

Mohd. Akhtar Hussain Alias Ibrahim Ahmed Bhatti

Vs

Assistant Collector of Customs (Prevention), Ahmedabad and Another

Criminal Appeal No. 467 of 1988

(G. L. Oza, K. Jagannatha shetty JJ)

31.08.1988

JUDGMENT

JAGANNATHA SHETTY, J. -

1. We grant special leave and proceed to dispose to the appeal.
2. The appeal arises from a judgment of the Gujarat High Court dated July 20, 1987 in Criminal Appeal Nos. 260 of 1987, 105 of 1987 and 444 of 1987. It raises a short butt not very easy point for determination. The point relates to sentencing practice as to concurrent or consecutive sentences.
3. The essential facts can be stated in summary from as follows : Appellant - Mohd. Akhtar Hussain alias Ibrahim Ahmad Bhatti is a Pakistani national. On April 15, 1982, the gold 7000 tolas of foreign mark of the value of Rs. 1.4 crores was seized from his possession at Ahmedabad. Later he was arrested. On September 23, a case was filed in the Court of Chief Metropolitan Magistrate, Ahmedabad in CC No. 1674 of 1982. He was charged under Section 85 (1) (ii) of the Gold (Control) Act, Act 1968. He pleaded guilty to the charge. On January 11, 1984 he was convicted and sentenced to imprisonment for 7 years and fine of Rs. 10 lakhs. It is the maximum punishment prescribed under the Gold (control) Act. Upon appeal, the Bombay High Court confirmed that sentence but reduced the fine to Rs. 5 lakhs. The special leave petition filed by the appellant was dismissed by this Court. That conviction and sentence became final.
4. When the appellant was in judicial custody in the aforesaid case, there was further investigation with regard to his smuggling activities. It revealed widespread racket of smuggling gold and silver in collusion with several persons. On January 6, 1983 he was again prosecuted along with 18 others under Section 135 of the Customs Act, 1962. The complaint in this case was filed before the Additional Chief Metropolitan Magistrate, Ahmedabad. It was registered as CC No. 129 of 1986. It was alleged in the complaint that the appellant and others had imported gold worth Rs. 12.5 crores and smuggled out of India silver worth Rs. 11.5 crores during December 1981 to February 1982. In this case also the appellant did not wait for the trial of the case. He pleaded guilty to the charge. The other 18 accused, however, did not follow him. They denied the charge and the case against them is said to be still pending for disposal.
5. On January 6, 1987, the trial Magistrate convicted the appellant, in the following terms :

Accused 1 in this case is proved guilty under Section 135 of Customs Act and it is ordered that accused 1 is sentenced for 4 years (for four years) RI and a fine of Rupees 2 lakhs (Rupees two lakhs only) and if fine not paid, further sentence of RI

for six months more. This sentence is to be undergone on expiration of sentence in Criminal Case No. 1674 of 1982. Accused is found guilty under Section 120-B of Indian Penal Code, but no separate sentence is ordered, for the same.

6. The reasons given in support of the above conclusion are :

It is not proper to pass order only by taking the circumstances and difficulties of the accused. Simultaneously, midway should be found looking to the circumstances of the nation and personal circumstances of the accused. It is not possible to order sentence of both the case of the accused, to run concurrently. When the accused in previous case, was ordered to undergo sentence of 7 years RI then, in this case it does not seem reasonable to order sentence for similar period i. e. detain in jail for 12 to 14 years and fine and if fine not paid, to undergo further more sentence. The accused had pleaded guilty and requested for mercy. It is the interest of justice to show slight mercy in the order of sentence by the court.

7. Against this order of conviction and sentence there were appeals and counter-appeals before the High Court. The appellant appealed against the sentence on the ground that the sentence should have been made concurrent. The State, on the other hand, demanded the maximum sentence again. The maximum sentence prescribed under Section 135 of the Customs Act is also 7 years. The State contended that in view of the enormity of the economic crime committed by the appellant, he should be given the maximum and consecutive. The High Court accepted the State appeal, enhanced the sentence from 4 years to 7 years and made it consecutive. Consequently, the High Court dismissed the appeal of the appellant. The result is that he has to serve in all 14 years imprisonment which he has challenged in this appeal.

8. Section 427 CrPC incorporates the principle of sentencing an offender who is already undergoing a sentence of imprisonment. The relevant portion of the section reads :

427 (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction of imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence.

9. The section relates to administration of criminal justice and provides procedure for sentencing. The sentencing court is, therefore required to consider and make an appropriate order as to how the sentence passed in the subsequent case is to run. Whether it should be concurrent or consecutive ?

10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

11. In this appeal, the primary challenge to the sentence is based on assumption that the two cases against the appellant, under the Gold (Control) Act, and the Customs Act pertain to the same subject matter. It is alleged that the appellant was prosecuted under the two enactments in respect of seizure of 7000 tolas of gold. On this basis, reference is also made to Section 428 CrPC claiming set off in

regard to the period of imprisonment already undergone by the appellant.

12. The submission, in our opinion, appears to be misconceived. The material produced by the State unmistakably indicate that the two offences for which the appellant was prosecuted are quite distinct and different. The case under the Customs Act may, to some extent, overlap the case under the Gold (Control) Act, but it is evidently on different transactions. The complaint under the Gold (Control) Act relates to possession of 7000 tolas of primary gold prohibited under Section 8 of the said Act. The complaint under the Customs Act is with regard to smuggling of gold worth Rs. 12.5 crores and export of silver worth Rs. 11.5 crores. On these facts, the courts are not unjustified in directing that the sentences should be consecutive and not concurrent.

13. The question that, however, remains to be considered is whether the maximum sentence under the Customs Act is warranted? Whether, in the circumstances, it is wrong in principle to sentence the same offender for another maximum imprisonment?

14. It is argued that the High Court has failed to take into consideration the total period of sentence which the appellant has to undergo. It is also argued that since the conviction was based on the plea of guilty the appellant should have been given a credit in the sentence. The personal problems of appellant are also highlighted for reduction in the sentence.

15. The High Court has refused to take into consideration the mercy plea of the appellant and much less the plea of guilty. The enormity of the crime committed by the appellant, according to the High Court, warranted nothing less than the maximum sentence. The High Court had this to say :

The individual hardships of the appellant and his family would be of no consequence at all. If offence was such that the maximum sentence should have been awarded, then the learned Metropolitan Magistrate should not have made an ill-conceived attempt to find out a via media. We, therefore, feel that the appeal filed by the State requires to be allowed. The fact that the accused had pleaded guilty is of no consequence. It is not the case of plea bargaining because the accused had pleaded guilty and yet he was given numerous opportunities to reconsider his decision. If the accused even thereafter had pleaded guilty, the fact that he was awarded a 7 years' rigorous imprisonment sentence in the previous case would be no ground for the learned Metropolitan Magistrate to award less than the maximum sentence if the facts of the case warranted such a maximum sentence. The enormity of the crime called for nothing less than the maximum sentence.

16. We have carefully perused the entire material on record. It may be recalled that the appellant was given the maximum sentence of 7 years in the previous case under Gold (Control) Act. The conviction thereunder was also based on the plea of guilty. The latter sentence under the Customs Act was also on the plea of guilty. Generally, it is both proper and customary for courts to give credit to an accused for pleading guilty to the charge. But no credit need be given if the plea of guilty in the circumstance is inevitable or the accused has no alternative but to plead guilty. The accused being caught red-handed is one such instance. The first case under the Gold (Control) Act against the appellant falls into the latter category, 7000 tolas of gold of foreign mark of the value of Rs. 1.4 crores were seized from the possession of appellant. The plea of guilty in that case was inevitable. The court was, therefore, justified in awarding the maximum sentence. But the second case under the Customs Act was not of that type. Here the prosecution has to prove many thing. There are 18 other accused facing the trial in the same case. The appellant, however, pleaded guilty

perhaps on legal advice. He must have been told that some credit for such plea would be given by the court and if the credit is not given and the maximum sentence is awarded the appellant is surely entitled to complain for giving the maximum sentence.

17. It is no doubt true that the enormity of the crime committed by the accused is relevant for measuring the sentence. But the maximum sentence awarded in one case against the same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The court has to consider the totality of the sentences which the accused has to undergo if the sentences are to be consecutive. The totality principle has been accepted as correct principle for guidance. In *R. v. Edward Charles French*, Lord Lane, C. J., observed :

We would emphasize that in the end, whether the sentences are made consecutive or concurrent the sentencing judge should try to ensure that the totality of the sentences is correct in the light of all the circumstances of the case.

18. The trial Magistrate in this case has properly considered all aspects including the plea of guilty and given good reasons for awarding 4 years RI. That means in all, the appellant has to undergo 11 years of imprisonment. That by itself is quite long enough in a man's life. But the High Court took a narrow view of the whole matter with the enormity of the crime on the forefront. The broad expanse of discretion left by legislation to sentencing courts should not be narrowed only to the seriousness of the offence. No single consideration can definitely determine the proper sentence. In arriving at an appropriate sentence, the court must consider and sometimes reject, many factors. The court must 'recognise, learn to control and exclude' many diverse data. It is a balancing act and tortuous process to ensure reasoned sentence. In consecutive sentences, in particular, the court cannot afford to be blind to imprisonment which the accused is already undergoing.

19. In the result, the allow the appeal, set aside the judgment of the High Court and restore that of the trial court.

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