Shah Guman Mal

Vs

State of Andhra Pradesh

Criminal Appeal No. 47 of 1974

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

06.02.1980

JUDGMENT

FAZAL ALI, J. -

1. This appeal by special leave is directed against a judgment dated August 18, 1973 of the Andhra Pradesh High Court. The facts of the case have been detailed in the judgment; of the High Court and it is not necessary to repeat them all over again. The appellant was tried by the Magistrate for offences under Section 135(1)(b)(ii) of the Customs Act, 1962 and Section 85(ii) read with Section 8(i) of the Gold Control Act, 1968 and sentenced to rigorous imprisonment for nine months under each count. Both the sentences were directed to run concurrently. Sentences of fine were also imposed. The Sessions Judge, on appeal, set aside the conviction and sentence under the Gold Control Act and acquitted the appellant of that charge for the reason that the requisite sanction for his prosecution was not accorded, but maintained the conviction and sentence of the appellant under Section 135(1)(b)(ii) of the Customs Act. Thereafter, the appellant went up in revision to the High Court which confirmed the conviction and sentenced upheld by the Sessions Judge. Then the appellant moved this Court and this appeal is by special leave.

2. The allegations made against the appellant may be briefly stated. On April 16, 1971, PW 4, Superintendent of Control Excise issued a warrant (Ex. P-3) authorising PW 3 and another Inspector to proceed to the house of the appellant at 6.30 a.m. PW 3 called PW 1 and one Nihalchand as mediators and informed them that the accused had concealed gold biscuits of foreign origin in his house and hence it was decided to search his house. When the search was conducted, the accused was directed to produce the gold biscuits of foreign origin in his possession. The accused denied that he possessed any but the Excise officials searched the house and found in a secret chamber of an iron safe, which was opened by the accused with the keys in his possession, a bundle containing 28 gold biscuits and a half biscuit marked as M.Os. 1-29. All these biscuits bore foreign markings. In another secret chamber were found gold earrings in plastic boxes and a bundle of currency notes. The accused was then questioned in the presence of the witnesses and he stated that he had been receiving gold biscuits from some unknown person from Bombay and that the other articles belonged to him and his mother. On being questioned further, the accused admitted that he had no general or special permit from the Reserve Bank of India or the Gold Control Administrator to import or keep foreign gold. The statement of the accused was recorded and is marked Ex. P-4. Before launching a prosecution, the Collector of Central Excise issued a notice calling upon the appellant to show-cause why M.Os. 1 to 51 be not confiscated and penalty levied. The accused gave his explanation, Ex. P-7. Thereafter, the Collector passed orders of adjudication confiscating the articles and imposed a penalty of Rs. 5,000. On appeal, the confiscation of jewellery and cash was set aside. Subsequently, PW 5, the Assistant Collector of Customs filed a complaint for the

prosecution of the appellant under the Customs Act. We have already mentioned that the prosecution and conviction under the Gold Control Act was set aside for lack of proper sanction. It is also admitted by the prosecution in the instant case that as no seizure was made in accordance with the provisions of the Customs Act, the presumption under Section 123 thereof was not available to the prosecution.

3. Section 135(1)(b), under which the appellant has been convicted, runs thus :-

> 135(1) Without prejudice to any action that may be taken under this Act, if any person -
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> (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111,

4. Analysing the essential ingredients of clause (b), it is manifest that before a conviction can be recorded under it, the prosecution must prove that the accused has acquired possession of or is in any way concerned in depositing, keeping, etc., any goods which he knows or has reason to believe are liable to confiscation under Section 111. Thus, in the instant case, as no presumption under Section 123 was available, it was for the prosecution to prove affirmatively that the appellant was in possession of smuggled gold knowing full well that it was imported from outside the country so as to fall within the ambit of Section 111. Dr. Chitale, appearing for the appellant, contended that if the presumption under Section 123 is not available to the prosecution, then there is no legal evidence to show that the appellant had any knowledge or had any reason to believe that the goods were imported or were smuggle without a lawful permit. The counsel appearing for the State, however, submitted that the fact that the gold bore foreign markings and was recovered from the possession of the appellant who had admitted in his statement before the Customs officers that some unknown person had given it to him, would itself raise a sufficient presumption to attribute knowledge to the appellant that the gold was smuggled without any permit. Although the question raised by the counsel for the parties is not free from difficulty, an overall consideration of the special facts of the present case would show that there could no difficulty in holding that having regard to the admissions made by the appellant and his subsequent conduct, the onus would shift to the appellant to show that the gold found from him with foreign makings was imported without any permit to his knowledge. This will be the combined effect of the provisions of Sections 106 and 114 of the Evidence Act. The matter was considered at great length in the case of Behram Khurshed Pesikaka v. State of Bombay ((1955) 1 SCR 613, 625 : AIR 1955 SC 123) where this Court holding that Section 106 could not be construed to place the onus on the accused to prove the prosecution case, observed as follows :

> Section 106 of the Evidence Act cannot be construed to mean that the accused has by reason of the circumstance that the facts are especially within his own knowledge to prove that he has not committed the offence (see Attygallo v. King (AIR 1936 PC 169), also In re Kanakasabai Pillai (AIR 1940 Mad 1). It is for the prosecution to prove that he has committed the offence and that burden is not in any manner whatsoever displaced by Section 106 of the Evidence Act.

These observations were made with respect to the peculiar facts of that case. It appears that what had happened in that case was that the appellant was found to be guilty of an offence under the

Prohibition Act and the only evidence to prove his guilt was that he was smelling of alcohol. This Court held that it was for the prosecution to prove the contravention of the provisions of the Prohibition Act and to prove further that a particular intoxicant which was a liquor under the Act, was consumed by the accused and merely because the accused knew that he had taken (which was a matter within his knowledge) could not relieve the prosecution of the burden of proving that the liquor consumed was an intoxicant as defined under the Act. It is, therefore, clear that the observations made by this Court regarding the interpretation of Section 106 of the Evidence Act would not apply to the facts of the present case. In the case of Issardas Daulat Ram v. Union of India ((1962) Supp 1 SCR 358, 363 : AIR 1966 SC 1867), this Court, after discussing the admitted circumstances of the case, found that the relevant pieces of evidence would prove the guilty knowledge of the accused. That was a case which arose under Section 178-A of the Sea Customs Act and this Court observed as follows :

> If the gold now in question had been imported earlier it would be extremely improbable that the gold would remain in the same shape of bars and with the same fineness as when imported after the passage of this length of time. It was precisely for this reason that at the stage of the enquiry before the Collector the principal point which was urged on behalf of the appellants was to deny that the seized gold was of foreign origin and it is the nature of the defence that accounts for the order of the Collector dealing almost wholly with the consideration of that question. In order to reach his finding about the gold being smuggled that Collector has referred to the conduct of the appellants .... These were undoubtedly relevant pieces of evidence which bore on the question regarding the character of the gold, whether it was licit or illicit. Learned counsel is, therefore, not right in his submission regarding the absence of material before the Collector to justify the finding recorded in paragraph 6 we have set out earlier.

5. The facts of the present case appear to us to be almost on all fours with the facts of the case mentioned above. Here also, the facts are that gold with foreign markings in the shape of biscuits without indicating any change was recovered from the possession of the appellant. Secondly, the appellant admitted that the gold was brought from outside the country. The appellant further admitted that he did not hold any permit for importing the gold and the plea taken by him was that some unknown person had delivered the gold to him. In view of these circumstances and the fact as to how the accused came into possession of the gold and whether it was imported or not being within the special knowledge of the accused, if he failed to disclose the identity of the person who gave him the gold, then it was open to the Court to presume under Sections 106 and 114 of the Evidence Act that the appellant knew that the gold in his possession was smuggled and imported without permit.

6. In State of Punjab v. Gian Chand (Criminal Appeal 195 of 1962, decided on April 2, 1968), while examining the validity of conviction and sentence under Section 167(81) of the Sea Customs Act, 1878, this Court held that as the accused did not claim any ownership over the gold and was a bullion merchant the mere fact that the gold had foreign markings would not be sufficient to prove that the accused had knowledge that the gold was smuggled. In this connection, this Court observed as follows :

> In our view, the High Court was right in its conclusion because the fact that none of the respondents claimed ownership over the said gold could not necessarily mean either that the gold was smuggled gold or that the respondents were in possession

> thereof with the knowledge that it was so. The fact that the gold has foreign marks stamped on it can only mean that the gold was foreign. But since such foreign gold used to be imported before the present restrictions were imposed on its importation, it could have been imported without any violation of law. Consequently, that fact alone would not establish either of the two ingredients of section 167(81).

7. The facts of this case are, however, clearly distinguishable from those of the present case. In the first place, in the case mentioned above, the accused was a bullion merchant and it was in the very nature of circumstances and as a part of his profession, natural for him to be in possession of gold. Secondly, the Court clearly held that during those days foreign gold used to be freely imported in our country and therefore the mere presence of foreign markings would not be sufficient to raise a presumption under Section 106 of the Evidence Act so as to attribute knowledge to the accused that the gold was smuggled. In the instant case, the facts are quite different and so is the nature of the admission made by the appellant.

8. In a later decision of this Court in the case of C. I. T. v. Best & Co. ((1966) 2 SCR 480, 486 : AIR 1966 SC 1325), this Court observed as follows :

> When sufficient evidence, either direct or circumstantial, in respect of its contention was disclosed by the Revenue, adverse inference could be drawn against the assessee if he failed to put before the Department material which was in his exclusive possession. The process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other.

It is true that this case arose under the provisions of the Income Tax Act but the principles laid down by this Court would apply equally to the facts of the present case. In the case of Collector of Customs, Madras v. D. Bhoormull ((1974) 3 SCR 833 : (1974) 2 SCC 544), a case under the Sea Customs Act, while dwelling on the nature and purport of the onus which lay on the prosecution, this Court observed as follows : (SCC p. 553, para 30)

It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167 to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; ... All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

Similarly, while dealing with the merits of the case, this Court made the following observations : (SCC p. 557, para 41)

In the case before us, the circumstantial evidence suggesting the inference that the goods were illicitly imported into India, was similar and reasonably pointed towards; the conclusion drawn by the Collector .... The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving

him a fair opportunity of rebutting the first and the foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge.

It was also pointed out that the broad effect of the application of the basic principles underlying Section 106 of the Evidence Act would be that the onus is discharged if the prosecution adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. In the case of Labhchand Dhanpat Singh Jain v. State of Maharashtra ((1975) 2 SCR 907 : (1975) 3 SCC 385), this Court was again considering the extent and application of Sections 106 and 114 of the Evidence Act and in this connection, observed as follows : (SCC 388, paras 8 and 9)

Even if we were to apply the ratio decidendi of Gian Chand's case (Criminal Appeal 195 of 1962, decided on April 2, 1968) in the case before us, we find that the result would only be that no presumption under Section 123 of the Act could be used against the appellant. We do not think that the High Court or the Magistrate had used this presumption. We find that they had relied upon circumstantial evidence in the case to infer the character of the gold recovered and the accused's guilty knowledge .... A reference to Issardas Daulat Ram v. Union of India ((1962) Supp 1 SCR 358, 363 : AIR 1966 SC 1867) is enough to show that the conduct of the accused and the incredible version set up by him were enough to saddle the accused with the necessary knowledge of the character of the goods found in his possession ... At least, the burden of proving an innocent receipt of gold lay upon the appellant under Section 106, Evidence Act. The totality of facts proved was enough, in our opinion, to raise a presumption under Section 114 Evidence Act that the gold had been illegally imported into the country so as to be covered by Section 111(d) of the Act. The appellant had not offered had not offered any other reasonable explanation of the manner in which it was being carried.

The facts in this case appear to be very similar to the facts in the present case. Furthermore, the case of Balumal Jamnadas Batra v. State of Maharashtra ((1976) 1 SCR 539 : (1975) 4 SCC 645) was also a case under the Customs Act and where also the presumption under Section 123 was not applicable. It was held therein that having regard to the conduct of the accused and nature of the articles mens rea was established. In this connection, this Court observed as follows : (SCC P. 648, para 7)

The very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into this country very recently from another country. The inscriptions on them and writing on the boxes were parts of the state in which the goods in unopened boxes were found from which inferences about their origin and recent import could arise. The appellant's conduct, including his untruthful denial of their possession, indicated consciousness of their smuggled character or mens rea.

9. From the aforesaid case also it would appear that this Court was prepared to draw a presumption against the accused from the fact that the articles concerned were concealed and had particular markings and special features and from the nature of the unsatisfactory explanation given by the accused.

10. While it is, therefore, true that in the instant case the seizure was not made under Section 111 of the Customs Act and the prosecution could not press into service the presumption arising from Section 123 of the Customs Act, that does not clinch the issue. It is proved that the appellant was in

possession of gold with foreign markings which was found to be in the shape of biscuits or bars kept in a secret chamber of the safe, and that the accused admitted that the gold was brought from outside the country and was given to him by somebody whose identity he was not prepared to disclose. Thus, the appellant knew as to who was the person who had given him the gold and if he also knew, as he says, that the gold was smuggled, he must have known whether the person who delivered the gold to him brought it under a permit or without any permit because at the time of the occurrence the import of gold was banned excepting under special circumstances. Having regard to the totality of the situation, there is no reason why the prosecution would not be entitled to call into aid the combined effect of the presumptions under Sections 106 and 114 of the Evidence Act. We are, therefore, satisfied that the prosecution has clearly proved the charge under Section 135(1)(b)(ii) of the Customs Act.

11. It was also contended by Dr. Chitale that as the case had been going on for eight years, a lenient view on the question of sentence may be taken. The sentence being one only of rigorous imprisonment for nine months, we think there is no room for any reduction thereof.

12. For the reasons given above, the appeal fails and is accordingly dismissed.

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