Triveni Prasad Ramkaran Verma

Vs

The State of Maharashtra

Criminal Appeal No. 264 of 1971

(P.N. Bhagwati, Syed M. Fazal Ali JJ)

07.09.1976

JUDGMENT

BHAGWATI, J. –

1. The appellant was tried before the Presidency Magistrate, 25th Court, Mazgaon, Bombay for offence under clauses (a) and (b) of Section 135 read with Section 135(ii) of the Customs Act, 1962 and Rule 126H(2)(d) read with Rule 126P(2)(iv) of the Gold Control Rules, 1963. The prosecution case against the appellant was that on September 7, 1965 about 3.45 p.m. Inspector Tilwe, who was at the material time Senior Grade Inspector of Customs attached to Gold Circle, Central Excise, Bombay, received information that two persons would be coming down from a building known as Hira Mahal, situated at Kalbadevi Road, and they will be carrying gold in the handle of a cane basket and also in their shoes. Inspector Tilwe, on receipt of this information, sent for Inspector Nichani and both of them kept guard outside Hira Mahal building from about 8.00 p.m. Around 8.45 p.m., the appellant accompanied by his maternal uncle's son Dwarkaprasad, his son Dalip aged 9 years and his servant by the name of Mahadev, came out of Hira Mahal building. The appellant was carrying a basket in his hand and after coming out of the building, the appellant and his companions got into a victoria and proceeded towards Victoria Terminus station. Inspector Tilwe and Inspector Nichani followed these persons and when the appellant and his companions got down from the victoria and entered the platform, Inspector Tilwe accosted them and took them to the office of the Assistant Station Master and searched them there in the presence of three panchas. Two of the panchas were selected by Inspector Tilwe while the third volunteered to act as pancha. On taking search, it was found that the shoes worm by the appellant and Dwarkaprasad had specially made cavities and four gold biscuits with foreign markings were found in the shoes of each of these two persons. The basket carried by the appellant also contained 27 gold biscuits with foreign markings concealed in the handle which was made of brass and which had a specially made cavity in it for concealing gold biscuits. While the search was going on, one Ticket Collector called Tharandas Bhatia arrived on the scene and he also witnessed the search. Inspector Tilwe seized the gold biscuits which were recovered from the appellant and Dwarkaprasad, in the reasonable belief that they were smuggled and hence liable to confiscation under Section 111 of the Customs Act, 1962. This search and seizure was recorded in a panchanama Ex. X, which was witnessed by the three panchas. Inspector Tilwe also seized from the appellant two first class railway tickets for the journey from Bombay to Kanpur, one reservation card and two platform tickets and so also were the basket and the shoes seized under the same panchanama Ex. X. Inspector Tilwe then took the appellant and Dwarkaprasad to the Central Excise Office and recorded their statements in the presence of Inspector Nichani under Section 107 of the Customs Act, 1962. The statement of the appellant which is marked Ex. M was written by Dwarkaprasad in Hindi and was signed by the appellant. The appellant admitted in his statement that he was carrying smuggled gold concealed in

the handle of the basket and shoes for being handed over to a firm called M/s. Pannalal Durgaprasad at Kanpur and that he had been doing this work for the last six months ever since his business as a goldsmith was closed down. Another statement of the appellant was also subsequently recorded by Inspector Tilwe on November 22, 1966 at the shop of the appellant and this statement was written by one Maganlal, an employee of the appellant, in Gujarat and was signed by the appellant. Both the appellant and Dwarkaprasad were thereafter prosecuted for offences under clauses (a) and (b) of Section 135 read with Section 135(ii) of the Customs Act, 1962, and Rule 126H(2)(d) read with Rule 126P(2)(iv) of the Gold Control Rules, 1963. Dwarkaprasad pleaded guilty to the charge and was convicted and we are not concerned in this appeal with the conviction and sentence recorded against him. The appellant denied the charge and hence he was tried before the learned Presidency Magistrate. The only evidence led on behalf of the prosecution against the appellant was that of Inspector Tilwe and Tharandas Bhatia. None of the panchas was examined as a witness to prove the search and seizure. The learned Presidency Magistrate observed that in view of the fact that Tharandas Bhatia had not signed the panchanama Ex. X nor his statement had been recorded by the customs authorities or the railway police, and his name had also not been shown as a witness in the complaint, it would not be desirable to rely on his evidence against the appellant. But the learned Presidency Magistrate found the evidence of Inspector Tilwe satisfactory and convincing and on the strength of this evidence, he held the charge proved against the appellant and convicted the appellant of the offence under clause (b) of Section 135 read with Section 135(ii) of the Customs Act, 1962 and Rule 126H(2)(d) read with Rule 126P(2)(iv) of the Gold Control Rules, 1963 and sentenced him to suffer rigorous imprisonment for two months and to pay a fine of Rs. 500 or in default to suffer rigorous imprisonment for two months for each of these two offences. Since there was no evidence to show that the appellant himself had smuggled the seized gold into India, he was acquitted of the charge under clause (a) of Section 135 read with Section 135(ii) of the Customs Act, 1962.

2. The appellant preferred an appeal against his conviction and sentence but the High Court agreed with the view taken by the learned Presidency Magistrate and dismissed the appeal of the appellant. Hence the present appeal with special leave obtained from this Court.

3. It is true that the conviction of the appellant rests solely on the evidence of Inspector Tilwe. There were three panchas who witnessed the panchanama Ex. X regarding search and seizure of gold from the appellant but unfortunately none of the three panchas could be examined, as they were not traceable in spite of efforts made by the prosecution. Two of the panchas undoubtedly remained present in the course of the adjudication proceedings but that was in December 1967. The trial before the learned Presidency Magistrate commenced in April, 1969 and evidence was given by Inspector Tilwe in December, 1969 and at that time none of the three panchas could be traced and brought for the purpose of giving evidence. The statement of Inspector Tilwe that "all the three panchas are now not traceable in spite of great efforts" was not challenged in cross-examination and we must, therefore, proceed on the basis that none of the three panchas was available and if that be so, no adverse inference can be drawn against the prosecution for not examining any of the three panchas. Tharandas Bhatia was no doubt examined but the learned presidency Magistrate preferred not to rely on his evidence and we think, he was right in doing so. Inspector Nichani could, of course, have been examined as a witness, since he was present at the time of search and seizure, but his non-examination cannot help the appellant, since he was also an Inspector in the Customs Department like Inspector Tilwe and once Inspector Tilwe gave evidence, it would not have added to the weight of prosecution evidence by also examining him. The prosecution case against the appellant must, therefore, in the ultimate analysis stand or fall by the evidence of Inspector Tilwe. The learned Presidency Magistrate as well as the High Court accepted the evidence of Inspector

Tilwe and we do not see any reason to interfere with the concurrent view taken by both these courts as regards the appreciation of his evidence. It was not the case of the appellant that he and Dwarkaprasad along with Dalip and Mahadev did not proceed from Hira Mahal building to Victoria Terminus or that they were not taken by Inspector Tilwe to the office of the Assistant Station Master for purpose of search or that gold was not found as a result of the search, but his defence was that the seized gold was found from Dwarkaprasad and not from him and that both the basket and the shoes belonged to Dwarkaprasad and he had nothing to do with the same. Now, it is difficul to see why Inspector Tilwe should have falsely implicated the appellant if, in fact, the seized gold was found only from the person of Dwarkaprasad and the appellant was completely innocent. It may also be noticed that the case of the appellant was that Mahadev was the servant of Dwarkaprasad and it was Dwarkaprasad who was going from Bombay to Kanpur along with his servant Mahadev and the two railway tickets from Bombay Kanpur were meant for Dwarkaprasad. But it is difficult to understand why in that event there should have been two first class railway tickets. Mahadev could not possibly be travelling by first class along with his master. The fact that there were two first class railway tickets shows that the appellant and Dwarkaprasad were going to travel from Bombay to Kanpur. This is also borne out from the statement Ex. H given by the appellant to Inspector Tilwe. The appellant tried to wriggle out of the statement Ex. H by showing that it was taken from him under threat and was not a voluntary statement containing the true facts. But it is evident from the contents of the statement Ex. H that it is a genuine document. There are several details in the statement which could never have been dictated by Inspector Tilwe. There is inherent evidence in the contents of the statement Ex. H showing that the statement is true. It was admitted in the statement Ex. H, that the appellant was carrying gold from Bombay to M/s. Pannalal Durgaprasad at Kanpur and this statement is clearly supported by the seizure of two first class railway tickets from Bombay to Kanpur. It is true that the reservation card seized at the time of search did not show in whose name the reservations were made and it would have been better, if the prosecution had summoned the railway authorities to produce the reservation chart of the train for the purpose of showing in whose name the reservations were made. But even so, the fact that the reservation card was seized from the appellant shows that the appellant was travelling from Bombay to Kanpur. We do not see any cogent reasons for taking a different view from that taken concurrently by the learned Presidency Magistrate and the High Court in regard to the evidence of Inspector Tilwe and we think this evidence is sufficient to found the conviction of the appellant.

4. The appellant, however, contended that even if it be held that gold was found from person of the appellant, as alleged by the prosecution, it was smuggled gold and hence not covered by the Gold Control Rules, 1963 and, in the circumstances, no offence under Rule 126H(2)(d) read with Rule 126P(2)(iv) could be said to have been committed by the appellant in acquiring such gold. The argument of the appellant was that the Gold Control Rules, 1963 apply only in relation to what may be called legal gold or non-smuggled gold and smuggled gold is outside their scope and ambit and hence acquisition of smuggled gold would not constitute an offence under the Gold Control Rules, 1963. This is an argument of despair and cannot be sustained even for a moment. Rule 126H(2)(d) provides, inter alia, that no person other than a licensed dealer shall buy or otherwise acquire or agree to buy or acquire gold, not being ornaments, except in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may make in this behalf. The word 'gold' is defined in clause (c) of the explanation to Rule 126A to mean gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold.

This definition odes not restrict the meaning of the word 'gold' to legal or non-smuggled gold. It is

wide enough to include any kind of gold, whether smuggled or non-smuggled. The restrictions imposed by the Gold Control Rules, 1963 could not have been intended merely to apply to legal gold. The object and purpose of the restrictions would be frustrated by excluding from their ambit and coverage smuggled gold. The Gold Control Rules, 1963 seek to control and regulate dealings in gold and 'gold' within the meaning of these rules must include not only non-smuggled gold but also smuggled gold. We fail to see on what principle of construction can smuggled gold, which is 'gold' within the meaning of the definition, be excluded from the operation of these Rules. There is no scope for inferring any such exclusion nor is there anything in the Rules which supports such exclusion. Take, for example, Rule 126 which says that dealer shall not make or manufacture any article of gold other than ornament. Can it be suggested for a moment that this rule does not prohibit a dealer from making or manufacturing articles out of smuggled gold ? Then again, look at Rule 126C. It provides, inter alia, that no dealer shall make, manufacture or prepare any ornament having gold of a purity exceeding fourteen carats. Can a dealer make an ornament of smuggled gold having purity exceeding fourteen carats without committing a breach of this rule ? Rule 126-I provides that every person shall make a declaration to the Administrator as to the quantity, description and other prescribed particulars of gold owned by him. How can a person, who has smuggled gold, say that he is not bound to make a declaration under this rule ? The object of requiring a declaration is that the Government should know what is the gold possessed by each person, so that dealings in gold can be controlled and regulated and this object would be thwarted in smuggled gold were not subject to the retirement of declaration. Then again consider Rule 126D which says that no person shall make, advance or grant any loan to any other person on the hypothecation, pledge, mortgage or charge of any gold other than ornament, unless such gold had been included in a declaration. If smuggled gold were outside the scope of this rule, it would be open to a person to advance moneys on the security of smuggled gold without involving any violation of this rule. That surely could not have been the intention of the Government in making the Gold Control Rules, 1963. We are aware that there is a decision of the Calcutta High Court in Aravinda Mohan Sinha v. Prohlad Chandra Samanta [AIR 1970 Cal 437 : 1970 Cri LJ 439] where a Division Bench has taken the view that declaration under Rule 126P is in respect of legal gold as opposed to smuggled gold and no question of declaration in respect of smuggled gold can arise under Gold Control Rules, 1963, but we do not think this decision represents the correct law on the point. We are of the view that the Gold Control Rules, 1963 are applicable alike to smuggled gold as to non-smuggled gold, and the inhibition of Rule 126H(2)(d) that no person other than a licenced dealer shall acquire gold except in accordance with a permit or authorisation granted by the Administrator is not confined in its operation to non-smuggled gold but applies equally in relation to smuggled gold. The learned Presidency Magistrate and the High Court were, therefore, right Rule 126H(2)(d) read with Rule 126P(2)(iv) of the Gold Control Rules, 1963.

5. Since the appellant is convicted of the offence under Rule 126P(2)(iv) of the Gold Control Rules, 1963, the sentence of imprisonment to be imposed on him cannot be less than six months and the High Court was right in enhancing the sentence to six months' imprisonment. But so far as the sentence of fine is concerned, we do not think that the facts and circumstances of the case justify a heavy fine of Rs. 3000 for each of the two offences for which the appellant is convicted. It appears from the statement of the appellant Ex. H that he was a carrier of gold for M/s. Pannalal Durgaprasad of Kanpur and the purchase price of gold was provided substantially by this Kanpur firm and the appellant was merely to receive some commission. The appellant was a goldsmith who had lost his business for the last six months and perhaps economic necessity drove him to carry on this nefarious activity. The sentence of imprisonment which has been imposed on the appellant would be sufficient deterrent to him and many others who indulge in this anti-social activity which

is calculated to disrupt the economy of the country. We feel that in the circumstances, the ends of justice would be met if the sentence of fine is reduced from Rs. 3000 to Rs. 500 for each of the two offences.

6. We accordingly confirm the conviction of the appellant as also the sentence of imprisonment imposed on him but reduce the sentence of fine from Rs. 3000 to Rs. 500 for each of the two offences for which the appellant is convicted, with a direction that in default of payment of fine, the appellant will suffer rigorous imprisonment for a period of two months. The appeal is allowed to this limited extent.

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