

(2012) 10 CAL CK 0067

Calcutta High Court

Case No: C.R.A. No. 253 of 2002

Deputy Commissioner of
Customs

APPELLANT

Vs

Mohendra Singh Arora

RESPONDENT

Date of Decision: Oct. 1, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Customs Act, 1962 - Section 108, 123, 135(1)(b), 135(1)(b)(i)
- Evidence Act, 1872 - Section 114

Citation: (2013) 1 CALLT 599 : (2013) 3 CHN 552

Hon'ble Judges: Raghunath Bhattacharya, J

Bench: Single Bench

Advocate: Shampa Sarkar and Mr. Prasenjit Chatterjee, for the Appellant; Amit Bhattacharjee, Subrata Talukdar, Ayan Bhattacharya and Mr. Anjan Datta, for the Respondent

Final Decision: Dismissed

Judgement

Raghunath Bhattacharya, J.

Being aggrieved by and dissatisfied with the order of acquittal passed by Sri K.D. Bhutia, Metropolitan Magistrate, 17th court at Bankshall Court, Calcutta in Complaint Case No. 1248/89 dated 08.01.2002 u/s 135(1)(b)(i) of Customs Act petitioner, Deputy Commissioner of Customs preferred the instant appeal against the order passed by the Trial Court. Shortly put the petitioner's case is that Anoop Swarup, Assistant Collector of Custom Preventive, after obtaining sanction from the concerned authority of custom has filed the case against Mahendra Singh Arora, proprietor of M/s. Premier Straps B-7/14 Radha Bazar Lane, Kolkata-700001 and M/s. Gurunanak Watch Co., A-20, 14 Radha Bazar Lane, Kolkata-700001 for possessing foreign made wrist watch movement illegally.

On the basis of the source information and on the basis of such authorization order Customs Officials conducted a raid in the shop of the accused situated at Radha Bazar Lane on 05.12.1988 and in the said raid the officials had seized 2292 pieces of wrist watch movement of Russian, Swiss and Japanese made worth Rs. 2,33,845/- from the false camber of ceiling and boxes. On demand the accused failed to produce any document to prove his possession of the same. That apart the officials seized Rs. 31,333/- from the almirah. The officials seized the same is belief that the same is to be the sale proceed of the accused smuggled wrist watch movement. It is the further case of the prosecution is that the customs officials are conducted a raid in the house of the accused beateel at 26/C, Adhirpukur Road, 2nd Floor, Kolkata-700019 on 05.12.1988 on the basis of search authorization No. 204/P and recovered 179 pieces of wrist watch movement of Russian made valued at Rs. 15,215/- under the bed. In this case also accused could not produce any valid document in respect of the possession of the same. On the basis of search authorization customs officials searched the locker No. 417 of Dena Bank, Park Circus Branch standing in the joint names of the accused and his wife Satnam Arora in presence of the accused and two witnesses on 06.12.1988. In the said locker the officials found Rs. 1,00,000/- in cash, bank papers and jewelleries. The official believing the said Rs. 1,00,000/- to be the same proceeds of smuggled wrist watch movement seized under the seizure list.

Accused made a statement u/s 108 of Custom Act on 05.12.1988 admitting that the customs officials seized smuggled wrist watch movement which he bought from different broker without any vouchers and bill and Rs. 30,000/- was sale proceed of the smuggled watch movement but he denied having any locker. On 15.12.1988 and 17.01.1989 accused gave a written statement in Hindi and English admitting his guilt. The custom officials got the seized wrist watch movement examined by M/s. Vijoy Watch Industry, Calcutta - 700001. According to expert the seized articles are made of Swiss, Russia and France. Thus the accused found guilty and commission of offence u/s 135(1)(b) of the Customs Act, 1962. Hence the prosecution case.

To counteract the prosecution submission defence as it appears from the trend of the cross-examination of P.W.s is that the seized watches are not of foreign made. The custom officials has obtained the statement of the accused u/s 108 Customs Act and signature of the accused on seizure list and other connected papers by practicing fraud further the accused during his examination at the time of framing charge and that of examination u/s 313 Cr. P.C. has pleaded innocence.

2. On the basis of the submission made by both sides and after perusing the evidence before charge a charge u/s 135(1)(b)(i) of the Customs Act was framed against the accused person to which he pleaded not guilty and claimed to be tried.

3. From the side of the prosecution as many as 13 witnesses were examined. P.W. 1 Ardhendu Bikash Chakraborty was a preventive Officer of Customs and posted at the Collectorate of customs, Strand Road at the relevant time. P.W. 2 Bishnupada

Das was the controller of Export and Import. He was also posted in the office of the Chief Controller of Customs. According to him licence of importation of goods is issued by the Joint Chief Controller and according to him it appears from the office records that no import license was issued in the name of the accused person. The cross-examination before charge has been declined and P.W. 2 was not produced for further cross-examination after charge. P.W. 3 Debabrata Kirtania is the preventive officer and posted at Calcutta Airport. P.W. 4 Gopinath Bandapadhyaya was also a preventive officer of Customs. P.W. 5 Dilip Kumar Saha was working as customs Superintendent attached to same Division on the date of occurrence. He was posted at preventive officer, Customs House at Calcutta. P.W. 6 Aroop Swarup was the Assistant Collector, Central Excise, Bhopal and he was posted at Collector office at the relevant time. P.W. 7 Soumen Chakraborty was posted in the office of the Superintendent Intelligence Section at Customs House, Kolkata at the relevant period. P.W. 8 Gopal Chandra Murmu was senior preventive officer of Calcutta Customs. P.W. 9 Minoti Guha Thakurta preventive officer of Customs House and accompanied in a raiding party at the accused premises. P.W. 10 Pranabendu Sen, was a senior manager of Dena Bank. S.K. Bardhan, employee of the custom was examined as P.W. 11. P.W. 12 Chandan Dasgupta, the bank officer of Dena Bank. He was locker in-charge at the relevant time. The locker of the bank locker No. 417 of the bank searched by the customs officials and Satnam Arora was one of the owners of the locker and she was present at the time of search. According to him there are about one lakh of rupees in the said locker which was seized by the customs officers in presence of P.W. 12, Bank Manager under seizure list. P.W. 13 Gopal Krishna Bijoy have manufacturing business of watches under the name and style M/s. Bejoy Watch Industries having head office at Kolkata. He claimed that he is the only manufacturer of wrist watches in whole of Eastern India. Before going into the details about the evidences let us look into the evidence of the Bank Manager. P.W. 10 happens to be the manager of Dena Bank of Park Circus Branch at the relevant time the locker No. 417 was searched in presence of P.W. 12, one of the owner of locker, Satnam Arora and the custom official. About a one lakh of rupees Indian currency was recovered from the locker and was seized under seizure list and the bank manager signed on it. Just like P.W. 12 P.W. 10 has only stated that there was a locker in the bank bearing No. 417 and Satnam Arora was one of the owner of the bank from the locker was searched by the customs officers in presence of Satnam Arora, Manager of the Bank and the P.W. 12 one lakh of rupees and some jewelleries wee recovered from the locker and P.W. 10, the manager of the Bank signed on the seizure list save and except this neither P.W. 10 nor P.W. 12 have stated anything which help the prosecution case or defence case in any way. So, both the P.W. 10 and P.W. 12 may be categorized as formal witness. P.W. 2 just like P.W. 10 and P.W. 12 has only contended that no import licence was issued in the name of Mahindra Singh Arora up to 05.12.1988 except this he has not stated anything. So, P.W. 2 may be categorized as formal witness just like P.W. 10 and P.W. 12.

4. P.W. 1 was posted as a preventive officer (customs) at the relevant time produced the currency register and from the currency it appears that a sum of Rs. 30,000/- was deposited with the register on the basis of the seizure list dated 05.12.1988. It appears that P.W. 1 has no connection with the instant matter. I have already stated about P.W. 2, P.W. 3 Debabrata Kirtania, P.W. 4 Gopinath Bandapadhyaya, P.W. 5 Dilip Kumar Saha, P.W. 7 Soumen Chakraborty, P.W. 9 Minoti Guha Thakurta and P.W. 11 S.K. Bardhan are the preventive officers and superintendent of customs at the relevant time i.e. in the year 1988 have stated in their evidence (I have not discussed their ocular version separately for the sake of convenience) that on the basis of source information as well as the search authorization they had been to the shop of the accused person and residence and recovered 2292 pieces of wrist watch of foreign origin. They also made search of locker of a nationalized bank standing in the name of Satnam Arora and recovered some currency notes. This was made under the seizure list and it was duly signed by the local witnesses. But it is curious enough to note that prosecution has failed to produce those local witnesses before the Court below in order to prove their signatures. It was argued by the learned Lawyer appearing for the defence that practically there is no existence of the local witnesses. Mr. Amit Bhattacharya appearing in this case on behalf of the defence ably assisted by Learned Counsel Ayan Bhattacharya have categorically stated that the custom officers are so lazy or to be more correct that they had not made any attempt for search of those witnesses though the distance between the customs office and shop of the local witnesses are within a mile. The seizure was made in presence of Manubhan Moora and Pankesh Thakkar both of Radha Bazar Lane and Pankesh Thakkar Pankaj Sinaiya. It was reflected in the judgement of the lower Court that one witness signed in two seizure list in two different manner and he gave two addresses in two seizure list. No cogent explanation was put forward by the custom officials in this regard. Learned Counsel for the customs Ms. Sarkar in her usual fairness have stated that she had no information whether custom officers had made any enquiry or not in this regard. Why the signatures are different and why the particular witnesses signed in one exhibit in both capital and small letter. Other exhibit in capital letter this raised a serious doubt in the mind of the Court regarding the authenticity of seizure.

5. After all, one big question is - what must be the reasons of these excise officials - all public servants supposedly dedicated to their duties-being disbelieved. It is generally expected of public servants that they perform their duties faithfully and sincerely and a presumption u/s 114 of the Evidence Act can be drawn that they perform their duties in the ordinary course of business and perform it obediently and with right earnest. Their trustworthiness is ingrained in the nature of the job they do, in the fair amount of etical standard they are supposed to maintain and it is ordinarily presumed, they conform to truth and eschew falsehood.

6. It is further mentioned that it was quite difficult to disbelieve the statement of the Government officials yet P.W. 4 who conducted the raid in the house of the accused

and identifying the signature of the witnesses in the Court have categorically stated that the signature of the witness Pankesh Thakkar was written as Bomkesh Thakkar. The reason for this is best known to P.W. 4 why he depose in such a casual manner in the Court below and he must bear in mind that his testimony is most vital in this type of case and it damage the prosecution case to a great extent. Prima facie it appears that custom officers have made some paper work and falsely implicated this accused in the instant case.

7. However, in the seizure list accused has put his signature. It is also an admitted fact that accused made a statement u/s 108 of Customs Act and in his statement he stated that search was made in presence of the independent witnesses. But in absence of any witnesses or not non-production of the independent witnesses created a doubt in the mind of the court whether the statement made by the accused u/s 108 was taken voluntarily or under pressure.

8. P.W. 3 Mr. Kirtania has stated that wrist watch movements are of foreign made. He further contended that there is embossment of foreign country in the said writ watch movement but that witness i.e. Mr. Kirtania during the course of his cross-examination has categorically admitted that none of the seized wrist watch movement bears the name of the country which manufactured the same. All the other witnesses who happens to be custom officers and accompanying the raiding party has stated that all the wrist watch movements are made of foreign origin. But in their cross-examination they have not stated the name of the country who manufactures this wrist watch movement. So, al the ocular version of the raiding party i.e. the custom officers created a doubt in the mind of the Court about the authenticity of the seizure. Moreover, as pointed out Mr. Bhattacharya that such seizure and statement u/s 108 were taken in the same day but in each of these documents the time was not mentioned and he raised the question whether all those documents are manufactured or not.

9. Now let us confined my attention the opinion of the expert. It appears that an expert opinion was obtained from M/s. Vijoy Watch Industry, Calcutta-700001. According to the expert the seized wrist watch movements are of Swiss origin but the learned Trial court has failed to find any reason opinion of the expert to that effect. P.W. 13, the expert contended that he received a letter from Mr. Mazumder, Superintendent of customs with a request to give number embossed in wrist watch movement made in Russia, France and Switzerland. On 08.03.1989 he gave his reply to that effect to the custom officers but said letter was not produced before the Court below. Moreover, none of the witnesses have stated that said letter either destroyed or misplaced or lost during the course of transaction. P.W. 13 claimed that he was the sole manufacturer of the wrist watch in Eastern India but his verbal claim was not supported by any cogent document. So, the entire prosecution case depends upon the ocular version not only of the seizing party but also upon the opinion of the expert. Practically no documents were produced in order to

substantiate the ocular version of the witnesses. Though Ms. Sarkar has made a desperate attempt to prove her case beyond all reasonable doubt yet I think that she has miserably failed to fill up the lacuna created by the witnesses adduced on behalf of the prosecution.

10. Learned Counsel for the Customs referred to a decision reported in [Surjeet Singh Chhabra Vs. Union of India and others](#), where it was held that the custom officers are not the police officers hence confession though retracted is an admission and binds upon the petitioner. In this connection I like to mention that same is more or less settled principle of law. Another decision reported in [Union of India Vs. Shyamsunder and others](#), S where it was held that the custom officers taking into consideration the various impelling circumstances appearing in the case, have arrived at the conclusion on a reasonable belief that these goods are smuggled goods. As rightly pointed out by the learned Additional Solicitor General, the respondents from whom these contrabands were seized have not satisfactorily discharged the burden of proof cast upon them as required by Section 123 of the Customs Act that they are not smuggled goods. In this connection in the instant case I like to mention that the evidence adduced on behalf of the State does not prove beyond doubt that the goods were imported because only wrist watch movements having some different numbers which according to the custom officers are made of foreign country. But the expert who attend the Court from Bihar and have not stated clearly that these goods were imported and when it was seized though it was claimed that the two witnesses are present but their signature appearing on seizure list are in my humble opinion appears to be fictitious and witnesses have failed to identify the signature properly, moreover, the seizure witnesses as discussed earlier did not appear before the Court to depose. So, I am afraid this ruling is not applicable in the instant case.

11. From the side of the accused Mr. Bhattacharya (Senior) ably supported by (junior) Bhattacharya cited bundle of decisions not only of Apex Court but also of different High Courts. At first I like to mention the number of the decisions. The reference Nos. [Puran Vs. The State of Punjab \(I\)](#), 1973 CRI. L.J. 1551 (V 79 C. 470), 1985 CRI. L.J.U. 324 and 2003 (161) ELT 1016 (Tri.-Kolkata). Before discussing those judgements elaborately I like to mention that the cash book of sale proceeds of the shop not seized not verified though one lakh were recovered and seized from the locker of Satnam Arora. In addition to this expert has failed to produce a letter from the custom authority from where it may be ascertained that they seek opinion and that he was not expert but opined only from his experience so that can be easily concluded that claim of P.W. 13 as an expert is not proved on doubt and his evidence is not at all trustworthy. And after going through all the decisions cited by the learned Counsel for the accused person I do not like to elaborate this judgement as I have already discussed that expert was not examined. The wrist watch movement bears some marks and it was claimed by the custom officers that those marks are made of foreign country but it was not proved beyond all reasonable

doubt seizure witnesses were not produced though the cash were seized but there is no satisfactory explanation whether these seized cash were sale proceed of the smuggled goods. Moreover, no attempt was made on behalf of the custom officers to produce seizure witness to prove this case beyond all reasonable doubt or to prove that the wrist watch movement falls within the purview of Prohibitory order.

12. In view of aforesaid discussion though Mrs. Sarkar made a desperate attempt to reverse the judgement of the learned Trial Court yet I think that due to the negligence on the part of the custom officers she has failed to discharge her duty properly. But her endeavour is really appreciating.

13. In view of aforesaid discussion this Court has no other alternative but to dismiss the appeal. The order of acquittal passed by the Lower Court is hereby confirmed.

14. Let copy of this judgement along with Lower Court Record be sent down to the Court below at once. Urgent photostat certified copy, if applied for, be handed over to the parties as early as possible.