

**Charanjit Kumar Vs. Commissioner of Customs**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Sep-01-1998

**Reported in :** (1999)(110)ELT931TriDel

**Appellant :** Charanjit Kumar

**Respondent :** Commissioner of Customs

**Judgement :**

1. The facts of the case, in brief, are that 5 pieces of gold totally weighing 467.3000 gms. were seized from the person, Charanjit Kumar, the present appellant along with Indian currency in the form of cash and bank drafts. Show cause notice dated 12-10-1989 was issued alleging contravention of several provisions of the Customs Act, 1962 and also Gold (Control) Act, 1968, seeking confiscation of the gold and imposition of penalty upon Charanjit Kumar. After hearing, the Additional Commissioner passed the order releasing the Indian currency, confiscating the gold and imposition of combined penalty upon Charanjit Kumar under both the Acts. The Commissioner (Appeals) having upheld this order, the present appeal has been filed.

2. I have heard Shri J.P. Kaushik, Id. Advocate and Shri T.A.Arunachalam, Id. DR I have also seen the cited judgments and the various documents on record.

The two panchnamas and the assay report indicate recovery of primary gold without any markings. An assayer assayed the gold on 6-5-1989. His finding is that the purity of the gold was "about 24 carat estimated".

Shri Kaushik drew attention to the reply filed by the present appellant before the first adjudicating authority in which the demand was made to send his primary gold for assay to the Govt. Mint. A request was also made for permission to cross-examine the assayer. Judging from the proceedings, neither request was accepted. Shri Kaushik also refers to the document issued by Arun Kumar in which the purity of the gold was described as 23 1/2 ct.

3. The purity of gold can be described in carats or by "touch" whereby the highest purity is of 24 carat or of 100 touch. The measurement of touch is more accurate. At the material time, the provisions of Gold (Control) Act prohibited making of primary gold of purity higher than 995.0 per mille in terms of Gold Control (Specification of Standard Gold Bars and Conditions of Refining) Rules, 1968 issued under Section 114 of the Act, 1968 read with Section 18 thereof. Therefore, where any primary gold was seized which showed purity higher than 995 it was presumed to be melted from foreign marked gold. However, this by itself could not be taken to be conclusive. The Delhi High Court in the judgment reported in 1983 (14) E.L.T. 2142, chose not to rely upon high purity of the seized gold to arrive at the conclusion that it was of smuggled origin. The carat method of assay is less accurate than the touch method. On top of this, when the assayer uses the words "approximately" or "about", the entire exercise loses its thrust and becomes an unreliable piece of evidence. Therefore, on the basis of the assay report, it cannot be held that the primary gold was of foreign origin.

4. In the statements of the appellant, made on the date of seizure as also on the next day, the admission was made that the gold was melted from smuggled gold acquired from two persons, namely. Sham Kumar and Siyaram. Both these persons, in their statements, have denied having given any foreign gold to Charanjit Kumar. Charanjit Kumar's confessional statements were retracted orally by him when he was taken before the Magistrate on 7-5-1989. Shri Kaushik, Id. Advocate stated that on the complaint of torture having been made, the Id. Magistrate had directed the appellant to be examined by the Jail Doctor. The certificate given by the Jail Doctor is on record when the appellant was examined on 8-5-1989 at 6.50 A.M. As per the medical certificate, the injuries were about 1 1/4 days' old i.e. when he was being interrogated by the investigating officers. A

copy of the medical report was given to the appellant by the Court on 18-4-1996, copy of which is placed on record. The medical examination report was brought to the notice of the adjudicating authority, who chose not to place reliance thereupon, in the process making the observation that the specimen signatures of Charanjit Kumar was not available on the medical report. In view of the clear sequence of events, there appears little doubt that the medical report pertained to the present appellant. A formal retraction was later made when he was released from jail on 11-5-1998.

5. Shri Kaushik claimed that the confessional statements having been retracted at the earliest cannot become an evidence.

6. Shri T.A. Arunachalam, Id. DR refers and relies upon the Supreme Court judgment in the case of Surjit Singh Chabra v. U.O.I. reported in 1997 (89) E.L.T. 464. In this case, the confessional statement was retracted at the earliest. Even then the Court held that it continued to bind him. Id. DR also states that in the present case, statement was formally retracted by way of a letter to the Commissioner 20 days after the initial deposition. Shri Kaushik relies upon three-member judgment of the Supreme Court in the case of K.I. Pavunni v. AC. reported in 1997 (18) R.L.T. 641 in which the Court had taken cognizance of the cited judgment in the case of Surjit Singh Chhabra and laid down the procedure to be followed by the Courts in dealing with retracted confessions.

7. The Supreme Court in the judgment in the case of K.I. Pavunni in paragraph 25 observed as under : "25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or make to the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement.

The Court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the

Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base conviction. However, the prudence and practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution." 8. This finding was based on the analysis of Section 24 of the Evidence Act and observes that in weighing the statement, it was necessary to find out whether it was obtained by reason of any inducement etc. In this case it is correct that the formal retraction of the statement was made to the Commissioner nearly after 20 days of the confession having been made. The same claim is made in the bail application on 11-5-1995.

The Id. Advocate has placed a copy of the bail application on record.

His claim that even at the time of remand, the claim had been made, seems to be established on the court directing medical examination to be conducted. The medical report suggests that the present appellant received physical injuries approximately at the time when he was making the confessional statement. Therefore, his claim that the statement was obtained by force cannot be lightly disregarded.

9. In the cited judgment, in the case of K.I. Pavunni the Supreme Court had observed as to how the burden shifts from the prosecution to the accused in the case of retraction of confessional statements. Briefly stated that the judgment shows that where the retracted statement is proved by any corroborative evidence then in spite of its retraction it has high degree of value and that the burden to prove that the statement is obtained by threat shifts to the accused. In the present case, there is no supporting evidence to the confessional statements.

The two persons named by one Charanjeet Kumar in his confession as suppliers of foreign gold, have refused any such connection. The present appellant had shown at early stage in the investigations that the statement was given under torture. Therefore, very little reliance can be placed on the confessional statement to hold that the gold in his possession was melted from foreign gold.10. The show cause notice also invokes the provisions of Section 123 of the Customs Act. Under

this provision, the burden is on the accused that the goods seized from his possession were not smuggled goods. This particular provision has been examined in a number of decisions.

11. The Id. Advocate relied upon AIR 1965 (Gujarat) 135 in which the High Court examined the provisions of Section 178A of the Customs Act which was the provision akin to Section 123 of the Customs Act, 1962.

The Hon'ble High Court held that for the provisions to be invoked there must exist a reasonable belief in the mind of the officer arising out of some definite material by way of some definite information. In cases where by chance gold is seized in transit, the provision of Section 123 would not apply but that the burden continues to remain on the officers. In view of the non-application of Section 123, the retraction of the statement and in view of the total absence of any corroborative evidence, it has to be held that the smuggled origin of the gold has not been proved. The orders of confiscation thereof under Section 111 and 120 of the Customs Act therefore, do not sustain. Consequently, the orders imposing penalty on the appellant under the Customs Act also do not sustain.

12. The show cause notice alleges contravention of Sections 8, 11, 16 and 27 of the Gold (Control Act). These provisions, inter alia, relate to possession of primary gold, making primary gold, declarations and dealing without licence. Shri Kaushik claims that the gold was carried on behalf of the licensed dealer, who had maintained the accounts of the origin of the seized gold, that the registers had been examined and checked by the jurisdictional Gold Control Officers and that carriage of the primary gold was made in terms of provisions of law. It is his submission that on the basis of the evidence on record, it can be established that the present appellant had not contravened the cited provisions.

13. I find that in his discussions the adjudicating authority had not made any discussion of the defence in regard to the contravention's alleged under the Gold (Control) Act. The only reference in his order is to the liability to the confiscation of the gold and imposition of penalty. These allegations would sustain under the Gold (Control) Act only where it is established that the present appellant was not entitled to hold and possess primary gold. There is no discussion at all in either

order about this. I do not accede to Shri Kaushik's request that the Tribunal should examine the evidence and grant relief.

This is for the original adjudicating authority to do and the Tribunal cannot sit in the judgment of the primary issues. As far as contraventions relating to Gold (Control) Act are concerned, I deem it proper to set aside both the orders and refer the proceedings back to the appropriate authority for re-adjudication in de novo proceedings.

In such proceedings, the appropriate authority should take into account the submissions made on the alleged contraventions of the cited provisions and issue appropriate orders in which the liability to confiscation of the gold under the provisions of the Gold (Control) Act and also the liability to penal action can be determined.

14. In the result, the order is set aside as far as it relates to the confiscation of goods and imposition of penalty under the Customs Act, 1962 and remand the same for de novo consideration as far as it relates to the confiscation and penalty under the Gold (Control) Act.

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