

(1968) 10 BOM CK 0020

Bombay High Court

Case No: Criminal Appeal No"s. 15 and 35 of 1967

The Assistant
Commissioner of
Customs

APPELLANT

Vs

L.R. Melwani

RESPONDENT

Date of Decision: Oct. 16, 1968

Acts Referred:

- Constitution of India, 1950 - Article 20
- Penal Code, 1860 (IPC) - Section 120B

Citation: (1970) 72 BOMLR 782

Hon'ble Judges: V. Ramaswami, J; K.S. Hegde, J; J.C. Shah, J; G.K. Mitter, J; A.N. Grover, J

Bench: Full Bench

Final Decision: Allowed

Judgement

K.S. Hegde J.

1. These appeals by certificate arise from the decision of the High Court of Bombay in Criminal Revision Application No. 238 of 1966 wherein the following questions of law arise for decision :

(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Article 20(2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act ?

(ii) Whether under any circumstance the finding of the Collector of Customs that accused Nos. 1 and 2 are not proved to be guilty operated as an issue estoppel in the criminal case against those accused ?

(iii) Whether the present prosecution amounts to an abuse of the process of the Court in view of inordinate delay in launching the same and consequently whether it

is liable to be quashed ?

(iv) Whether Section 173 (4), Criminal Procedure Code is applicable to the facts of this case and

(v) Whether the documents mentioned in the petition filed by accused No. 1 on August 3, 1965 are required to be summoned u/s 94, Criminal Procedure Code.?

2. The aforementioned questions were raised before the trial Magistrate by accused No. 1 by means of an application but the learned Magistrate found no substance in the pleas advanced in that application and accordingly he dismissed the same as per his order dated January 25, 1966. In revision, a Division Bench of the Bombay High Court agreeing with the trial Magistrate negatived all but one of the contentions advanced on behalf of accused Nos. 1 and 2. It did not agree with the learned Magistrate that there was no need, at that stage to summon the statements of witnesses recorded by the Customs authorities in the enquiry under the Customs Act. It directed the learned Magistrate to summon those statements and curiously enough, it went further and directed him to see that the prosecution made available the copies of those statements to the accused before the commencement of the enquiry in the case. In so far as the other documents called for are concerned, the High Court after indicating, what according to it, is the law on the subject left the matter to the discretion of the learned Magistrate.

3. Criminal Appeal No. 15 of 1967 is filed by the Assistant Collector of Customs, Bombay and the State of Maharashtra and Criminal Appeal No. 35 of 1967 is the appeal filed by accused Nos. 1 and 2 in the case (Case No. 98 of 1965 in the Court of the Chief Presidency Magistrate, Bombay). The appellants in Criminal Appeal No. 15 of 1967 challenge the correctness of the decision of the Bombay High Court in so far as it went against them and the appellants in Criminal Appeal No. 35 of 1967 challenge that decision in other respects.

4. The prosecution case is that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places in the beginning of October, 1959 or thereabout for the purpose of smuggling goods into India and in pursuance of that conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960.

5. In that connection an enquiry was held by the Customs authorities. In the course of the enquiry some of the goods said to have been smuggled were seized. After the close of the enquiry those goods were ordered to be confiscated. In addition penalty was imposed on some of the accused. Thereafter on February 19, 1965, the Assistant Collector of Customs, Bombay after obtaining the required sanction of the Government filed a complaint against five persons including the appellants in Criminal Appeal No. 35 of 1907 (accused Nos. 1 and 2 in the case) u/s 120-B, Indian Penal Code read with Clauses (37), (75), (76) and (81) of Section 167 of the Sea Customs Act, 1878 (Act VIII of 1878) as well as u/s 5 of the Imports and Exports

(Control) Act, 1947. Before the commencement of the enquiry in that complaint, accused No. 1 filed on August 3, 1965, the application mentioned above.

6. Now we shall proceed to examine the contentions set out earlier.

7. Reliance on Article 20(2) is placed under the following circumstances. In the enquiry held by the Collector of Customs, he gave the benefit of doubt to accused Nos. 1 and 2. This is what he stated therein :

As regards M/s. Larmel Enterprises (of which accused No. 1 is the proprietor and accused No. 2 is the Manager) although it is apparent that they have directly assisted the importers in their illegal activities and are morally guilty. Since there is no conclusive evidence against them to hold them as persons concerned in the act of unauthorised importation, they escape on a benefit of doubt.

8. Despite this finding the Assistant Collector in his complaint referred to earlier seeks to prosecute these accused persons. Hence the question is whether that prosecution is barred under Article 20(2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this article the rule of *autrefois acquit* embodied in Section 403, Criminal Procedure Code. Assuming we can do that still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20(2), it is necessary for an accused person to establish that he had been tried by a "Court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established, it can be contended that he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made u/s 236 or for which he might have been convicted u/s 237. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "Court". In [Magbool Hussain Vs. The State of Bombay](#), this Court held that the wording of Article 20 of the Constitution and the words used therein show that the proceedings therein contemplated are proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal and "prosecution" in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. This Court further held that where a person against whom proceedings had been taken by the Sea Customs authorities u/s 167 of the Sea Customs Act and an order for confiscation of goods had been passed, was subsequently prosecuted before a criminal Court for an offence u/s 23 of the Foreign Exchange Regulation Act in respect of the same act, the proceeding before the Sea Customs authorities was not a "prosecution" and the order for confiscation was not a "punishment" inflicted by a

Court or judicial tribunal within the meaning of Article 20(2) of the Constitution and hence his subsequent prosecution was not barred. The said rule was reiterated in [Thomas Dana Vs. The State of Punjab](#), and in several other cases.

9. We shall now take up the contention that the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution. The issue estoppel rule is but a facet of the doctrine of *autrefois acquit*. In *Sambasivam v. Public Prosecutor, Federation of Malaya* [1950] A.C. 458, Lord Mac Dermott enunciated the said rule thus :

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "*Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

The rule laid down in that decision was adopted by this Court in [Pritam Singh and Another Vs. The State of Punjab](#), and again in [N.R. Ghose Vs. The State of West Bengal](#), . But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent Court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2.

10. This takes us to the contention whether the prosecution must be quashed because of the delay in instituting the same. It is urged on behalf of the accused that because of the delay in launching the same, the present prosecution amounts to an abuse of the process of the Court. The High Court has repelled that contention. It has come to the conclusion that the delay in riling the complaint is satisfactorily explained. That apart, it is not the case of the accused that any period of limitation is prescribed for filing the complaint. Hence the Court before which the complaint was filed could not have thrown out the same on the sole ground that there has been delay in riling it. The question of delay in riling a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no

ground for dismissing the complaint. Hence we see no substance in the contention that the prosecution should be quashed on the ground that there was delay in instituting the complaint.

11. We also see no merit in the contention that the accused in this case are entitled to the benefit of Section 173, Criminal Procedure Code which provides that before the commencement of the enquiry or trial the officer-in-charge of the police station who forwards a report u/s 173, Criminal Procedure Code, should furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded u/s 173 (1), Criminal Procedure Code of the first information report recorded u/s 154, Criminal Procedure Code and all other documents or relevant extracts thereof on which the prosecution proposes to rely, including the statements and confessions, if any, recorded u/s 164, Criminal Procedure Code and the statements recorded u/s 161, Criminal Procedure Code of all the persons whom the prosecution proposes to examine as its witnesses.

12. On a plain reading of Section 173, Criminal Procedure Code, it is clear that the same is wholly inapplicable to the facts of the present case. In the instant case no report had been sent u/s 173, Criminal Procedure Code. Therefore that provision is not attracted. That provision is attracted only in a case investigated by a police officer under Chapter XIV of the Criminal Procedure Code, followed up by a final report u/s 173, Criminal Procedure Code. It may be remembered that Sub-section (4) of Section 173, was incorporated into the Criminal Procedure Code for the first time by Central Act 26 of 1955, presumably because of the changes effected, in the mode of trials in cases instituted on police reports. Before the Criminal Procedure Code was amended by Act 26 of 1955, there was no difference in the procedure to be adopted in the cases instituted on police reports and in other cases. Till then in all cases irrespective of the fact whether they were instituted on police reports or on private complaints, the procedure regarding enquiries or trials was identical. In both type of cases, there were two distinct stages i.e., the enquiry stage and the trial stage. When the prosecution witnesses were examined in a case before a charge is framed, it was open to the accused to cross-examine them. Hence there was no need for making available to the accused the documents mentioned in Sub-section (4) of Section 173, Criminal Procedure Code. The right given to him u/s 362, Criminal Procedure Code was thought to be sufficient to safeguard his interest. But Act 26 of 1955 as mentioned earlier made substantial changes in the procedure to be adopted in the matter of enquiry in cases instituted on police reports. That procedure is now set out in Section 251(A), Criminal Procedure Code. This new procedure truncated the enquiry stage. Section 251 (A), Criminal Procedure Code says that the Magistrate, if upon consideration of all the documents referred to in Section 173 and making such examination if any, of the accused as he thinks necessary and after giving the prosecution and the accused an opportunity of being heard considers the charge against the accused to be groundless he shall discharge him but if he is of opinion that there is ground for presuming that the accused has

committed an offence triable as a warrant case which he is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against him. Under the procedure prescribed in Section 251 (A), Criminal Procedure Code but for the facility provided to him u/s 173(4) of that Code an accused person would have been greatly handicapped in his defence. But in a case instituted on a complaint, like the one before us and governed by Sections 252 to 259 of the Criminal Procedure Code, no such difficulty arises. Therein the position is as it was before the amendment of the Criminal Procedure Code in 1955.

13. We are unable to agree with the learned Judges of the High Court that the Legislature did not make available the benefit of Section 173(4), Criminal Procedure Code in cases instituted otherwise than on police reports by oversight. The observation of the learned Judges in the course of their judgment that

Even the great Homer occasionally nods. There is nothing to show that the legislature has applied its mind to the question of the amendment of the procedure so far as the investigation of an offence under the Sea Customs Act is concerned at the time when it was considering amendments to the Criminal Procedure Code

is without any basis. In the first place, it is not proper to assume except on very good grounds that there is any lacuna in any statute or that the Legislature has not done its duty properly. Secondly from the history of the legislation to which reference has been made earlier, the reason for introducing Section 173(4) is clear. The learned Judges of the High Court were constrained to hold that Section 173(4), Criminal Procedure Code in terms does not apply to the present case. But strangely enough that even after coming to the conclusion that that provision is inapplicable to the facts of the present case, they have directed the learned Magistrate to require the prosecution to make available to the accused, the copies of the statements recorded from the prosecution witnesses during the enquiry under the Customs Act. They have purported to make that order u/s 94(2), Criminal Procedure Code which to the extent material for our present purpose reads :

Whenever any Court,... considers that the production of any document or other thing is necessary or desirable for the purposes of any...inquiry, trial or other proceeding under this Code by or before such Court... such Court may issue a summons ... to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

This section does not empower a Magistrate to direct the prosecution to give copies of any documents to an accused person. That much appears to be plain from the language of that section. It was impermissible for the High Court to read into Section 94, Criminal Procedure Code the requirements of Section 173 (4), Criminal Procedure Code. The High Court was not justified, in indirectly applying to cases instituted on private complaints the requirements of Section 173(4), Criminal

Procedure Code.

14. That apart we do not think that the High Court was justified in interfering with the discretion of the learned Magistrate. Whether a particular document should be summoned or not is essentially in the discretion of the trial Court. In the instant case the Special Public Prosecutor had admired the learned trial Magistrate that he would keep in readiness the statements of witnesses recorded by the Customs authorities and shall make available to the defence counsel the statement of the concerned witness as and when he is examined. In view of that assurance, the learned Magistrate observed in his order :

The recording of the prosecution evidence is yet to commence in this case and at present there are no materials before me to decide whether or not the production of any of the statements and documents named by the accused in his application is desirable or necessary for the purpose of the enquiry or trial. As stated at the outset, the learned Special Prosecutor has given an undertaking that he would produce all the relevant statements and documents at the proper time in the course of the hearing of the case. The request made for the issue of the summons u/s 94, Criminal Procedure Code is also omnibus.

15. The reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in Court are likely to be destroyed or tampered with or the same are not likely to be made available when required. It has proceeded on the erroneous basis that the accused will not have a fair trial unless they are supplied with the copies of those statements even before this enquiry commences. Except for very good reasons, the High Court should not interfere with the discretion conferred on the trial Courts in the matter of summoning documents. Such interferences would unnecessarily impede the progress of cases and result in waste of public money and time as has happened in this case.

16. For the reasons mentioned above, we allow Criminal Appeal No. 15 of 1967 and dismiss Criminal Appeal No. 35 of 1967. In other words, we restore the order of the learned Magistrate.