

**(1980) 04 CAL CK 0001**

**Calcutta High Court**

**Case No:** Criminal Appeal No. 204 of 1974

Customs for Prevention (I)

APPELLANT

Vs

Remo Morgani

RESPONDENT

**Date of Decision:** April 11, 1980

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 342, 378(4)
- Customs Act, 1962 - Section 111, 135, 137, 5
- Prevention of Food Adulteration Act, 1954 - Section 20
- Sea Customs Act, 1878 - Section 167(81)

**Citation:** (1983) 12 ELT 790

**Hon'ble Judges:** Sudhindra Mohan Guha, J; N.C. Mukherjee, J

**Bench:** Division Bench

**Advocate:** R.N. Basu and Pijush Kanti Roy, S.M. Sanyal, for the Appellant; P.K. Ghosh and Jugal Ch. Porel, for the Respondent

**Final Decision:** Dismissed

### **Judgement**

N.C. Mukherjee, J.

This appeal was filed after obtaining a special leave to appeal against an order of acquittal passed in case No. 907 of 1968 u/s 135(b) of the Customs Act by Shri D. P. Sarker, Presidency Magistrate, 3rd court, Calcutta, on 13-3-74.

2. The facts of the case may briefly be stated as follows :-

That the accused-respondent who holds an Italian Passport, came to India by Pan American Air Ways on 16-2-68 through Palam Air Port at Delhi. On his arrival at Palam Air Port, the accused-respondent without declaring dutiable or restricted goods carried by him besides having some new clothings and 400 U. S. dollars with him managed to obtain clearance of his baggages from the Customs Officers at Palam Air Port and thereafter came to Calcutta and put on at Carlton Hotel 2,

Chowringhee Place, Calcutta. Thereafter, on receipt of some information. Customs Officers on the strength of a search warrant on 26-2-68 searched the Room No. 15 of the above Hotel which was in occupation of the accused-respondent in presence of witnesses. In course of search large quantity of jewelleries and precious stones, viz., 83 strings of coral beads, 6 pieces of gold rings set with coral, one pair of gold ear tops with coral fittings and one pair of gold cufflinks all of foreign origin were found inside a suitcase and leather brief case belonging to the accused-respondent. Besides a sum of Rs. 2400/- in Indian currency of hundred rupee notes inside the leather brief case and also some incriminatory documents indicating accounts of business transaction were found ; that the accused having failed to produce any valid document such as import license and permit in support of his lawful acquisition and/or legal importation and/or possession of those articles, the Customs Officers on reasonable belief that those articles were smuggled goods liable to confiscation and that the currency notes were the sale proceeds of the smuggled goods seized them under seizure list. After obtaining requisite sanction a petition of complaint was filed in court of the Chief Presidency Magistrate, Calcutta. The Learned Chief Presidency Magistrate sent the case for trial to the 15th court of the Presidency Magistrate who framed a composite charge under both the clauses of Section 135 of Customs Act. The accused moved this Court against the said order of framing charges and obtained a Rule being Criminal Revision No. 842 of 1968. This Court made the Rule absolute and sent back for framing proper charge. On remand, charge u/s 135(a) of the Act was framed. The accused again moved the Court and obtained a Rule being Criminal Revision No. 441 of 1969. This Court set aside the charge u/s 135(a) and directed that the trial should proceed u/s 135(b) of the Act. The case came up for hearing before the 11th Court of the Presidency Magistrate, Calcutta, prosecution witnesses were examined. The accused was examined u/s 342 of the Code. At this stage the Board of Central Excise and Customs by an order dated 22-12-71 in the appeal of the accused on the adjudication proceeding directed that the coral beads be re-exported to Italy and reduced the personal penalty imposed on the accused-respondent at the adjudication proceeding from Rs. 50,000/- to Rs. 10,000/-. That after the order passed by the Board of Central Excise and Customs the accused respondent made an application before the trial court praying for acquittal. The learned Magistrate rejected the application. Thereafter, the accused filed another application stating that the Court at Calcutta had no jurisdiction to try the case, that application also rejected. Against the aforesaid orders, the accused moved this Court for quashing the proceedings and obtained a Rule being Criminal Revision No. 117 of 1972 which was ultimately discharged by this Court. While discharging the Rule this Court observed that the scope of an adjudication proceeding for confiscation and penalty and that of a Criminal proceeding are entirely different. On remand, the trial court held that the Calcutta Court had jurisdiction to try this case. The accused again moved this Court which ultimately upheld the decision of the trial court. There- after, the case came up for hearing before Shri D. P. Sarkar, Presidency Magistrate, 3rd Court, Calcutta.

The prosecution examined as many as 10 witnesses. According to the complainant the evidence was sufficient to convict the accused. But the learned Magistrate by this order dated 13-3-74 acquitted the accused. Being aggrieved by the aforesaid order of acquittal the petitioner obtained special leave which was granted and thereafter the present appeal was filed which was admitted.

3. Mr Surathi Mohan Sanyal, learned Advocate appearing on behalf of the appellant contends that the learned Magistrate was wrong in holding that the facts disclosed in evidence do not make an offence u/s 135(b) of the Customs Act. It is submitted that on the proper reading an assessment of evidence on record, the learned Magistrate was wrong in not holding that all the ingredients of Section 135(b) of Customs Act have been made out in this case. With all emphasis Mr Sanyal urges that the learned Magistrate erred in law in holding that there is defect in framing of the charges inasmuch as the learned Magistrate failed to note that the order framing the charges was upheld by this Court. Mr Sanyal next contends that the learned Magistrate was wrong in holding that the charges u/s 135(b) of the Customs Act was unsustainable as the Board of Excise and Customs passed an order on appeal against the order in adjudication proceedings directing re-exportation of coral inasmuch as the subsequent order of the Board has no relevance to the main ingredients of the section, viz. dealing with goods which the dealer know or has reason to believe are liable to confiscation u/s 111 of the Customs Act. The learned Magistrate according to Mr Sanyal, ought to have held as was held by this Court that the scope of all adjudication proceedings for confiscation and penalty and that of Criminal Proceedings are entirely different. It is next submitted by Mr Sanyal that regard being had to the evidence in this case that the accused had in his possession jewelleries of foreign origin, viz. coral pieces without any permit or licence, the importation of which was prohibited at the material time, the learned Magistrate was wrong in holding that the accused had neither knowledge nor belief u/s 135(b) of the Customs Act.

4. Mr Pradip Kumar Ghosh, learned Advocate appearing on behalf of the accused-respondent, apart from arguing on merits, takes some preliminary points. It is contended in the first place that the appeal is not maintainable as the case having been instituted upon a complaint it was only the actual complainant who had the right of appeal and none else could exercise the right of appeal u/s 417(4) of the Old Code corresponding to Section 378(4) of the New Code. Mr Ghosh submits that according to the scheme of the Criminal Procedure Code, a public servant can file a complaint on his own in discharge of his official duties. When the public servant files a complaint in discharge of his official duty he, as an individual, becomes the complainant for all purposes of the Codes. He does not represent the State or the Union of India or any authority to whom he is subordinate. Customs Act further provides in Section 137 that no court shall take cognizance of any offence except with the previous sanction of the Collector of Customs. The Customs Act is, however, silent as to who should file complaint and does not specify or authorise any

particular official for the purpose of filing complaint. In the present case, Mr Ghosh points out that one Mr A. M. Sinha, an Assistant Collector of Customs, filed the complaint. In the complaint, he described himself in the following terms :

"A. M. Sinha, Assistant Collector of Customs for Prevention Customs House, Calcutta representing the Union of India (I)."

Mr Ghosh contends that nothing prevented Sri Sinha from filing the complaint on his own as an individual public officer in discharge of his official duty. It was not necessary for him to do so in a representative capacity. Mr Ghosh submits that the description "representing Union of India" was misleading factually incorrect and legally not justified as there is no provision either in the Criminal Procedure Code or in the Customs Act for filing complaint in a representative capacity. Only in the case of an offence under certain special statute there are provisions that a particular person or authority should file a complaint and that the said person or authority may delegate this power or appoint an agent for this purpose. In prevention of Food Adulteration Act, 1964, Section 20 contains a provision that a complaint should be filed by the State Government or by the Central Government or by a person to whom this power may be delegated by Central Government. There is no such provision in the Customs Act. Mr Ghosh, in the next place, submits that the Assistant Collector of Customs cannot represent the Union of India as he has not been authorised by the Union of India to do so. The Union of India can be represented by a person if he has been authorised to do so by the President of India. Mr Sanyal, learned Advocate appearing on behalf of the appellant on the other hand, submits that since Mr. Sinha was admitted an officer of the Union of India, he could represent the Union of India even without any authorisation in that behalf. Mr Sanyal relied on Section 5 of the Customs Act. Section 5 of the Customs Act merely provides that subject to such condition of limitations as the Board made himself an officer of Customs may exercise the powers and discharge the duties conferred or imposed on him under this Act. The Act is however, silent so to the filing of a complaint. If there had been a specific provision in the Act to the effect that any officer of the Customs may file a complaint representing the Union of India, then the Assistant Collector of Customs could represent the Union of India by virtue of the said provision. Mr Ghosh contends with much emphasis that it is preposterous to suggest that an officer merely because he is an officer of the Customs Department, can represent the Union of India without any authority in that behalf. Mr Ghosh draws our attention to the petition of complaint itself where the complaint has been signed not in a representative capacity, but as an individual by Sri A. M. Sinha ; in the body of the complaint there is nothing to show that the same was being filed in a representative capacity. In evidence Sri Sinha (P.W.I.) stated as follows -"I am the complainant in this case. I have care- fully gone through the petition of complaint before filing it in court." Mr Ghosh, in this connection further submits that from scheme of the Code it is evident that the Code does not contemplate a complaint being filed by the Union of India through a representative like the Assistant

Collector of Customs nor there is any such provision in the Constitution of India. Though the complaint was filed by Sri A. M. Sinha as has been stated earlier, the SLP and the petition of the appeal have been filed by one Sri Jivan Krishna. In the cause title of the appeal the appellant has been described as the Union of India on the complaint of the Assistant Collector of Customs. Mr Ghosh contends that the said description is wholly misleading, It gives the impression as if the Union of India is the appellant, but the Union of India not being the complainant has no right of appeal u/s 417(3) of the Old Code or or u/s 378(4) of the New Code. The Vakalantnama in the present appeal has been signed by Sri Jivan Krishna. But there is nothing to show that he was authorised to represent the Union of India. Nor did he sign the Vakalatnama in a representative capacity. It is not known why Sri A. M. Sinha who filed the petition of complaint did not file the petition of special leave or the petition of appeal. To support the contention that the case having been instituted upon a complaint it was only the actual complainant who had the right of appeal. Mr Ghosh relies on several decisions, namely, Nanilal Samanta Vs. Rabin Ghosh, AIR 1967 Cal 452 (On the death of Monmatha Nath Haider his heirs and sons Sachindra Nath Haider and Ors. Petitioners v. Niranjan Mondal and Ors. opposite parties) ; Firm Mohammad Sana Ullah and Sons Vs. Firm Hajji Rahim Bux and Sons, Mr Ghosh contends that the Union of India has no right of appeal in the instant case. Only the State Government could have preferred an appeal against the order of acquittal u/s 417(3) of the Old Code. The State Government could have exercised that right of appeal only through the Public Prosecutor ; in cases in which there is a right of appeal in favour of the Central Government u/s 417(3) of the Code corresponding to Section 378(4) of the New Code, the Central Government could have exercised the right of appeal but only through the Public Prosecutor. Mr. Sanyal relies on a decision reported in Municipal Corporation of Delhi Vs. Jagdish Lal and Another, Mr Ghosh submits that the facts of the case referred to above are completely different and the principle laid down in the said case does not apply to the facts of the pre- sent case for two reasons. Firstly, in the case referred to above there was a specific provision in Section 20 of the Prevention of Food Adulteration Act requiring the complaint to be filed by the prescribed authority. In the Supreme Court case, there was a specific authorisation made by the Municipal Corporation in favour of the Municipal Prosecutor and such specific authorisation was proved in the case. But there is no such specific authorisation in the instant case.

5. Mr Ghosh next takes another preliminary objections, namely that special leave having been granted by a learned Single Judge and the appeal having been admitted by a learned Single Judge, the appeal should have been heard by a learned Single Judge and not by a Division Bench. Under the Rules of the High Court, Appellate side, a Single Judge is competent to hear an appeal from an order of acquittal. But, under Rule 9(2) (proviso) a single Judge may send back a particular case to the Division Bench for the disposed of by the Division Bench. It is also provided that a single Judge cannot pass a substantive sentence other than one of

fine or imprisonment in default of payment. As the instant appeal has not been referred to the Division Bench by the learned Single Judge, in the event of an order of acquittal being set aside, there can be only an order of remand or sentence or fine but no sentence of imprisonment. Although the Division Bench has actually heard the matter, the Division Bench should be deemed to be exercising the power of a Single Judge. We are required to consider this point only if we set aside the order of acquittal. But, for the reasons which will be set forth just now we are not going to set aside the order of acquittal.

6. Mr Ghosh, in the next place, contends that the sanction is bad in law as the sanctioning authority did not apply his mind when granting sanction. After hearing the learned Advocate for the parties and on going through the sanction itself, we do not accept the contention raised by Mr Ghosh and find that the sanction has been properly granted.

7. With regard to the merits, Mr Ghosh contends that in this particular case on the facts by the prosecution a charge could have framed u/s 135(a) of the Customs Act and not u/s 135(b) of the Act. This matter came up to this Court and a Division Bench of this Court, in which I was a party, in the case of Remo Morgani Vs. State of West Bengal and Others, was of opinion that in this case the charge should be framed u/s 135(b) of the Customs Act. In coming to such finding we relied on a decision, reported in Sachidananda Benerji, Assistant Collector of Customs Vs. Sitaram Agarwala and Another, which was a case under the Sea Customs Act. Mr Ghosh wants to make a distinction between Section 167 (81) of the Sea Customs Act and Section 135 of the Customs Act, 1962. It is also submitted that the said distinction was noted by their Lordships in paragraph 27 of the report referred to above. We have considered this matter carefully and we are not inclined to take a different view than what was taken by the Division Bench earlier. Mr. Ghosh next contends that even assuming that in the particular case a charge can be framed u/s 135(b) of the Customs Act. Section 135(b) expressly includes mens rea as an ingredient of the offence. But in the instant case having regard to the circumstances proved by the prosecution evidence as also by the statements u/s 342, there is no material to infer guilty knowledge of the accused. It is also contended that in order to prove that an offence u/s 135(b) has been committed it is necessary for the Prosecution to prove that the goods were liable to be confiscated u/s 111 of the Customs Act. The only Clause in Section 111 that can be relevant in this context is Clause (D). But, in order to invoke Clause (D) of Section 111 it is necessary to prove that the goods were prohibited goods. In order to prove prohibition the prosecution has relied on Imports (Control) Order, 1955. Item No. 318 of the Schedule thereof is "Coral prepared" ; but that does not mean that there was an absolute prohibition with regard to "coral prepared". Paragraph 3 of the said order deals with restriction of import. But the said restriction is subject to qualification "save as otherwise provided in this order". paragraph II contains a saving clause and the prohibition under paragraph 3 should be read along with exemption under paragraph II. Under

paragraph II (g) goods otherwise prohibited are exempted from prohibition if the value thereof comes within the admissible limits under Baggage Rules for the time being in force. Thus, the value becomes important. This is admitted by both P.W.S. 2 and 10 who deposed that upon a certain valuation goods otherwise prohibited are eligible for importation. This being the position, it was the duty of the prosecution to prove the valuation of the coral beads. The evidence of PW. 2 as regards the valuation is merely hearsay. The evidence of P.W. 6 is also unreliable. The valuation, therefore, has not been proved satisfactorily. That being so, it has not been proved that the goods were prohibited goods. It is also submitted by Mr Ghosh that in the context of the statement of the accused u/s 342 of the Code, the absence of proof with regard to proper valuation becomes extremely important. It should be remembered that the accused produced a receipt and documents translated by the Indian Embassy which establish the bona fide of the defence. We find much substance in the contention raised by Mr Ghosh to the effect that the valuation has not been proved satisfactorily. That being so, it cannot be said with certainty that the goods were not eligible for importation. After a careful consideration of the arguments advanced by the learned Advocates for the parties, we accept the argument of Mr Ghosh that the appeal not having been filed by complainant and the complainant who filed the complaint having not been authorised by the Union of India to file the complaint, Sri Jivan Krishna, the Customs Officer who has filed the appeal was not competent to file the same. There is nothing to show that Sri Jivan Krishna could represent the Union of India. We, therefore, accept the preliminary objection raised by Mr Ghosh that the appeal is not maintainable. We also accept the arguments of Mr Ghosh on merits. This being the position, we do not find anything to interfere with the order of acquittal.

In the result, the appeal is dismissed.

Sudhindra Mohan Guha, J.

I agree.

Appeal Dismissed.