Thomas Dana

Vs

The State of Punjab

Petition No. 65 of 1958 and Criminal Appeal No. 112 of

(CJI S. R. DASS, N. H. Bhagwati, B. P. Sinha, K. Subha Rao, K. N. Wanchoo JJ)

04.11.1958

JUDGMENT

SINHA, J. -

Petition Nos. 65 of 1958, under Article 32 of the Constitution, on behalf of one Thomas Dana, and Criminal Appeal No. 112 of 1958, by special leave to appeal granted to one Leo Roy Frey (appellant), raise substantially the same question of some constitutional importance, and have, therefore, been heard together, and will be covered by this judgment. The main question for determination in these two cases, is whether there has been an infringement of the constitutional protection granted under Article 20(2) of the Constitution. For the sake of brevity and convenience, we shall refer to Thomas Dana as the first petitioner, and Leo Roy Frey, as the second petitioner, in the course of this judgment.

The relevant facts are these : The first petitioner is a Cuban national. He came to India on a special Cuban passport No. 11822, dated November 16, 1954, issued by the Government of the Republic of Cuba. The second petitioner is a citizen of the United States of America, and holds a U.S.A. passport No. 45252, dated July 1, 1955. In May, 1957, both the petitioners were in Paris. There, the second petitioner purchased a motor car from an officer of the American Embassy. He is said to have sold that car to the first petitioner on May 14, 1957, and the same month, it was registered in the first petitioner's name. The two petitioner sailed by the same steamer at the end of May. The car was also shipped by the same steamer. They reached Karachi on June 11, 1957, and from there, flew to Bombay. From June 11 to 19, 1957, they stayed together in Hotel Ambassador in Bombay. The car was delivered to the first petitioner in Bombay on June 13, and on June 19, both of them flew from Bombay to Delhi. In Delhi also, they stayed together at Hotel Janpath. The first petitioner received the car at Delhi by rail on June 22, and the same night, the two petitioners left by the said car for Amritsar, where they reached after mid-night, and stayed in Mrs. Bhandari's Lodge. On the morning of June 23, they reached Attari Road Land Customs Station by the same car (No. CD 75 TT 6587). On arrival at Attari, the petitioners presented themselves for completing customs formalities for crossing over to Pakistan. The Customs officers at Attari Road Land Customs Station, handed over to them the Baggage Declaration forms, to declare the articles that they had in their possession, including any goods which were subject to the Export Trade Control and/or Foreign Exchange Restrictions, and/or were dutiable. Both the petitioners completed the forms aforesaid, and handed those completed statements over to the Customs officers. The first petitioner declared the under noted articles :-

> #Indian currency Rs. 40Pakistan currency Rs. 50U. S. Dollars $. 30.00Gold ring 1 (valued at Rs. 100)Personal effects Valued at $ 100.00Car Valued at Rs. 15,000##

On suspicion, the Customs officers searched his baggage which was being carried in the car aforesaid. His person was also searched, and as a result of the search, the under noted articles which had not been declared by him, were recovered :-

> #Indian currency Rs. 900Pakistan currency Rs. 250U. S. Dollars $. 1.00Hong Kong Dollars $. 1.00Thailand currency 78Pocket radio 1Time-piece 1##

The second petitioner, in his statement, had declared the following articles :-

> #Indian currency Rs. 40U. S. Dollars $. 500.00U. S. Coins $. 1.23Belgian coins BF 26.00French coins BF 205.00Italian coins L. 400.00Wrist watch 1Personal effects Rs. 1,00,000##

On suspicion, the Customs staff searched the person of the second petitioner also. They recovered from him one pistol of .22 bore with 48 live cartridges of the same bore. As he could not produce a valid licence under the Indian law, the pistol and the cartridges were handed over to the police, for taking appropriate action under the Indian Arms Act. The car was thoroughly searched, and as a result of the intensive search and minute examination on June 30, 1957, a secret chamber above the petrol tank, behind the hind seat of the car, was discovered. The chamber was opened, and the following things which had not been declared by the petitioners, were recovered from inside the secret chamber :-

> #Indian currency Rs. 8,50,000U. S. Dollars $. 10,000.00Empty tin containers 10 (The containers bore marks to(rectangular) indicate that they were used for carrying gold bars)Mirror 1,##

besides other insignificant things. Under the Indian law, Indian currency over Rs. 50, Pakistan currency over Rs. 100 and any foreign currency, could not be exported out of India, without the permission of the Reserve Bank of India. The export of a pocket radio also required a valid licence under the Imports and Exports (Control) Act, 1947. The petitioners could not produce, on demand, the requisite permission from the Reserve Bank of India, or the licence for the export of the pocket radio, or a permit for exporting a time piece, as required by the Land Customs Act, 1924. The car also was handed over to the police for necessary action. The offending articles, namely,

> #Indian currency Rs. 8,50,900Pakistan currency Rs. 250U. S. Dollars $. 10,001.00Hong Kong Dollar $. 1.00Thailand currency T. 78.00##

pocket radio, and the time-piece, etc., were seized under section 178 of the Sea Customs Act, 1878. Both the petitioners were taken into custody for infringement of the law. On July 7, both the petitioners were called upon to show cause before the Collector of Central Excise and Land Customs, New Delhi, why a penalty should not be imposed upon them under section 167(8) of the Sea Customs Act, 1878, and why the seized articles aforesaid, should not be confiscated under section 167(8) and section 168 of the Act. Both the petitioners objected to making any statements in answer to the show-cause notice, on the ground that the matter was subjudice and any statement made by them, might prejudice them in their defence. But at the same time, the second petitioner disclaimed any connection with the car in which the two petitioners were travelling, and which had been seized. After some adjournments granted to the petitioners to avail themselves of the opportunity of showing cause, the Collector of Central Excise and Land Customs, New Delhi, passed orders on July 24, 1957. He came to the conclusion that the petitioners had planned to

smuggle Indian and foreign currency out of India, in contravention of the law. They had been acting in concert with each other, and had, throughout the different stages of their journey from France to India, been acting together, and while leaving India for Pakistan, were travelling together by the same car, until they reached the Attari Road Land Customs Station, on their way to Pakistan. He directed that the different kinds of currency while had been seized, as aforesaid, from the possession of the petitioners, be "absolutely confiscated" for contravention of section 8(2) of the Foreign Exchange Regulation Act, 1947, read with sections 23-A and 23-B of the Act. He also directed the confiscation of the car aforesaid, which could be redeemed on payment of a "redemption fine" of Rs. 50,000. He also ordered the confiscation of the pocket radio and the time-piece and other articles seized, as aforesaid, under section 167(8) of the Sea Customs Act, read with section 5 of the Imports and Exports (Control) Act, 1947, and section 7 of the Land Customs Act, 1924. He further imposed a personal penalty of Rs. 25,00,000 on each of the petitioners, under section 167(8) of the Sea Customs Act.

After making further inquiry, on August 12, 1957, the Assistant Collector of Customs and Central Excise, Amritsar, under authority from the Chief Customs Officer, Delhi, filed a complaint against the petitioners and a third person, named Moshe Baruk of Bombay, (since acquitted), under section 23, read with section 8, of the Foreign Exchange Regulation Act, 1947, and section 167(81) of the Sea Customs Act, 1878. The petition of complaint, after stating the facts stated above, charged the accused persons with offences of attempting to take out of India Indian and foreign currency, in contravention of the provisions of the Acts referred to above.

After recording considerable oral and documentary evidence, the learned Additional District Magistrate, Amritsar, by his judgment dated November 13, 1957, convicted the petitioners, and sentenced them each to two years' rigorous imprisonment under section 23, read with section 23-B, of the Foreign Exchange Regulation Act, six month's rigorous imprisonment under section 120-B(2) of the Indian Penal Code, the sentences to run concurrently. It is not necessary to set out the convictions and sentences in respect of the third accused Moshe, who was subsequently acquitted by the High Court of Punjab, in exercise of its revisional jurisdiction. The learned Magistrate also, perhaps, out of abundant caution, directed that "The entire amount of currency and foreign exchange and the car in which the currency had been smuggled as well as the sleeveless shirt Ex. P. 39 and belt Ex. P. 40 shall be confiscated to Government". This order of confiscation was passed by the criminal court, notwithstanding the fact, as already stated, that the Collector of Central Excise and Land Customs, New Delhi, had ordered the confiscation of the offending articles under section 167(8) of the Sea Customs Act and the other related Acts referred to above.

On appeal by the convicted persons, the learned Additional Sessions Judge, Amritsar, by his judgment and order dated December 13, 1957, dismissed the appeal after a very elaborate examination of the facts and circumstances brought out in the large volume of evidence adduced on behalf of the prosecution. It is not necessary, for the purposes of these cases, to set out in detail the findings arrived at by the appellate court, or the evidence on which those conclusions were based. It is enough to state that both the courts of fact agreed in coming to the conclusion that the accused persons had entered into a conspiracy to smuggle contraband property out of this country.

The petitioners moved the High Court of Judicature for the State of Punjab, separately, against their convictions and sentences passed by the courts below, as aforesaid. Both the revisional applications were dismissed summarily by the learned Chief Justice. By his order dated February 28, 1958, the learned Chief Justice refused to certify that the case was a fit one for appeal to this Court.

The petitioners then moved this Court for, and obtained, special leave to appeal from the judgment and orders of the courts below, convicting and sentencing them, as stated above. They also moved this Court for writs of habeas corpus. The petition of the first petitioner for a writ of habeas carpus was admitted, and was numbered as petition No. 65 of 1958, and a rule issued. The writ petition on behalf of the second petitioner was dismissed in limine. All these orders were passed on April 28, 1958. Subsequently, the first petitioner moved this Court for revocation of the special leave granted to him, and for an early hearing of his writ petition No. 65 of 1958, as the points for consideration were common to both the cases. This Court granted the prayers by its order dated May 13, 1958.

Before dealing with the arguments advanced on behalf of the petitioners, in order to complete the narrative of events leading up to the filing of the cases in this Court, it is necessary to state that the petitioners had moved this Court separately under Art. 32 of the Constitution, against their prosecution in the Magistrate's court, after the aforesaid orders of confiscation and penalty, passed by the Collector of Customs. They prayed for a writ of certiorari and/or prohibition, and for quashing the proceedings. There was also a prayer for a writ in the nature of habeas corpus. On that occasion also, the protection afforded by Article 20(2) of the Constitution, was pressed in aid of the petitioners' writ applications. This Court, after hearing the parties, dismissed those writ petitions, holding that the charge against the petitioners included an offence under section 120B of the Indian Penal Code, which certainly was not one of the heads of charge against them before the Collector of Customs. This Court, therefore, without deciding the applicability of the provisions of Article 20(2) of the Constitution, to the facts and circumstances of the present case, refused to quash the prosecution. The question whether Article 20(2) of the Constitution, barred the prosecution of the petitioners under the provisions of the Sea Customs Act and the Foreign Exchange Regulation Act, was apparently left open for future determination, if and when the occasion arose. In view of the events that have happened since after the passing of the order of this Court, dated October 31, 1957, (reported in [1958] S.C.R. 822), it has now become necessary to determine that controversy.

It was vehemently argued on behalf of the petitioners that the prosecution of the petitioners under the provisions of the Acts aforesaid, and their convictions and imposition of sentences by the courts below, infringe the protection against double jeopardy enshrined in Article 20(2) of the Constitution, which is in these terms :-

> "No person shall be prosecuted and punished for the same offence more than once."

It is manifest that in order to bring the petitioners' case within the prohibition of Article 20(2), it must be shown that they had been "prosecuted" before the Collector of Customs, and "punished" by him for the "same offence" for which they have been convicted and punished as a result of the judgment and orders of the courts below, now impugned. If any one of these three essential conditions, is not fulfilled, that is to say, if it is not shown that the petitioners had been "prosecuted" before the Collector of Customs, or that they had been "punished" by him in the proceedings before him, resulting in the confiscation of the properties aforesaid, and the imposition of a heavy penalty of Rs. 25,00,000, each, or that they had been convicted and "sentenced" for the "same offence", the petitioners will have failed to bring their case within the prohibition of Article 20(2). It has been argued, in the first instance, on behalf of the petitioners that they had been "prosecuted" within the meaning of the article. On the other hand, the learned Additional Solicitor-General has countered that argument by the contention that the previous adjudication by the Collector of Customs, was by an administrative body which has to act judicially, as held by this Court in F. N. Roy v. Collector of Customs ([1957] S.C.R. 1151), and reiterated in Leo Roy Frey v. Superintendent, District Jail, Amritsar ([1958] S.C.R. 822); but the Collector was not a criminal court which could in law, be said

to have tried the petitioner for an offence under the Indian Penal Code, or under the penal provisions of the other Acts mentioned above.

It is, therefore, necessary first to consider whether the petitioners had really been prosecuted before the Collector of Customs, within the meaning of Article 20(2). To "prosecute", in the special sense of law, means according to Webster's Dictionary, "(a) to seek to obtain, enforce, or the like, by legal process; as, to prosecute a right or a claim in a court of law, (b) to pursue (a person) by legal proceedings for redress or punishment; to proceed against judicially; esp., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or violation of law, in due legal form before a legal tribunal; as, to prosecute a man for trespass, or for a riot." According to Wharton's Law Lexicon, 14th edn., p. 810, "prosecution" means "a proceeding either by way of indictment or information, in the criminal courts, in order to put an offender upon his trial. In all criminal prosecutions the King is nominally the prosecutor." This very question was discussed by this Court in the case of Maqbool Hussain v. The State of Bombay ([1953] S.C.R. 730, 738, 739, 743), with reference to the context in which the word "prosecution" occurred in Article 20. In the course of the judgment, the following observations, which apply with full force to the present case, were made :-

> "..... and the 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."

In that case, this Court discussed in detail the provisions of the Sea Customs Act, with particular reference to Chapter XVI, headed "Offences and Penalties". After examining those provisions, this Court came to the following conclusion :-

> "We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy."

The learned counsel for the petitioners, did not categorically attack the correctness of that decision, but suggested that that case could be distinguished on the ground that in the present case, unlike the case then before this Court, a heavy penalty of Rs. 25,00,000 on each of the petitioners, was imposed by the Collector of Central Excise and Land Customs, besides ordering confiscation of properties and currency worth over 8 1/2 lacs. But that circumstance alone cannot be sufficient in law to distinguish the previous decision of this Court, which is otherwise directly in point. Simply because the Revenue Authorities took a very serious view of the smuggling activities of the petitioners, and imposed very heavy penalties under item 8 of the Schedule to section 167 of the Sea Customs Act, would not convert the Revenue Authorities into a court of law, if the Act did not contemplate their functioning as such. That the Sea Customs Act did not envisage the Chief Customs Officer or the other officers under him in the hierarchy of the Revenue Authorities under the Act, to function as a Court, is made absolutely clear by certain provisions of that Act. The most important of those is the new section 187A, which was inserted by the Sea Customs (Amendment) Act, (21 of 1955). That section is in these terms :-

> "187A. No Court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to section 167, except upon complaint in

writing, made by the Chief Customs officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs authorized in this behalf by the Chief Customs officer."

This section makes it clear that the Chief Customs Officer or any other officer lower in rank than him, in the Customs department, is not a "court", and that the offence punishable under item 81 of the Schedule to section 167, cannot be taken cognizance of by any court, except upon a complaint in writing, made, as prescribed in that section. This section, in our opinion, sets at rest the controversy, which has been raised in the past upon certain expressions, like "offences" and "penalties", used in Chapter XVI. These words have been used in that Chapter in their generic sense and not in their specific sense under the penal law. When a proceeding by the Revenue Officers is meant, as is the case in most of the items in the Schedule to section 167, those officers have been empowered to deal with the offending articles by way of confiscation, or with the person infringing those rules, by way of imposition of penalties in contradistinction to a sentence of imprisonment or fine or both. When a criminal prosecution and punishment of the criminal, in the sense of the Penal law, is intended, the section makes a specific reference to a trial by a Magistrate, a conviction by such Magistrate, and on such conviction, to imprisonment or to fine or both. In this connection, reference may be made to the penalties mentioned in the third column against items 72, 74, 75, 76, 76A, 76B, 77, 78 and 81, which illustrate the latter class of the penalty in column 3. The penalties mentioned in the third column of most of the items of the Schedule to section 167 of the Act, do not make any reference to a conviction by a Magistrate and punishment by him in terms of imprisonment or of fine or of both. For example, item 76C, which was inserted by the Sea Customs Amendment Act X of 1957, in the third column meant for penalties, has only this "such vessel shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding one thousand rupees." Item 76A, on the other hand, specifically mentioning conviction, imprisonment and fine, was inserted by Sea Customs Act XXI of 1955. Both the amending Acts, by which the aforesaid additional offences were created, and penalties prescribed, were enacted after the coming into force of the Constitution. The Legislature was, therefore, aware of the distinction made throughout the Schedule to section 167, between a proceeding before Revenue authorities by way of enforcing the preventive and penal provisions of the Schedule and a criminal trial before a Magistrate, with a view to punishing offenders under the provisions of the same section. It is, therefore, in the teeth of these provisions to contend that the imposition of a penalty by the Revenue officers in the hierarchy created by the Act, is the same thing as a punishment imposed by a criminal court by way of punishment for a criminal offence.

This distinction has been very clearly brought out in the recent judgment of this Court in the case of Sewpujanrai Indrasanrai Ltd. v. The Collector of Customs ([1959] S.C.R. 821). In that case, though the question of double jeopardy under Article 20(2) of the Constitution, had not been raised, this Court has pointed out the difference in the nature of proceedings against offending articles and offending persons. A proceeding under the Sea Customs Act and the corresponding provisions of the Foreign Exchange Regulation Act, in respect of goods which have been the subject-matter of the proceedings, has been held to be of the nature of a proceeding in rem whereas, a proceeding against a person concerned in smuggling goods within the purview of those Acts, is a proceeding in personam, resulting in the imposition of a punishment by way of imprisonment or fine one him, where the offender is known. In the former case, the offender may not have been known, but still the offending goods seized may be confiscated as a result of the proceedings in rem. That case was not concerned with the further question whether, besides the liability to the penalty as contemplated by section 23(1)(a), namely, a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention had taken place, the person contravening the provisions of the

Foreign Exchange Regulation Act, 1947, upon conviction by a court, is also punishable with imprisonment which section 23(1)(b) prescribes, namely imprisonment for a term which may extend to 2 years, or with fine, or with both. The decision of this Court (supra) is also an authority for the proposition that in imposing confiscation and penalty under the Sea Customs Act, the Collector acts judicially. But that is not the same things as holding that the Authority under section 167 of the Act, functions as a Judicial Tribunal or as a Court. An Administrative Tribunal, like the Collector and other officers in the hierarchy, may have to act judicially in the sense of having to consider evidence and hear arguments in an informal way, but the Act does not contemplate that in so doing, it is functioning as a court. As already pointed out section 187A, which was inserted by the Amending Act of 1955 (21 of 1955), brings out, in bold relief, the legal position that the Chief Customs Officer or any other officer of Customs, does not function as a court or as a Judicial Tribunal. All criminal offences are offences, but all offences in the sense of infringement of a law, are not criminal offences. Likewise, the other expressions have been used in their generic sense and not as they are understood in the Indian Penal Code or other laws relating to criminal offences. Section 167 speaks of offences mentioned in the first column in the Schedule, and the third column in that Schedule lays down the penalties in respect of each of the contraventions of the rules or of the sections in the Act. There are as many as 81 entries in the Schedule to section 167, besides those added later, but each one of those 81 and more entries, though an offence, being an act infringing certain provisions of the sections and rules under the Act, is not a criminal offence. Out of the more than 81 entries in the Schedule to section 167, it is only about a dozen entries, which contemplate prosecution in the criminal sense, the remaining entries contemplate penalties other than punishments for a criminal offence. The provisions of Chapter XVII of the Act, headed "Procedure relating to offences, Appeals, etc.", also make it clear that the hierarchy of the Customs Officers under the Act have not been empowered to try criminal offences. They have been only given limited powers of search. Similarly, they have been given limited powers to summon persons to give evidence or to produce documents. It is true that the Customs Authorities have been empowered to start proceedings in respect of suspected infringements of the provisions of the Act, and to impose penalties upon persons concerned with those infringements, or to order confiscation of goods or property which are found to have been the subject-matter of the infringements, but when a trial on a charge of a criminal offence is intended under any one of entries of the Schedule aforesaid, it is only the Magistrate having jurisdiction, who is empowered to impose a sentence of imprisonment or fine or both.

It was also suggested in the course of the argument that the use of a particular phraseology in the Act, should not stand in the way of looking at the substance of the matter. It may be that the Act has drawn a distinction between confiscation of property and goods, and imposition of penalties on person concerned with the infringement, on the one hand, and the imposition of a sentence of imprisonment or fine or both by a Magistrate, on other hand; but, it is further contended, the Customs Authorities, who impose a penalty or who order confiscation of goods of very large value, are in substance imposing punishments within the meaning of the criminal law. In this connection, our particular attention was drawn to para. 24 of the order dated July 24, 1957, passed by the Collector of Central Excise and Land Customs, New Delhi, which is in these terms :-

> "24. Having regard to all the circumstances of the case, I find that both Sarvshri Thomas Dana and Leo Roy Frey are equally guilty of the offence. They attempted to smuggle Indian and foreign currency out of India. I hold both of them as the persons concerned in the offence committed under section 167(8) of the Sea Customs Act, 1878. The foregoing facts prove beyond doubt that the offence was the result of the most deliberate and calculated conspiracy to smuggle this huge amount of currency

> out of the country. The offenders, therefore, deserve deterrent punishment. I, therefore, impose a personal penalty of Rs. 25,00,000 (Rupees twenty-five lakhs only) each on Shri Thomas Dana and Shri Leo Roy Frey which should be paid within two months from the date of this order or such extended period as the adjudicating officer may allow."

The expressions "equally guilty of the offence", "the offence was the result of the most deliberate and calculated conspiracy to smuggle," and "deserve deterrent punishment", have been greatly emphasized in aid of the argument that the Collector had really intended to punish the petitioners in respect of the "offence", and found them "guilty." It is true that these expressions are commonly used in judgments given in criminal trials, but the same argument can be used against the petitioners by saying that mere nomenclature does not matter. What really matters is whether there has been a "prosecution".

It is true that the petitioners were dealt with by the Collector of Central Excise and Land Customs, for the "offence" of smuggling; were found "guilty", and a deterrent "punishment" was imposed upon them, but as he had not been vested with the powers of a Magistrate or a criminal court, his proceedings against the petitioners were in the nature of Revenue proceedings, with a view to detecting the infringement of the provisions of the Sea Customs Act, and imposing penalties when it was found that they had been guilty of those infringements. Those penalties, the Collector had been empowered to impose in order not only to prevent a recurrence of such infringements, but also to recoup the loss of revenue resulting from such infringements. A person may be guilty of certain acts which expose him to a criminal prosecution for a criminal offence, to a penalty under the law intended to collect the maximum revenue under the Taxing law, and/or, at the same time, make him liable to damages in torts. For example, an assessee under the Income-tax law, may have submitted a false return with a view to defrauding the Revenue. His fraud being detected, the Taxing Officer may realise from him an amount which may be some multiple of the amount of tax sought to be evaded. But the fact that he has been subjected to such a penalty by the Taxing Authorities, may not avail him against a criminal prosecution for the offence of having submitted a return containing false statements to his knowledge. Similarly, a person may use defamatory language against another person who may recover damages in tort against the maker of such a defamatory statement. But the fact that a decree for damages has been passed against him by the civil court, would not stand in the way of his being prosecuted for defamation. In such cases, the law does not allow him the plea of double jeopardy.

That this is the law in America also, is borne out by the following quotation from the "Constitution of the United States of America" - revised and annotated in 1952 by Edward S. Corwin - at p. 840 :-

> "A plea of former jeopardy must be upon a prosecution for the same identical offense. The test of identity of offenses is whether the same evidence is required to sustain them; if not, the fact that both charges relate to one transaction does not make a single offense where two are defined by the statutes. Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents puts him twice in jeopardy. Congress may impose both criminal and civil sanctions with respect to the same act or omission, and may separate a conspiracy to commit a substantive offense from the commission of the offense and affix to each a different penalty. A conviction for the conspiracy may be had though the subsequent offense was not completed. Separate convictions under different counts charging a monopolization and a conspiracy to monopolize trade, in an indictment under the

> Sherman Antitrust Act, do not amount to double jeopardy."....."
>
> "..... A forfeiture proceeding for defrauding the Government of a tax on alcohol diverted to beverage uses is a proceeding in rem, rather than a punishment for a criminal offense, and may be prosecuted after a conviction of conspiracy to violate the statute imposing the tax."

To the same effect is the following placitum under Article 240 in Vol. 22 of 'Corpus Juris Secundum', headed "Offenses and Proceedings in Which Former Jeopardy Is a Defense" :-

> "The doctrine applies to criminal prosecution only and generally to misdemeanours as well as felonies. A former conviction or acquittal does not ordinarily preclude subsequent in rem proceedings, civil actions to recover statutory penalties or exemplary damages, or proceedings to abate a nuisance."

On behalf of the petitioners, their learned counsel placed reliance upon the two American decisions in Morgan v. Zevine (59 L.Ed. 1153; 237 U.S. 632) and United States of America v. Anthony La Franca (75 L.Ed. 551; 282 U.S. 568). The former decision is really against the contention of double jeopardy, raised in this case. That case lays down that persons who steal postage stamps and postal funds from a post office of the United States, after having committed burglary, and thus, having effected their entry into the premises, committed two distinct offences which may be separately charged and punished under the United States' Penal Code. Two separate convictions and sentences as for two distinct offences in those circumstances were not held to be within double jeopardy within the meaning of the United States' Constitutional 5th Amendment. The reason given for the decision against the contention of double jeopardy was that though the offences had been committed in the same transaction, they had been constituted separate and distinct offences by the United States' Penal Code - articles 190 and 192. In the latter case, the plea of double jeopardy was given effect to because the special statutes, infringements of which formed the subject-matter of the controversy, namely, for unlawfully selling intoxicating liquor, had made a specific provision that if any act is a violation of earlier laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and also of the National Prohibition Act, a conviction for such act or offence under one statute, shall be a bar to prosecution therefor under the other. It is clear, therefore, that where there is a specific statutory provision creating a bar to a second prosecution, the court is bound to give effect to the plea of double jeopardy. It is not necessary to refer to certain decisions of the English courts, relied upon by the learned counsel for the petitioners, because those cases had reference to the question whether certain orders passed by certain courts were or were not made in a criminal case or matter within the meaning of the statutes then under consideration before the court. Those are observations made with reference to the terms of those statutes, and are of no assistance in the present controversy. The learned counsel for the petitioners was not able to produce before us any authority in support of the proposition that once a person has been dealt with by the Revenue Authorities for an infringement of the law against smuggling, he cannot also be prosecuted in a criminal court for a criminal offence.

In view of these considerations, and particularly in view of the decision of this Court in the case of Maqbool Hussain v. The State of Bombay ([1953] S.C.R. 730, 738, 739, 743), there is no escape from the conclusion that the proceedings before the Sea Customs Authorities under section 167(8) were not "prosecution" within the meaning of Article 20(2) of the Constitution. In that view of the matter, it is not necessary to pronounce upon the other points which were argued at the Bar, namely, whether there was a "punishment" and whether "the same offence" was involved in the proceedings

before the Revenue Authorities and the criminal court. Unless all the three essential conditions laid down in clause (2) of Article 20, are fulfilled, the protection does not become effective. The prohibition against double jeopardy would not become operative if any one of those elements is wanting.

It remains to consider a short point raised particularly on behalf of the second petitioner (Leo Roy Frey). It was argued that the letter Ex. P. DD/2, admittedly written by him to his father in German, had not been specifically put to him with a view to eliciting his explanation as to the circumstances and the sense in which it had been written. The learned Magistrate in the trial court put the following question (No. 20) to him :-

> "It is in evidence that Ex. P. FF/1 is the translation of the letter Ex. P. DD/2. What have you to say about it ?"

The answer given by the accused to this question was "The translation of Ex. P. FF/1 is mostly correct except for few variations which could have been due to misinterpretation of handwriting." It is clear from the question and answer quoted above, that the learned Magistrate did afford an opportunity to this petitioner to explain the circumstances appearing in the evidence against him with particular reference to the letter. If the court had persisted in putting more questions with reference to that letter, perhaps, it may have been argued that the examination under section 342 of the Code of Criminal Procedure, was in the nature of a cross examination of the accused person, which is not permitted. In our opinion, there is no substance in the contention that the petitioner had not been properly examined under section 342, Criminal Procedure Code, to explain the circumstances appearing in the evidence against him.

It follows from what has been said above, that there is no merit either in the appeal or in the petition. They are, accordingly dismissed.

SUBBA RAO, J. - I have had the advantage of reading the judgment prepared by Sinha J., but I cannot persuade myself to agree with my learned brother.

The facts are fully stated in the judgment of my learned brothers and therefore it would suffice if I restate briefly the facts strictly relevant to the question raised. On June 11, 1957, the petitioner arrived at Bombay, later came to Delhi and from there he travelled to Amritsar by car in company with Mr. Leo Roy Frey. On June 23, 1957, he reached Attari Road Land Customs Station and was arrested under section 173 of the Sea Customs Act, 1878 (Act VIII of 1878) on suspicion of having committed an offence thereunder. He was served with a notice by the Collector of Central Excise and Land Customs, New Delhi, on July 7, 1957, to show cause why penalty should not be imposed on him under section 167(8) of the Sea Customs Act (hereinafter called the Act) and section 7(2) of the Land Customs Act, 1924, and why the goods should not be confiscated. By order dated July 24, 1957, the petitioner was adjudged guilty under section 167(8) of the Act and currency of the value of over 9 lakhs, car worth Rs. 50,000, and other things were confiscated, and he was punished with personal penalty of Rs. 25,00,000. The petitioner was again prosecuted on the same facts before the Additional District Magistrate, Amritsar, on charges under section 167(81) of the Act and sections 23 and 23B of the Foreign Exchange Regulation Act. He was convicted on charges under section 23 read with section 23B of the Foreign Exchange Regulation Act, section 167(81) of the Act and section 120B of the Indian Penal Code and sentenced to imprisonments of 2 years, 6 months and 6 months respectively by the Additional District Magistrate, Amritsar. The conviction and sentences were confirmed on appeal by the Additional Sessions Judge, and the revision filed in the High Court

was dismissed.

The learned counsel for the petitioner contends that the Courts in punishing him violated the fundamental right conferred on him under Article 20(2) of the Constitution as he has been prosecuted and punished for the same offence by the Collector of Customs. The learned Additional Solicitor General counters this argument by stating that the petitioner was not prosecuted earlier before a judicial tribunal and punished by such tribunal, and, in any view, the prosecution was not for the same offence with which he was charged before the Magistrate, and therefore this case does not fall within the Constitutional protection given under Article 20(2).

Before addressing myself to the arguments advanced it would be convenient at this stage to steer clear of two decisions of this Court. The first is Maqbool Hussain v. The State of Bombay ([1953] S .C.R. 730). There proceedings had been taken by the Sea Customs Authorities under section 167(8) of the Act and an order for confiscation of goods had been passed. The person concerned was subsequently prosecuted before the Presidency Magistrate for an offence under section 23 of the Foreign Exchange Regulation Act in respect of the same act. This Court held that 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 a judicial tribunal within the meaning of Article 20(2) of the Constitution and the prosecution was not barred. The important factor to be noticed in that case is that the Sea Customs Authorities did not proceed against the person concerned but only confiscated the goods found in his possession. At page 742, Bhagwati J. says "Confiscation is no doubt one of the penalties which the Customs Authorities can impose. But that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods which have been dealt with contrary to the provisions of the law.....". Though the observations in the judgment cover a wider field - I shall deal with them at a later stage - the decision could be sustained on the simple ground that the previous proceedings were not against the person concerned and therefore he was not prosecuted and punished for the same offence for which he was subsequently proceeded against in the Criminal Court. The second decisions is Sewpujanrai Indrasanrai Ltd. v. The Collector of Customs ([1959] S.C.R. 821). There also the Customs Authorities confiscated the goods found in the possession of the appellant. Under section 8(3) of the Foreign Exchange Act, a restriction imposed by notification made under that section is deemed to have been imposed under section 19 of the Sea Customs Act, and all the provisions of the Sea Customs Act shall have effect accordingly. But the said deeming provision is subject to an important qualification contained in the words 'without prejudice to the provisions of section 23 of the former Act.' It was argued that by reason of the provisions of section 8(3) of the Foreign Exchange Regulations Act, the appellant should have been proceeded against under section 23 of that Act and it was not open to the Customs Authorities to take action against the offender under section 167(8) of the Sea Customs Act. This Court negatived that contention accepting the principle that confiscation of the goods under section 167(8) of the Sea Customs Act was an action in rem and not a proceeding in personam. Das, J., who delivered the judgment of the Court made the following observations in repelling the said argument :

> "The penalty provided is that the goods shall be liable to confiscation. There is a further provision in the penalty column that any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods etc. The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding in rem and the penalty is enforced against the goods whether the offender is known or not known; the order of confiscation under section 182, Sea Customs Act, operates directly upon the status of the property, and under section 184

transfers an absolute title to Government. Therefore, in a case where the Customs authorities can proceed only against the goods, there can be no question of applying section 23 of the Foreign Exchange Act and even on the construction put forward on behalf of the appellant company as respects section 8(3), the remedy under the Sea Customs Act against the smuggled goods cannot be barred."

This decision also indicates that the confiscation of the goods is an action in rem and is not a proceeding in personam. A combined effect of the aforesaid two decisions may be stated thus :

Section 167(8) of the Act provides for the following two kinds of penalties when contraband goods are imported into or exported from India : (1) such goods shall be liable to confiscation; (2) any person concerned in any such offence shall be liable to a penalty. If the authority concerned makes an order of confiscation it is only a proceeding in rem and the penalty is enforced against the goods. On the other hand, if it imposes a penalty against the person concerned, it is a proceeding against the person and he is punished for committing the offence. It follows that in the case of confiscation there is no prosecution against the person or imposition of a penalty on him. If the premises be correct, the subsequent prosecution of the person concerned cannot be affected by the principle of double jeopardy, as he was not prosecuted or punished in the earlier proceedings. But the question that arises in the this case is whether, when there was a proceeding in personam and a penalty was imposed upon the person concerned under section 167(8) of the Act, he could be prosecuted and punished in regard to the same act before another tribunal.

On the facts of this case it is manifest that the petitioner was prosecuted before the Magistrate for the same act in respect of which a penalty of Rs. 25,00,000 had been imposed on him by the Collector of Customs under section 167(8) of the Act. The question is whether the prosecution and punishment of the petitioner infringed his fundamental right under Article 20(2) of the Constitution. It reads :

"No person shall be prosecuted and punished for the same offence more than once."

The words of this Article are clear and unambiguous and their plain meaning is that there cannot be a second prosecution where the accused has been prosecuted and punished for the same offence previously. The clause uses the three words of well-known connotation : (1) Prosecution; (2) punishment; and (3) offence. The word 'offence' is defined in section 3(38) of the General Clauses Act, 1897, to mean any act or omission made punishable by any law for the time being in force. Under section 4 of the Code of Criminal Procedure, it means any act or omission made punishable by any law for the time being in force. An offence is therefore an act committed against law or omitted where the law requires it.

Punishment is the penalty for the transgression of law. The terms 'punishment' and 'penalty' are frequently used as synonyms of each other; and, indeed under clause (1) of Article 20 of the Constitution, the word 'penalty ' is used in the sense of 'punishment'. The punishments to which offenders are liable under the provisions of the Indian Penal Code are : (1) death; (2) imprisonment for life; (3) imprisonment, which is of two descriptions, viz., (i) rigorous, i.e., with hard labour; and (ii) simple; (4) forfeiture of property; and (5) fine.

The word 'prosecuted' is comprehensive enough to take in a prosecution before an authority other than a magisterial or a criminal Court. Having regard to the historical background, a restricted meaning has been placed upon it by this Court in Maqbool Hussain v. The State of Bombay ([1953]

S.C.R. 730). Bhagwati, J., in delivering the Judgment of the Court observed at page 742 thus :

> "Even though the customs officers are invested with the power of adjudging confiscation, increased rates of duty or penalty, the highest penalty which can be inflicted is Rs. 1,000. Confiscation is no doubt one of the penalties which the Customs Authorities can impose, but that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods which have been dealt with contrary to the provisions of the law and in respect of the confiscation also an option is given to the owner of the goods to pay in lieu of confiscation such fine as the officer thinks fit. All this is for the enforcement of the levy of and safeguarding the recovery of the sea customs duties. There is no procedure prescribed to be followed by the Customs Officer in the matter of such adjudication and the proceedings before the Customs Officers are not assimilated in any manner to the provisions of the Civil or the Criminal Procedure Code. The Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorised to administer oath to any witness. The appeals, if any, lie before the Chief Customs Authority which is the Central Board of Revenue and the power of revision is given to the Central Government which certainly is not a judicial authority. In the matter of the enforcement of the payment of penalty or increased rate of duty also the Customs Officer can only proceed against other goods of the party in the possession of the Customs Authorities. But if such penalty or increased rate of duty cannot be realised therefrom the only thing which he can do is to notify the matter to the appropriate Magistrate who is the only person empowered to enforce payment as if such penalty or increased rate of duty had been a fine inflicted by himself. The process of recovery can be issued only by the Magistrate and not by the Customs Authority. All these provisions go to show that far from being authorities bound by any rules of evidence or procedure established by law and invested with power to enforce their own judgments or orders the Sea Customs Authorities are merely constituted administrative machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act."

This Court therefore accepted the view that the earlier prosecution should have been before a Court of law or a judicial Tribunal, and that the Sea Customs Authorities when they entertained proceedings for the confiscation of gold did not act as a judicial Tribunal. In my view the said decision unduly restricted the scope of the comprehensive terms in which the fundamental right is couched. If res integra, I would be inclined to hold that the prosecution before the Customs Authority for an offence created by the Act is prosecution within the meaning of Article 20, even though the Customs Authority is not a judicial Tribunal. But I am bound by the decision of this Court in so far as it held that the earlier prosecution should have been held before a Court of law or a judicial Tribunal, and that the Customs Authority adjudging confiscation was not such a tribunal. But the said observations must be confined to the adjudication of confiscation by the Customs Authority.

The outstanding question therefore is whether a Collector of Customs in adjudging on the question whether any person concerned in the importation or exportation of the prohibited goods committed an offence, and in imposing a penalty on him, acts as a judicial Tribunal. There is a current of judicial opinion in support of the contention that under a particular Act an authority may act as a judicial Tribunal in discharge of certain duties and as an executive or administrative authority in discharge of other duties. The question whether a particular authority in discharging specified duties

is a judicial tribunal or not falls to be decided on the facts of each case, having regard to the well-settled characteristics of a judicial tribunal.

In 'Words and Phrases', permanent edition, Vol. 23, "Judicial Tribunal" has been defined thus : "It is a body who has the power and whose duty it is to ascertain and determine the rights and enforce the relatives duties of contending parties." In 'The Encyclopedia of Words and Phrases - Legal Maxims', by Sanagan and Drynan, much to the same effect it is stated thus :

> "A 'judicial tribunal' is one that dispenses justice, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing the 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. A judicial tribunal looks for some law to guide it. An administrative tribunal, within its province, is a law unto itself."

In Cooper v. Wilson ((1937) 2 K.B. 309, 340, 341) the characteristics of a judicial decision are given as follows, at page 340 :

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites :- (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal argument by the parties; and (4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

This passage has been approved by this Court is Maqbool Hussain's Case ([1953] S.C.R. 730).

In Venkataraman v. The Union of India ([1954] S.C.R. 1150) this Court considered the question whether Article 20 protects an Officer against whom an enquiry was held under Public Servants Enquiries Act, 1850 (Act XXXVII of 1850) from being prosecuted again on the same facts before a Criminal Court. This Court held on a consideration of the provisions of that Act that the appellant was neither prosecuted nor punished for the same offence before a judicial tribunal. But in coming to that conclusion the following criteria were applied to ascertain the character of the proceedings : (1) duty to investigate an offence and impose a punishment; (ii) prosecution must be in reference to the law which creates the offence and punishment must also be in accordance with what the law prescribes; (iii) there must be the trappings of a judicial tribunal and (iv) the decision must have both finality and authoritativeness, which are the essential tests of a judicial pronouncement. Having regard to the aforesaid tests, I shall now proceed to consider the applicability of Article 20 to the present prosecution.

A fundamental right is transcendental in nature and it controls both the legislative and the executive acts. Article 13 explicitly prohibits the State from making any law which takes away or abridges any fundamental right and declares the law to the extent of the contravention as void. The law therefore must be carefully scrutinized to ascertain whether a fundamental right is infringed. It is not the form

but the substance that matters. If the legislature in effect constitutes a judicial tribunal, but calls it an authority, the tribunal does not become any the less a judicial tribunal. Therefore the correct approach is first to ascertain with exactitude the content and scope of the fundamental right and then to scrutinize the provisions of the Act to decide whether in effect and substance, though not in form, the said right is violated or curtailed. Otherwise the fundamental right will be lost or unduly restricted in our adherence to the form to the exclusion of the content.

The question therefore is whether the petitioner was in effect and in substance prosecuted and punished by a judicial tribunal for the same offence for which he is now prosecuted. Section 167 of the Act opens with the following words :

> "The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively."

Chapter XVI of the Act deals with 'Offences and Penalties'. Section 167 provides for offences and penalties in a tabular form,. The first column gives the particulars of the offences; the second column gives the sections of the Act to which the offence has reference; and the third column gives the penalties in respect of the relevant offences. Apart from the fact that the statute itself, in clear terms, describes the acts detailed in the first column of section 167 as offences against particular laws, the acts described therein clearly fall within the definition of 'offences' in the General Clauses Act and the Indian Penal Code. There cannot therefore be the slightest doubt in this case that the contravention of any of the provisions of the Act mentioned in section 167 is an offence.

The next question is whether the penalties prescribed for the various offences in the third column of section 167 are punishments within the meaning of Article 20 of the Constitution. A glance at the third column shows that the penalties mentioned therein include direction of payment of money, confiscation of goods and the receptacles wherein they are found, and imprisonment. The penalties may be imposed by the Customs Officers or Magistrates as the case may be. Where a person is convicted by a Magistrate and sentenced to imprisonment or payment of fine or where a penalty is imposed by a Customs Officer, in either case, the punishment is described as penalty in the third column of section 167. Section 167 clearly indicates that penalty is punishment inflicted by law for its violation - for doing or failing to do something that is the duty of the party to do. Section 167 therefore defines a criminal act and fixes a penalty or punishment for that act. The two words 'penalty' and 'punishment' are interchangeable and they convey the same idea.

The more difficult question is whether a Customs Authority, when it functions under section 167 of the Act, is a judicial tribunal. It is not, and cannot be, disputed that a magistrate, who convicts and punishes a person for the infringement of some of the provisions of section 167 of the Act, is a judicial tribunal. Is it reasonable to assume that when another authority adjudges on similar offences under the same section, it is functioning in a different capacity ? Section 182 defines the jurisdiction of the Customs Authority in respect of the offences mentioned in section 167 of the Act. It says :

> "In every case, except the cases mentioned in Section 167, Nos. 26, 72 and 74 to 76, both inclusive, in which under this Act, anything is liable to confiscation or to increased rates of duty;
>
> or any person is liable to a penalty,

such confiscation, increased rate of duty or penalty may be adjudged -

(a) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs-collector;

(b) up to confiscation of goods not exceeding two hundred and fifty rupees in value, and imposition of penalty or increased duty, not exceeding one hundred rupees, by an Assistant Commissioner or Assistant Collector of Customs;

(c) up to confiscation of goods not exceeding fifty rupees in value, and imposition of penalty or increased duty not exceeding ten rupees, by such other subordinate officers of Customs as the Chief Customs-authority may, from time to time, empower in that behalf in virtue of their office :".

Section 187 : "All offences against this Act, other than those cognizable under section 182 by officers of Customs, may be tried summarily by a Magistrate."

It is therefore clear that some offences under section 167 are cognizable by the Customs Authorities and some offences by Magistrates. Section 171A, inserted by the Sea Customs (Amendment) Act, 1955 (Act 21 of 1955), confers power on officers of Customs to summon any person to give evidence and produce documents; it reads :

"171A. (1) Any officer of Customs duly employed in the prevention of smuggling shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code." Under this section, the Customs Authority, who makes an inquiry, is empowered in connection with that inquiry, to summon persons to give evidence and produce documents and the witnesses summoned are under a statutory duty to speak the truth. The circumstance that under clause (4) of the said section, an inquiry is deemed to be a judicial proceeding within the meaning of section 193 and. 228 of the Indian Penal Code, viz., for the purpose of punishment for giving false evidence and for contempt of Court, does not detract from the judicial characteristics conferred upon the

> authority by the other clauses of the section. Clause (4) must have been enacted only by way of abundant caution to guard against the contentions that the authority is not a Court; and to bring in the inquiry made by the Customs Officer in regard to administrative matters other than those conferred upon him under section 167, within the fold of section 193 and section 228 of the Indian Penal Code. Sections 188, 189, 190A and 191 provide a hierarchy of tribunals for deciding appeals and revisions. The Chief Customs-authority may, suo motu or otherwise exercise revisional powers in regard to the orders of the subordinate officers. Power is also conferred on Government to interfere in matters in regard whereof no appeal is provided for. It is true that no rules have been framed providing the manner in which the Customs-collector should proceed with the inquiry in regard to offences committed under the Act of which he is authorized to take cognizance. But the record discloses that a procedure analogous to that obtaining in criminal Courts is followed in regard to the said offences. Charges are framed, evidence is taken, a advocates are heard, decision is given on the question whether an offence is committed or not; and, if the offence is held to have been committed, the person concerned is convicted and a penalty is imposed. When the statute empowers the officer to take cognizance of an offence, to adjudge upon the question whether the offence is committed or not and to impose a penalty for the offence, it is implied in the statute that the judicial procedure is to be followed. The entire scheme of the Act as disclosed in the Sea Customs Act leaves no doubt in my mind that so far as offences mentioned in section 167 are concerned, the Customs Authority has to function as a Judicial Tribunal. I have therefore no hesitation to hold that the Customs Officers in so far as they are adjudicating upon the offences mentioned under section 167 of the Act are functioning as judicial tribunals. If the other view, viz., that an authority is not a judicial tribunal, be accepted, it will lead to an anomalous position, which could not have been contemplated by the legislature. To illustrate, a Customs Collector may impose a penalty of Rs. 25,00,000 as in this case on his finding that a person has committed an offence under section 167(8) of the Act, and the accused can be prosecuted again for the same offence before a Magistrate. On the other hand, if the prosecution is first laid before a Magistrate for an offence under section 167(81) and he is convicted and sentenced to a fine of a few rupees, he cannot be prosecuted and punished again before a Magistrate. Unless the provisions of the Constitution are clear, a construction which will lead to such an anomalous position should not be accepted, for, by accepting such a construction, the right itself if defeated.

It is then contended that the offence for which the petitioner was prosecuted by the Magistrate is different from that in regard whereof he was sentenced by the Customs Officer. The petitioner was convicted under section 167(8) of the Act, whereas he was subsequently prosecuted and punished under section 167(81) of the Act. Section 167(81) of the Act reads as follows :

> "If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of, or is in any way concerned in carrying removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid; or

> if any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods,
>
> such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years, or to fine, or to both."

It is contended that under section 167(81) knowledge or intention to defraud is an ingredient of the offence, whereas under section 167(8) they are not part of the offence, that offences under sections 167(8) and 167(81) are different, and that therefore the prosecution and punishment for an offence under the former sub-section would not be a bar for prosecution and punishment under the latter sub-section. It is not necessary to consider the decisions cited in support of the contention that for the application of the principle of double jeopardy the offence for which a person is prosecuted and punished in a second proceeding should be the same in respect of which he had been prosecuted and punished at an earlier stage. That fact is self-evident from Article 20(2) of the Constitution itself. If so, the only question is whether the petitioner was prosecuted before the Magistrate for the same offence in regard to which he was prosecuted before the Collector of customs. It is true that the phraseology in section 167(8) is more comprehensive than that in sub-section (81) in that the offences under the former sub-section take in acts committed without knowledge or intent to defraud. But it does not exclude from its scope acts committed with knowledge or with intent to defraud. For, a person who imports or exports prohibited goods with intent to defraud is also concerned in the offence of such importation or exportation. The question of identity of offence is one to be determined on the facts and circumstances of a particular case. One of the tests is whether an offence for which a person was earlier prosecuted takes in all the ingredients of the offence, the subject matter of the second prosecution. The fact that he might have been prosecuted for a lesser offence is not a material circumstance. The question therefore is not whether under section 167(8) a person can be found guilty of an offence even if there is no fraudulent intent or knowledge, but the question is whether the petitioner was prosecuted and punished on the same facts in regard to which he was subsequently prosecuted and punished before the Magistrate. The record discloses that the petitioner was prosecuted before the Customs Authority as well as the Magistrate on the same facts, viz., that he, along with others, attempted to take out of India, Indian currency (as detailed in paragraphs 14 and 17 of the complaint of the Assistant Collector of Customs and Central Excise, Amritsar), in contravention of the law prohibiting such export. It is not the case that the knowledge on the part of the petitioner of his illegal act is excluded from the first prosecution and included in the subsequent one. In the circumstances, I cannot hold that the offence for which he was prosecuted by the Magistrate is different from that in regard to which he was prosecuted and punished by the Customs Authority. In this view, the prosecution and punishment by the Magistrate directly infringes the fundamental right under Article 20(2) of the Constitution.

No attempt has been made by the learned Solicitor General to contend that the offence under sections 23 and 23B of the Foreign Exchange Regulations Act for which the petitioner is convicted is an offence different from that for which he was prosecuted earlier under section 167(8) of the Act.

It is conceded that the decision in the writ petition covers the decision in connected appeal also. In the result, the writ petition and the appeal are allowed.

ORDER

In view of the opinion of the majority, the Petition and the Appeal are dismissed.

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