported to be under the provisions of the Customs Act. It was also claimed by the prosecution that it was in

the reasonable belief that the goods ware smuggled goods that the seizure was effected by the Inspector of Central Excise. Then, the only other condition that remains to be satisfied for the presumption to arise under S. 123(1) is that the goods seized are those enumerated in S. 123(2). The contention of the learned Central Government Pleader is that, if the seizure was made in the reasonable belief that what was seized was smuggled gold, the prosecution had no duty to prove that what was seized was gold.

5. The evidence available in this case with respect to the nature of the article seized consists of Ext. P-2 (a statement stated to have been given by the accused) and the evidence of pw. 3 (a goldsmith who is stated to have tested the article immediately after the seizure). Reliance is also placed by the prosecution on the statement made by the accused under S. 342 of the Code of Criminal Procedure. As for Ext. P-2, it was not proved as required under the provisions of the Evidence Act. As a matter of fact, this statement alleged to have been given by the accused was not at all put to him when he was examined under S. 342 Crl. PC. It is stated to have been recorded by the Assistant Superintendent of Central Excise who was not examined in court. The net result is that neither the person who recorded the statement has been examined, nor has the statement been put to the person who is alleged to have given it. Different consideration might have arisen if the statement was put to the accused, and he had acknowledged the signature therein as his and admitted the contents to be true even if the person who recorded it has not been examined is court. Anyway, neither of these things has happened in this case and, therefore, Ext. P-2 cannot be pressed into service for proving the prosecution case. Moreover, Ext. P-2 cannot be construed to be anything like an expert opinion of an analyst which is admissible in evidence under S. 510 Crl. PC.

6. Now we pass on to the evidence of pw. 3, the goldsmith. It is in evidence that this goldsmith resides about one mile away from, the Trichur Railway Station. It is also admitted by pw. 3 himself that there are other goldsmiths residing nearer to the Railway Station. There is a suggestion in cross-examination by the accused that this particular goldsmith is depending on the goodwill of the Excise authorities for the purpose of obtaining the renewal of the certificate under the Gold Control Act. pw. 3 does not claim to have any training or qualification in the art of testing gold. He did not conduct either the furnace test or the specific gravity test. All that he did was, according to him, to have it tested on the touch-stone, and that was how he came to the conclusion that what was seized was gold of 24 carat. pw. 3 was cross-examined by the accused with respect to his competency to testify the nature of the goods seized. He has, in the witness box, miserably failed to give the impression that he was a competent witness to certify that what was seized from the accused was gold. In the absence of any training or qualification to the credit of Pw.3, it would be unsafe to rely on his evidence and conclude that what was seized from the accused was gold. It may also be pertinent to note that for reasons best known to the prosecution the alleged gold bars seized from the accused were not produced in

court. When this fact also is taken into account, the evidence of pw. 3 becomes absolutely worthless, because he had no occasion for identifying the alleged gold bars with respect to which he was giving evidence in court. The prosecution did not choose to send the article for analysis. If a competent analyst had conducted furnace test or such dependable test, noted the data, and given evidence with reference to the certificate issued by him, that would have set at rest the doubt about the nature and quality of the goods seized, purported to be gold. In a case like this it was the elementary duty of the prosecution to produce the material object in court and adduce the best possible evidence to prove the nature and quality thereof, as it is the basic factor which goes to the very root of the case. However, no serious attention seems to have been paid in this direction by the prosecution.

7. The only other material on which the prosecution seeks to rely is the statement given by the accused under S. 342 Crl. P.C. I am afraid, even here the prosecution is not on sure ground. It would be a sad position for the prosecution if it disowns its primary duty to prove its case and seeks to rely on the statement given by the accused under S. 342 of the Code. Even assuming that it will have some value in case of admission, the prosecution cannot seek to split that statement into various parts and rely on what it considers to be advantageous to establish its case. This is what the prosecution has sought to do in this case. The learned Sessions Judge who beard and disposed of the appeal has placed reliance on the following sentence in the statement given by the accused under S. 342 Crl. P.C.:

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This is treated as an admission on the part of the accused that the article seized was gold. In order to give a complete picture of what the accused stated, it would be better to note in what context and in answer to which question this particular statement was given. The question was like this:-

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To the next question the answer given by the accused was: To the next question the answer given by the accused was:

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If these questions and answers are read and considered together, no inference on the basis of an alleged admission could have been drawn by the courts below, The learned District Magistrate and the Sessions judge ought to have borne is mind that a statement given by the accused under S. 342 Crl. PC. could not be split into various parts and the favourable parts made use of as proof of the guilt of the accused on the basis of an alleged admission. The Supreme Court had occasion in The State of Gujarat and Another Vs. Acharya D. Pandey and Others, etc., , to consider the scope and applicability of the statement under S. 342 Crl. PC. in arriving at a conclusion in

a criminal proceeding. In Para. 5 of the said judgment, Hegde J. has observed as follows:

We are asked to infer the guilt of the accused No. 1 on the basis of the statement made by him under S. 342, Cr. PC. We cannot split that statement into various parts and accept a portion and reject the rest. We have to either accept that statement as a whole or not rely on it at all. In his statement the accused pleaded that he was not guilty and if his statement is taken as a whole, it does not show that he was guilty of any offence.

In the light of this decision of the Supreme Court there is absolutely no difficulty in holding that the courts below have fallen in error in relying for conviction on a portion of the statement given by the accused under S. 342 Crl. PC. as an admission, discarding the rest of it. From the aforesaid discussion we find that the prosecution has not succeeded in establishing that what was seized was gold.

8. Now the next question is whether, as is contended by the learned Central Government Pleader, even if the prosecution did not succeed in proving the nature of the goods seized, by the application of the provisions of S. 123 (1) of the Customs Act, it could have been held that what was seized was gold, unless the accused proved it to be something other than gold, if the prosecution claimed that the seizure was in the reasonable belief that it was smuggled gold It is submitted by the learned counsel for the revision petitioner that the question whether the prosecution has a duty to prove that what his been seized is gold in a case as in the present one, where the accused is prosecuted under S. 135 (b) of the Customs Act, following seizure of goods from the accused by the Customs Officer in the reasonable belief that what has been seized is gold, has not so fair arisen for consideration by the Supreme Court, or any of the High Courts. Though this question does not appear to have been directly posed for consideration, some of the decisions of the Supreme Court, I am inclined to hold, give an indication that it is only where the prosecution proves that the goods seized are goods enumerated in sub-section (2) of S. 123 that the presumption under S. 123(1) can arise. In Pukhraj Vs. D.R. Kohli, Gajendragadkar J., referring to S. 178A of the Sea Customs Act, which corresponds to S. 123 (1) of the Customs Act, has observed as follows:
S. 178A of the Sea Customs Act places the burden of proving that the goods are not smuggled goods; on the person from whose possession the said goods are seized, where it appears that the goods Were seized under the provisions of the Sea Customs Act in the reasonable belief that they are smuggled goods.

The emphasis here with respect to burden of proof is on smuggled goods, not on goods. The prosecution, in terms of S. 123, has to prove that the goods seized are something referable to sub-section (2) of that section. Then, and then alone, the burden shifts to the accused. If the prosecution fails to prove that what has been seized in the reasonable belief to be smuggled gold, is really gold, no burden is cast

on the accused to prove that what has been seized from him is not gold or smuggled gold. In Hukma Vs. State of Rajasthan, the Supreme Court has held as follows:

While S. 178A has the result of placing the burden of proof that the gold was not smuggled on the accused, it is of no assistance to the prosecution to prove that the accused was carrying the gold knowingly to evade the prohibition which was for the time being in force with respect to the import of gold into India.

The above observation of the Supreme Court, no doubt, was in the context of mens rea, but even then there is an indication that the burden of proof on the accused was confined to establishing that the gold was not smuggled when it is proved or admitted that what has been seized was gold. In Kewal Krishan Vs. State of Punjab, the position has been made further clear. The Supreme Court observed

When the goods are seized by the Customs Officer in the reasonable belief that they are smuggled goods then under S. 178-A of the Sea Customs Act the onus of proving that they are not smuggled goods, that is, not of foreign origin on which duty is not paid, is on the person from whose possession goods are seized.

So the nature of the burden cast on the accused admits of no doubt. He has to prove that what has been seized from him is not smuggled gold only after the prosecution discharges its burden of proving that it is gold. In other words, if the goods are established to be any of the goods enumerated in sub-section (2) of S. 123, then the accused found to be in possession of, or carrying with him, such goods, in order to succeed in his defence, has to establish that the goods are not either "goods of foreign origin or, in the alternative, even if they are of foreign origin, it is not a case where the goods have been imported or carried without payment of duty in accordance with the law for the time being in force. In this view, in the present case, the burden of proof on the part of the accused can arise only if the prosecution proves that what has been seized is gold. We have already found that the prosecution has not succeeded in proving that what has been seized by the Inspector of Central Excise is gold. Suspicion, however grave, is no substitution for legal proof.

In the light of the above finding, consideration of other grounds urged in the memorandum of revision petition may not arise in this case. The accused is entitled to an acquittal on the sole ground that the prosecution did not establish that what was seized from the accused was gold.

In the result, the criminal revision petition is allowed, the judgments of the courts below are set aside and the accused is acquitted. Fine, if paid, will be refunded to him.

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