

Sevantilal Karsondas Modi

Vs

The State of Maharashtra and Another

Criminal Appeal No. 196 of 1973

(Syed M. Fazal Ali, A. D. Koshal JJ)

30.01.1979

JUDGMENT

KOSHAL, J. –

1. This appeal by special leave is directed against the judgment dated August 7, 1973 of the Bombay High Court upholding the conviction of Sevantilal Karsondas Modi (the sole appellant before us) for an offence under Section 120-B of the Indian Penal Code, read with clauses (a) and (b) of sub-section (1) of Section 135 of the Customs Act, 1962, and a sentence of rigorous imprisonment for a year recorded by the Chief Presidency Magistrate, Bombay.

2. The appellant was one of 30 accused persons against whom the police initiated proceedings in the court of the trial Magistrate. Out of them, accused 28 to 30 were not tried as they had absconded and could not be apprehended. The case against accused 18 and 19 was allowed to be withdrawn by the learned Magistrate on an application made by the Public Prosecutor under Section 494 of the Code of Criminal Procedure. Accused 14, 24, 25, 26 and 27 were discharged by the learned Magistrate for want of evidence against them. Charges were framed by him on 10 counts against the other 20 accused who were tried in consequence. At the trial, 266 witnesses were examined in support of the prosecution case and 6 in defence. Accused 9, 10, 11, 15, 16, 17 and 20 were acquitted as a result of the trial, while 13 of those charged were convicted and sentenced to various terms of imprisonment. All the 13 last mentioned went up in appeal to the High Court who acquitted accused 1, 21, 22 and 23. Accused 13 happens to be the appellant before us. He was convicted and sentenced by the learned Magistrate as aforesaid and also on a separate charge for an offence under clauses (a) and (b) of sub-section (1) of Section 135 of the Customs Act and sentenced to rigorous imprisonment for six months in consequence. His conviction on that charge, however, was set aside by the High Court, against whose judgment, as already stated, special leave to appeal was granted to him by this Court.

3. The prosecution case insofar as it relevant for the purpose of this appeal may be briefly stated. V. K. Asthana (PW 228) who was then the Deputy Director in the Directorate of Revenue Intelligence in the Department of customs at Bombay and is hereinafter referred to as 'Asthana', received information in the first half of September, 1966 to the effect that flat No. 2 forming part of the building known as Sagar Mandir and situated in that locality of Bombay which is called 'Shivaji park' was being used for storage of smuggled gold and disbursement thereof to its purchasers. After the flat had been kept under watch for a few days by some officials of the Department, a decision was taken by Asthana to raid the premises. The raiding party which consisted of senior Customs officers, took position in the vicinity of Sagar Mandir on the morning of September 14, 1966. They included B. M. Sevalia, Preventive officer, Bombay customs (PW 7 and hereinafter referred to as

'Sevalia') G. N. Alreja, Preventive officer, Bombay Customs (PW 34 and hereinafter mentioned as 'Alreja') P. G. N. Ayengar Appraiser in the Directorate of Revenue Intelligence (PW 144 and hereinafter called 'Ayengar') and D. G. Mugwe' principal Appraiser in the said Directorate (PW 152 and hereinafter referred to as 'Mugwe') Sevalia was deputed to watch the movements of persons entering the flat and to give signal on the arrival of the suspects. At about 8.50 a.m. accused 12 was seen entering the flat and Sevalia alerted the other members of the raiding party by giving the agreed signal. Half an hour later, a car stopped at the entrance therefrom. Accused 5 went towards the concerned flat but got suspicious on noticing the presence of strangers near the entrance. He turned back and so did his two companions. All three of them took to their heels but were caught by the raiding party on direction by Mugwe. Accused 12 was found inside the flat. The person of each one of accused 5, 6 and 7 was searched and yielded 200 slabs of gold, weighing 10 tolas each. All the slabs bore foreign markings and were contained in jackets having long pockets and worn by each of the captives. Bunches of keys, Exs. K-4, K-5 and K-6 and a diary containing accounts Ex. 'O' were found lying in the passage forming part of the flat. Bandi, Ex j-2 was secured from a room of the flat. A search of the person of accused 12 yielded keys Ex K-2, which fitted the locks used in the flat, and sheets of accounts Ex. 'S'

4. While the search was going on, accused 13 was found peeping from outside through a grille forming part of the flat but started running away on seeing what was happening inside. He was chased and captured and two keys were seized from his person. One of them was found to fit the lock on the outer door of the flat and the other to fit the latch therein. He was also found wearing a bandi similar to bandi, Ex. J-2. At his instance, four slabs of gold and 10 gold bangles, each weighing 10 tolas, were recovered from underneath the mattress lying on a bed in the flat.

5. Accuse 5 to 7 and 13 were interrogated by the Customs officials. The statement of accused 13 Ex. Z-383 was recorded by Ayengar on September 15, 1966. In that statement, the appellant gave an exhaustive account of the circumstances in which he happened to come to Bombay and made his services available to the principal accused named J. K. Shah. The long and short of the statement may be summarised thus :

One day J. K. Shah called accused 13, gave him some cloth and sent him in the company of one Goverdhan Das to have the cloth tailored into bandis of a special type having two wide and long pockets in the front. The cloth supplied was thick and strong. A few days after the bandis were ready, accused 13 was taken to the flat in question by his sister's husband, named Natwarlal (accused 12) or by accused 15. Thereafter accused 13 visited the flat several times when he would receive bandis containing gold brought from outside and store them in the flat or would remove such bandis from the flat to other places in town. J. K. Shah had given him keys of the flat. Whatever gold was removed by him from the flat, was either deposited by him in a room on the second floor of a building situated in Modi Street or delivered to J. K. Shah in the latter's office on the 3rd floor of building No. 111 situated in Tambakanta. The room in Modi Street had a telephone the number whereof was 262283 and a key of this room was supplied to him by J. K. Shah. He used to receive orders either from J. K. Shah or from accused 15 to go to the flat in Sagar Mandir and receive the gold there. He received gold in this way on September 12 and 13, 1966. On the day of his capture he was in the room in Modi Street when he received a telephone call from J. K. Shah at 11 or 11.15 a.m. requiring him to visit the flat in Sagar Mandir and find out if any trouble was brewing and that if that was so, J. K. Shah was to be informed on the telephone. Accused 13 rushed to Sagar Mandir in a

taxi and tried to find out from outside if there was anything wrong. For that purpose he looked through a broken ventilator. While he was coming towards the road on the beach nearby he was detained and was taken inside the building.

6. While the above statement was being recorded accused 4, 5, 6, 7 and 8 were identified by accused 13 as the persons from whom he used to receive gold at Sagar Mandir.

7. The evidence relied upon by the prosecution against accused 13 may be split up under the following heads :

(a) He was seen visiting the flat in Sagar Mandir on September 8, 9 and 13, 1966 by the Customs officials who were watching the premises under the orders of Mugwe.

(b) He was peeping into flat No. 13 between 11 a.m. and 12 noon on September 14, 1966.

(c) When he found that the flat was under search by officers belonging to the Customs Department, he tried to run away.

(d) He was found in possession of keys fitting the locks of the flat.

(e) He was wearing a bandi similar to bandi, Ex. J-2 which is a special type of bandi suitable for carrying gold slabs secretly.

(f) Four slabs of gold and 10 gold bangles were recovered from underneath the mattress at his instance.

(g) The confession made by him and contained in statement Ex. Z-383.

8. The learned trial Magistrate found all the above heads to have been established and that is why he convicted and sentenced accused 13 on two counts. The High Court took a different view in relation to beads (a) and (f). It was of the opinion that the identification of accused 13 by the Customs officials on September 8, 9 and 13, 1966 could not safely be relied upon as they had seen people coming into and going out the Sagar Mandir only from a distance and for very short periods of time so that their view of such people could possibly be mere "fleeting glances". It further held the alleged recovery of the four gold slabs and 10 gold bangles to be unreliable as the marginal witness to the recovery memo who was produced in court by the prosecution did not support it and stated that he had not seen accused 13 pointing out the slabs and the bangles. The High Court concluded therefore that the charge under clauses (a) and (b) of sub-section (1) of Section 135 of the Customs Act was not sustainable. However it found the other heads of evidence proved and on the basis thereof upheld the conviction and sentence in relation to the charge of conspiracy to commit the other offences just above described.

9. After hearing learned Counsel for the parties at length we find ourselves unable to uphold the impugned judgment insofar as accused 13 is concerned. The circumstances that he was found peeping into the flat, that he tried to run away on seeing the Customs officials searching the premises, that he was in possession of duplicate keys of the flat and that he was found wearing a bandi similar to bandi, Ex. J-2 are not incompatible with his innocence. He was a close relation of accused 12 who has been found to be the person really incharge of the flat and it would thus be natural for him (accused 13) to share the flat with the permission of accused 12. In so living with his

brother-in-law he may have been given to wear the bandi found on his person not for the purpose of carrying gold but just for use as ordinary raiment. Again, in a city like Bombay it is not unusual for persons sharing a particular accommodation to be provided with separate sets of keys for each in order to facilitate ingress or egress at will. Further, an innocent man finding his premises being watched by persons in authority may well feel funky at the prospect of a false implication on the basis of a mere suspicion (which may or may not be well-founded) and may try to make himself scarce. Without more, the circumstances covered by heads (b), (c), (d) and (e), therefore, cannot be regarded as incriminating circumstances. So the conviction really rests on the confession attributed to the appellant. If it is found to be voluntary and true, it may receive some support from the four heads of evidence just above described. If, on the other hand, the confession appears to be either untrue in any material particular or having been caused by any inducement, threat or promise such as is described in Section 24 of the Evidence Act, it must fall and with it fall the other heads of evidence, leaving no material to support the conviction. As it is, we find that the appellant has been able to prove the existence of circumstances which make it highly probable that his confession is hit by the mandate in Section 24 above mentioned. Our reasons for coming to this conclusion follow.

10. The case set up by accused 13 insofar as his confession is concerned, mainly consists of a plea that it was the result of an assault on him by the Customs officers including Ayengar and Sevalia and that the latter had forced him into making an endorsement in his own handwriting under/the confessional statement to the effect that that statement was voluntary and had been explained to him by Sevalia. Naturally, the story of the assault has been stoutly denied by Ayengar and Sevalia; but then the circumstances prevailing at the relevant time in the Customs House where the statement was recorded definitely indicate that all was not well with the manner in which the interrogation of various accused was being carried on. In this connection the outstanding feature of the situation is the fact that accused 15, when examined by Dr. S. R. Joglekar (DW 1) on September 16, 1966 at 6.15 p.m. was found to have on his person seven injuries which the doctor has described thus :

- (1) Ecchymosis below right eye, outer part, 1/4" x 1/3", blackish colour.
- (2) Ecchymosis below left eye, middle, 1/4" x 1/4", blackish colour.
- (3) Diffused contused area, 2 1/4" x 3", on right thigh, upper part.
- (4) Contused area on right buttock, 3" x 2", lower part, wheal (?) marks seen.
- (5) Diffused contused area on left thigh, back and outer part, 5" x 2", wheal (?) marks seen transverse.
- (6) Transverse wheal (?) marks on back of left knee.
- (7) Contused area on back of left leg. 2" x 1".

11. According to the doctor, these injuries appeared to have been caused two to four days earlier. Admittedly accused 15 was apprehended by the Customs staff on September 14, 1966. No explanation whatsoever is offered for his injuries by the prosecution but the stand taken by accused 15 himself in this behalf may be stated in his own words :

At that time, there were six Customs officers around me. In the gallery, I was again shown the 4 keys. I was again asked about the said keys and I had again given the same reply. The said officers on hearing this, got enraged and began to say that I was

stating falsehoods. One of the officers then asked me to take out my clothes. I had then worn one underwear and a pant and one bush-coat and a ganji. I was then asked to remove my pant as well as my underwear by the said officer and I did so accordingly against my will. That officer then ordered me to sit in the position of "a chair". I was so asked to sit like a chair without the support of a wall even to my back. The six officers were then standing around me at that time. After making me to sit in that chair position they began to ask me about the said keys. I had again given the same reply about the said keys. If I moved a little from the position of a chair given to me, I was kicked by all the officers immediately. I was able to sit in that position for 4-5 minutes. I used to fall down thereafter. I used to be kicked therefor, made to stand again and asked to resume the same position. In this way, I had fallen and had been assaulted again and again by the said officers for about an hour or so. While I was so being questioned and made to sit in that position again and again, one of the officers had gone out and had returned with a ruler in hand having a round shape. As I was made to sit in that position of a chair, I often used to move therefrom, the officers immediately used to assault me and I used to get up thereby. Out of the Customs officers the officer who had the ruler in his hand used to assault me therewith and the other officers used to assault me with kicks. I had been assaulted with that ruler on my left buttock, on my right buttock, on the back portion of the calf of my left leg, on my right thigh, on the backside of my both legs, etc. I had received injuries at all these place stated by me above and as a result of this assault on me, I could not even stand up. Throughout the assault, I was being questioned again and again about the said keys by all the said officers and at every time I was stating that I did not know anything more about the same. Thereafter I had fallen down on the ground with my face towards the ground. All the said six officers then went away.

12. This stand may not be devoid of exaggeration and embellishment but it receives great support from the testimony of Dr. Joglekar (DW 1) so that the probability appears to be that accused 15 received his injuries at the hands of the Customs staff; and there being no explanation on the part of prosecution as to the situation in which he was beaten, it is reasonable to presume that the stand taken by him is correct and that the injuries were inflicted on him as a measure of coercion adopted to secure his confession.

13. In coming to a contrary conclusion, the High Court was mainly influenced by the fact that although accused 15 had filed a complaint in court against the concerned officers of the Department of Customs, he did not prosecute it but had it dismissed for default. The High Court observed in this connection :

The only explanation for this unusual attitude offered by him to the Court is that he was afraid of vindictive attitude from the officers. We have not been able to conceive how officers could have adopted any vindictive attitude, when accused 15 was not concerned with any offence. Be that as it may, the fact remains that the complaint was not prosecuted and the evidence was recorded behind the back of the officers. It is not possible to hold on the present material that assaulting by the officers was for the purposes of extorting some confession and such assault alone was the cause of the injuries received by him. Beyond, therefore, creating a fog of suspicion, the injuries proved to have been caused to accused 15, cannot indicate that all the accused were subjected to torture, assault and pressure for giving statements to the liking of

officers or compelling them to sign the prepared statements.

We do not appreciate this approach to the determination of the voluntary nature of the confession of accused 15. As we have already pointed out, the time of infliction of injuries coincided with the day on which accused 15 was apprehended and his confession was recorded. In this situation it was the imperative duty of the prosecution to explain the circumstances in which it became necessary for force to be used by the Customs staff on the person of accused 15 and in the absence of any such explanation there is no reason why his plea should not be taken at its face value.

14. We are of course not directly concerned with the voluntary nature of the confession of accused 15 in this appeal but the circumstances discussed in the last paragraph indicate that the Customs officials did not stick to ethical standards in the performance of their duties and, on the other hand, exhibited such a zeal in bringing the captives to book as transgressed the limits set thereon by law. We have already alluded to the fact that the High Court itself did not regard the recovery of four gold slabs and 10 gold bangles alleged to have been made at the instance of accused 13 to be trustworthy. Besides, the plea of accused 13 that he was coerced into making the confession was taken at the earliest opportunity, i.e., on September 20, 1966 which was the day next to that of his release from custody on bail. That plea is contained in letter Ex. 29 addressed by him on that date to the Additional Collector of Customs, Bombay, which contained the following averments :

From the 14th instant at 12 noon till about 3 p.m. I was locked up alone in one room with some Customs officers who continuously interrogated me, threatened and physically assaulted me to make and sign a statement prepared by them after ascertaining a few personal questions from me pertaining to my family and myself. I was not allowed to sleep during the entire night of 14/15 and was not allowed to see any person. The statement was written out by the officers themselves in English language and it was not explained to me and my signature was obtained which I have signed in Gujarati. As a result of this threat, coercion and complete exhaustion, I had no alternative but to sign the statement after which only I was allowed to rest.

15. Taking note of these circumstances we would consider it extremely unsafe to regard the confession. Ex. Z-383 signed by the appellant as having been made by him voluntarily and therefore trustworthy. The appellant, in our opinion, has shown the existence of circumstances which make it appear to the Court that the confession may well have been obtained in a manner which would bring it within the ambit of Section 24 of the Evidence Act, it being undisputed that the concerned officers of the Department of Customs were "persons in authority" within the meaning of that expression as used in the section.

16. In the result the appeal succeeds and is accepted. The judgment of the High Court is reversed. The conviction recorded against and the sentence imposed upon the appellant by the learned trial Magistrate and upheld by the High Court are set aside and he is acquitted of the charge in its entirety.

</html