

Shri Tara Chand

Vs

Superintendent of Central Excise, Bombay

Criminal Appeal No. 76 of 1968

(S. M. Sikri, I. D. Dua, V. Bhargava JJ)

03.12.1970

JUDGMENT

DUA, J. -

1. This appeal by special leave is directed against the judgment and order of the Mysore High Court on appeal setting aside in part the order of the appellant's acquittal by a Second Class Magistrate and convicting him under Rule 126-P(2) of the Defence of India Rules as amended in 1963 - hereafter called the Rules - and sentencing him to rigorous imprisonment for six months. The order of the Trial Court acquitting him of the offence under Section 135 of the Customs Act was upheld.

2. The appellant alighted from a service plan at S.A.L. Aerodrome, Bangalore, on November 16, 1963, at about 12.45 in the afternoon. E.R. Fariman, Inspector, C.I.D., had prior incriminating information about the arrival of a person whose description seemed to tally with that of the appellant. The Inspector and his staff who were on the look-out waited for the appellant to take his baggage from the baggage-counter. As soon as the appellant took delivery of a plastic bag and a hold-all the Inspector asked the appellant to accompany him to the Security Room. On being questioned the appellant gave his name as Tarachand though he admitted that he had traveled under the name of J. D. Shaw. In the Security Room in the presence of Panchwatdars the plastic bag and the hold-all were opened and examined. From a pillow taken out of the hold-all were found two tape bags containing 16 pieces of gold with foreign markings. These tape bags had been put into the pillow which was then stitched. The appellant was then produced by the Inspector before his D.S.P. along with the articles seized from him. After obtaining sanction from the Collector under Section 137(1) of the Customs Act and under Rule 126-Q of the Rules, Shri Rasool, Superintendent of Central Excise (P.W. 3), filed the complaint.

3. The learned Magistrate trying the appellant found the gold pieces to be of foreign origin. He, however, did not find any evidence establishing them to be smuggled with the result that the appellant was acquitted of the offence under Section 135 of the Customs Act. The learned magistrate did not draw any presumption against the appellant because the seizure of the gold pieces was not by the customs authorities but by the police who thereafter handed over the gold pieces to the Office of the Collector of Central Excise and Customs.

4. While considering the case against the appellant under Rule 126-P(2) of the Rules, the learned Magistrate observed that according to the relevant notification issued by the Government of India on November 5, 1963, in modification of the earlier one issued under Rule 126-J, read with Rule 126-X of the Rules, it is either the Assistant Collector of Central Excise or the Collector of Central Excise who can institute prosecution. These officers are not authorised to delegate the power to institute

prosecution. According to the learned Magistrate the Collector of Excise had, therefore, no power to delegate the right to institute prosecution with which he alone had been clothed. Exhibit P-5 was in the circumstances considered to be ineffective. On this reasoning the complaint having not been filed by the officer competently authorised the appellant was acquitted.

5. On appeal by the Superintendent of Central Excise and Customs iii(the complainant in the case), the High Court disagreed with the view taken by the learned Magistrate. It may be pointed out that the appeal by the complainant was confined only to the acquittal under Rule 126-P(2) of the Rules and the appellant's acquittal under Section 135 of the Customs Act was not questioned, it being conceded that there was no evidence on the record to bring the appellant's case under Section 135 of the Customs Act.

6. The High Court relying on Ex.P-5 and the two notifications issued by the Government of India came to the conclusion that the Collector was lawfully empowered to authorise the Superintendent of Central Excise to prosecute the appellant. That court also arrived at the conclusion that the appellant, who was not a dealer or refiner, having a licence, was found in possession of gold, of which no declaration had been made under the law and, therefore, he was guilty of an offence punishable under Rule 126-P(2) of the Rules. The appeal was accordingly allowed and the appellant convicted and sentenced to rigorous imprisonment for six months.

7. In this court Shri. Tarkunde assailed the legality of the view taken by the High Court. According to him the Trial Court had rightly held the prosecution not to have been instituted by a duly authorised person. Let us see if the scheme of the relevant statutory provisions supports the learned counsel.

8. Part XII-A of the Rules deals with Gold control and it contains Rules 126-A to 126-Z. This part was inserted in the Defence of India Rules in January, 1963. Rule 126-Q provides :

"(1) No prosecution for any offence punishable under this Part shall be instituted against any person except by, or with the consent of, the Administrator or any person authorised by the Administrator in this behalf.

(2) Nothing in Rule 154 shall apply to any contravention of any provision of this part or any order made thereunder."

The word "Administrator" was substituted for the word "Board" in September, 1963. We are informed that no Administrator as defined in Rule 126-A(a) was appointed by the Central Government under power conferred on it by Rule 126-J(1). Under Rule 126-X, the Central Government is empowered to perform all or any of the functions of the Administrator and also by notification to exercise all or any of the powers conferred on the Administrator by Part XII-A if considered necessary or expedient in the public interest to do so. The Administrator who is to take suitable measures; (a) to discourage the use and consumption of gold, (b) to bring about conditions tending to reduce the demand for gold and (c) to advise the Central Government on all matters relating to gold, is enjoined by Rule 126-J(3) to discharge his functions subject to the general control and directions of the Central Government. Sub-rules (4) and (5) of Rule 126-J provide :

"(4) The Administrator may by general or special order authorise such person as he thinks fit to exercise all or any of the powers exercisable by him under this part and different persons may be authorised to exercise different powers :

Provided that no officer below the rank of Collector of Customs or Central Excise or Collector of a district shall be authorised to hear appeals under sub-rule (3) of Rule 126-M.

(5) Subject to any general or special direction given or condition attached by the Administrator any person authorised by the Administrator to exercise any powers may exercise these powers in the same manner and with the same effect as if they had been conferred on that person directly by this part and not by way of authorisation."

We may bear in mind the effect of sub-rule (5) on the scheme. Rule 126-H(2)(d) dealing with restrictions on possession and sale of gold by persons other than licence holders lays down :

"(2) Save as otherwise provided in this part, -

X X X##

(d) no person other than a dealer licensed under this part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold not being ornament, except,

(i) by succession, intestate or testamentary, or

(ii) in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may, by general or special order make in this behalf :

Provided that a refiner may buy or accept gold from a dealer licensed under this part;"

Turning now to the two notifications on the construction of which the fate of this case depends, we find that on January 10, 1963, the Central Government issued a notification in exercise of the powers conferred on it by Rule 126-X, read with Rule 126-J(4) authorising certain officers of the Central Excise Department to exercise any or all of the powers of the Gold Board in relation to certain matters specified therein. At SI. No. 10 of the Table contained in the notification officers not inferior in rank to the Assistant Collector were authorised to exercise powers and functions in relation to the matter of "according of sanctions for the prosecution of offences : with reference to Rule 126-Q. We have reproduced the exact words of the entry in Col. (4) of the Table. This notification was amended in certain respects on November 5, 1963. At SI. No. 10 of the amended Table officers not inferior in rank to the Assistant Collector of Central Excise Department were authorised to exercise the powers and functions in relation to the matter of "institution of prosecution for any offence punishable under Part XII-A of the Defence of India Rules" with reference to Rule 126-Q. Here again we have reproduced the exact words used.

9. According to Shri Tarkunde these notification did not empower the Assistant Collector to authorise the Superintendent of Central Excise and Customs to institute the present, proceedings. The Assistant Collector, said the counsel, was authorised only himself to institute them and he could not lawfully accord consent for the institution of prosecution as he purported to do under Ex. P/5. We are unable to accept this submission. The actual wording of the relevant entries in all the columns of Serial No.10 in the Table of the later notification may here be reproduced :

#"10. Assistant Collector Institution of prosecution of the Central Excise for any offence punishable Department. 126-Q under Part XII-A of the Defence of India Rules, 1962."##

This has to be read along with the opening part of the earlier notification, dated January 10, 1963, which remains the principal notification and was amended only in certain particulars on November 5, 1963. According to the opening part of the principle notification the officers not inferior in rank to the officers specified in Col. 2 of its Table were authorised to exercise any or all of the powers of the gold Board in relation to the matters specified in the corresponding entries in Cols. 3 and 4. In place of "Gold Board" we have to read the word "Administrator" and since no Administrator was ever appointed, the powers and functions entrusted to him were at the relevant time being exercised by the Central government. We may point out that it was apparently by oversight that the word "Administrator" was not substituted for the expression "Gold Board" in the notification though in September, 1963, such substitution had been effected by appropriate amendment in the relevant rules. This was not controverted at the bar and indeed no point was sought to be made on this ground. It would thus be seen that in determining the scope and extent of the powers of the officers authorised in the Table of the Notification to exercise the powers and functions of the Administrator, actually exercised by the Central Government (there being no Administrator appointed under the rules) we have to see the nature of the power and function mentioned in Col. 4 and examine it by reference to the rule mentioned in Col. 3 in the light of the expression "in relation to the matters specified" in the notification which, in our opinion, to some extent widens the scope of the powers and functions delegated by the notification.

10. Under Rule 126-Q as read in the light of the entries are Serial No. 10 of the notification, prosecution for an offence punishable under Part XII-A, can, in our opinion, be instituted by or with the consent of an officer not inferior in rank to the Assistant Collector of the Central Excise Department. In Ex.P-5, dated September 4, 1964, Shri V. Parthasarathy, Collector of Central Excise accorded his sanction to the prosecution of the appellant as required under Rule 126-Q of the Defence of India Rules. He did not do so in exercise of the powers conferred on him by the two notifications mentioned above. The offence for which the consent was given was described in this document as under :

"Whereas Shri Tarachand, S/O Deviraj (Devichand), Room No. 4. Mistry Bungalow, Duncan Road, Bombay-4, was found to have acquired gold not being ornament except by succession, intestate or testamentary or in accordance with the permit granted either by the Administrator or by the Deputy Secretary in the office of the Gold Control Administrator, Bombay, duly authorised in this behalf by the Government of India, vide their Notification No. F-1/8/63-CC, dated 20-10-1963, 16 pieces of gold of 10 tolas each bearing markings as to its origin and purity contrary to the provisions of Rule 126-H(d) of the Defence of India Amendment Rules.

Whereas any person having in his possession or in his control any quantity of gold or buy or otherwise acquires or accepts gold in contravention of any provisions of Part XII-A of the Defence of India Rules renders himself liable for punishment under Rule 126-P(2).

And on careful study of the material placed before me and satisfying myself that the said Sri. Tarachand is liable to action under Rule 126-P(2) of the Defence of India Amendment Rules, 1963, for reasons mentioned above, I, V. Parthasarathy, Collector

of Central Excise, Mysore Collectorate, Bangalore, in exercise of the powers conferred on me by the Government of India in their Notification No. F-25/1/63-GCR, dated 5-11-63, issued under Rule 126-J, read with Rule 126-K, of the Defence of India Amendment Rules, do hereby accord consent for the institution of prosecution of the said Shri Tarachand as required under Rule 126-Q of the Defence of India Amendment Rules, 1963."

11. This authority, in our opinion, quite clearly falls within the notification read as a whole and the High court was right in so construing it.

12. The submission that these notification must be construed strictly because by these instruments the authority to prosecute is delegated and so construed they should be held to confer power only to prosecute but not to accord consent to the appellant's prosecution by some other person or authority has not impressed us. The attempt by the appellant's learned counsel in this connection to equate these notifications with powers of attorney does not carry the matter any further. The plain reading of the relevant entries in the notifications leaves no doubt in our mind as to its meaning, scope and effect. It quite clearly authorises the Collector to exercise the power and function in relation to the matter of institution of prosecution for any offence punishable under Part XII-A of the Rules referred to in Rule 126-Q. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems to us that after the responsible officers of this Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution including the drafting and presentation of the complaint can be lawfully carried out by others. That this is the real object and purpose of the notifications is clearly brought out on plain reading of their language. To hold otherwise, as desired by Shri Tarkunde, would not only mean unduly straining the unambiguous statutory language but would also tend to thwart, instead of effectuating, their real purpose. We are thus in agreement with the view taken by the High Court.

13. The counsel next submitted that the charge leveled against the appellant was different from the one for which he was been convicted. In any event the charge framed, according to the counsel, was vague and it has caused him prejudice his defence. Here again, we are unable to agree. In the complaint all the relevant facts were stated quite clearly and it was emphasised that the appellant had been found in possession of 16 pieces of gold with foreign markings ingeniously concealed inside long tabular pouches, in turn hidden inside a pillow case. He was stated to be guilty inter alia of offences punishable under Rule 126(2). The second charge framed by the Court was as follows :

"That you on or about the 16th November, 1963 at about 12.45 hours at H.A.L. Aerodrome, Bangalore, alighted from the plane No. 105 which arrived from Bombay and when you and your articles were searched, you were found in possession of 16 pieces of gold each bearing marking as to its foreign origin and purity weighing 10 tolas each, having illegally imported into India in contravention of prohibition imposed by the Ministry of Finance Notification No. 1211 F-1/48, dated 25th August, 1948, and without permit issued by the Gold Control Authorities as required under Rule 126-H(d) under the Defence of India Amendment Rules, 1963 and thereby committed an offence under Rule 126-P(2) read with Rule 126-I(10) of the Defence of India Amendment Rules, 1963, relating to Gold Control and within my cognizance."

The appellant never complained that this charge was vague or outside the complaint. Indeed in his

statement in Court the appellant has admitted all the relevant facts alleged by the prosecution. The facts alleged and proved clearly bring the appellant's case within the mischief of Rules 126-H(2)(d) and Rule 126-P(2). Rule 126-H(2)(d) had already been reproduced earlier under Rule 126-P(2)(ii) whoever has in his possession or under his control any quantity of gold in contravention of any provision of Part XII-A, is punishable with imprisonment for a term of not less than six months and not more than two years and also with fine. All the relevant salient facts alleged by the prosecution having been admitted by the appellant there can hardly be any question of prejudice having been caused to him by the wide language of the complaint and the charge, assuming the language to be wide. This argument is accordingly repelled.

14. Lastly the counsel contended that the sentence imposed was too severe. The entire gold seized from him having been confiscated the sentence undergone should, according to the submission, be held to serve the cause of justice. We have already noticed that under Rule 126-P(2)(ii) the minimum period of imprisonment prescribed is six months. According to the appellant the law has since been amended and under the Gold (Control) Act, 18 of 1965, which has repealed Part XII-A of the Rules there is no minimum sentence of imprisonment prescribed. In our opinion this case must be governed by the law as it was in force prior to the enforcement of the Gold (Control) Act, 1965. Our attention has not been drawn to any provision of law nor to any principle or precedent which would attract the provisions of the Gold (Control) Act of 1965 to this case in regard to the question of sentence.

15. This appeal accordingly fails and is dismissed.

</html