

**(2011) 01 DEL CK 0452**

**Delhi High Court**

**Case No:** Criminal Revision Petition No. 261 of 2007

Subhash Jain APPELLANT

Vs

State RESPONDENT

**Date of Decision:** Jan. 14, 2011

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Customs Act, 1962 - Section 108, 110, 123, 135(1)
- Evidence Act, 1872 - Section 30
- Gold (Control) Act, 1968 - Section 66

**Citation:** (2011) 2 JCC 921

**Hon'ble Judges:** Mukta Gupta, J

**Bench:** Single Bench

**Advocate:** Surat Singh, for the Appellant; Satsih Aggarwal, for the Respondent

**Final Decision:** Dismissed

### **Judgement**

@JUDGMENTTAG-ORDER

Mukta Gupta, J.

This a revision petition challenging the order of the learned Additional Sessions Judge dated 2nd April, 2007 dismissing the appeal of the Petitioner, thus upholding the conviction of the Petitioner for offence punishable u/s 135(1)(b) of the Customs Act and a sentence of rigorous imprisonment and a fine of Rs. 5,000/- and in default of payment of fine to further undergo simple imprisonment for one month.

2. The case of the Respondent is that on 4th July, 1985, the baggages of two domestic passengers Shri Subhash Jain and Akbal Jain traveling on IC 139, bound for Madras, were examined at Delhi Airport by custom officers in the presence of two independent witnesses. Thereafter the Petitioner and Akbal Jain were brought down and were asked to identify their baggage. The baggage with baggage claim tag No.

038639 was identified by the Petitioner. The same was opened by the keys supplied by the Petitioner. On search, 5 gold bars wrapped in newspaper and thereafter by adhesive tape were recovered. An expert was called, who certified the purity of gold as 23 ct and the weight of the same to be 2413 gms. The Petitioner failed to produce any document to show legal import or possession of gold bars. Hence, they were seized u/s 110 of the Customs Act and Section 66 of the Gold Control Act. The Panchnama, Ex. PW3/A was drawn in this regard which was duly signed by the Petitioner. Thereafter, the Petitioner gave his statement in his own handwriting u/s 108 of the Customs Act vide Ex.P W1/A wherein it was inter-alia stated that he has a shop at Mori Gate where he was selling tractor parts which is closed for the last 10 months and since then he is doing in the sale and purchase of tractor parts by roaming around; since his business was not doing well he was in difficulty; when he met his old friend Sushil Jain who was studying with him in school and college, who has a shop of gold jewellery at Beadon Pura, Karol Bagh; around 8-10 days ago Sushil Jain told him that in case he had money he could fell him some work and told that if the gold of foreign origin was purchased and melted to make it Vitoor and taken to Madras, one can save Rs. 70 to Rs. 80/- per 10 gms. as a result of which per kilogram there is a profit of around Rs. 8000/- and the total expenditure for going to Madras including air fare comes to Rs. 3,000/-. On his saying, he gave Rs. 1,80,000/- to Sushil Jain on the 3rd July, 1985 when Akbal Jain, brother-in-law of Sushil Jain was also there; thereafter he and Sushil Jain went to Chandni Chowk and bought 9 gold biscuits of 10 tolas each with foreign marking; they then went to Karol Bagh and melted the same and were taking it to Madras.

3. After recording the statement of the Petitioner and his co-accused u/s 108 of the Customs Act, the Petitioner along with co-accused was arrested and produced before the learned ACMM on 5th July, 1985. Bail application was filed on behalf of the Petitioner on 6th July, 1985 which was not signed by the Petitioner but by his counsel wherein it was stated that he is a businessman dealing in tractor parts and has been falsely implicated in this case; the alleged recovery has already been effected and no further investigation is to be carried out; the statement has been coerced out of the Petitioner, which stands withdrawn.

4. On filing of the complaint, the learned ACMM on the basis of the statement of the prosecution witnesses and the accused u/s 313 Code of Criminal Procedure convicted the Petitioner as above which conviction was upheld in appeal by the learned Additional Sessions Judge.

5. Learned Counsel for the Petitioner contends that both the learned ACMM and the learned Additional Sessions Judge committed grave illegality in convicting the Petitioner in the absence of substantive evidence, on the basis of statement u/s 108 of the Customs Act. It is argued that the gold recovered from the Petitioner was of Indian origin and hence no offence is made out. In the absence of the foreign marking on the gold which finding of fact has been arrived at by both the Courts

below, the Petitioner cannot be convicted of the above mentioned offences. Reliance is placed on Union of India (UOI) Vs. Bal Mukund and Others, to contend that confession of the accused cannot be the basis of conviction and the same can be used only to lend credence. Reliance on Superintendent of Superintendent of Customs Vs. Bhanabhai Khalbhai Patel and another, is placed to contend that the statement recorded u/s 108 of the Customs Act cannot be used as corroborative piece of evidence to the testimony of the witnesses. Lastly, relying on Directorate of Revenue Intelligence v. Moni and Anr. dated 2nd December, 2009 passed by this Court in Crl. O.P. 216/2007, it is contended that only on the basis of disclosure statement of the accused which has been retracted and in the absence of any other evidence on record, a person cannot be penalised without any independent corroboration.

6. Learned Counsel for the Respondent contends that the prosecution has proved recovery of gold of 23 Ct. purity weighing 2413 gms. The Petitioner did not give any explanation or any legal evidence for lawful possession of the said gold. In every case of recovery of gold, it is not essential that there should be a foreign marking to prove that the gold is of foreign origin. The retraction made by the Petitioner is no retraction in the eyes of law and moreover, mere retraction is not sufficient, the same should be translated into legal evidence. The prosecution has proved by cogent evidence recovery of gold from the Petitioner and there were reasons to believe that the same was of foreign origin and in view of the said evidence as per Section 123 of the Customs Act, the burden of proof shifts to the accused to prove that they are not smuggled goods. The panchnama which talks about the gold being smuggled is only signed by the Petitioner. The statement of the Petitioner recorded u/s 108 of the Customs Act is in his own hand writing and till date there is no allegation that the same was taken from him after beating or using any unlawful means. Reliance is placed on Kanhaiyalal v. Union of India 2008 (1) JCC 23, UOI v. Satrohan 2008 (3) JCC 174 to contend that the conviction can be simply based on the confessional statement recorded u/s 108 of the Customs Act. I have heard learned Counsels for the parties and perused the record. The prosecution has proved recovery of gold weighing 2413 gms. of 23 ct from the baggage of the Petitioner. Thus, there is positive evidence on record to show that the Petitioner was in conscious possession of 2413 gms. of gold. The Petitioner at the time of recovery or even thereafter has not been able to prove on the basis of documents that the gold has been acquired from India and is not smuggled. Though in the present revision petition, it is argued by the learned Counsel for the Petitioner that the gold was of Indian origin but no evidence has been adduced by the defence. As per the evidence produced by the prosecution in the form of statement of the Petitioner u/s 108 of the Customs Act, the gold was of foreign origin. In the statement u/s 313 Cr.P.C., the case of the Petitioner is that he has been falsely implicated; he identified his bag and from the said baggage nothing incriminating was recovered, and a false recovery case was made against him to get award this case. As regards the statement Ex.P

W1/A recorded u/s 108 of Customs Act is concerned, the explanation u/s 313 Code of Criminal Procedure is that it was not a voluntary statement; the Petitioner was tortured and forced to sign the blank paper and on the first opportunity he retracted. It may be noted that the suggestion given to PW2 on behalf of the Petitioner in his cross-examination is that the statement of the Petitioner was not voluntary and the same was recorded under threat or pressure and was recorded by the Petitioner at the dictation of PW2 and was got signed from him. Thus, the suggestion itself shows that there is no allegation of torture and moreover the statement itself shows that there is no allegation of torture and moreover the statement is written in his own handwriting whereas the explanation u/s 313 Code of Criminal Procedure is that he was forced to sign on blank paper. I find no merit in the present case, the conviction has been based only on the statement of the Petitioner recorded u/s 108 Code of Criminal Procedure. The possession of gold has been proved and the fact that it is of foreign origin has been proved by the statement of the Petitioner recorded u/s 108 of the Customs Act. u/s 123 of the Customs Act, the burden of the prosecution is not to prove beyond reasonable doubt that the goods recovered were smuggled goods. It is sufficient for the prosecution to prove that it has reasons to believe that goods are smuggled goods whereafter the burden to prove that they are not smuggled goods shifts to the person from whose possession the goods are seized. The statement of the Petitioner recorded u/s 108 of the Customs Act proves that there is a reasonable belief that the gold found in possession of the Petitioner is smuggled. Though this statement is sought to be retracted after two days in the bail application which is not signed by the Petitioner but by his counsel wherein it has only been written that the confession was coerced from him and the same stands withdrawn. This is not a proper retraction but a defence sought to be laid. This so called retraction does not cast a doubt on the voluntariness of the confessional statement. The reliance of the learned Counsel for the Petitioner on the decision rendered in UOI v. Bal Mukund (supra) is wholly misconceived. In the said case, the Hon'ble Supreme Court was dealing with the confession of the co-accused and was thus considering its evidentiary value u/s 30 of the Evidence Act. Indubitably, in the present case, the confession under consideration is that of the Petitioner himself u/s 108 of the Customs Act, and thus the said judgment has no relevance as it is a settled legal principal that u/s 30 of the Evidence Act, confession of co-accused can be used only to lend assurance. In Kanhaiyalal v. UOI (supra), UOI v. Satrohan (supra) and M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence, it has been held that once the Court is assured of the voluntariness of the confessional statement and that the same has been obtained without any torture or harassment, the confessional statement can be made the basis of conviction. Thus, I find no illegality in the impugned judgment. The revision petition is dismissed. Trial Court record be sent back.