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Mani Kant Sohal Vs M/s. Pannalal Kesharchand Banthia and others

Court: Bombay High Court

Date of Decision: Nov. 14, 1990

Acts Referred: Gold (Control) Act, 1968 â€" Section 85

Citation: (1991) 2 BomCR 461 : (1991) CriLJ 1247

Hon'ble Judges: M.F. Saldanha, J

Bench: Single Bench

Advocate: M.K. Patwardhan, for the Appellant; S.G. Jain, B.I. Dalvi and Mrs. S.S. Keluskar, Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This is a Criminal Revision Application filed by the Assistant Collector of Customs, Marine and Preventive Wing, Alibag Division, in respect of

an order dated 6-5-1988 passed by the Judicial Magistrate, First Class, Panvel, in Regular Case No. 357 of 1985. Respondents Nos. 1 to 3 to

the Criminal Revision Application were the original Accused Nos. 1 to 3 before the trial Court. The applicant herein had filed a complaint before

the learned Judicial Magistrate charging the accused with having committed offences punishable under different sub-clauses of S. 85 of the Gold

(Control) Act, 1968 and the rules framed thereunder.

2. The brief facts giving rise to this prosecution are as follows :-

Accused No. 1 is a partnership firm, and accused Nos. 2 and 3 are the partners thereof. On 2-2-1982 pursuant to a secret information, the

Superintendent of Customs (Preventive), Gold (Control), Bombay, along with the assisting officers raided and searched the licenced shop premises

of accused No. 1, holder of Gold Dealer"s Licence No. 3/6/71, situated at 776, M.G. Road, Panvel, District Raigad, in the presence of Panchas

and accused Nos. 2 and 3. The applicant scrutinized the statutory registers as also the gold ornaments lying in stock-in-trade. It is the case of the

prosecution that on verification with the relevant entries in the registers, which the accused are bound to maintain, excess and unaccounted stock of

primary gold weighing 146.000 Gms. and new gold ornaments weighing 1,800.650 Gms. of 23 carate purity was found. It is the prosecution case

that since the accused could not satisfactorily account for this quantity of gold valued at Rs. 3,13,940/-, the same was seized by the officers under

a panchanama dated 2-2-1982. The statement of accused No. 2 was recorded u/s 63 of the Gold (Control) Act, 1968, wherein he has stated that

he was present throughout the search and the panchanama, and that he agreed with the facts recorded in the panchanama. Certain other statements

were also recorded by the officers, pursuant to which the accused were prosecuted before the trial court. At this stage, it is relevant to mention

that, in the adjudication proceedings, primary gold weighing 146.000 Gms. and new gold ornaments weighing 1,800.650 Gms. were confiscated

u/s 71 of the Gold (Control) Act, 1968, and on certain personal penalties, an option to redeem the confiscated gold and gold ornaments was also

given to the accused. The adjudication order was passed on 29-6-1984. The accused appeared to have thereafter filed an appeal against the

order in question, which is at present pending.

3. At the trial, the prosecution examined two witnesses, both of them being the officers who had taken part in the raid that was carried out on 2-2-

1982. The learned Judicial Magistrate thereafter proceeded to evaluate the evidence of these two witnesses and came to the conclusion that no

prima facie case was made out against the accused to frame charges as prayed for by the prosecution and that the accused are entitled for a

discharge. The learned Judicial Magistrate has also ordered that the gold ornaments seized by the prosecution be returned to the accused. It is

against this order that the present criminal revision Application has been filed.

4. Mr. Patwardhan, the learned advocate appearing on behalf of the applicant, has submitted that the learned Judicial Magistrate was in error in

having discharged the accused at the preliminary stage of the trial without affording the prosecution an opportunity of producing the remaining oral

as also the documentary evidence. He has referred to the complaint filed before the learned Judicial Magistrate and has pointed out that the

evidence of the panchas and of certain other witnesses was yet to be recorded, and further more, that the learned Judicial Magistrate has been

totally carried away by certain parts of cross-examination conducted and that, consequently, the order in question is incorrect and it is liable to be

set aside. As against this statement, Mr. Jain, the learned advocate appearing on behalf of respondents Nos. 1 to 3, has pointed out that the

prosecution itself stopped its evidence after the examination of the two witnesses and applied for framing of the charges. He submitted that in a

case where the prosecutor applies to the Court for framing of the charge at a certain point of the proceedings and files a purshia to the effect that

he has closed his case, the learned trial Judge was fully justified in evaluating only that material which was produced before the Court. Mr. Jain has

further submitted that merely because there may be a reference in the complaint to certain statements and documents, the trial Court cannot

presume that the prosecution will examine these witnesses and produce the documents in question at some subsequent point of time. In any event,

the trial Court cannot take into account in anticipation the material that is likely to come before the Court at a future point of time. Mr. Jain is

correct to the extent that in criminal Court proceedings governed by the warrant procedure where the prosecutor concludes his evidence before

framing charge, it must be presumed that the prosecution has evaluated the amount of evidence that is necessary for the purpose of establishing the

charge and that consequently the trial Judge would be presumed that the prosecution has evaluated the amount of evidence that is necessary for the

purpose of establishing the charge and that consequently the trial Judge would be fully justified in holding that on the material in question, a charge

may or may not be framed. If the prosecution chooses not to produce a certain material, it can never be contended at the stage of framing charge

that such material is likely to be produced at a later point of time. To this extent, as far as the present proceedings are concerned, it will have to be

seen as to whether on the basis of the material adduced before the Court the learned Judicial Magistrate was justified in holding that no prima facie

case has been made out.

5. I have gone through the record of the case and the the evidence recorded before the trial Court. It is, undoubtedly, true that in the course of the

cross-examination, certain questions were put to the witnesses on the basis of which it was sought to he pointed out that there was a serious doubt

with regard to the very basis of the Prosecution case, namely, the manner in which the excess had been worked out. Mr. Jain forcefully submitted

that, in the present proceedings, the foreign material contained in the ornaments, such as beeds, stones, etc., is required to be excluded; that, on the

other hand, certain exemptions are available and that taking into account all these factors, it is virtually impossible for any Court on the facts of the

present case to arrive at a conclusion in any offence under the Gold (Control) Act. In support of his contention, Mr. Jain relied on a decision of the

Supreme Manick Chand Pal and Others Vs. Union of India (UOI) and Others, in a group of writ petitions under the Gold (Control) Act, 1968.

The Supreme Court was basically concerned in this group of writ petitions with the constitutional validity of various provisions of the Gold

(Control) Act, 1968, all of which were held to be intra vires. In para (14) of the judgment, the Supreme Court has, undoubtedly, observed that the

type of forms which the dealers are required to fill up, as far as Registers Nos. 11 and 12 are concerned, do not provide adequate and proper

columns and that, consequently, certain serious difficulties were created as far as the dealers were concerned. The Supreme Court had observed in

that judgment that there was substance in the case and that the forms in question had to be revived. On the basis of this judgment, Mr. Jain had

contended that so far as the present case is concerned, even if on technicalities it were to be argued by the Prosecution that the learned Judicial

Magistrate ought to have afforded the Prosecution the opportunity of producing the remaining evidence and that the learned Judicial Magistrate

was unjustified in discharging the accused, no useful purpose will be served by reviving the Prosecution as the result of the case would be

inevitable.

6. As far as the submission of Mr. Jain is concerned, Mr. Patwardhan, the learned advocate appearing on behalf of the applicant, has submitted,

and to my mind rightly, that the order of the learned Judicial Magistrate proceeds exclusively on the basis of the material elicited in the cross-

examination from the Prosecution witnesses. In so doing, the learned Judicial Magistrate has totally by-passed certain vital pieces of evidence,

namely, the Panchanama. the statements of the Accused containing certain vital admissions and the documentary evidence on record, namely, the

registers and the seized property, on the basis of which the Prosecution was in a position to demonstrate that the Accused had not complied with

several statutory requirements, which constituted offences for which they stood charged, and secondly, that the Prosecution can still establish its

case on the basis of the material before the Court. The fact that the learned Judicial Magistrate has totally ignored all this evidence is clear from his

order and this along constitutes a serious error.

7. In dealing with offences under the Gold (Control) Act, 1968 which at the relevant time were categorised as the economic offence. the trial Court

ought to have seriously evaluated the evidence which the Prosecution had produced before it and which was on record upto the point at which the

application for framing of the charge was made by the Prosecutor. That material, in my judgment, was sufficient to make out a prima facie case

against the accused and consequently the order of discharge will have to be set aside.

8. As far as the second part of the order passed by the learned Judicial Magistrate is concerned it is necessary to clarify that even if a Criminal

Court before which the property of the present type has been produced comes to the conclusion that the property is liable to be returned to the

accused, such order must always be conditional on orders that may be passed by other parallel authorities in other connected proceedings. It was,

therefore, necessary for the learned Judicial Magistrate to have made an order for the return of the property conditional on the property not being

required in any other proceedings.

9. It is necessary to point out that the seizure in the present case was effected on 2-2-1982, after which it appears that the complaint was filed in or

about the year 1985 and was, therefore, numbered as Regular Case No. 357 of 1985. The discharge order has been passed in the year 1988,

which indicates that the Prosecution at that point of time was approximately 6 years old. Though it is a salutary principle that a wrong order should

not escape merely because of lethargy on the part of the prosecuting authority in the manner of proceeding against him, the Legislature itself

realised that it is not fair to keep the accused under threat of a prosecution for an inordinately long period of time. Therefore, limitation was

provided for in the Code of Criminal Procedure, 1973, which carved out the principle that if the prosecuting authority does not proceed within a

reasonable time that it is precluded from proceeding thereafter. Economic offences of almost all categories were exempted from the provisions

relating to limitation as a result of which the concerned Department considered it perfectly normal, to be virtually sleeping over the records, and

commence proceedings at a point of time when the Investigating Officers and the departmental witnesses have either been transferred or have

retired or in many cases have died. Due to these changes, the requisite records are often-times misplaced or untraceable, because the new officer

shows little interest in a proceeding that was not his. There can be no dispute about the fact that investigations in cases under the Customs Act and

the Central Excise Act are completed virtually within a matter of days or weeks. Why the prospection should thereafter be delayed for several

years in an unanswered question. In the absence of any satisfactory reason, it gives rise to grave suspicion that this is being done deliberately or in

collusion with the possible beneficiary. Undoubtedly, when a case is taken up after six years as in the present situation, the evidence, both oral and

documentary, is bound to be patchy and often-times not available. The accused is, therefore, a direct beneficiary. While analysing as to why the

Prosecutions are kept pending by the authorities for several years, the conclusion is inescapable that this is being done for the benefit of the

accused.

10. The pressure under which the sub-ordinate Courts are functioning, particularly as far as the work load is concerned, are well-known, and even

after a complaint or a charge-sheet is filed, it is inevitable that there will be considerable delay before the case is heard and disposed of the

difficulties of the trial Courts are compounded by the investigating authorities who file complaints and charge-sheets in respect of offences that have

taken place many years earlier and the trial gets unusually protracted with several subsidiary procedures having to be resorted to for the purpose of

ensuring the presence of the accused who, if on bail, have sometimes stopped appearing before the Court after a certain stage, tracing out the

investigating officers and witnesses, none of whom are in their original position, and thereafter trying to ferret out the requisite documents and

property which is not readily forthcoming. This does not justify the lack of interest with which the proceedings are thereafter conducted. In the

present case, nothing stopped the prosecutor from proceeding further with the evidence, particularly if he had taken the trouble to check the record

and to find out the admissions or statements that had been elicited in cross-examination. It also dose not appear as thought the prosecutor has

done his duty by bringing to the notice of the trial Magistrate the other material that existed on record on the basis of which the framing of a charge

would have been justified.

11. In the result, the Criminal Revision Application is allowed. The order of the learned Judicial Magistrate discharging the accused dated 6-5-

1988 is set aside. Regular Case No. 357 of 1985 is restored and the learned Judicial Magistrate is directed to frame charges against the Accused

and to hear and dispose of the case according to law. Considering the fact that the incident in this case relates to the year 1982 and that the

Prosecution itself was instituted in the year 1985, the learned Judicial Magistrate shall dispose of the proceedings expeditiously. The rule is made

absolute accordingly. The learned Judicial Magistrate, while deciding the present case, shall take into account the fact that the observations made in

this judgment are limited for the purpose setting aside the discharge and consequently the learned Judicial Magistrate shall hear and decide the

matter strictly on merits without in any way being influenced by the contents of this judgment. A copy of this judgment shall be forwarded to the

Secretary to the Government, Ministry of Finance, New Delhi, and the Secretary to the Government, Home Department, New Delhi. The Central

Government shall seriously consider, in the light of what has been pointed out regarding the inordinate delay in the filing of complaints and

prosecutions in the Customs and Excise proceedings, as to what are the steps necessary for the purpose of remedying this state of affairs.

12. Order accordingly.