

Costao Fernandes

Vs

State at the instance of D.S.P. C.B.I. Bombay

Criminal Appeal No. 242 of 1996

(G. N. Ray, B. L. Hansaria JJ)

20.02.1996

JUDGEMENT

G. N. RAY J.

1. While respectfully agreeing with the judgment of any learned brother, I intend to add as follows :

Mr. Altaf Ahmad, learned Additional Solicitor General appearing for the respondent has very strongly contended that even if in the facts of the case, it becomes apparent that the appellant, a Preventive Officer of the Customs Department, on the basis of source information, was keeping a vigil on the apprehended smuggling activities and having located the deceased speeding away with smuggled goods in a contessa car had chased him in his motor cycle and attempted to stop the vehicle but he was resisted by the deceased driving the said car, the appellant is not entitled to claim protection against initiation of a criminal trial for causing death of the driver of the vehicle under Section 155 of the Customs Act because under Section 106 of the Customs Act, he was authorised to take such course of action as was confined to stopping the vehicle and not beyond that. The learned Additional Solicitor General has submitted that if a custom officer while attempting to stop a vehicle involved in smuggling activities had faced resistance from the driver or occupant of the vehicle which had necessitated to take action by way of right to private defence and by that process, the driver or the occupant had suffered bodily injuries which had caused death, the concerned officer cannot claim protection at the threshold in stopping the criminal trial under Section 155 of the Customs Act. He has to face the Criminal trial where the question of the right of private defence, if raised, is to be considered in the light of the evidence to be adduced in the case.

2-3. In my view, such contention should not be accepted. The very purpose of Section 106 of the Customs Act in stopping the conveyance and searching the same when it was reasonably believed by a Customs Officer that such conveyance was or going to be involved in carrying out smuggling activities, will be frustrated if the Customs Officers, in the bonafide exercise of his powers and consequential duties as enjoined under Section 106 of the Customs Act is not permitted to take all consequential actions necessary for stopping the conveyance and conducting the search of such conveyance. If in course of a consequential action, it becomes necessary to immobilise the driver or occupant of a vehicle when without recourse of such action it was not possible to stop the vehicle, I fail to see any reason why the Customs Officer will not possess power and authority under Section 106 of the Act. It will not be correct to contend that the Customs Officer's power under Section 106 of the Act is confined only to immobilisation of the conveyance even when without which

immobilisation, stopping of the conveyance cannot be effected. Sub-section (2) of Section 106 of the Customs Act authorises a competent Officer to fire upon animal, vehicle or aircraft for forcibly stopping the same. It will be only hypertechnical to contend that although in an attempt to immobilise an aircraft or a vehicle, the same may be fired upon and by such process serious damage to the aircraft or the vehicle may be caused which may lead to loss of life of the pilot or driver together with occupants of the concerned conveyance, an action in injuring the driver or the occupant of the vehicle in an attempt to immobilise the vehicle is beyond the scope and ambit of Section 106.

4. It is, however, necessary to indicate a note of caution in the matter of consideration of protection against criminal liability if sought for under Section 155 of the Customs Act at the threshold of the Criminal trial. Since such immunity is claimed at the threshold, the Court should carefully scrutinise the relevant facts and materials placed before it for the purpose of finding (a) that the concerned Officer was authorised to act for prevention of smuggling activity and in fact had bona fide acted in exercise of his duties and functions in preventing the smuggling activities being carried or about to be carried (b) there are prima facie materials to indicate that such officer had honestly attempted to stop the conveyance for effecting search of the same (c) that such an attempt to stop the vehicle was sought to be frustrated either by not stopping the vehicle or by attempting to forcibly taking away the vehicle despite attempt by the concerned officer to stop the vehicle and (d) that recourse to use of force on the driver or occupant of the vehicle was apparently necessary to immobilise the vehicle or to save himself from imminent danger of personal risk. If on consideration of the materials placed before the Court, a possible view can be objectively taken that in discharge of the duties and functions under Section 106 of the Customs Act that a competent Officer had bonafide used force and such use of force is not just a ruse for high handed action on his part which was not at all necessary in the facts of the case but prima facie there is justification for the course of action pleaded by the officer, the Court would give effect to the protection under Section 155 of the Customs Act by dropping the criminal case initiated against the concerned Officer. The facts already on record, some of which have been indicated in the judgment of my learned brother, indicate that the appellant was on official duty as Preventive Officer to look out for smuggling activities at the relevant time and in discharge of his official duties he had chased a speeding contessa car driven by the deceased in an attempt to stop the car for searching the same. As a matter of fact, he overtook the car and having disclosed his identity asked the deceased to stop the car but when the driver had attempted to flee with the car, he jumped into the same and tried to take out the ignition key in order to stop the vehicle. It has not been revealed that appellant had received various injuries including incised wounds which on the basis of medical report are likely to have been caused at the time when attempt to stop car was made. Such facts prima facie support the appellant's claim for the protection under Section 155 of the Customs of Act to the appellant but subject him to a full fledged trial on a charge of murder by pointing out that it would be open to the appellant to plead for right to private defence in such trial, like any other accused.

5. It may be indicated here that in the case of *Bhappa Singh v. Ram Pal Sing*, (1981) Supp SCC 12 : (AIR 1982 SC 779), the officials of the Customs and Excise Department raided a jewellery shop of the complainant and being attacked, the said raiding party fired shots. The complainant lodged a complaint that the members of the raiding party had come to commit dacoity in the jewellery shop. Indicating the circumstances, this Court held that the raiding party had not gone to commit the dacoity but they had to open fire thereby injuring some person in the shop when they were resisted in the carrying of the raid peacefully and men of the raiding party were manhandled. The impugned order quashing the complaint against the raiding party was upheld by this Court on the basis of general prima facie impression even by noticing that perhaps the matter may have required further

evidence before quashing. It will be appropriate to refer paragraph 7 (of SCC) : (para 6 of AIR) hereunder :

"Even though what we have just stated is a general prima facie impression that we have formed at this stage on the materials available to us at present, it may not be possible to come to a conclusive finding about the falsity or otherwise of the complaint. But then we think that it would amount to giving a go-by to Section 108 of the Gold (Control) Act, if cases of this type are allowed to be pursued to their logical conclusion i.e., to that of conviction or acquittal. In this view of the matter we do not feel inclined to upset impugned order, even though perhaps the matter may have required further evidence before quashing of the complaint could be held to be fully justified. The appeal is accordingly dismissed."

(Emphasis added)

6. A valiant and dutiful custom officer risked his life to fight the mighty under-world of smugglers ; unarmed and single-handedly. And see ! he succeeded after hot chase on his motorcycle-smuggler being in a car. The result was smuggling of gold worth Rs. 8 crores was prevented. The reward? He has been made to face a prosecution under Section 302 of the I.P.C. at the behest of the CBI, who is brought hurriedly and for undisclosed reasons to investigate, inasmuch as in the scuffle which had taken place between the appellant-official and the suspected smuggler, during the course of which a big-sized knife (dagger) carried by the run way was used, the smuggler died, because of the injuries sustained at the hand of the appellant, who had as many as 22 injuries on his person.

7. The CBI says the injuries were self-inflicted. The CBI has taken this stand because, according to it, the appellant had a ulterior motive in killing the deceased, which was to share reward relating to recovery of smuggled gold worth Rs. 28 lacs. The reward had, however, become due in 1984 and the present occurrence had taken place on 16-5-1991. How farfetched is the imputed motive ? The High Court itself has disbelieved this and has really criticised the CBI for suggesting the same. This is, however, not all. As the further case of the CBI is that no records were placed before it to show that the appellant had prior information of smuggling, following which the smuggler was chased. Another material used against the appellant is, his so-called abscondence.

8. None of the aforesaid has legs to stand, as would appear from what is being stated later. A biased investigation of the type ofhand from the CBI has indeed painted us, because people of this country has still high hopes from it, which would get dashed if bias creeps in its investigation. But then, the deceased was no ordinary mortal, as he was a brother of one time Chief Minister of Goa; and the occurrence had taken place in Goa.

9. What finds the appellant before this Court is denial of the protection made available by Section 155 of the Customs Act. 1962 (the Act). The section has provided :

"Section 155, Protection of action under the Act. - (1) No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations.

(2) No proceeding other than a suit shall be commenced against the Central Government or any office of the Government or a local authority for anything

purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, after the expiration of three months from the accrual of such cause."

10. As Section 155 has nexus with performance of official act, let it be seen what has been empowered by the Act on a person like the appellant. This is spelt out by Section 106 of the Act reading as below :

"Section 106. Power to stop and search conveyances.- (1) Where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and-

(a) rummage and search any part of the aircraft, vehicle or vessel;

(b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;

(c) break open the lock of any door or package for exercising the powers conferred by Clauses (a) and (b), if the keys are withheld.

(2) Where for the purposes of sub-sec. (1)-

(a) it becomes necessary to stop any vessel or compel any air craft to land, it shall be lawful for any vessel or aircraft in the service of the Government while flying her proper flag and any authority authorised in this behalf by the Central Government to summon such vessel to stop or the aircraft to land, by means of an international signal, code or other recognised means, and thereupon such vessel shall forthwith stop or such aircraft shall forthwith land; and if it fails to do so, chase may be given thereto by any vessel or aircraft as aforesaid and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, it may be fired upon;

(b) it becomes necessary to stop any vehicle or animal, the proper officer may use all lawful means for stopping, it , and where such means fails, the vehicle or animal may be fired upon."

11. Let it be seen why the protection of Section 155 has been denied and why CBI insists that this section has no operation. The first premises of denial is that there is no material to show if the appellant was really engaged in any official work inasmuch as there is no writing showing prior information relating to attempted smuggling. This, however, is an obvious untenable stand inasmuch as from the impugned order it is clear that on the day of occurrence itself it was told within a few hours to the local police, which had come at the scene around 2 p.m. while the occurrence was around 12.30 p.m. that the appellant had been working "on some tip-off about smuggling of gold". In this connection Shri Bobde appearing for the appellant, has drawn our attention to a complaint filed in the Court of Chief Judicial Magistrate, Margoa, being subject matter of Criminal Case No. 1/C/94/A by the Union of India through the Assistant Collector of Customs (PO). Marmagao, against 8 accused persons in which there is a clear statement in para 3 that pursuant to information received by the Custom Department in May, 1991 regarding the landing of contraband gold, the

Custom Officer, Shri Costao Fernandes, the appellant herein, was keeping vigilance of the said area. The further averment in paragraph 4 is that about 11 a.m. Shri Costao received information regarding some movement sufficient to suspect landing of gold and whereupon he immediately rushed to the site.

12. Addl. Solicitor General, Shri Altaf Ahmad, submits that this is the stand of Union of India through its Customs Department in some other case, whereas in the present case the CBI could not be satisfied during investigation about any such prior information. The mildest observation we would make in this context is that the CBI has exposed inasmuch as the Department's stand relating to prior information has not found place for the first time in the complaint, but was so mentioned on 16th May 1991 itself, and within few hours, by one Shri L.R. Naik. Superintendent of Custom, Revenue Intelligence. Marmagoa, who informed about the same to P.S.I. Mohan Naik who was the police officer who had received the telephone call at about 1.10 p.m. on 16th from Head constable, R. G. Prabhu giving the information that brother of Churchill Alemao (who was once a Chief Minister of Goa) has been murdered. This shows that the Custom Department has not cooked up this story subsequently.

13. To boost up his case, the CBI has further stated that after the occurrence the appellant was not available for two days, i.e. he was absconding, which shows his guilty mind. It is true that the appellant had surrendered before the police on 18th, but that was because he became mortally afraid of his life after what had happened on 16th; and so, surrender before the police was to seek protection. Where is the guilty mind then ?

14. Coming to the case of self-infliction wounds, the same is sought to be brought home by the Addl. Solicitor General by referring to the "Hurt Certificate", which has noted that on the appellant being examined on 18th May, 22 injuries were found on his person. The learned counsel refers us to column 5 of this certificate dealing with "Duration of each hurt" and submits that as the duration was of 24 hours, the same could show that the injuries were received on 17th, and not on 16th. This establishes a case of self-infliction of injuries contends the counsel. He, however, missed the mark "-" put before 24 hours, which shows that the time was more than 24 hours. So, this part of CBI's case also falls to the ground.

15. Faced with the position that the wounds were not self-inflicted and the killing could have been, indeed was, in self-defence, the submission is that protection of Section 155, nonetheless, is not available because killing of a smuggler is not a part of the official duty, which alone is protected by this section. It is laboured hard to impress that the official duty, in the present case, was confined to stop the movement of the vehicle and no further. After the vehicles got stopped, the submission is, that the act in performance of official duty was over and the appellant could not have scuffled with the deceased leading to the latter's death. We cannot agree inasmuch as on 16th itself it was stated at the spot by some watchers to the police officer who came there that the appellant was "trying to grab the ignition key" of the vehicle which was being driven by the deceased. This shows that the appellant was trying to prevent the mobility of the vehicle. If while engaged in such an act, the appellant was assaulted, and 22 times at that, with an instrument like knife causing bruises, abrasions, incised wounds on various parts of body like cheek, chest, back, shoulder, arm, leg and thigh, he could not have allowed himself to be killed, but had to defend himself by retaliation. The killing was thus not divorced from the performance of the duty enjoined by Section 106 of the Act.

16. Shri Bobde has brought to our notice in this connection the decision of this Court in Bhappi Sen v. Rampal Sen, 1981 Supp 1 SCC 12 : (AIR 1982 SC 779) in which protection of Section 108 of the

Gold (Control) Act, 1986, which is in pari materia with Section 155 of the Act, was made available to custom officials who had fired at the inmates of a raided jewellery shop causing gun shot wounds to the son of the appellant, which had been done as three persons of the custom party had received head injuries caused by blunt weapon. The learned counsel submits that the same view merits to be taken in this case. Addl. Solicitor General, however urges that the observation made by the Court in paragraph 7 shows that it did not fully approve the quashing of the complaint by the High Court by giving the benefit of Section 108. But, the relevance and importance of the judgment is that protection of Section 108 was not denied even when, while engaged in duty of search, bodily harm had been caused to the other side, when the same had become necessary in self-defence.

17. Addl. Solicitor General has another submission to make. The same is that being faced with an organised under-world of smugglers, the appellant should have remembered that "discretion is the best part of valour". If the appellant would have done so, he would have perhaps saved his skin, but could not have saved the larger interest of the society and nation, which does lie in preventing smuggling. The appellant showed valour not in taking to heels, but in fighting. We have all praise for such an officer and we would not allow him to be prosecuted, much though the smugglers would want it to be so. Indeed the appellant is being persecuted not prosecuted, as the action smacks of revenge seeking to take his life because he has taken the life of a smuggler, of course, one close to political high ups of Goa. Let this not be countenanced. Let this head-hunting be not permitted.

18. The prosecution against the appellant is therefore, quashed. The appeal stands allowed accordingly. Appeal allowed.