

J. A. Naidu and Others

Vs

State of Maharashtra

Criminal Appeals Nos. 496-498 of 1976

Atmaram Vasudev Damie

Vs

State of Maharashtra

Criminal Appeal No. 321 of 1977

M. M. Keer and Others

Vs

State of Maharashtra

Petition For Special Leave to Appeal (Cri) No. 490 of 1979

Criminal Appeals Nos. 496-498 of 1976, 321 of 1977 and Petition for Special Leave to Appeal (Cri) No. 490 of 1979

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

27.03.1979

JUDGMENT

KOSHAL, J. –

1. By this judgment we shall dispose of Criminal Appeals 496, 497 and 498 of 1976 and 321 of 1977 as well as Special Leave Petition No. 490 of 1979, all of which are directed against a common judgment of the Bombay High Court dated July 27, 1976.

2. The number of person accused at the trial giving rise to the appeals and petition above mentioned was 14. For the purpose of better appreciating the facts of the case they may be classified under three heads as shown in the following tables :

#-----	Sl. Name of accused	Description
1.	Damle Superintendent, Central Excise and Customs, Dahanu.	TABLE I1. A. V.
2.	J. A. Naidu Inspector, Central Excise and Customs, Dahanu.	
3.	S. M. Kelkar Sub-Inspector, Central Excise and Customs, Dahanu.	
4.	M. M. Keer } Sepoys, Central Excise and Customs,	
5.	M. C. Nikam } Dahanu.	TABLE II
6.	A. R. Alli Sub-Inspector, Central Excise and Customs, Tarapur.	
7.	S. B. Kurudkar } Sepoys, Central	
8.	D. B. Pednekar }	

Excise and Customs,9. Y. S. Sawant } Tarapur.10. J. V. Pujare }11. B. S. Gavas }  
TABLE III12. Y. G. Ambhire Fisherman and mason at Dhakte-Dahanu.13. Indru T.  
Dadlani Trader in textiles, 27, Everest, Peddar Road, Bombay.14. Fakira Mahamed  
Dealer in ready-made garments, Room No. 10, 2nd Lane, Kamathipura, Bombay.-----  
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This classification would show that accused 1 to 3, 5 and 6 are officials of the Central Excise and Customs Department stationed at Dahanu while those in Table II are officials of the same category stationed at Tarapur. Table III, on the others hand, contains the names of three non-officials hailing from Dhakte-Dahanu and Bombay.

3. The 14 accused were tried for offences under Sections 120-B, 161 165-A and 218 of the Indian Penal Code, Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act and Sections 135 and 136 of the Customs Act, the charge being sub-divided into 66 counts. The substance of the allegations against them was that accused 1 to 11 entered into a conspiracy with accused 13 who is a smuggler, and his two associates, accused 12 and 14, from March 1 to 3, 1967 at Varor and Tarapur (District Thana), the common object of which was to attach 39 packages of smuggled goods out of 103 and allow the rest to escape attachment, which conspiracy was acted upon and in pursuance of which accused 1 to 11 accepted from accused 13 illegal gratification in the form of money amounting in all to Rs. 48,600, in addition to some smuggled goods, as a reward for the favour shown to accused 12 to 14.

4. The Additional Special Judge, Thana, who held the trial found the prosecution case proved against accused 1 to 13 who were convicted of various offences covered by different counts of the charge and were sentenced in consequence to imprisonment for periods ranging from six months to six years and to fines ranging from Rs. 50 to Rs. 10,000. Accused 14 was however acquitted of the charge in its entirety.

5. The 13 persons convicted by the trial Judge filed six appeals against his judgment while the State also filed an appeal against the acquittal of accused 12 on some of the heads of charge. During the pendency of these appeals, accused 13 died and his appeal therefore abated except insofar as the fine imposed on him was concerned. The High Court accepted the appeal preferred by accused 12 and acquitted him of the charge. All the other appeals however dismissed by it except in relation to the sentences which were reduced in regard to some counts.

6. The judgment of the High Court is challenged in Criminal Appeal No. 496 of 1976 by accused 2, in Criminal Appeal No. 497 of 1976 by accused 3, in Criminal Appeal No. 498 of 1976 by accused 4, in Criminal Appeal No. 321 of 1977 by accused 1 and in Special Leave Petition No. 490 of 1979 by accused 5 to 11.

7. The prosecution case may be stated thus. Indru Dadlani (accused 13) travelled from Bombay to Dubai on February 5, 1967 by air (vide documents Exs. 72 and 107). Eleven days later, i.e., on February 16, 1967 he flew from Bahrain to New Delhi (vide document Ex. 76). On the next day, Ramchandani (PW 1) who was then working as Rummaging Inspector, Town Intelligence, Customs Department, Bombay, received secret information to the effect that the two air journeys undertaken by accused 13 were made with the object of smuggling foreign goods into India and that such goods consisting mainly of textiles, medicines and watches valued in all at about rupees 20 lakhs were to be brought to India by sea during the next few days. The informant promised to secure further details and convey the same to Ramchandani (PW 1). All this information was recorded by

Ramchandani (PW 1) in document Ex. 29.

8. On March 1, 1967, the informant visited Ramchandani (PW 1) again and told him that the smuggled goods were to arrive near Poisar and would be transported from there in a truck. Ramchandani (PW 1) contacted the Assistant Collector of Customs Mr. Ganguli (PW 2) and the two of them accompanied by other officials of the Customs Department as also by police personnel visited the Poisar sea-shore but were unable to trace any smuggled goods or the truck in which the same were intended to be transported.

9. On March 2, 1967, the informant provided further information to the Customs officers. A party consisting of Assistant Collector of Customs Ganguli (PW 2), Rummaging Inspector of Customs Ramchandani (PW 1) and Intelligence Officers of Customs R. T. Sainani (PW 3) and G. R. Patankar (PW 9) visited Poisar a second time, after deputing Preventive Officers of Customs D. Y. Agarkar (PW 8) and Balasundaram to keep a watch at the Mahim check-post and intercept any truck which aroused suspicion. The search at Poisar again proved futile when one Sadiq Mohomed suggested to the Customs party that the place in question might be Boisar and not Poisar. The party visited Police Station Thana and from there took along Inspector of Police K. T. Sainani (PW 11), Sub-inspector of Police Khanvilkar and some armed constables. The party then visited Boisar without success. As the existence of a Hanuman temple in the vicinity of the place where the smuggled goods were to arrive had been mentioned by the informant, a suggestion was made by a police constable that the party might visit Tarapur which lay near such a temple. The party reached Tarapur at about 5 a.m. on March 3, 1967, and then decided to obtain assistance from the Central Excise staff attached to the Tarapur Customs House. A knock at the door of the House brought out accused 1 and the party entered the premises to find accused 1 to 11 present therein. It was discovered that accused 1 to 3, 5 and 6 had come to Tarapur on March 1, 1967 in response to a letter (Ex. 141) addressed by accused 4 to accused 1 and asking for assistance in seizing contraband articles which were likely to land any time on the night following. When Ganguli (PW 2) disclosed the purpose of the visit he was informed by accused 1 that the latter's party had already seized contraband goods consisting of 39 packages valued at about rupees two lakhs. The revelation aroused suspicion as Ganguli's information was that the goods were contained in 103 packages and were worth about rupees 20 lakhs. When asked as to whether any wrist watches formed part of the haul, accused 1 replied in the negative, and produced two panchanamas prepared in connection with the seizure. Shortly afterwards it was noticed that some packages were lying in the hall where Ganguli (PW 2) was talking to accused 1. On an enquiry from Ganguli as to whether those packages formed part of the haul, accused 1 replied that was not so and added that all the seized goods had been deposited in the muddemal room. At this juncture, Ganguli (PW 2) wanted to have a look at the seized goods and accused 4 took him to the muddemal room where Ganguli was shown the 39 packages. Ganguli (PW 2) then enquired from accused 1 about the reason for the presence of unattached packages lying in the hall. Accused 1 stated that the same were meant for the use of the Customs staff including himself.

10. Ganguli's informant had further told him that accused 13 had despatched a truck to transport the goods, that the truck-driver had been given a sum of Rs. 50,000 by accused 13, that the truck, while it was preparing to leave, was found to be in need of some repairs and that accused 13 had arranged to send some spare parts for it. Ganguli's suspicion having been aroused by what had transpired at the Tarapur Customs House he at once confronted accused 1 with a question as to what had happened to the money which the truck-driver had brought from Bombay. At this query accused 1 broke down and revealed that he had taken a sum of Rs. 10,000 and that the remaining amount had been taken by other members of the staff from accused 13. Accused 1 to 11 then produced currency notes as

detailed in Ex. 31 which may be reproduced here with advantage :

#Indian currency surrendered on March 3, 1967 by :(1) Damble, Superintendent .. 10,000(2) Ali, S.I. .. 10,000(3) Naidu, Inspector .. 10,000(4) Pednekar, Sepoy .. 2,000 + 2 F. Pens(5) Gavas, Sepoy .. 2,000(6) Karudakar, Sepoy .. 2,000(7) Nikani, Sepoy .. 1,000 + 1,000(8) Kir, Sepoy .. 800(9) Poojara, Sepoy .. 1,000(10) Sawant, Sepoy .. 2,000(11) S. M. Kelkar, S.I. .. 5,000(12) Unclaimed produced by Damble .. 2,000 ----- 47,800 + 1,000 = 48,800 + 2 F. Pens. -----##

Each of the 11 accused stated to Ganguli (PW 2) that he had received the amount produced by him from accused 13. However, this fact was not mentioned in Ex. 31 which Intelligence Officer Sainani (PW 3) prepared at the instance of Ganguli (PW 2) and which was not authenticated at the time by either Sainani (PW 3) or Ganguli (PW 2) affixing his signature to it. The money, amounting in all Rs. 48,800 was, however, directed by Ganguli (PW 2) to be deposited by accused 1 to 11 in the room occupied by accused 4.

11. In addition to the packages lying in the hall some other packages and articles were found at other places inside the Customs House premises. When Ganguli (PW 2) made enquiries from accused 1 to 11, each one of them, except accused 2 and 3, admitted having received some of the goods (in addition to money) from accused 13 by way of illegal gratification as a consideration for allowing him to remove without let or hindrance 64 of the 103 smuggled packages. Ganguli (PW 2) directed Intelligence Officers Sainani (PW 3) and Patankar (PW 9) to prepare slips indicating separately each article and sum of money produced by each accused and admitted by him to have been received from accused 13. No such slip was however prepared by Sainani (PW 3) while Patankar (PW 9) prepared only five slips on each of which he scribbled the name one of the Sepoys. All these goods were transferred in separate lots to the room occupied by accused 4, which was then placed in charge of a police guard.

12. Ganguli (PW 2) contacted higher officers of the Customs and Police Departments on telephone and in response to his call, Superintendent of Police H. F. Almeida (PW 37) and Deputy Superintendent of Police C.B.I., Bombay, N. P. Rege (PW 22) reached the Tarapur Customs House at 4.15 p.m. They were apprised of the details by Ganguli (PW 2) whose complaint was recorded by D.S.P. Rege (PW 22). A panchanama of the currency notes worth Rs. 48,800 produced by accused 1 to 11 was prepared. It was at this stage that Ex. 31 was signed by Ganguli (PW 2) and handed over to Rege (PW 22).

12a. Patankar (PW 9) then made a panchanama (Ex. 46) of the articles which accused 1 to 11 had received from accused 13 as part of the illegal gratification. The completion of the panchanama took quite a few hours and went on into March 4, 1967.

13. 52 witnesses were produced at the trial in support of the prosecution case. They included residents of Varor who were expected to depose that 103 packages had arrived at the sea-shore either on February 28 or March 1, 1967, that those packages were removed to Varor village by the villagers and that it was thereafter that a tripartite deal between accused 13, the villagers and the officials attached to the Tarapur Customs House was struck, as a result of which 39 packages were seized by the Customs staff while the rest were allowed to be taken away by accused 13 who paid sum of Rs. 5000 to a leader of the villagers as bush money, in addition to what he had to pay and give to accused 1 to 11. All the witnesses from Varor, however, turned hostile to the prosecution. The depositions of the other witnesses sought to prove the prosecution case as set out earlier.

14. The defence case was that only 39 packages were found on the sea-shore and were seized by the Customs officials. According to the accused, those 39 packages were taken to the Tarapur Customs House where they were opened and it was then that a detailed panchanama of their contents was prepared. The accused pleaded that a general warning had been issued to the villagers to deposit any goods that they might have removed from the sea-shore, on pain of legal action. According to accused 1, he had gone out of the Customs House at about 4 a.m. on March 3, 1967 when he saw a couple of bundles lying in the compound thereof and had them deposited inside the hall. It was further averred that goods found lying at various places inside the premises of the Customs House were most probably deposited thereat by villagers in response to the warning issued as stated above. The accused denied all knowledge of the source of the amount of Rs. 48,800 and denied that any of them had produced any money to Ganguli (PW 2) or had admitted the receipt of any illegal gratification whatsoever from accused 13.

15. The learned Additional Special Judge accepted the confessions said to have been made by accused 1 to 11 at the time production by them of the currency notes and the goods in question. It was contended before him that those confessions were inadmissible for the reason that they were made in the immediate presence of, and, therefore, for all practical purposes, to Police Inspector K. T. Sainani (PW 11) so that they were hit by the mandate in Section 25 of the Evidence Act. The learned Additional Special Judge was of the opinion that although the currency notes and the goods might have been produced by the accused within the sight of Sainani (PW 11), the latter was then not within the hearing of the accused and the concerned Customs officials. He also arrived at a finding that the currency notes and the goods described in Ex. 31 and 46 were received by accused 1 to 11 from accused 13.

16. In relation to the confessions, the High Court come to a different conclusion. It held :

According to us, the presence of the police seems to have been procured because the Customs Officers had a lurking suspicion about the conduct and integrity of the Excise Staff. They were deliberately kept present to overawe the Excise Officers and that object seems to have succeeded. If that is so, all the incriminating statements made by accused 1 to 11 either in relation to money or the goods will have to be eliminated from consideration altogether. We hold that the entire evidence of the Customs Officers and Police Officer Sainani with regard to the confessional statement of accused 1 to 11 is inadmissible and cannot be relied upon as evidence against the accused.

17. Nevertheless the High Court regarded documents Ex. 31 and 46 as forming a correct record of what transpired at the Tarapur Customs House on March 3 and 4, 1967 in spite of the fact that Ex. 31 remained unauthenticated till the arrival at the Customs House of Almeida (PW 37) and Rege (PW 22) and not even an attempt was made till then to prepare a panchanama of the goods said to have been produced by accused 1 and 4 to 11. In this connection the High Court observed :

Having heard the arguments of the learned counsel on both sides and after having gone through the entire evidence in this case along with the counsel for the accused, our impression and view is that Mr. Ganguli may have committed some mistakes and he could have done something more than what he did. But by and large in spite of the mistakes committed by him, Mr. Ganguli and the Customs Officers from Bombay seem to be truthful witnesses and they are honest officers who have acted according to their best judgment, even though a certificate of very accurate action could not be

given to them. We are particularly impressed by the fact that these officers never knew any person from the Excise Department but they must have been themselves surprised to find money and goods so easily accepted by their own subordinates.

If Mr. Ganguli had made a regular panchanama by immediately calling two panchas from the town it would have been certainly better. The production of goods and money could have been recorded in a regular panchanama in the presence of two independent citizens. That was not done. Would that mean that nothing was found and that the whole case alleged against the accused persons is a mere creation of the imagination of Mr. Ganguli ? Did he weave out a plot on the spot and carry it out with a view to involve the accused persons ? It may be worthwhile to note at this stage that finding of money and goods and contraband articles in the Customs House is not being seriously challenged or could not be seriously challenged by the learned counsel for the accused persons. They made a very feeble attempt to explain how the money could possibly have come there. While making that attempt they could not pick up courage to say that Ganguli must have brought this money from Bombay to plant on them. If money to the tune of Rs. 48,800 was not taken by the Customs Officers with them and if we have rejected the theory of the packages containing contraband articles also carrying Indian currency notes, where did so much money come from ?

In view of the fact that witnesses from Varor had turned hostile to the prosecution, the High Court held that there was no evidence about the number of packages which landed at the Varor sea-shore. However, it formed the opinion that such number was certainly much greater than 39.

18. It was on these premises that the High Court passed the impugned judgment.

19. We fully agree with the High Court, for the reasons recorded by it (and the same need not be repeated here), that the confessions attributed to the accused are hit by Section 25 of the Evidence Act and are inadmissible in evidence. But we do not see eye to eye with the High Court in the opinion it has formed with regard to the other evidence. The question is not of Ganguli (PW 2) having committed some errors of procedure but of his reliability and that of the other prosecution witnesses who took part in the proceedings at the Tarapur Customs House on March 3 and 4, 1967. In this connection we may straightway observe that we look upon document Ex. P-31 which forms the corner-stone of the prosecution case, with great suspicion. Our reasons in that behalf are obvious. Ganguli (PW 2) was an experienced officer holding a high rank in the Customs Department and, as the High Court also observed, he undoubtedly knew that he had all the powers of a police officer to effect a raid, seize goods, prepare a panchanama and record statements under Section 108 of the Customs Act. Not only did he not prepare any panchanama of the money and goods said to have been produced to him by the accused, he did not even record their statements although the same amounted to confessions and therefore to very valuable pieces of evidence. Not only that, he did not care even to authenticate Ex. 31; nor did Sainani (PW 3) who prepared the document make a mention therein of the name of accused 13 as the person from whom the currency notes were alleged to have been received by accused 1 to 11. The case for the prosecution itself is that Ganguli (PW 2) signed Ex. 31 no earlier than the afternoon of March 3, 1967 when the party headed by Almeida (PW 37) arrived at the Customs House. We fail to understand why a seasoned Customs Officer like Ganguli (PW 2) behaved in such an irresponsible manner in a matter of such far-reaching importance. It is all very well to say that a big sum like Rs. 48,800 would probably not have been brought from outside but that is an argument which may be sufficient to raise only a suspicion, albeit a grave suspicion, against the accused; but as has been repeatedly pointed out by this Court, suspicion, however grave, cannot take the place of proof. On the other hand, we cannot help thinking that if the facts had been as claimed by the prosecution, Ex. 31 would have been a

straightforward and comprehensive document stating not only the amount surrendered by each of accused 1 to 11 but also the person from whom and the circumstances in which it had been received by him. Furthermore, there is no reason at all why it should not have been signed immediately on its completion by a least Sainani (PW 3) if not by Ganguli (PW 2) and a couple of panchas also. There is further no reason why the goods, which accused 1 and 4 to 11 confessed to have received from accused 13 as part of illegal gratification were not made the subject-matter of a panchanama on the morning of March 3, 1967 and why the preparation of the panchanama was postponed till the arrival of senior officers of police. In the circumstances we are of the opinion that Exs. 31 and 46 cannot form, all by themselves, a basis of the conviction of any of the accused and, on the other hand, must be ignored along with the related oral testimony of Ganguli (PW 2) and other witnesses for the prosecution, by reason of the suspicion attaching to them as documents not reliable enough for proof of the fact that the currency notes and the goods described in them were produced by accused 1 to 11 and in the circumstances put forward by the prosecution in that behalf.

20. The High Court appears to have acted on documents Exs. 31 and 46 not so much because of the intrinsic worth but mainly for the reason that the defence version was regarded by it as a fantasy. It thought that the contraband articles lying unaccounted for in various places forming part of the Tarapur Customs House could not have been found there unless they were part of the booty received by accused 1 to 11 from accused 13. It also rejected as preposterous a suggestion made by counsel for the defence that the amount of Rs. 48,800 could have been recovered from the packages in which those articles were contained. In taking the view of the matter that it did, the High Court, for all practical purposes, presumed the accused to be guilty unless they succeeded in establishing their innocence, which was not a correct approach to the appreciation of evidence. It was for the prosecution to prove affirmatively that the contraband articles were in the conscious possession of accused 1 to 11 and that they had received the currency notes in question as claimed by the prosecution. Neither of these matters was a matter of assumption, although of course the same could be inferred from circumstances which, in our opinion, have not been shown to exist. We do not regard the defence as a bundle of assertions which could not possibly be true within the domain of reason. There is nothing inherently improbable in the currency notes having been found in one or more of the packages which are said to have been lying unaccounted for in the Customs House; nor can we agree that the averment about residents of Varor having deposited the said packages in response to a warning issued to them earlier borders on the absurd, even though it may not be very probable.

21. Our conclusions just above reached and contained in paragraphs 19 and 20 leave the prosecution with no material such as may suffice, apart from documents Exs. 31 and 46, to be incriminatory of any of the accused. Accordingly we accept all the appeals, reverse the impugned judgment, set aside the conviction recorded against and the sentences imposed upon appellants (being accused 1 to 11 and 13) and acquit them of the charge in its entirety.

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