

CALCUTTA HIGH COURT

Sitaram Agarwala

Vs.

State (Calcutta)

Criminal Appeals Nos.345 and 360 of 1959

(S.K. Sen and N.K. Sen, JJ.)

11.08.1961

JUDGMENT

S.K. Sen, J.

1. The appellants of the two appeals Sitaram Agarwala and Wang Chih Kaw have been convicted under Section 167(81) of the Sea Customs Act Sitaram, Agarwala has been sentenced to pay a fine of Rs. 2000/-, in default, to suffer rigorous imprisonment for six months and Wang Chih Kaw has been sentenced to rigorous imprisonment for three months and to pay a fine of Rs. 1000/-, in default, to suffer rigorous imprisonment for three months more.

2. The prosecution case was briefly as follows: On 25-8-58, P.W.1 Ram Sevak Ojha, a constable attached to the Detective Department, noticed Sitaram Agarwala and one Bholanath Gupta at the crossing Hariram Goenka Street and Kalakar Street. In consequence of an information received, the constable decided to follow them. Sitaram Agarwala and Bholanath Gupta got into a bus of route No.32 and the constable also boarded the same bus. Sitaram Agarwala and Bholanath Gupta got down from the bus at the junction of B.K. Pal Avenue and J.M. Avenue and so did the constable. These men took their seat in a park known as Narendra Deb Square. The constable kept watch on them from a distance. After a while these men came out and stood on the western footpath of J.M. Avenue. After sometime a baby taxi came there from the south along J.M. Avenue and stopped there. The accused Wang Chih Kaw was in that baby taxi. He came down and shook hands with the accused. Sitaram Agarwala and all the three then got into the baby taxi. When the taxi was about to start, the constable disclosed his identity to the driver and asked him to stop. He asked all of them to go to the thana, but the accused Sitaram Agarwala and Bholanath Gupta got out of the taxi and tried to run away. The constable caught hold of them and put them inside a police wagon which happened to come up. The Chinese accused then tried to escape. The constable asked the members of the public to secure him and three young men of whom two were college students, namely, P.W.2 Santi Kumar Sen and P.W.3 Alok Kumar Dutta and P.W.5 Tapan Kumar Mujumdar, chased the Chinese gentleman, who threw away three packets which these men picked up. A Sergeant, T. Mukherjee, came on a motor cycle from the opposite direction and he actually secured the Chinese accused Wang Chih Kaw and the three young men handed over the three packets to the sergeant, T. Mukherjee. The sergeant took the

packets as well as the Chinese accused to Shampukur Police station and handed over the packets there as well as the accused. The packets were found to contain 23 gold bars of about 16 tolas each with Chinese inscriptions on them. On search of the person of Sitaram Agarwalla who was also taken to Shampukur Police station, a sum of Rs. 49,320/. in notes of various denominations was found with him.

3. Subsequently, the Customs Department took charge of the gold bars and by an order of the Customs Collector, the gold bars were confiscated. The police, after investigation, sent up the three accused Wang Chih Kaw, Sitaram Agarwalla and Bholanath Gupta in respect of an offence under Section 167 (81) of the Sea Customs Act. The learned Presidency Magistrate who tried the case held that the case was not sufficiently proved against Bholanath Gupta and acquitted him. He, however, convicted and sentenced Sitaram Agarwalla and Wang Chih Kaw as already stated. The two accused have filed two separate appeals which have been heard together.

4. Mr. A.K. Dutt, appearing for the appellant Sitaram Agarwalla has challenged the story given by the constable Ram Sevak Ojha that he followed Sitaram Agarwalla and another person on a bus of route No.32 upto Narendra Deb Square and that there he saw Sitaram Agarwalla shaking hands with a Chinese gentleman and climbing into a taxi along with the Chinese gentleman. He has pointed out that the three young men who chased the Chinese gentleman subsequently, namely, P.W.2 Santi, Kumar Sen, P.W.3 Alok Kumar Putta and P.W.5 Japan Kumar Majumdar, did not say that they saw Sitaram Agarwalla and Bholanath Gupta getting into the taxi. Their evidence is that they saw a baby taxi parking and when the police constable challenged, the accused Nos.2 and 3 got down from the taxi and the constable managed to secure them after a tussle and that the constable called to the young men and asked them to help him in arresting the two men and also the Chinese gentleman who came out of the taxi after those two men and that these young men then chased the Chinese gentleman who was actually arrested by a sergeant who came from the other side. It is possible that the three young men who were engaged in talking among themselves, did not see the two men Sitaram Agarwalla and Bholanath Gupta getting into the taxi, but this was noticed by P.W.1 Ram Sevak Ojha, the constable, because the constable was actually keeping a watch on them; there appears to be no reason to disbelieve the evidence of the constable who at least in part is corroborated by the evidence of the three young men who had no reason to give false evidence in support of the prosecution case.

5. Mr. Dutt has pointed out that the first G.P. entry which was made when the constable and the sergeant arrived at the Sampukur Police Station with the accused was not exhibited. It appears from the evidence of P.V.7 Sub-Inspector, S.D. Banerjee, that a later G.D. entry recorded at 2-50 p.m., was proved in the case as Ext.6 and it gives a summary of the prosecution case as stated by the constable, P.W.1 in court; but according to P.W.7 there was an earlier G.D. entry when at about 1.30 p.m. the constable produced the two accused Sitaram Agarwalla and another accused at the thana and at about 1.45 p.m. the sergeant produced the Chinese accused with the 23 gold bars at the thana. Mr. Dutt has urged that from the nonproduction of the earlier G.D. entry, an adverse inference ought to be drawn against the prosecution case. It is true that the earlier G.D. entry should have been produced in the case; but in spite of the non-production it does not appear that there is any reason to disbelieve the evidence of the constable, P.W.1 who is corroborated by the G.D. entry - Ext.6 and also to a large extent by the evidence of the three young men, P.Ws.2, 3 and 5 to whom reference has already been made. Generally, therefore, we must accept the prosecution story that Sitaram Agarwalla who had a large sum of money with him had gone to

meet the Chinese gentleman and after shaking hands with him got into the taxi with him when the police constable challenged them and arrested them.

6. The appellant Sitaram Agarwalla tried to give an explanation for the large sum of money in his possession by examining two D.Ws.P.W.1 Paramananda Bagla is the maternal uncle of the appellant Sitaram Agarwalla and P.W.2 Laduram Churiwalla is the father-in-law of the appellant Sitaram Agarwalla. Accordingly, their evidence that for some other purpose the money had been sent through Sitaram Agarwalla that day cannot be accepted. From the circumstances the inference is clear that Sitaram Agarwalla had gone to meet the Chinese accused in order to purchase the gold bars from him.

7. The question, however, is whether this constitutes an offence under Section 167(81) of the Sea Customs Act. This clause is as follows:

"If any person knowingly and With intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid; or

If any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods." The charge framed against Sitaram Agarwalla was that by going to meet the accused Wang Chih Kaw who had 23 smuggled gold bars in his possession and by taking with him a sum of Rs. 49,320/-the accused disclosed a previous arrangement for the purpose of purchase of the smuggled gold and thereby the accused was concerned in dealing with the smuggled gold. Now, it has already been found that it is reasonably clear that the appellant Sitaram Agarwalla did go to meet the Chinese accused with the intention of purchasing smuggled gold; but it is difficult to agree with the finding of the learned magistrate that by merely going in order to purchase smuggled gold in accordance with a previous arrangement, it could be said that the appellant Sitaram Agarwalla was in any manner dealing with the smuggled gold. If the purchase had actually been completed so that the appellant Sitaram, Agarwalla obtained control over the smuggled gold bars, or even if without getting possession, he had made a transaction in the gold bars, it could certainly be said that he was in some manner dealing with them; but in the present case, the arrangement for the purchase was frustrated by the intervention, of police constable of the Detective Department. It can only be said that there was an attempt to purchase smuggled gold on the part of Sitaram Agarwalla, but the purchase was not completed, it does not appear that such attempt to purchase is included within the scope of clause (81). The learned Standing Counsel has drawn our attention to the use of the word "attempt' in the second paragraph of clause (81); but this attempt is concerned with attempt at evasion of any duty chargeable on the goods and not attempt to deal with smuggled property in any way. An attempt to deal with smuggled property or an attempt to

purchase smuggled gold does not in our opinion come within the scope of clause (81) as it stands at present. There appears to be no general provision that an attempt to commit any of the offences defined in Section 167 of the Sea Customs Act shall itself be punishable as an offence. Section 511 of the Indian Penal Code applies to offences punishable under the Indian Penal Code itself and does not apply to an attempt to commit an offence under any other Act. In the circumstances, we must hold that it cannot be said that Sitaram Agarwalla was concerned in dealing with the smuggled gold in any way and he must, therefore, be acquitted of the charge against him.

8. So far as the appellant Wang Chih Kaw is concerned, Mr. S.S. Mukherjee, appearing for him, has urged that he was not really in possession of the smuggled gold and he has urged that it is very surprising that each of the three young men namely, P.Ws.2, 3 and 5, should have picked up one of the three packets alleged to have been thrown away by this appellant. He has urged that in the circumstances the evidence of these young men should be disbelieved. He has suggested that the gold bars could have been planted in order to implicate the Chinese accused falsely; but the only people concerned at the time of the arrest of the Chinese appellant and of the others is the constable Ram Sevak Ojha and the sergeant T. Mukherjee, apart from the three young men, P.Ws.2, 3 and 5. It is absurd to suggest that between them they could have produced the 23 gold bars of about 16 tolas each valued at over Rs. 40,000/-. In the circumstances, the evidence of P.Ws.2, 3 and 5 as to the appellant Wang Chih Kaw having thrown away the packets of gold bars which they picked up, must be accepted and it must be held that the Chinese accused was in possession of the gold bars in question.

9. The next question is whether the gold was smuggled gold. The learned Presidency Magistrate relied on the presumption which might be drawn from Section 178A (1) of the Sea Customs Act. Section 178A(1) runs as follows :

"Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

Sub-section (2) defines the articles to which this section applies. The articles include gold manufactures. It is clear that this presumption will arise only when the goods are seized under the Sea Customs Act. Section 178 of the Sea Customs Act provides how goods may be seized under the Act, as follows :

"Anything liable to confiscation under this Act may be seized in any place (in India either upon land or water, or within the Indian customs waters), by any officer of Customs or other person duly employed for the prevention of smuggling". There is also S.172, under which a search warrant may be obtained from a Magistrate on the application of a Customs Collector and a search held under such search-warrant. In the present case the gold bars were taken charge of by sergeant T. Mukherjee, P.W.6 and then handed over to the officer-in-charge of Shampukur Police station. Neither of these officers is an officer of the Customs or a person duly employed for the prevention of smuggling. It is clear therefore that the gold bars were seized in the Present case not under the Sea Customs

Act, but under the general powers of the Police. Therefore, the presumption under Section 178A of the Sea Customs Act, that the goods are smuggled goods, cannot be drawn in this case.

10. The learned Standing Counsel has urged that even apart from the presumption, the evidence adduced in the case is sufficient to show that the gold bars are smuggled. Before proceeding further, it is necessary to clarify what is meant by saying that certain goods are smuggled goods. The term "smuggled goods" is not defined in the Sea Customs Act. In *Babulal Amthlal v. Collector of Customs*¹, it has been observed that the word "smuggling" must be understood as having the ordinary dictionary meaning, viz., carrying of goods clandestinely into a country. Goods may be carried clandestinely in order to evade the payment of Customs duty livable thereon, or in order to evade any legal order of prohibition or restriction on the import of the particular class of goods. Smuggled goods may therefore be taken to mean goods which have been imported by avoiding the payment of the Customs duty livable thereon, or by evading any legal order of prohibition or restriction on the import of such goods.

11. The evidence in this case clearly shows that the gold bars weighed about 16 tolas each and there were Chinese inscriptions on them and they were in possession of a Chinese who ostensibly carried on business as a carpenter : vide the statement of the accused Wang Chih Kaw under Section 342 Criminal Procedure Code and the evidence of D.W.3 Sibdas Chaudhury. There is no doubt therefore that the bars are Chinese gold bars. Import of such gold bars into India is restricted, vide the evidence of P.W.10 Manik Chand Banerjee, an Assistant of the Exchange Control Department, Reserve Bank of India. P.W.10 gave the dates from which the restriction, order has been in force, as 1939 and again 1947. In 1939, the restriction order was an order under the Documents%20and%20Settings/Administrator/Desktop/SubContractor/POP/Desktop/J3efen.ce">Defence of India Rules. After the termination of emergency due to the Second World War, such restriction order lapsed, but thereafter under the Imports and Exports Control Act, 1947, restriction on the import of gold was imposed by Notification No.12(11)F-1/48 dated August 25, 1948. Since August 25, 1948, import of gold into India can be made only under a general or special permit granted by the Reserve Bank of India. P.W.10 stated that no one with the name Wang Chih Kaw had applied for or obtained a permit for import of gold between 25th August, 1957 and 25th August, 1958, i.e. during one year preceding the seizure of foreign gold from the accused Wang Chih Kaw. The accused Wang Chih Kaw did not claim that he had imported the gold under a valid permit in his statement under Section 342 of the Criminal Procedure Code, he disclaimed connection with the gold bars found. But it has been found that he was in possession of 23 Chinese gold bars. It is also clear from the evidence that he attempted to sell the gold bars surreptitiously and not in the course of open business in gold. In the circumstances, it may reasonably be inferred that the accused knew that the gold bars were smuggled goods, i.e., brought into India by evading the restriction order in force. Though there is no evidence showing when the gold bars came into India, it is safe to hold that if they had been imported before August 25, 1948, they would not be sought to be disposed of surreptitiously.

¹ AIR 1957 SC 877

12. The question, however, is whether mere possession of smuggled gold without proof that the appellant had any hand in carrying the same into this Country in contravention of the restriction order is sufficient to bring the accused within clause (81) of Section 167 of the Sea Customs Act. Clause (81) has already been quoted. It requires that the person (1) knowingly and (2) with intent

to defraud the Government of any duty payable thereon, or (2) to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto, should acquire possession of or should in any way be concerned in carrying, removing, depositing, harboring, keeping or concealing or in any manner dealing with any goods in respect of which the necessary duty has not been paid or which have been imported in contravention of any prohibition or restriction for the time being in force. As the clause stands, it is necessary that the person should have the intent either to defraud the Government in respect of duty i.e. to evade payment of duty, or to evade any prohibition or restriction in force as to import. The clause therefore requires that the person should be a direct importer or concerned in some way in importing. The learned Standing Counsel has urged that this construction of the clause (81) is inconsistent with the various acts which are made punishable in the next few lines of the clause, e.g. "in any way concerned in carrying, removing depositing, harboring, keeping or concealing or in any manner dealing with". He has therefore, suggested that the words knowingly and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto" governs only the act first described, viz. "acquires possession of" and not the other acts next mentioned and that in respect of such other acts, it is sufficient that the person concerned should have knowledge that the goods are smuggled. But having regard to the construction of the clause, we are unable to accept the argument of the learned Standing Counsel. We must hold that the words describing the necessary mens rea govern all the acts mentioned in the first paragraph of clause 81 of Section 167 of the Sea Customs Act. In other words, the clause only deals with acts done in order to smuggle goods successfully; it does not include in its scope a person who subsequently obtains smuggled goods, though the smuggled goods themselves are liable to be confiscated when seized.

13. The learned Standing Counsel has referred to the observation of the Supreme Court in AIR 1957 Supreme Court 877 : 1957 SCR 1110, in connection with the genesis of section 178A of the Sea Customs Act, viz. that the Central Government appointed a Taxation Inquiry Commission and the Commission recommended, among other things, that smuggling be made a criminal offence and that legislation be adopted to transfer the onus of proof in respect of offences relating to smuggling to the person in whose possession any dutiable, restricted or prohibited goods are found; and it was to implement this recommendation that Section 178A of the Sea Customs Act was enacted. Clause 81 of section 167 was also given its present shape by the same Amending Act.

14. But the Supreme Court did not lay down in the decision cited above that for the offence created by clause 81 of section 167, mere knowledge that the goods are smuggled goods is sufficient. In view of the terms of clause 81, such a conclusion cannot be arrived at. The prosecution must establish not only that the accused knew that the goods are smuggled, but that he took some active part in the smuggling, thereby indicating the intention to avoid payment of duty or evade the restriction order. If evidence was produced to show that the accused was seen to go into a ship berthed in the Calcutta docks, or even had been to the dock area before he was found in possession of the gold bars, it might have been inferred that he did have something to do with smuggling and so committed the offence under section 167 (81) of the Sea Customs Act. But there is no such evidence in the case. The learned Standing Counsel has drawn our attention to the evidence of P.W.2 Santi Kumar Sen and the search list Ext.2, showing that the accused had a jacket on him with six pockets. This may give rise to a suspicion, but by itself it is not sufficient

to show that the accused himself carried the bars from the dock area. He might have obtained the goods from somebody else who was active smuggler.

15. Our attention has been drawn to an unreported decision of this Court, viz. *Prabhudas Kalyanji v. State*², In that case, Customs Officers came upon the accused in the Sonapatty (gold market) of Calcutta when he was about to melt down some bars of Chinese gold; the conviction of the accused under section 167 (81) of the Sea Customs Act was upheld in that case. As regards the law it was clearly held in that case that it was not enough to show that the accused was in possession of smuggled gold, but it must also appear that he had knowingly and with intent to evade the Notification No.12 (11) F of August 25, 1948, acquired possession of the smuggled gold. Hence, as regards the law, the decision in the unreported case cited was not different from the view we are taking. As regards the point whether the facts proved in that case were such as to show that the accused had knowingly and with intent to evade the restriction order, acquired possession of the gold bars, we have nothing to do with the same; each case has to be decided on its own facts and evidence.

16. In the present case, even though the disclaimer by the Chinese accused of any connection with the gold bars seized and his having found with a jacket with six pockets on him, may give rise to suspicion, the evidence in our opinion is not sufficient to establish that the accused Wang Chih Kaw was himself the direct smuggler or did any act in connection with the process of smuggling and had the intention of evading the restriction order as to the import of gold into India. Hence he must also be given the benefit of doubt and acquitted.

17. Accordingly, both these appeals are allowed and the conviction of the appellants under Section 167 (81) of the Sea Customs Act and the sentences passed thereunder are set aside. The appellant Wang Chih Kaw is discharged from his bail bond. The fines, if paid, will be refunded.

18. Let the sum of money which was seized from Sitaram Agarwalla and deposited in the Malikhana of the Court be returned to the appellant concerned after the period of two months, unless in the meantime any other order to the contrary is passed by a competent Court.

N. K. Sen, J.

19. I agree.

Appeals allowed.

² Criminal Rev. No.1144 of 1960 disposed of on 18-5-1961