Hans George Vs. State

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Court : Mumbai

Decided On : Dec-10-1963

Reported in : AIR1964Bom274; (1964)66BOMLR262; 1964CriLJ650; ILR1964Bom319; 1964MhLJ441

Judge : Chandrachud and ;Palekar, JJ.

Acts : Foreign Exchange Regulation Act, 1947 - Sections 8(1), 8(2), 23, 23(2), 23(3), 23(1-A), 23(1-B), 24 and 24(1); Reserve Bank of India Act, 1934 - Sections 8; General Clauses Act, 1897; Sea Customs Act, 1878 - Sections 75 and 167(81); Defence of India Rules, 1939 - Rules 81(4) and 119

Appeal No. : Criminal Appeal No. 653 of 1963

Appellant : Hans George

Respondent : State

Advocate for Def. : Govt. Pleader, ;S.B. Kher, Special Public Prosecutor

Advocate for Pet/Ap. : S.J. Sorabji and ;A.J. Rana, Advs., ;i/b., Mulla and Mulla and Craigie Blunt and Caroe, Attorneys

Judgement :

Chandrachud, J.

1. The appellant Mayer Hans George, who is a German National, has been sentenced to a year's term by the leaned Presidency Magistrate, 23rd Court, Bombay, for offences under Section 23(l-A)(a) of the Foreign Exchange Regulation Act, 1947, and See. 167(81) of the Sea Customs Act, 1878. Stated simply, the charge against the appellant is that he brought gold into India without the permission of the Reserve Bank of India and with intent to defraud the Government of the duty payable thereon.

2. The facts which are relevant for the decision of this appeal are mostly admitted. The appellant boarded a Swiss Air Plane at Zurich, Switzerland, on the 27th of November 1962, holding a ticket for Manila, Phillipines. The plane touched the Santacruz-Airport, Bombay, at 6.05 a.m. on the 28th for a brief halt. Acting on previous information, two Customs Officers, Turilay and Bhappu, looked out for the appellant and not finding him in the Transit Passengers' Lounge, they boarded the plane and saw the appellant sitting solitarily in the plane. Inspector Bhappu verified the name of the appellant and asked him if he was carrying gold. The appellant, who knows and can speak in English, is stated to have indicated a 'No' by the shrug of his shoulders. Inspector Bhappu, however, felt the back of the appellant, suspected that the appellant was carrying gold on his person, off-loaded him and took him to the Customs Baggage Hall for a search. The search showed that the appellant was wearing a specially prepared jacket, having 28 compartments, which was attached to his body by adhesive tapes. In these compartments were found 34 slabs of gold weighing I Kilo each, of the total value of Rs. 3,06,000/- at the local market rate.

3. Soon after the search, the appellant admittedly made a statement (Ex. P) which shows that he is a professional carrier of gold. It appears from the statement that the appellant was once a sailor, then a porter and is now employed by an agency to smuggle gold into various countries. The appellant has stated in Ex. P that on the occasion in question, he was asked to carry gold from Zurich to Manila on a wage of 500 German Marks and that the gold did not belong to him.

4. It is on these facts that the appellant was charged with having brought gold into India without the requisite permission and with intent to defraud the Government of

the duty payable thereon. The appellant admitted that he was carrying gold on his person, but denied, that he brought it into India or that he intended to defraud the Government by evading to pay the duty. According to the appellant, he never intended to remove the fold from the airship, that the gold was on through transit from Zurich to Manila, that is to say from a place out of India to another place out of India, that by a notification dated the 25th of August 1948 the Reserve Bank of India had granted a general permission to carry gold if it was on through transit, that when he boarded the plane at Zurich on 27th November 1962 he had no knowledge, of the subsequent notification dated the 8th of November 1962 published on the 24th of November 1962 by which the Reserve Bank purported to withdraw the earlier permission and that he had no guilty intention in carrying the gold. The appellant finally stated that he was carrying gold on his person partly as a measure of safety and partly as a measure of economy to save freight and insurance charges.

5. The learned Presidency Magistrate has held that the appellant must be deemed to have had notice of the notification dated the 8th of November 1962 which was published in the Government Gazette on the 24th of November 1962, that the appellant was carrying gold contrary to the terms of that notification, that the appellant had cancelled the gold on his person with intent to defraud the Government of the duty payable on the gold and that,therefore, the appellant had committed the two offences of which he was charged. This appeal is directed against the order of conviction and the concurrent sentence of one year.

6. Mr. Sorabjee, who appears on behalf of the appellant, has raised three principal contentions, the first of which relates to the construction of the notification dated the 8th of November 1962. The argument of the learned Counsel is that the general permission which was granted by the Reserve Bank in 1948 to carry gold on through transit remains unaffected by the subsequent notification in case in which the gold is carried on person or as a part of personal baggage. It is necessary, for a proper appreciation of this contention, to refer to the relevant provisions of the Foreign Exchange Regulation Act (Act VII of 1947) and to set out the notifications issued by the Reserve Bank of India, permitting the import of gold under stated qualifications.

7. Section 8 of the Foreign Exchange Regulation Act, which relates to restrictions on the import and export of currency and bullion, reads as follows:

'(1) The Central Government may, by notification in the official Gazette, order that, subject to such exemptions, it any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign.

'Explanation -- The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removal from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case may be sending, into India of that article for the purposes of this section.'

(2) No person shall, except with the general or special permission of the Reserve Bank or the written permission of a person authorised in this behalf by the Reserve Bank, take or send out of India any gold, or precious stones or Indian currency or foreign exchange other than foreign exchange obtained from an authorised dealer.'

8. It is relevant to state, though it may seem slating the obvious, that Section 8 contemplates the imposition of but does not by itself impose restrictions on the import of bullion and currency into India. The schemes of Section 8 is to place an embargo by Sub-section (2) on the taking or sending out of India sold, precious stones, Indian currency, and foreign exchange other than that obtained from an authorised dealer, except with the permission of the Reserve Bank; and to authorise the Central Government by Sub-section (1) to notify restrictions on the bringing or sending into India any currency or bullion except with the permission of the Reserve Bank and on payment of such fee as may be prescribed. The effect of the explanation to Sub-section (1) is to treat currency and bullion in through transit as if it were brought or sent into India.

9. Acting in pursuance of powers conferred by Sub-section (1) of Section 8, the Central Government issued a notification in the Official Gazette (being Notification

do. 12/11 F. 1/48 dated the 25th of August 1948) banning the import of bullion and certain types of Jewellery, except under the permission of the Reserve Bank. The notification, as amended upon the 31st of July 1948, reads as follows:-

'In exercise of the powers conferred by Sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947) and in supersession of the Notification of the Government of India in the late Finance Department No. 12(11) Fl/47, dated the 25th March 1947, the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India :-

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not; or

(b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling or any silver coin not current in the country of Issue;

(c) any Jewellery or articles made wholly or mainly of gold or of silver.'

The language of this notification is so wide and the articles brought within its compass of such a heterogeneous variety that, in the light of the explanation to Sub-section (1) of Section 8, transit passengers travelling, e.g. from Australia to England, wearing gold tie-pins or silver brooches, would fall within the mischief of the notification if the airship they travelled by were to touch an Indian Airport. The rigour, however of this notification was relaxed by a notification of even date which was issued by the Reserve Bank permitting under a condition the 'bringing or sending' of gold or silver which is on through transit. The Notification (being Notification No. F.E.R.A. 62/48 R.B., dated the 25th August 1948) read as follows :

'In pursuance of the notification of the Government of India in the Ministry of Finance No. 12 (ll)-Fl/48, dated the 25th August 1948, restricting the bringing or sending into India of gold and silver, and in supersession of the Reserve Bank of India Notification No. F.E.R.A. 37/48-R.B., dated the 21st January 1948, the Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided

that the gold 01 silver (a) is on through transit to a place which is outside both (i) the territory of India and (ii) the Portuguese Territories which are adjacent to or surrounded by the territory of India and (b) is not removed from the carrying ship or aircraft, except for the purpose of transhipment.'

10. It was not disputed at the trial and is Indeed obvious that the appellant had not committed a breach of any of the conditions of this notification. The gold which he was carrying on his person was on 'through transit' from Zurich to Manila and was not removed by him or on his behalf from the aircraft in which he was travelling as a transit passenger. It may be recalled that the appellant did not deplane at the Santacruz Airport and was found sitting in the aircraft when, a few minutes before the plane was scheduled to leave the Airport, the Customs Officers asked him to get down from the plane.

11. This notification, however, was superseded by another notification issued by the Reserve Bank of India and the case of the prosecution is that the appellant has committed a breach of the fresh notification. It is important to mention that the subsequent notification is dated the 8th of November 1952 and was published in the Gazette of the Government of India dated the 24th of November 1962. These dates have an important bearing on the Second contention advanced by Mr. Sorabjee that the appellant had no knowledge of the existence of this notification when he left Zurich on the 27th of November and that be had, therefore, no 'mens rea'. The notification, to a construction of which we must now proceed, reads thus:

'No. F.E.R.A. 208/62-R.B.: In pursuance of the notification of the Government of India in the Ministry of Finance No. 12 (11) F-1/48 dated the 25th August, 1943 and in supersession of the Reserve Bank of India notification No. F.E.R/A 62/48 R.8. dated the 25th August 1943, as amended from time to time, the Reserve Bark of India hereby gives general permission to the bringing or sending of any of the following articles, namely,

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not; or

(b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling, or any silver coin not current in the country

of issue; or

(c) any jewellery or articles made wholly or mainly of gold or of silver, into any port of place in India when such article is on through transit to a place which is outside the territory of India:

Provided that such article is not removed from the ship or conveyance in which it is being carried-except for the purpose of transhipment: Provided further that it is declared In the manifest for transit as same bottom cargo or transhipment cargo.'

12. The question which arises in the background of these facts and notifications is whether the appellant who was admittedly carrying 34 Kilos of gold-slabs on his person, has committed a breach of the notification dated the 8th of November 1962. That the appellant must be deemed to have brought gold into India though he was on a through flight from Zurich to Manila, is beyond controversy in view of the explanation to Section 8 (1) of the Foreign Exchange Regulation Act. The explanation provides, in so far as is material, that 'the bringing' into any place in India, of gold which is intended to be taken, out of India without being removed from the conveyance in which it is being carried, shall nevertheless be deemed to be a bringing of gold into India far the purposes of Section 8. The only aspect of the matter which therefore requites consideration is whether the appellant who brought gold into India has fulfilled the conditions subject to which alone the Reserve Bank has, by its notification dated the 8th of November 1962, granted a general permission to bring gold into India.

13. Though the wording of the notification of the 8th of November 1962 is somewhat different from that of the earlier notification dated the 25th of August 1948, it is clear that the nature of the conditions which the two notifications impose is identical except for the condition contained in the second proviso of the notification of the 8th November. In other words, and this is not disputed, the only effective change brought about by the subsequent notification of the 8th of November is to add a proviso containing an additional condition. Under the earlier notification of the 25th of August 1948, two conditions were required to be satisfied in order that gold or silver could be 'brought into India': (1) the gold of silver was required' to be on through transit to a place outside India as well as outside the

adjacent Portuguese' territories, and (2) it was not to be removed from the conveyance in which it was being carried, except for the purpose of transhipment. The adjacent Portuguese territories became a part of the Indian Union in 1961 and the reference to those territories which was contained in the first of these conditions became inapposite. The notification dated the 8th of November 1962 gives a general permission to bring into India gold and silver articles of the description mentioned in clauses (a), (b) and (c) of the notification on the conditions that (1) the article is on through transit, that is to say it is despatched from a place outside India to another place outside India; (2) the, article is net removed from the conveyance in which it is being carried, except for the purpose of transhipment; and; (3) the article 'is declared in the manifest for transit as same bottom cargo or transhipment cargo'.

14. The real question which thus arises before us narrows down to the enquiry relating wholly to the fulfilment of the third condition mentioned above, It being common ground that neither of the first two conditions was broken by the appellant. Counsel for the appellant contends that the third condition which is contained in the second proviso of the notification dated the 8th of November 1962 is wholly inapplicable to case like, the present one in which the permitted article is carried on person, for such an article cannot possibly be declared in the manifest for transit as same bottom, cargo or as transhipment cargo. This contention seems to us to be well founded. In the first place, it is clear from the evidence of Inspector Darins B. Bhappu that the manifest for transit discloses only such goods as are 'unaccompanied baggage' and that 'accompanied baggage is never manifested as cargo manifest'. What Inspector Bhappu has stated is plain commonsense because the transit manifest for cargo can obviously not mention goods which are on the person of a passenger. It would indeed be idle and meaningless to specify in the transit manifest that a woman passenger had a silver brooch on her person or that a male passenger was carrying a gold cigarette case. The cargo manifests of the Swiss Airline are on the record at Ex. K and they show that only such goods are entered therein as are placed in the custody of the carriers. From the several manifests which form part of Ex. K, it would seem that the object of maintaining the transit manifest for cargo is two-fold : to keep a record of goods delivered into the custody of the carrier for safe carriage and to enable the Customs authorities to

check and verify the dutiable goods which arrive by a particular flight. Neither of these objects can be achieved by a passenger asking the carriers, on his unverified statement, to include a particular article in the transit manifest.

15. This is one aspect of the matter. The other aspect which is equally important is that what is required by the second proviso is not a mere declaration in the manifest for transit that an article was being carried, but a declaration of the article 'as same bottom cargo or transhipment cargo'. Cargo which a common carrier conveys is broadly of two types; 'same bottom cargo' and 'transhipment cargo'. As is indicated in Article 606 of the Chapter on 'Shipping and Navigation' in Kalsbury's Laws of England 3rd Edition Vol. 35, p. 426, the contract of carriage generally provides and the cargo shall be carried to its destination, as far as may be, by the same conveyance throughout the voyage or journey, that is to say, that it will not be transhipped. In such eases the cargo is described as 'same bottom cargo'. In cases in which the cargo may be transhipped from ore conveyance into another during the course of transit, it is called 'transhipment' cargo'. It seems to us difficult to appreciate how possibly an article carried on person could be manifested in the transit manifest as same bottom cargo or transhipment cargo. These terms, as stated above, are apposite only in cases in which the cargo is entrusted to the carrier for carriage and can have no application to articles not so entrusted. In our opinion, therefore, the second proviso can have no application to cases in which a permitted article is carried by a passenger on his person.

16. It is urged by the learned Government Pleader that if in the very nature of things the second proviso is incapable of being satisfied in cases in which an article is carried on person, the effect would be that the article cannot be carried at all rather than that the article could be carried in defiance of the injunction contained in the second proviso. It is argued that the policy of law, as, disclosed by the scheme of Section 8 of the Foreign Exchange Regulation Act, is to impose a ban on the import of gold and silver except under the permission of the Reserve Bank, so that he who brings gold or silver into India, actually or fictionally, must be able to justify his act on the permission of the Reserve Bank or else must submit to the consequences of having brought the articles into India without the requisite permission. Now, there can be no doubt that the object and purpose of Section 8,

as shown by Sub-section (1) thereof, is to authorise the Central Government to ban the bringing of certain articles like gold and silver into India and to allow the 'bringing' of these articles if and to the extent to which it is permitted by the Reserve Bank, specially or generally. It must, therefore, follow that he who 'brings' gold or silver into India must, if challenged, be able to justify his act by reference to the terms of the permission granted in that behalf by the Reserve Bank. It must, however, be appreciated that Section 8 as well as the notification issued by the Central Government visualise the 'bringing' of gold or silver into India under the permission of the Reserve Bank and we find it impossible to accept the contention of the Government Pleader that the permission granted by the Reserve Bank by its notification of the 8th of November 1962 must be construed so as to render it non-existent for all practical purposes, at least in so far as some of the permitted articles are concerned. Let us take a specific instance and test the validity of the argument advanced by the learned Government Pleader. The notification of the 8th of November, for example, grants permission to bring into India (1) any gold coin, (2) silver coins of a certain description, and (3) any jewellery or articles made wholly or mainly of gold or silver, subject to certain conditions. The contention of the Government Pleader must mean that a transit passenger whose airship touches an Indian Airport would commit an offence under the Foreign Exchange Regulation Act unless, in addition to satisfying the other conditions, he also declares his silver tie-pin or his gold cigarette case in the manifest for transit as same bottom cargo or transhipment cargo. The argument of the Government Pleader must also mean, and he put it in so many words, that if these articles cannot be declared in the transit manifest, as indisputably they cannot be, the international passenger must not take these articles with him at all. The particular instance quoted above highlights the absurdity of the situation arising out of the construction canvassed by the learned Government Pleader. We find it impossible to conceive that the Reserve Bank granted a formal permission to carry articles of the kind mentioned above end then imposed, as it were by the back door, conditions which are incapable of fulfilment. To accept the argument of the learned Government Pleader is to hold that the Reserve Bank took away by the left hand the permission which it granted by the right and that the permission so solemnly granted is still-born. The proper interpretation to be put on the notification,

therefore, is that the second proviso is not intended to apply to articles carried on person and that in respect of those articles the condition mentioned in the second proviso need not be complied with.

17. The learned Government Pleader says that even it the interpretation suggested by him is accepted (that is to say, even if it be held that a transit passenger carrying a small silver or gold article must declare it in the transit manifest as same bottom cargo or transhipment cargo and that if he does not so declare it, he would commit an offence if his conveyance were to touch Indian territory hard and inconvenient results could be avoided by not prosecuting the passengers who have committed small or inadvertent breaches of the law. That according to the learned Government Pleader is the reason why Section 23 (3) of the Foreign Exchange Regulation Act provides that cognizance of offences under the Act can be taken by Courts on the written complaints of certain Officers only. How, Section 23 (3) is undoubtedly some safeguard against frivolous prosecutions, but it is no consolation to a transit passenger that if he were to carry a small article of silver or gold he could be off-loaded and detained in India but may not, perhaps, be prosecuted. In any event, the construction of a notification, the breach of which involves penal consequences, cannot be influenced by the supposition that hard results could be avoided by a judicious selection of cases by the prosecuting agency.

18. In this behalf, the learned Government Pleader, has drawn our attention to notification No. F.E.R.A 186/61 R.B. issued by the Reserve Bank of India on the 26th of April 1961 which 'permits a person to bring into India his personal jewellery made wholly or mainly of gold, which is worn on his person or which forms part of his personal baggage, provided that the value of such jewellery does not exceed the limit specified in the rules made by' the Chief Customs authority under Section 75 of the Sea Customs Act, 1878, for import free of Customs duty or the value of which, being in excess of the above said limit, is passed by the customs authorities on payment of the customs duty prescribed by law'. The argument of the learned counsel is that in so far as personal jewellery is concerned there could be no hardship, as the notification cited above permits such jewellery to be carried subject to certain conditions. We are unable to accept this Submission. The

notification on which the Government Pleader relies applies, in the first place, to jewellery only and then again to jewellery made wholly or mainly of gold. Articles other than jewellery and jewellery not made of gold do not fall within the notification. Secondly, the notification is intended to apply, as shown by the concluding portion which provides for payment of customs duty, to cases of actual import by persons who enter India and not to transit passengers. This notification, therefore, can afford no assistance in the construction of the notification dated the 8th of November 1962 which deals exclusively with a fictional importation by passengers on through transit.

19. It is then contended by the learned Government Pleader that the permission granted by the Reserve Bank to 'bring' gold into India must be construed to be a permission pertaining to a lawful activity and cannot apply to cases in which gold is being smuggled. This argument is based on the assumption that the appellant intended to smuggle the gold into India. There is no justification for this assumption and it militates against the admitted facts that the appellant did not deplane at the Santacruz Airport and was seated in the plane when, a few minutes before the scheduled departure, he was asked by the Customs Officers to get down from the plane. Importation of gold is not a universal offence and in the background that the appellant was a through passenger from Zurich to Manila, it would be difficult to hold that the intention of the appellant was to smuggle the gold into India.

20. Before we part With the question relating to the construction of the notification, we must dispose of a contention made by Mr. Sorabjee. It is argued by the learned counsel that the second proviso of the notification of the 8th of November does not impose an additional condition but is in the nature of a proviso to the first proviso. In ether words, the argument is that the first proviso of the notification must be construed as permitting transhipment of an article in through transit provided the article is declared in the manifest for transit as same bottom cargo or transhipment cargo. We see no substance in this contention and the short answer is that the declaration of an article as same bottom cargo in the transit manifest would be wholly inappropriate in case the article is intended to be transhipped. The language of the second proviso shows that it concerns itself not merely with

articles intended to be transhipped but also with articles which are intended to be carried as same bottom cargo. The subject-matter of the second proviso being thus wider than that of the first proviso, it would be wrong to construe the second proviso as carving something out of the first proviso.

21. For the reasons mentioned above, we are of the view that the second proviso of the notification dated the 8th of November 1962 has no application to articles carried on person by a transit passenger, for such articles cannot possibly be declared in the manifest for transit either as same bottom cargo or ES transhipment cargo. It is undeniable that the two other conditions, namely that the article must be in through transit and that the article must not be removed from the conveyance except for transhipment, have been complied with by the appellant. We must, therefore, hold that appellant has not committed a breach of the notification and is accordingly not guilty under Section 23 (I-A) (a) of the Foreign Exchange Regulation Act.

22. In the view which we have taken of the construction of the notification, it may not be strictly necessary to deal with the alternate submission of Mr. Sorabjee that the act of the appellant was not accompanied by a guilty mind. We must, however, decide that question also, for even if the construction we have placed on the notification is incorrect, the appellant would be entitled to an acquittal if he had no guilty intention or knowledge of the wrongfulness of his act. Besides, both the learned Counsel have, addressed us elaborately on that question and it would only be fair to them to discuss the point. Mr. Sorabjee argues that the appellant could possibly have had no knowledge of the notification when he left Zurich, that in fact the appellant was not aware of the notification and that, therefore, the appellant had no mens tea. it is necessary in this behalf to refer to a few relevant dates. The notification in question which is issued by the Reserve Bank of India is dated the 8th of November 1962. It was published on Saturday the 24th of November 1962 in Part II of the Gazette of the Government of India. This appellant left Zurich (Switzerland) on Tuesday that 27th of November and the Swiss airplane in which he was travelling as a through passenger from Zurich to Manila, touched the Santacruz Airport, Bombay, for a brief halt at about 6.00 a.m. on the 28th. That the appellant did not have knowledge of the notification when he left Zurich is

undisputed. The statement of the appellant that he was not aware of the notification when he left Zurich also accords with probabilities, it being unlikely that any one in Zurich would know on the 27th of November that a certain notification was published in India on the 24th. Though, however, it is not disputed that the appellant was in fact not aware of the notification when he left Zurich, it is contended on behalf on the State that the appellant had the means to knowledge, that had he, before emplaning at Zurich,' made enquiries by reference to the Gazette of India, he could have obtained knowledge of the notification, that he denied to himself the opportunity to obtain that knowledge and that, therefore, he must be fixed with constructive notice of the notification. We are unable to appreciate why the appellant was under an obligation to make enquiries by reference to the Gazette of the Government of India. The notification in question is issued by a Corporation, namely, the Reserve Bank, and neither the Reserve Bank of India Act (Act No. 11 of 1934) under which the Reserve Bank was incorporated, nor Section 8 of Foreign Ex-change Regulation Act, which contemplates the grant of permission by the Reserve Bank for import or export of bullion, and currency, contains any provision prescribing the mode by which such a permission should be published. Nor indeed does the General Clauses Act (India Act No. X of 1897) afford any assistance in the matter. It does not contain any provision declaring that publication in the Government Gazette of notifications issued by statutory Corporations shall be deemed to be due publication. In the absence, therefore, of any legislative indication or guide, the appellant could not be said to have had a certain means to acquire knowledge of the existence of the notification, it is necessary to emphasize that the ignorance pleaded by the appellant is not one, for example, of in Act of Parliament' or of an Act of a State Legislature, for in such cases publication in the Official Gazette would undoubtedly be due publication and would constitute constructive notice to all concerned.

23. In support of his argument that the appellant had the means to knowledge, the learned Government Pleader has drawn our attention to a booklet called 'Outline of Exchange Control in India' which appears to have been published in May 1960 by the Reserve Bank. At pages 9 and 10 of the booklet it is stated that 'the various notifications and orders issued by the Government of India and the Reserve Bank under the Act (meaning thereby the Foreign Exchange Regulation Act) are

published in the Gazette of India' and "general permission' granted by the Bank in respect of some of the provisions of the Act are made known either through notifications published in the Gazette of India or circulars issued to authorised dealers'. The argument is that the booklet, an official publication of the Reserve Bank, declares to the world that mode by which permissions granted by the Reserve Bank are published and that it was, therefore, the duty of the appellant to make enquiries, before he left Zurich, whether any notification altering the legal position had appeared in the Gazette of the Government of India, We find it impossible to attach to the booklet the sanctity which the State claims for it. The booklet is not published in the discharge of statutory functions of the Corporation and we do not quite see how, in the first instance, the appellant could be deemed to have had knowledge of the booklet itself. There is no suggestion that the appellant was in fact aware of the publication of the booklet nor indeed does it appear from the record that the booklet is accepted, by and large, as a declaration of the official policy of the Reserve Bank. In fact, no evidence has teen led by the prosecution as regards the circumstances in which or the authority under which the booklet was published. The booklet seems to have been put before the trial Court for the first time during the course of the arguments.

24. If, therefore, the appellant had neither actual or constructive notice of the notification can we hold him guilty under Section 23(l-A)(a) of the Foreign Exchange Regulation Act for the contravention of the notification? The answer to this question would depend upon whether mens rea is an essential ingredient of the offence charged. Section 23(l-A)(a) of the Act provides, in so far as is material, that whoever controverts any of the provisions of the Act of any rule, direction or order made thereunder, shall be punishable with imprisonment which may extend, to two years or with fine or with both. Sub-sec, (1-B) of Section 23 confers on the Court the power to direct confiscation of property in respect of which the contravention has taken place, and, lastly, Sub-section (2) of Section 23 empowers certain Magistrates to impose a fine exceeding Rs. 2.000/-.

25. Two rival contentions are canvassed before us Mr. Sorabjee argues that mens rea is an essential ingredient of the offence charged, whereas the contention of the State is that Section 23(1-A) contains a rule of absolute liability not dependent

for its proof upon the existence of a guilty state of mind. The question whether and now far mens rea form: an integral part of crimes generally has been the subject-matter of various decisions from which one can deduce a proposition as being well-established. The true legal position, as stated by the learned. Chief Justice of England in Brend v. Wood, (1946) 62 TLR 462, Is:

'It is.....of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that unless the statute, either clearly or by necessary implication rules out mens-rea as a constituent part of the crime, a defendant should not be found guilty of an offence against the criminal law unless he had a guilty mind'; or to use the language of Wright, J. in the of quoted case of Sherras v. De Rutzen (1895) 1 QB 918: 'There is a presumption that mens rea, an evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable 'to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered'.

Both of these, decisions have been cited with approval by Their Lordships of the Supreme Court in Ravula Hariprasad Rao v. The State : 1951 CriLJ768 .

26. The main question, which we must consider is whether Section 23 (l-A)(a) of the Foreign Exchange Regulation Act rules out mens rea, expressly or by necessary implication, as an essential ingredient of the offence created by it. It is urged by the learned Government pleader that the language of the Section, the subject-matter with which it deals and the language of Statutes In part, materia indicate that by necessary implication Section 23(1-A). (a) excludes mens rea as an essential ingredient of the offence. We are unable to agree. It is true, as contended by the learned Government Pleader, that Section 23(l-A)(a) does not say, as for example, Section 167(81) of the Sea Customs Act, 1878, says, that whoever 'knowingly' and with a particular intent does an act shall be guilty of an offence. There is, however, no authority for the proposition that the absence of the word 'knowingly' or of words to that effect either shifts the burden of proving knowledge, to the accused or excludes the blameworthy condition of mind as an essential ingredient of an offence. As observed by Justice Devlin in Roper v.

Taylor's Central Garages (Exeter) Ltd. (1951) 2 TLR 284.

'..... But where the statute contains no express provision, that is, where it does not contain the word 'knowingly', the first thing is to examine the statute to see whether the ordinary presumption that mens rea is required applies or not. If it is found that it does not apply, the mere doing of the act is itself an offence and guilty knowledge is irrelevant. If it does apply, I should have thought that the natural result would be that the prosecution must discharge the burden of showing guilty knowledge. All that the word 'knowingly' does is to say expressly what is normally, implied, and if the presumption that the statute requires mens rea is not rebutted I find difficulty in seeing how it can be said that the omission of the word 'knowingly' has, as a matter of construction, the effect of shifting the burden of proof from the prosecution to the defence.' An argument similar to that of the learned Government Pleader, based on the absence of the word 'Knowingly' was recently advanced before the Privy Council in Um Chin Aik v. The Queen, (1963) AC 160. One of the grounds on which the argument was rejected by the Privy Council was that the absence of a word or phrase like 'knowingly' in the relevant section is not sufficient to prevail against the conclusion which the language as a whole suggests. It must also be mentioned incidentally that the Privy Council has, in that case, accepted as correct the formulation of Wright, J. in 1895 1 QB 918. As regards the difference in the language of Section 23(I.-A)(a) and Section 167(31) of the Sea Customs Act, such a difference cannot by itself be conclusive in determining whether mens rea is an essential ingredient of the former offence. In fact, in, Sherras's case, the circumstance that the word 'knowingly' was not found in the Sub-section under consideration but was found in another Sub-section of the same Section was not regarded as sufficient to displace the normal presumption that mens rea is an essential ingredient of every offence.

27. Our attention has been drawn by the learned Government Pleader to a judgment of the High Court of Calcutta in Legal Remembrancer, Bengal v. Ambika Charan Dalal ILR (1946) Cal 127, which takes the view that the doctrine of mens rea is peculiar to the English Common taw, that the Indian Legislature has embodied in the definition of every offence a clear statement of the mental condition necessary to constitute the offence, that if in any case the Legislature

has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional and that in such a case the doctrine of means rea would have no application. With respect, it Is not possible to agree with these observations especially in view of the decision of the Privy Council in Shrinivas Mall v. Emperor 49 Bom LR 688 : AIR 1947 PC 135, and of the Supreme Court in : 1951 CriLJ768 . The case before the Privy Council like the Calcutta case involved a breach of Rule 31 (4) of the Defence of India Rules, 1939. While upholding the conviction of the appellants on merits, the Privy Council expressly dissented from the view expressed by the High Court of Patna that the 1st appellant would have been liable for the acts of his servant, the 2nd appellant, even if he was not aware of the unlawful acts of the latter. Lord Dr Parcq, who delivered the judgment of the Board observes that mens rea was an essential ingredient of the offences under the Defence of India Rules, 1939, and in support of that conclusion reliance was mainly placed on the leading Judgments of Wright J. in 1895-1 OB 913 and of Lord God-dard, C. J. in (1946) 62 TLR 462. In Ravula's case, : 1951 CriLJ768 the Supreme Court was also concerned to determine the ingredients of an offence under Rule 81 (4) of the Defence of India Rules and at p. 328 of the Report (SCR) : (at p. 206 of AIR), their Lordships, after setting out the passage from the judgment of Lord Dr Parcq in which the two English cases have been relied-upon, observe that '..... the view of the law as propounded by the Privy Council is the correct view'. The decision of the Calcutta High Court that the doctrine of mens rea is a peculiar feature of the English Common Law and has no application in India is, in our opinion, not good law in view of the decision of the Privy Council in Shrinivas Mall's case 49 Bom LR 688 : (AIR 1947 PC 135) and that of the Supreme Court in Ravula's case, : 1951 CriLJ768 ,

28. Yet another reason why mens rea is said not to be a necessary ingredient of the offence under Section 23 (I-A) (a) is, according to the learned Government Pleader, the notional provision contained in the explanation to Section 8 (1) of the Foreign Exchange Regulation Act. The explanation, in effect, provides that currency or bullion carried by a through passenger is deemed to have been brought info India if the ship or airplane in which he is travelling touch as India, even though the articles are intended to be taken out of India without feeing removed from the conveyance in which they were being carried. We are unable to

appreciate how the explanation can assist the construction of the notification issued by the Reserve Bank. ATI that the explanation does is to create a fiction that for the purposes of Section 8 (t) it is not necessary, in order that an article could be said to have been brought in India, that it must be physically brought into India for use, sale or consumption therein. In other words, in view-of the deeming provision contained in the explanation, it would not be open, for example, to a transit passenger to contend that the gold which he was carrying was not intended to be brought into India, if the conveyance in which he was travelling were to touch a part of the Indian territory. The explanation does not have the effect of providing that currency or bullion found on the person of a transit passenger shall be deemed to have been brought fey him regardless of the consideration whether the act of carrying the articles in question was a volitional act or not. We are unable to accept the somewhat extreme submission made by the learned Government Pleader that a through passenger on whose person the contraband articles were planted would fall within the mischief of the explanation by mere reason of the circumstance that when his conveyance touched a part of the 'Indian territory, the article was found on his person.

29. Our attention has been drawn by the learned Government Pleader to Section 24 (1) of the Act which provides that if a person is prosecuted for the contravention of any provision of the Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall he on him. It is argued that this provision makes a significant departure from the normal rule of burden of proof in criminal cases and that it affords a strong indication that mens rea was not Intends to form a necessary ingredient of offence under the Act. The question whether in a given case the accused has discharged a burden which rests on him is essentially different from the question whether the accused can be convicted without proof of an evil intention or guilty knowledge. In the very case before us, for example, the contention of the appellant is that the Reserve Bank hack granted a general permission to carry gold by the notification dated the 25th of September 1948, that he was carrying gold in accordance with the terms and conditions of that notification and that he was not aware of the later notification which was published in India three days before he left Zurich. Even though, therefore, the burden of

proving the existence of permission may rest on the accused, it would, in our opinion, be open to him to plead a permission which does not render his set unlawful and to deny knowledge of the permission which is said to bring about a material change in law. The Special rule of evidence which is contained in Section 24, cannot in our opinion have the effect of displacing by implication the normal rule.

30. The last reason for which it is contended that mens rea is not essential ingredient of the offence under Section 23(l-A)(a) is stated to be the subject-matter of the statute. The learned Government Pleader says that, as shown by the preamble, the object of the Foreign Exchange Regulation Act is to conserve foreign exchange, that the Act is passed to ensure economic and financial interests of the Country and that it must have been the policy of the law to declare all acts which impair national economy as offences, regardless of whether those acts were done with a guilty intention. It is urged that it is because of these features that the High Court of Madras held in Bhagwandas Goenka v. Union of India : AIR1961 Mad47 , that the Act should be enforced rigidly in the wider interests of the Country 'in achieving its programme of the abolition of poverty and of planned national production'. The learned Counsel is right that in considering the question whether the normal presumption is rebutted we must take into account the words of the statute creating the offence as also the subject-matter with which it deals. We are, however, unable to agree that enactments which are passed in the wider interests of the public or the dominant object of which is to ensure the economic and financial interests of the Country, must, without more be construed as creating offences to which essence of an evil intention or 3 justifiable ignorance of legal provision is no defence. Let us, for example, take a few instances to show how even in the case of a statute like the one with which we are dealing, mens rea must be held to be a necessary ingredient of the offence. A contraband article may in conceivable circumstances be found on the person or in the baggage of a passenger without any awareness on his part as to the nature of the article he was carrying. One may, for example, agree to carry a packet to oblige a friend and the packet may ultimately be discovered to contain gold or diamonds; or one may be found carrying an article which is planted by an unfriendly companion and until after the search one may not at all he aware of the

presence of the article in one's pocket or in one's baggage. We find it difficult to appreciate why merely because the object of an enactment is to ensure the latest good of the largest number of people, cases such as these in which the conduct of the offender is rot voluntary or volitional must be visited with a penalty. It seems to us contrary to the basic principle of criminal Jurisprudence recognized by a long line of eminent decisions, to hold that though the words of the statute creating the offence are not sufficient to displace the normal presumption that mens rea is a necessary ingredient of every offence, a statute dealing with a grave and rampant evil must be assumed to contain a rule of strict liability. As observed by the Privy Council in 1983 AC 160, it is not enough merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. In cur opinion, the normal rule that mens rea is an essential ingredient of every offence is not excluded either by the terms of the statute or by the subject-matter with which it deals. It anything, the severe penalty of confiscation, an unlimited fine and imprisonment for two years, which is provided for the offence rather indicates that the rule of strict liability cart have no application. Offences which are within the exceptional class of offences which can be committed without a guilty mind are, as stated by the Privy Council in Shrinivas Mall's case 49 Bom LR 688 : AIR 1947 PC 135, usually of a comparatively minor character.

31. It is urged by the learned Government Pleader that even assuming that the offence under Section 23 (1-A) (a) of which the appellant is charged is incapable of being committed unless the act complained of is accompanied by a guilty mind, it must be assumed that the appellant was aware of the notification issued by the Reserve Bank on the 8th of November 1962. This argument has a two-fold aspect. The first aspect is that in order that a notification issued by the Reserve Bank could be effective it is not necessary that it should at all be published, and the second aspect is that if indeed publication of the notification is necessary on the footing that the notification :s law, the appellant cannot be permitted to plead ignorance of the notification, as ignorance of law is no excuse. We are unable to agree that the notification like the one before us could take effect without publication. Section 8 of the Foreign Exchange Regulation Act authorises the Central Government to order that no person shall bring or send bullion or currency into India, 'except with the general or special permission of the Reserve Bank' and

on payment of the fee prescribed, if any. The notification issued by the Central Government on the 25th of August 1948 imposes a total ban on bringing or sending into India gold or silver, 'except with the general or special permission of the Reserve Bank'. On the same day on which the Central Government issued the notification contemplated by Section 8(1), that is to say, on the 25th of August 1948, the Reserve Bank issued a notification granting general permission to the bringing or sending of gold or silver into India subject to certain conditions. It seems to us clear that the notification issued by the Central Government and the notification issued by the Reserve Bank granting general permission as contemplated by Section 8 CD and as mentioned in the notification issued by the Central Government, must be treated as part and parcel of a continuous, well-knit scheme. The argument of the learned Government Pleader is that only those notifications which amount to law are required to be published in order that they could be effective and that a 'notification granting a mere permission which neither creates rights nor imposes obligations cannot depend for its validity on prior publication. In fact, the learned Government Pleader has taken this argument to its extreme end by contending that the act of granting a permission is a mere administrative act, and that, therefore, its legal effect would not depend upon publication, a feature which is peculiar to notifications or orders which create legal rights or liabilities. We are unable to agree that a notification by which the Reserve Bank grants general permission to bring or send gold into India is a mere administrative act and does not partake of the characteristics of law. But for the notification of the Reserve Bank, the act of bringing or sending gold into India would be unlawful under the notification issued by the Central Government on the 25th of August 1948. The notification issued by the Reserve Bank, though called a permission, makes it lawful to bring gold or silver into India subject to certain conditions. In other words, the notification issued by the Reserve Bank of the 25th of August 1943 entitles a person to bring or send gold or silver into India subject to the two obligations mentioned therein. If the notification of the Reserve Bank is a part and parcel of Section 8 and if it creates rights and imposes obligations, it would be difficult to hold that the notification has been issued by the Reserve Bank in the discharge of its administrative functions. By the subsequent notification dated the 8th of November 1962, published on the 24th of November, the earlier

notification of the 25th of August 1948 was in terms superseded and a fresh permission was granted for bringing or sending into India articles mentioned in clauses (a) to (c) of the notification, subject to the conditions mentioned therein. In other words, what was lawful under the earlier notification- was attempted to be rendered unlawful by the subsequent notification, for according to the prosecution itself, the fresh notification imposes an additional condition for bringing or sending first-class of gold or silver into India. If we are right that the earlier notification rendering it lawful to bring gold or silver into India could not have existence in the eye of law unless it was published, the second notification which makes unlawful what was lawful before would necessarily require to be published.

32. It would be useful in this behalf to call attention to a decision of the Supreme Court in Harla v. State of Rajasthan : [1952]1SCR110 . A Council of Ministers appointed by the Crown Representative passed a resolution purporting to enact the Jaipur Opium Act. The resolution was not published and the question which arose before the Supreme Court was whether the mere passing of the resolution without promulgation or publication was sufficient to give legal effect to it. It was held by the Supreme Court that:

'.....it would be against the principles of natural justice to permit the subject of a State to be punished or penalised by law of which they had no knowledge and of which' they could not even with the exercise or reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published..., ...The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and, property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience.'

Their Lordships of the Supreme Court have further stated that proclamations or orders must be promulgated or published because, unlike the Acts of Parliament, they do not receive publicity and are not publicly enacted, it seems to us startling that a notification issued by the Reserve Bank imposing conditions, subject to

which alone articles mentioned therein may he brought or sent into India, could attract serious penal consequences even if the notification was never promulgated or published and resided in the secret drawer of an executive. The appellant has been charged under Section 8(1) of the Foreign Exchange Regulation Act read with the notification of the Reserve Bank dated the 8th of November 1962 and it must be remembered that the offence is punishable with imprisonment for a period of two years, an unlimited fine and confiscation. We find it impossible to persuade ourselves to hold that consequences as serious as these could be permitted to ensue out of the breach of a notification which may never have seen the light of the day.

33. As regards the submission of the learned Government pleader that the appellant should not be permitted to plead ignorance of the notification, ignorance of law being no excuse, the short answer is that law which re-quires to be published or promulgated before it can be enforced, cannot have binding effect unless it is published. It is true that knowledge of law can either be actual or notional; that is to say, a person can either be shown to have had actual knowledge of the law or as in the case of Acts of Parliament, knowledge may be presumed. But in the case of a notification like the present one, there could be no presumption, much less an irrebuttable presumption, that any particular person had knowledge thereof. In such cases, ignorance of law would be a valid excuse. It would in this behalf be useful to refer to a decision of the Privy Council to which Mr. Sorabjee has drawn our attention. In the case of 1963 AC 160, to which we have already referred in another connection, a person was charged for remaining in Singapore though prohibited by an order made by the Minister under Section 9 of the Immigration Ordinance prohibiting him from entering Singapore. There was no provision in the Ordinance for publishing an order or for otherwise bringing it, actually or nationally, to the attention of the person named, in cases in which the order was directed to an individual as distinct from one directed to a class of persons. No evidence was led at the trial of any step having been taken by way of publication of the order so as to bring it to the attention of the appellant or indeed of any one else. It was held that the maxim 'ignorance of law is no excuse' could not apply as there was no provision for the publication in any form' of an order of the kind made in that case or any other provision designed to enable a man by

appropriate enquiry, to find out what the law was. The observations contained in the judgment of ford Evershed, who delivered the opinion of the Board, would apply aptly to the case before us. As stated earlier, there is no provision either in the Foreign Exchange Regulation Act or in the Reserve Bank of India Act prescribing the mode by which a permission granted by the Reserve Bank shall be published or promulgated.

34. Mr. Sorabjee has drawn our attention to a large number of decisions under the Defence of India Act, 1939, which have consistently taken the view that orders or notifications which were issued under the Act could not be enforced unless there was either proof of actual knowledge or proof of due and proper publication. It is not necessary to refer to those decisions in details because, for one thing, they turn on the peculiar provision contained in Rule 119 of the Defence of India Rules, 1939, that a general order made under the rules must be published m such manner as may in the opinion of the person making the order 'be best adapted for informing persons whom the order concerns'. It is in the light of that rule that it was held, for example, in Emperor v. Leslie Gwilt 47 Bom LR 431 : AIR 1945 Bom 368 Emperor v. Raghunath Krishna 48 Bom LR 758 : AIR 1947 Bom 239 and Emperor v. Samansab Sultansab 48 Bom LR 764 : AIR 1947 Born 187 that even a bare publication of the order in the official Gazette was not enough to fix its knowledge on the accused unless there was evidence to show that the person making the order considered the particular form of publication as being best adapted for informing the persons whom the order concerns.

35. The only question which remains to be considered is with regard to the charge under Section 167 (81) of the Sea Customs Act, 1878. That Section can possibly have no application to the facts of the present case. It provides a penalty, in so far as is relevant, for persons who are concerned in carrying or concealing goods knowingly and with intent to defraud the Government of any duty payable thereon. The language of the Section shows that it can apply only to cases in which goods of a certain description are actually brought or attempted to be brought into India. The Section can have no application to the notional bringing of goods which falls under the explanation to Section 8(1) of the Foreign Exchange Regulation Act. The facts are undisputed that the appellant was a through passenger from Zurich

to Manila, that he did not get down from the airplane at the Santacruz Airport where the plane stopped for a brief halt, and that he continued to sit in the plane until, a few minutes before its scheduled departure, the Customs Officers compelled him to get down from the plane. The act of the appellant would fall within the technical definition of 'bringing' contained in the explanation to Section 8(1) of the Foreign Exchange Regulation Act, but cannot certainly fall within Section 167 (81) of the Sea Customs Act, 1878.

36. For these reasons, the appeal will be lowed and the order of conviction and sentence under both the counts will be set aside. The appellant shall be set it liberty forthwith.

37. Appeal allowed.