

Jethamal Pithaji

Vs

The Assistant Collector of Customs, Bombay and Another

Criminal Appeal No. 48 of 1970

(H. R.Khanna, A. Alagiriswami JJ)

10.09.1973

JUDGMENT

KHANNA, J. –

1. This appeal by special leave is against the judgment of the Bombay High Court affirming on appeal the conviction of the appellant under Section 167(81) of the Sea Customs Act and the sentence of rigorous imprisonment for two years.
2. The prosecution case is that on August 17, 1961 Sub-Inspector Sahani of the Railway Preventive Section, on receipt of some information, went to room No. 2 on the second floor of Bori Chawl in the 13th lane, Kamathipura, Bombay. The accused was found present there, holding a bag. The said bag was taken into possession by the Sub-Inspector and was found to contain 25 bars of gold, weighing ten tolas each, of the value of Rs. 78,400/-. The bars had foreign markings. The Sub-Inspector arrested the accused for an offence under Section 124 of the Bombay Police Act. As the articles recovered from the accused consisted of gold bars with foreign markings, the matter was entrusted to the Customs Officer H. C. Advani (P.W. 2). The gold bars too were handed over to Advani. Advani recorded statement Ex. A of the accused. A Complaint was thereafter filed against the accused by the Assistant Collector of Customs on the allegation that the accused had committed an offence under Section 167(81) of the Sea Customs Act.
3. The accused in his statement under Section 342 of the Code of Criminal Procedure stated that the gold bars in question had not been recovered by the police officer from the second floor of the building whereas the accused resided on the ground floor. The accused denied having anything to do with the gold bars which were taken into possession by the Sub-Inspector Sahani. No evidence was produced in defence.
4. The Chief Presidency Magistrate before whom the accused was sent up for trial accepted the prosecution allegations and rejected the version of the accused. The judgment of the trial Court, as mentioned earlier, was confirmed on appeal by the High Court.
5. In appeal before us, Mr. Gupte on behalf of the accused appellant has argued that the conviction of the accused is based upon the sole testimony of the Sub-Inspector Sahani. It is pointed out that Sahani made contradictory statements during the course of the trial and as such, his evidence cannot provide a solid foundation for basing the conviction of the accused. In this respect we find that the statements of Sahani and Advani were recorded by Mr. Nasrullah, Chief Presidency Magistrate on February 6, 1964. Charge under Section 167(81) of the Sea Customs Act was thereafter framed against the accused. There was further cross-examination of these two witnesses on February 12,

1964 after the framing of the charge. On February 25, 1964 the trial Court stayed further proceedings in the case to await the decision of a case pending in this Court, wherein it was stated a question of law having bearing upon the present case was involved. The proceedings in the case were revived on November 10, 1967 after this Court gave its decision in the other case. In the meanwhile Mrs. Nasrullah, Chief Presidency Magistrate had retired and had been succeeded by Mr. Gehani. It was then noticed that the charge framed against the accused by Mr. Nasrullah had not been signed by him. Fresh Charge in identical terms was thereafter framed by Mr. Gehani against the accused and was signed by him. Sahani was thereafter recalled for further cross-examination by the accused. Sahani P.W. had in the meantime been compulsorily made to retire from police department as a punishment. Sahani in his further cross-examination made a volte-face and stated that the bag containing the gold bars was found lying in room No. 2 on that building, while the accused was not present there. Sahani further stated that he had made the accused hold the bag in his hand at the time the panchas were called by him. The trial Court found that the statement of Sahani made in further cross-examination after the framing of the charge by Mr. Gehani was untrue and that the evidence given by him before Mr. Nasrullah was rothy or credence. The High Court agreed with the trial Court in respect, and after hearing Mr. Gupte we are not inclined to take a different view. Sahani was confronted with his earlier statement recorded by Sahani himself. It appears that Sahani wanted to spite the prosecution because of his compulsory retirement as a measure of punishment. The statement made by Sahani before Mr. Nasrullah was in accord with the Panchnama prepared by him and we see no cogent ground to disbelieve the statement of Sahani before Mr. Nasrullah.

6. The High Court in maintaining the conviction of the accused has also relied upon his statement Ex. A which was recorded by Custom Officer Advani (P.W. 2). According to statement Ex. A, the accused is a goldsmith and has his own shop. On the day of occurrence at about 2.30 p.m., it is stated, one Hafizji came to the shop of the accused and told him to keep the bag in question for about an hour whereafter Hafizji undertook to take the bag back. After the departure of Hafizji the accused felt that the bag was heavy. This fact aroused the suspicion of the accused and he took the bag upstairs to the room which had been taken by the accused on rent. The bag was then found to contain 56 gold bars of ten tolas each with foreign markings. The accused added that earlier than that Hafizji had never kept any bag or gold at his shop.

7. The trial Court and the High Court did not accept that part of statement Ex. A wherein the accused had stated about Hafizji having left the bag containing gold bars with the accused. We see no cogent ground to take a different view. If any one had left a bag containing gold bars at the shop of the accused, it is, in our opinion, very difficult to believe that the accused, who is a goldsmith, would not even touch the bag at the time it was left with him. The heavy weight of the bag in that event would have aroused his suspicion. The trial Court and the High Court, in our view, rightly rejected the version of the accused that he had been duped by one Hafizji and that he (the accused) did not know of the contents of the bag at the time it was left with him. The remaining part of statement Ex. A that the bag containing gold bars was taken by the accused to the room which had been taken on rent by him and that the bag was found in his aforesaid room clearly implicates the accused.

8. It has been argued by Mr. Gupte that statement Ex. A should be taken as a whole and in case the court comes to the conclusion that part of the statement is not worthy of credence, the court should reject the whole of the statement. It is not permissible according to the learned counsel, to reject the exculpatory statement and act upon the part of the statement which implicates the accused. In this respect we find that the question whether it is open to the court to accept the inculpatory part of the

statement even though the court rejects the exculpatory part was considered by the Constitution Bench of this Court in the case of Nishi Jha v. State of Bihar. This Court in that case quoted with approval the following observations from page 502 of Taylor's Law of Evidence, 11th Edition :

"In the proof of confessions - as in the case of admissions in civil cases - the whole of what the prisoner said on the subject at the time of making the confession should be taken together

But if, after the entire statement of the prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another. Even without such contradictions it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury, but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case."

It was held in that case by this Court that inculpatory part of the statement could be accepted even though the exculpatory part of the statement of the accused was rejected. In the present case, we find that the inculpatory part of statement Ex. A of the accused is distinct and severable from the exculpatory part. The present is not a case wherein the two parts of the statement are inextricably linked together and it is not possible to accept one part without accepting the other part. In case, the Court finds the exculpatory part of the statement of the accused to be inherently improbable, there is no reason why the other part of the statement which implicates the accused and which the court sees no reason to disbelieve, should not be accepted. In the circumstances, we find no infirmity in the judgment of the High Court in so far as it has accepted the inculpatory part of statement Ex. A of the accused. There is, in our opinion, no cogent to disbelieve the statement of the accused that the room from which the bag containing gold bars had been recovered had been taken by him on rent. This part of the statement clearly goes to show that the accused was in possession of the gold bars with foreign markings.

9. A faint hearted submission was also made at the end to the effect that statement Ex. A of the accused was hit by Article 20 of the Constitution. There is, in our opinion, no force in this submission because there is nothing to show that the accused made that statement as a result of any compulsion.

10. We would therefore, uphold the conviction of the accused. We see no cogent ground to interfere with his sentence. The appeal fails and is dismissed.

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