

**(2002) 04 MAD CK 0201**

**Madras High Court**

**Case No:** Civil Appeal No"s. 454, 551 to 554 of 1993

Asstt. Collector of C. Ex.

APPELLANT

Vs

M. Ganesan

RESPONDENT

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**Date of Decision:** April 1, 2002

**Acts Referred:**

- Customs Act, 1962 - Section 108, 2(34)
- Evidence Act, 1872 - Section 25, 26
- Gold (Control) Act, 1968 - Section 111, 135, 71, 85, 85(1)

**Citation:** (2002) 81 ECC 247 : (2003) 153 ELT 507

**Hon'ble Judges:** Malai Subramanian, J

**Bench:** Single Bench

**Advocate:** T.P. Sekar, Spl. P.P. Customs, for the Appellant; M. Balasubramanian, G. Alagar and R. Loganathan, for the Respondent

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### **Judgement**

Malai Subramanian, J.

The accused Nos. 1 and 2 in C.C. No. 81 of 1989 on the file of the Additional Chief Judicial Magistrate were convicted for an offence u/s 111(d) read with 135(i)(b)(i) of the Customs Act and sentenced each to undergo RI for a period of 2 years and to pay a fine of Rs. 3,000/-, in default, to suffer RI for 3 months. They were also convicted under the Gold Control Act, 1968 for the offence u/s 71 read with 85(1)(ii)(a) of the Act and were sentenced to undergo RI for one year and to pay a fine of Rs. 2,000/- each, in default, to suffer RI for 3 months. A3 was convicted for an offence u/s 11 r/w. 13(i) of the Foreign Exchange Regulation Act, 1973 and was sentenced to undergo RI for 2 years and pay a fine of Rs. 2,000/-, in default, to suffer RI for 3 months. He was also convicted u/s 111(d) of the Customs Act r/w. 13(I) and 67 of the Foreign Exchange Regulation Act and also u/s 3(2) of the Exports and Imports Act r/w. 135(I)(b)(I) of the Customs Act and was sentenced to undergo RI for 2 years and to pay a fine of Rs. 2/000/-, in default, to suffer RI for 3 months. He was also convicted for an offence u/s 71 r/w. 85(1)(ii)(a) of the Gold Control Act and was

sentenced to undergo RI for one year and to pay a fine of Rs. 2,000/-, in default, to suffer RI for 3 months. The accused Nos, 4 to 7 were convicted for an offence u/s 111(d) r/w. 135(b)(I) of the Customs Act and were sentenced to undergo RI for one year and to pay a fine of Rs. 2,000/- each, in default, to suffer RI for 3 months. All the accused were ordered to suffer the imprisonment concurrently.

2. As against the Judgment of conviction and sentence the accused went on appeal before the Principal Sessions Judge, Madurai, who heard their appeals in C.A. Nos. 91, 92, 97, 98 and 100 of 1992 and allowed their appeals, thereby set aside the conviction and sentence. Hence the Assistant Collector of Central Excise has preferred these appeals.

3. C.A. No. 454 of 1993 was filed against the acquittal of Accused No. 7. C.A. No. 551 of 1993 was filed against the acquittal of Accused Nos. 5 and 6. C.A. No. 552 of 1993 was filed against the acquittal of Accused Nos. 1 and 2. C.A. No. 553 of 1993 was filed against the acquittal of Accused No. 4. C.A. No. 554 of 1993 was filed against the acquittal of Accused No. 3. Since all these appeals relate to the same calendar case, the following common Judgment is passed and the respondents are described as accused only with reference to their numbers as per the Trial Court Judgment.

4. One Susai from Srilanka exported 90 gold bars to India and the same was brought to Thoothukudi and on 21-10-1989 in the wee hours, third accused received the gold bars along with one Murugesan and both of them took the same to Tirunelveli by bus. Thereafter, they boarded Nellai Express for the purpose of taking the gold bars to Chennai. They associated themselves with other accused and thereafter there was an understanding between them. Murugesan had to take the gold bars to Chennai and after handing over 45 gold bars to the persons who come to meet him at Chennai. Accused No. 3 should get the value and inform A1 and A2. It was also further agreed that accused No. 3 should not be sent in that train. Thereafter, the first accused engaged Taxi TCP-8383 and accompanied by accused Nos. 2, 3 and 7 went to Madurai Railway Station at about 9.20 p.m. on that day. When the train reached Madurai, they spotted accused No. 3 took him down from the train and the accused Nos. 1, 2, 3 and 7 along with one Murugesan went to Barani Hotel, Tirunelveli at about 12.25 midnight. Thereafter, the first accused booked room No. 208 in the name of one Pandian and they stayed there. Out of 90 gold bars they were keeping 80 gold bars at that time. It was so agreed that the first and second accused should have 30 gold bars and 50 gold bars should be placed with the custody of accused No. 3. Thereafter, they have started in the same car to Pudukottai where accused No. 1 and Murugesan were left. Accused Nos. 1, 2 and 7 returned to Tirunelveli. Third accused sent Murugesan to Thoothukudi and concealed 50 gold bars under the earth at Pudukottai.

5. On information PW.1, the Superintendent of Police (Customs), PW.2, the Inspector and party went to Bharani Hotel at about 5.45 a.m. on 22-10-1989. When they checked room No. 208, they found accused Nos. 1 and 2 there and they also handed

over 30 gold bars. It was kept wrapped in a towel under the bed. They were seized under Ex. P1 mahazar. Thereafter, they have also seized a TC-8383 Taxi, which was found stationed near Blue Star Hotel which is opposite to Bharani Hotel. The seizure Mahazar is Ex. P2. Trip Sheet Ex. P3 was also seized from the Taxi. Ex. P4 Diesel Bill for filling Diesel at Thirumangalam was also seized. Thereafter, accused Nos. 1 and 2 were taken to the Customs Office, Thoothukudi, where they were examined. Search was made in the house of accused No. 3. The statement given by accused No. 1 is Ex. P9. Ex. P10 statement was recorded from A2.

6. Thereafter, on information PWs. 1 and 2 went to Pudukottai, spotted one Palmyra tree, whereby they dug out a place for 2 feet and found 50 gold bars in MO.3 cloth bag with adhesive tapes MO.4 series and another cloths MO.5 under cover of Ex. P8 mahazar. They found Johnson Mathew, London seal in all the 50 gold bars. Thereafter, the contraband was weighted and quality was tested. Neither Susai nor Murugesan could be arrested. On the involvement of other accused, they were also arrested. Statements were recorded from them after obtaining sanction as well as authorisation to prosecute. All the accused were prosecuted for various offences under all the three Acts.

7. The learned Additional Chief Judicial Magistrate convicted all the accused as aforesaid on the evidence of PWs. 1 to 5. But the learned Principal Sessions Judge, Madurai, chose to acquit all the accused on various grounds. Initially he found that the sanction order was not properly given and the officer who gave the sanction order was not examined. He also rejected authorisation Ex. P38 for want of oral evidence to prove the same. According to him, no power was vested with the Collector of Central Excise and Customs to issue the notification Ex. P41. Since PW. 1 gave evidence that Ex. P41 notification was not issued by the Collector of District, the appellate Judge found that neither PW. 1 nor PW. 2 had any power to investigate and record statements from the accused. I am unable to agree with the learned Sessions Judge that Ex. P4 has no legal sanctity, since it was not issued by the Collector of Trichy. Ex. P41 has been issued by the Collector of Central Excise, Madurai, who seems to be in charge of Thoothukudi Customs. According to Section 2, Sub-section 34 of the Customs Act "proper officer" in relation to any functions to be performed under this Act means the officer of customs who is assigned those functions by the Board or the Collector of Customs. The Collector of Customs has given authorisation to Superintendent of Central Excise and Inspector of Central Excise also. Therefore, there is no violation of Section 2 Sub-section 34 of the Customs Act.

8. The learned Sessions Judge also could not find corroboration of evidence of PWs. 1 and 2 with PWs. 4 and 5, and therefore he disbelieved PWs. 1 and 2. PW. 4 is a taxi driver who turned hostile. PWs. 5 is the Receptionist, Bharani Hotel, Triunelveli, who also turned hostile. Therefore, according to the learned Session Judge the evidence of PWs. 1 and 2 was not corroborated by PWs. 4 and 5. Insofar as PW. 4,

the taxi driver is concerned, the Trip Sheet was recovered and the previous night, he also fueled the car at Thirumangalam, which is proved by Ex. P.4. This shows that he would have gone to Madurai previous night. It is the case of the prosecution that the PW. 4 took some of the accused along with Murugesan to Madurai and then after leaving Murugesan and some other accused, returned back to Tirunelveli. This aspect has not been considered by the learned Sessions Judge correctly because PW. 4 turned hostile. The fact that some of the accused went in a taxi driven by PW. 4 cannot be doubted. Even insofar as PW. 5 is concerned, the learned Sessions Judge records that PW. 5 is the person whose evidence discloses that room No. 208 was reserved by one Mr. Pandian and in the absence of examination of that Pandian, the prosecution cannot be taken to have proved that accused Nos. 1 and 2 stayed in the same room on the night of 21-10-1989. The case of the prosecution is that there was no such Pandian at all and the room was booked in the name of a fictitious person and accused Nos. 1 and 2 being Police Constables, took care not to book the room in their names. Be it as it may, the fact remains that PWs. 1 and 2 went to the Bharani Hotel at about 5.45 a.m. and they recovered 30 gold bars. It is the evidence of PWs. 1 and 2 and the moment they entered the room, accused Nos. 1 and 2 were seen perturbed and on demand accused No. 1 took the gold bars from underneath the bed, and the gold bars were wrapped in a towel and then handed them over to PWs. 1 and 2. Evidence of PW. 1 was disbelieved by the learned Sessions Judge purely because in the cross examination PW.2 was unable to answer to certain questions regarding the exact location of the Hotel, the side which the hotel was facing and how many floors were there in the hotel and that are the buildings nearby the hotel. After all, the officer has gone to the hotel to recover the gold bars and immediately after recovery, he goes to the Blue Star Hotel and also recovers the taxi. Under such circumstances and that too on the wee hours of the day, he could not have noticed all the topographical features of the area correctly. Because of his failure to answer such questions, his evidence has been disbelieved by the learned Sessions Judge which according to me is not correct. PW. 2, the Inspector of Customs has accompanied PW. 1 and also attested the Mahazar. Ex. P1 and Ex. P2 are the mahazars for recovery of gold bars and the taxi. PW.2 Was not cross examined as to the location of the hotel and other features. In view of the above evidence of PWs. 1 and 2, the prosecution case, that the accused Nos. 1 and 2 were found in possession of 30 gold bars stand proved. No explanation was offered either by accused No. 1 or accused No. 2 as to how they came into possession of those gold bars. Those gold bars were admittedly of foreign origin.

9. Besides the evidences of PWs. 1 and 2, there are the statements of accused Nos. 1 and 2 that were marked as Exs. P9 and P10 where there was a complete narration of the events as to how they came to the possession of these gold bars unauthorisedly without any licence.

10. Insofar as the confession made before the Customs Officers is concerned, it does not attract the mischiefs of Sections 25 and 26 of the Indian Evidence Act.

Customs Officers are not Police Officers and no police report is filed in this case and only private complaints are lodged. The statement by the accused was recorded u/s 108 of the Customs Act. The term "any person" found u/s 108 is analogous to the same term found in Section 161 of the Criminal Procedure Code and any person includes accused also. It is well settled that statements u/s 108 of the Customs Act are admissible in evidence as held by the Apex Court in [Romesh Chandra Mehta Vs. State of West Bengal,](#). The power u/s 108 is intended to be exercised by the Customs Officers. Section 108 Clause 3 enjoins on the person summoned by the officer to state the truth. The Supreme Court also in the case of Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. and Ors. reported in 2000 (120) E.B.T 280 (S.C.) : 2000 SCC (Cri) 1275 held as follows:-

"The ban contained in Section 25 of the Evidence Act is an absolute ban. But there is no ban in regard to the confession made to any person other than a Police Officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person u/s 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless such a statement should be scrutinised by the Court in the same manner as confession made by the accused person to any non-police personnel."

In this case when PWs. 1 and 2 recorded the confession statements of accused Nos. 1 and 2, they cannot be said to be under police custody. Therefore, Exs. P9 and P10 well admissible in evidence. Since these statements of both the accused corroborates the evidence of PWs. 1 and 2, there is no difficulty in holding that the evidence against accused Nos. 1 and 2 stand proved.

11. Under such circumstances, I hold accused Nos. 1 and 2 guilty of Section 111(d) r/w. 135(1)(b)(I) of the Customs Act and Section 71 r/w. 85(i)(ii)(a) of the Gold Control Act.

12. Coming to the offence as against accused No. 3 except the confession statements said to have been recorded from accused No. 3 that are marked as Exs. P21 and 22, there is absolutely no other evidence barring the statements of the co-accused. No witness speaks about the involvement of the accused No. 3. Though the statements of coaccused as well as the statement of the accused concerned are admissible in evidence, they cannot form sole basis for conviction. Neither PW. 1 nor PW. 2 would speak about the involvement of accused No. 3 directly. PWs. 4 and 5 have already turned hostile. PW. 3, who was Director of Revenue Intelligence and who arrested accused Nos. 4, 5 and 6 also does not speak about the involvement of accused No. 3. The evidence available on record is only the statement of accused No. 3 coupled with the statements of the co-accused. According to the evidence of PWs. 1 and 2, accused No. 3 was apprehended and his statement was recorded only on 25-10-1989. His statement Ex. P.21 reveals that he went to Pudukottai where he found the Palmyra tree, west to Crusher owned by Mani and by the side of the

Palmyra trees, he dug and then concealed 50 gold bars covered in a cloth. But those 50 gold bars were recovered by PWs. 1 and 2 on 23-10-1989 itself. Their evidence reveals that on information they went to the above spot and recovered 50 gold bars underneath the earth near a Palmyra tree in Pudukottai. There is no evidence as to how and on whose information they went to the spot and identified Mani's Crusher and then the Palmyra tree. If the statement from accused No. 3 would have been recorded prior to PWs. 1 and 2 recovering the gold bars, then it could have been a very good piece of evidence connecting accused No. 3 with recovery. Neither accused No. 1 nor accused No. 2 who were arrested on 23-10-89 spoke anything about the whereabouts of those 50 gold bars. Thus the recovery of those 50 gold bars is shrouded with full suspicious. Therefore, there is absolutely no evidence to link accused No. 3 with the offence. Even with regard to accused Nos. 4 to 7, there is no evidence except their own statements and the statements of the co-accused and no recoveries were made from accused Nos. 4 to 7.

13. In view of the above discussion, the order of the learned sessions Judge acquitting accused Nos. 3 to 7 cannot be interfered with.

14. In the result, if so far as accused Nos. 3 to 7 are concerned, the appellate judgment passed by the learned Sessions Judge, Madurai stands confirmed and the appeals C.A. No. 454, 551, 553 and 554 of 1993 against their acquittal stand dismissed. In so far as the accused Nos. 1 and 2 are concerned C.A. No. 552 of 1993 is allowed and the appellate Judgment is set aside and the trial Court's conviction and sentence is restored.

15. The trial Court is directed to take steps to arrest accused No. 1 and accused No. 2 to undergo the sentence.