

Assistant Collector of Customs

Vs

Mohanlal Shankerlal Kansara

Criminal Appeal No. 330 of 1978

06.03.1987

ORDER

1. After hearing learned counsel for the parties, we are satisfied that the judgment of the Gujarat High Court dated February 25, 1977 upholding the order of acquittal passed by the Judicial Magistrate, First Class (Railway), Surat dated September 9, 1974 acquitting the respondent of offences punishable under Section 135 of the Customs Act, 1962 and under Section 85 of the Gold (Control) Act, 1968, are manifestly erroneous and have caused flagrant miscarriage of justice.
2. It is brought out in the prosecution evidence that on the night of October 30, 1971 at about 9.45 p. m. the respondent was found loitering in suspicious circumstances on the platform at the Railway Station, Surat. He was apprehended by PW 1 Srikant Sharma, A. C. B. Police Inspector and on a search of his person was found carrying 20 gold bars each weighing 10 tolas bearing foreign markings Johnson Mathey - 999.0 London and Sheffield Smelting Co. Ltd. - 999.0 Sheffield - London which he had kept in a bundi having two pockets beneath his shirt. The contraband gold was seized. On the next morning he transmitted message to the customs authorities and PW 2 Ramesh Chandra Shukla, Customs Inspector took the respondent into custody and seized the gold bars. The customs authorities called a goldsmith PW 3 Rajnikant Soni who assayed the gold bars to be pure gold of 999.0 touch. Three gold bars, one each of three different foreign markings, were sent by the customs authorities to the Mint Master, Bombay for assaying but the report of the Mint Master is not forthcoming. The prosecution tendered in evidence PW 1 Srikant Sharma, Police Inspector, Anti-Corruption Branch, PW 2 Ramesh Chandra Shukla, Customs Inspector and PW 3 Rajnikant Soni, goldsmith, along with panchname, Ex. P-28, regarding testing of gold and Ex. P-13, statement made by the respondent before the Customs Inspector. The question before the learned Magistrate as well as the High Court was whether the evidence was sufficient to justify the guilt of the accused for the commission of offences with which he was charged. The respondent denied the commission of the offences and pleaded inter alia that he was an innocent carrier alleging that the gold bars were entrusted to him by one Nathubhai at Baroda for being taken to Nadiad and was asked to keep them in the inner pockets of his jacket. He asserted that he was a person without employment and was paid Rs. 100 for the work and had no knowledge as to the contents of the two packages. That explanation of his was an incredible one and not worthy of acceptance.
3. On these facts it is difficult to see how any court acting reasonably could have come to the conclusion that the respondent was not guilty of the offences with which he was charged. Both the learned Magistrate as well as the High Court have recorded an order of acquittal on the erroneous ground that the presumption under Section 123(1) of the Customs Act does not arise because the respondent was not apprehended by the Customs Officer but by the police and also because he was not carrying the contraband gold bars with foreign markings in a clandestine manner as they were being carried in the inner pockets of his bundi. To say the least, it is a travesty of justice that the learned Single Judge should have upheld the acquittal and held the offence under Section 135 of the

Customs Act as not made out. The judgment proceeds on a complete misunderstanding of the ratio of the two decisions of this Court in Labhchand Dhanpat Singh Jain v. State of Maharashtra and Balumal Jamnadas Batra v. State of Maharashtra. The two decisions instead of supporting the respondent are against him and in both the cases the court on the fact that the accused was found in possession of contraband gold which gave rise to a presumption under Section 123(1) of the Customs Act, negated the plea of the accused that he did not know that he was carrying any contraband gold. Further, the failure of the prosecution to examine the Mint Master or to produce a certificate from him must lead to the inevitable consequence of the acquittal of the accused of the offence under Section 85 of the Gold (Control) Act. This does not mean that in a case like this the customs authorities should rest themselves content by examining a goldsmith. The burden is on the prosecution to prove that the contraband is gold within the meaning of Section 2(f) of the Gold (Control) Act. There must therefore be positive evidence in the form of a certificate from the Mint Master that the contraband is gold of at least 9 carats purity. However, there does not seem to be any dispute in this case that the contraband was pure gold. We have the testimony of PW3 Rajnikant Soni who has deposed that he examined the gold bars in question and found them to be pure gold. It is true that he accepted during cross-examination that he had no specialised training in gold testing and also that he formed his opinion by the mere weight. But the fact remains that he has been a goldsmith and having been in this line of business for 20 years, he could judge by reason of the foreign marking 999.0, which was a guarantee of purity, that the contraband was pure gold. We fail to appreciate that the respondent at no time denied that the contraband in question was pure gold but only came forward with the plea that he had been entrusted with the gold bars by an unknown person called Nathubhai, who could not be traced, but of casual acquaintance for being carried, which story was totally unbelievable. The learned Single Judge has relied upon an earlier judgment of the High Court in Assistant Collector, Customs Baroda v. Mukbujusein Ibrahim Pirjada laying down that the foreign markings being not more than hearsay were no proof of the foreign origin of the gold bars which does not appear to lay down good law. It is accordingly overruled.

4. For these reasons, the appeal succeeds and is allowed. The judgment and order of the High Court upholding the order of acquittal recorded by the Judicial Magistrate are set aside and the respondent is convicted for having committed offences punishable under Section 135 of the Customs Act, 1962 and under Section 85 of the Gold (Control) Act, 1968. He is sentenced to undergo rigorous imprisonment for a period of six months on each count. The sentences shall run concurrently. The seized gold bars shall stand confiscated to the government.

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