

CALCUTTA HIGH COURT

Aravinda Mohan Sinha

Vs.

Prohlad Chandra Samanta

Criminal Appeal No. 476 of 1969 with Criminal Revn. Cases 635 and 636 of 1969

(A.K. Das and K.K. Mitra, JJ.)

28.11.1969

JUDGMENT

Das, J.

1. Revisional Applications Nos. 635 and 636 of 1969 and Appeal No. 476 of 1969, are heard together and this judgment will cover all of them.
2. Aravinda M. Sinha, Asstt. Collector of Customs is the applicant in all these matters against orders passed by different Presidency Magistrates under Section 135, Customs Act and Rule 126P of the D. I. Rules. The accused persons were convicted under both Customs Act and D. I. Rules, Rule 126P but the sentences were different. In Rule No. 635 and appeal No. 476, the learned Magistrate dealt with them under the Probation of Offenders Act on executing a bond and undertaking thereby to keep peace and be of good behavior for a period of 2 years and appear to receive sentence whenever called upon.
3. In Rule No. 436, the learned Magistrate sentenced the accused to fine only under Section 135, Custom's Act and refrained from passing any sentence under Rule 126P of the D. I. Rules.
4. Under the Customs Act, the convictions were based on a finding that they were in possession of smuggled gold and under Rule 126P of the D. I. Rules for failure to give necessary declaration.
5. Mr. Balai Roy, learned Advocate for the Customs has raised the following points.
 1. Punishment for an offence under Rule 126P (2) is imprisonment for a term of not less than six months and not more than 2 years and also fine. The sentence of fine and orders dealing under the Probation of Offenders Act are therefore bad in law.

2. Persons convicted under Rule 126P of D. I. Rules, cannot be dealt with under the Probation of Offenders Act.

The arguments advanced raise the following further points :-

3. Whether a revision petition lies in view of the provision under section 11 of the Probation of Offenders' Act for appeal in respect of an order under the Act.

Whether the prayer for treating Rules 435 and 436 as appeals is maintainable in view of Article 115 of the Indian Limitation Act.

4. Whether on the facts, conviction under Rule 126P (2) is maintainable.

6. Point No. 1.

Sub-Rule (2) of Rule 126P, provides for declaration of possession of gold other than ornament and sub-rule (2) of Rule 126P makes failure of such declaration "punishable with imprisonment for a term of not less than six months and not more than two years and also with fine".

7. The provision is clear and the minimum sentence provided is imprisonment for six months and also fine. This sentence cannot be substituted by a sentence of fine, nor can the Magistrate refuse to pass any sentence, after passing a sentence in respect of the offence under Customs Act, under any provision of the General Clauses Act. On facts besides, the offence under the Customs Act is for possession of smuggled gold while it is non-declaration of gold that makes it an offence under Rule 126P.

8. The next question is whether the offenders can be dealt with under the Probation of Offenders Act, in view of the provision for punishment under Rule 126P.

9. Section 3 of the Probation of Offenders Act empowers the Court to release certain offenders after admonition; Section 4 empowers it to release on probation of good conduct. The only limitation for releasing under Section 3 is that the offences must be certain specified offences under the Indian Penal Code or any offence punishable with imprisonment for not more than two years or with fine or with both under Indian Penal Code or any other law, that no previous conviction is proved against him and the Court thinks it expedient to take action under the Act.

10. Section 4 provides for release on probation if the offence is not punishable with death or imprisonment for life and the Court is of opinion that it is expedient to release him on probation.

11. Rule 126P, sub-rule (2) provides a minimum punishment but it does not override the provisions of the Probation of Offenders Act. This relates to term of the sentence, in respect of which a minimum is fixed, but it does not take away the Magistrate's power to take action under Section 3 or 4 of the Probation of Offenders Act, if he deems it expedient to take such action. Fixation of minimum sentence is not in conflict with Probation of Offenders Act where the Magistrate deems it expedient and this probation or admonition is in lieu of sentence. Infliction of sentence follows a conviction - whatever may be its extent or form but this Act provides for

admonition or probation in place of sentence under certain conditions and therefore provision for a minimum sentence does not affect Court's power under Sections 3 and 4 of the Probation of Offenders Act.

12. In Rule No. 436, the learned Magistrate did not pass any order under Probation of Offenders Act but refrained from passing any sentence. This is not permissible where a minimum sentence is provided for.

13. Point No. 3. We are dealing with 2 Rules and one appeal. In respect of the Rules, there are prayers for treating them as appeals. The opposite parties have raised an objection, on the ground of limitation under Article 115 of the I. L. Act.

14-15. Sub-section, (2) of Section 11 of the Probation of Offenders Act provides for appeal and it reads as follows: Notwithstanding anything contained in the Code, where an order under Section 3 or Section 4 is made by any Court trying the offender (other than a High Court) an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court. It is clear that this section provides for an appeal from any order passed under Sections 3 and 4, notwithstanding anything contained in the Code of Criminal Procedure. This is important in view of the provisions of Section 411 of Criminal Procedure Code which bars appeal from certain orders passed by a Presidency Magistrate.

16. Two of the matters before us are revision applications but in view of clear provision for appeal under Section 11 of the Probation of Offenders Act, revision applications under Section 439, Criminal Procedure Code are misconceived. Mr. Roy, realized this position and had earlier applied for treating these Rules as appeals. Mr. N. C. Banerjee, appearing for the opposite parties relied on Article 115 of the I. L. Act and pleaded limitation.

17. Article 115 provides for a limitation of sixty days for an appeal under Code of Criminal Procedure, 1898 from any other sentence or any order or any order not being an order of acquittal to the High Court. We have already pointed out that the right to appeal against the order passed by a Presidency Magistrate is not under the Code of Criminal Procedure but under Section 11 of the Probation of Offenders Act and Article 115, I. L. Act, has therefore no application. No limitation is provided for under the amended Limitation Act where right to appeal flows from some Act other than the Criminal Procedure Code and the period therefore must be taken to be a period which appears to be reasonable to the Court, in the facts and circumstances of the case. For this view, we may point out, by way of analogy, the new provision for limitation for revisional applications under the Criminal Procedure Code, under Article 131. This is a new provision fixing 90 days as the period of limitation from the date of the order or sentence. Before this amended Act came into operation, the period was always considered to be such as appeared to be reasonable in the facts and circumstances of the case. In the instant cases, the petitioners filed revisional applications obviously on wrong advice or misconception and then

applied for treating them as appeals before date of hearing. The petitions were delayed by about a week or 10-days beyond sixty days and obviously, within a reasonable period and the prayers should be allowed and these should be treated as appeals. The objections raised are overruled.

18. We have pointed out that in two cases, the learned Magistrates dealt with petitioners under the Probation of Offenders Act and in our view, this is not in conflict with the provisions of Rule 126P providing for a minimum sentence of R. I. for 6-months and fine. In Rule No. 436, the learned Magistrate sentenced the accused to fine under the Customs Act but refrained from passing any sentence under Rule 126P. We have also found that the minimum sentence is R. I. for 6-months and also, fine and the Magistrate is required to pass this sentence if the accused is found guilty.

19. We may however now consider whether on the facts of these cases, a charge under Rule 126P and conviction thereunder is justified. If this is not justified, the conviction and the sentence must be set aside.

20. The accused are prosecuted under the Customs Act for possession of smuggled gold and under Rule 126P for failure to give necessary declaration. Did the legislature expect or intend smuggled gold to be declared and were the relevant provisions under the Gold Control Order meant to cover smuggled gold, in respect of which suitable provisions were made in the Customs Act? Gold is defined in Clause (c) of Rule 126A and it reads as follows:-

"Gold" means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, or a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold;

21. Rule 126P makes possession of undeclared gold punishable. Obviously declaration under Rule 126P would not protect smuggled gold or the smuggler and the legislature also never expected that smuggled gold would be declared. Looking at the object of this Control Order and the time and manner in which it came in the Statute Book, it seems that declaration under Rule 126P is in respect of 'legal' gold, as opposed to smuggled gold. Customs Act deals with smuggled gold of foreign origin or marking, illegally imported into India and penalty including seizure is provided for in the Customs Act. The question of declaration in respect of that does not arise at all. Prosecution of the accused persons under Rule 126P is therefore uncalled for and their convictions under Rule 126P and the punishment inflicted are set aside.

22. In view of this, the question of awarding legal punishment under Rule 126P in Rule No. 536 does not arise at all.

23. In the result, the convictions of the respondents under Rule 126P and the sentence inflicted

are set aside but the convictions under Customs Act and the sentence inflicted thereunder are upheld. The orders under the Probation of Offenders Act in appeal No. 476 and Rule 635 remain.

24. The appeals are disposed of accordingly.

K. K. Mitra, J.

25. I agree.

Order accordingly.