

Abdul Rahiman Vs. the State of Mysore

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Court : Karnataka

Decided On : Feb-22-1971

Reported in : 1972CriLJ406

Judge : M.S. Nesargi, J.

Appellant : Abdul Rahiman

Respondent : The State of Mysore

Advocate for Pet/Ap. : Sri. L. G. Havanur, Sri. Havanur

Judgement :

ORDER

M.S. Nesargi, J.

1. This petition is directed against the conviction and sentence passed on the petitioner by the Addl. First Class Magistrate, Manealore in C. C. No. 2239 of 1967. convicting the petitioner for offence under Section 111 (d) read with Section 135 of the Customs Act. 1962 (hereinafter referred to in the course of this order as 'the Act') and Rule 126-P (2) (ii) of the Defence of India (Amendment) Rules 1963. dealing with gold control (hereinafter referred to as the 'Rules' in the course of this order), and sentencing him to undergo rigorous imprisonment for six months on each of the counts, and confirmed in Criminal Appeal No. 21 of 1969 by the Sessions Judge. South Kanara.

2. The prosecution case is that at about 12.30 p. m. on 11-1-1965. P. W.1 Nagaraj, a Sub-Inspector in Central Excise Department and working as such in Customs Special Preventive Branch at Mangalore. was on patrol duty at Hampanakatta bus stand in Mangalore town. He observed the petitioner Setting down from the bus which arrived from Udupi. Because of the hesitating and nervous movements of the petitioner, suspicions of P. W. 1 were aroused and as such P. W. 1 thought that the petitioner might be having some contraband articles and therefore discretely followed the petitioner. Ultimately the petitioner went into the compound of Lakshminarayana temple and sat on the Verandah viz.. 'Jasali'. At that stage. P. W. 1 asked the petitioner about his name, the place, etc., and got the details. by that time one Ratnakar Shet a sold smith (P. W. 3). who has his shop and workshop in one of the premises in the temple compound. was found entering the temple.

P. W. 1 was intending to search the person of the petitioner. Therefore, he called P. W. 3. by that time Ramnath a car broker of Manfialore. (P. W. 2). was passing on the road near that temple, and P. W. 1 called him also. Thereafter. P. Ws. 1, 2 and 3 and the petitioner proceeded to the workshop of P. W. 3 and in the presence of P. Ws. 2 and 3. P. W. 1 took the search of the person of the petitioner and he found that below a leather-belt tied at the waist of the petitioner, there was a cloth belt marked M. O. 7 and that cloth belt had pouches which contained six gold biscuits, marked M. Os. 1 to 6. each weighing ten tolas and bearing foreign markings viz. 'Johnson Mathev. 9990'. They were seized under mahazar Exhibit P-1. This was not only attested by the witnesses, but also by the petitioner.

Thereafter P. W. 1 took the petitioner to the office of P. W. 4 who was at that time Deputy Superintendent of Central Excise, Mangalore. P. W. 1 produced the gold biscuits. P. W. 4 arranged to keep them in safe custody under his seal. Thereafter, at the instance of P. W. 4, P. W. 1 secured P. Ws. 2 and 3 and P. W. 4 in the presence of P. Ws. 2 and 3 questioned the petitioner, and it is alleged by the prosecution that the Petitioner voluntarily narrated in Kannada as per Ext. P-3 and it was reduced to writing, read over to the petitioner and thereafter the Petitioner affixed his signature in Urdu. The panchas P. Ws. 2 and 3 also affixed their signatures to Exhibit P-3.

It is nextly the prosecution case that thereafter the investigation proceeded and on .18-8-1966. P. W. 6 who was then working as Deputy Superintendent of Central Excise at Mangalore. secured a gold-smith P. W. 5 and got P. W. 5 to cut corners from- each one of the Sold biscuits M. Os. 1 to 6 and weigh those small pieces i. e. M. Os. 1 (a) to 6 (a). Then P. W. 6 under his covering letter Ext. P-7 sent those pieces to the Mint Master at Bombay for assay and report. Ultimately, the Mint Master sent his certificates. Exhibits P-8 to P-13 under his covering letter Exhibit P-14, and the investigation was Proceeded with. Ultimately the Asst. Collector of Central Excise secured sanction to prosecute under Section 137 of the Act and consent to prosecute the petitioner under the Rules, and filed a complaint against the petitioner in the court of the learned Magistrate.

3. The defence put forward by the petitioner is that when he got down from the bus which arrived at Hampanakatta bus stand in Mangalore town, from Udipi, he met one Jaffer of Bhatkal, which is his place, and that Jaffer told shim that he wanted to go to Basavansudi. The petitioner was intending to go to Bhatkali Bazar and as such offered his company to Jaffer. On the way when they reached Basavanaudi. Jaffer told him that he had business with one Ratnakar Shet (apparently P. W. 3) and so saving went to the shop of P. W. 3 which is inside the temple premises Jaffer returned after a little time and said to the petitioner that he had cot work for three hours with the said P. W. 3 and therefore, the petitioner could so away and meet Jaffer about three hours later.

The petitioner went to see his relations in Bhatkali Bazaar and returned to Basavangudi at about 3.00 p. m. He found P. Ws. 1 to 3 inside the temple Premises. Jaffer was not there. P. W. 3 pointed him out and at once P. W. 1 and P.W. 3 went near him arid forcibly out him in a car and took him to the Customs Office. P. Ws. 1 to 3 spoke to him only in Urdu and he answered in Urdu. He has never stated to P. W. 4 as per Ext. P-3. It is his say that he has been falsely involved in this case.

4. It is argued on behalf of the accused in the two courts below that the said Jaffer must have brought the sold biscuits and attempted to sell them to P. W. 3 and that the bargain was not struck and, therefore. P. W. 3 went and brought P. W. 1 and

by that time Jaffer had made good his escape, and therefore. on finding this petitioner near the workshop. P. Ws. 1 and 3 involved him in this case. In fact, I find that this theory is suggested in the very manner to P. W. 3 in his cross examination.

5. The two courts below have accepted the testimony of P. Ws. 1 to 4 and 6 and come to the conclusion that the six sold biscuits M. Os. 1 to 6 are foreign gold and that they were found hidden in the pouches in M. O. 7 which was on the waist of the petitioner and that the petitioner has contravened the provisions of Section 111 (d) read with Section 135 of the Act and Rule 126-H (2) (d) read with Rule 126 (2) (ii) of the Rules.

6. Sri L. G. Havanur the learned Counsel for the petitioner, urged that P. Ws. 1 to 3 are not at all reliable witnesses and P. Ws. 2 and 3 are gold-smiths arid, therefore it must be taken that they were under the control of P. W. 1 and hence not independent witnesses. As already pointed out. the two courts below have placed reliance on the testimony of these witnesses.

P. W. 1 is an independent responsible officer of the Central Excise Department and his cross-examination does not disclose even a suggestion that he had anything to do with the petitioner on any earlier occasion. It is abundantly made clear in the evidence of P. W. 1 that the petitioner was a stranger to P. W. 1. The fact that the petitioner had gone to Lakshminarayana Temple premises at the said time is an undisputed one. The fact goes, in support of the say of P. W. 1 about his following the petitioner to the temple premises.

P. W. 2 Ramnath has given his caste as 'sonar' but he by profession is a car broker. He has stated that he had seen P. W. 1 on some occasions in the shop of his relative who is P. W. 5. P. W. 5 Lakshminarayana Shet is a jeweller in Mangalore. P. W. 1 has stated that he had visited the shop of P. W. 5 in connection with his duties as an officer belonging to the Central Excise Department. I find nothing strange in this, Nothing is elicited in the cross-examination of P. Ws. 2 and 5 to show that they knew the petitioner at any stage earlier to the incident and that they had something against the petitioner. Nothing is also elicited in the cross-examination of P. Ws. 2, 3 and 5 to indicate even that

they were under any type of obligation of P. W. 1. No such suggestion is also made to P. W. 1 in his cross-examination. I find that certain minor-most discrepancies appearing in the evidence of P. Ws. 1 to 3. in regard to whether P. W. 1 lifted the shirt of the petitioner at the time . of the search or the petitioner himself lifted it up at that time, have been caught hold of and argued in the two courts below that the evidence of P. Ws. 1 to 3 is not reliable.

In fairness to the learned Advocate Sri Havanurit must be stated here that hg did not at all make any such attempt in, the course of his arguments. His contention is that P. W. 2 is to be regarded as a chance witness, and therefore, his evidence is rendered doubtful. I find that it is elicited in the cross-examination of P. W. 2 that P. W. 5 is his brother-in-law and P. W. 2 does his car broker's work in the shoo of P. W. 5 and that at the point of time when he was asked to be a witness, he had gone to a saw mill in Kudroli to find out if he could set saw dust and while he was on his way to the shop of P. W. 5. he had to pass by the road near Lakshminarayana Temple and at that time P. W. 1 called him.

This explanation is on the face of it reasonable. Therefore, the contention that P. W. 2 is a chance witness, does not hold water. It was tried to be argued, i. e. in regard to P. W. 2, that his evidence discloses that there was a shorter route to the shop of P. W. 5. via Thrishuleshwara Temple, but P. W. 2 had chosen a longer route. I find that the question why he chose a longer route is not put to P. W. 2. If questioned on that point, he might have been able to give a convincing reply. But P. W. 2 has in his cross-examination stated that he had been to a saw mill at Kudroli and was going to the shop of P. W. 5. What is elicited in regard to the longer route and the shorter route is from the house of P. W. 2 to the shop of P. W. 5 and not from the saw mill at Kudroli to the shop of P. W. 5. Therefore. I see no force in this contention.

7. In regard to P. W. 3. Sri Havanur argued that P. W. 3 is a goldsmith himself and that fact would be sufficient to infer that he must be under the control of P. W. 1. He also pointed out that according to defence version P. W. 3 himself was at fault in attempting to purchase smuggled gold from Jaffer and therefore, his evidence cannot have any weight. I am unable to see any force in this reasoning. Merely

because P. W. 3 is working as a goldsmith and is running a shop, cannot lead to an inference that he must be under the control of P. W. 1. Moreover, as already pointed out. no plausible reason is made out in the evidence of P. W. 1 to contend that P. W. 1 had any axe to grind against the petitioner so as to involve him in a false case. The theory of the defence is that Jaffer took the gold billets to P. W. 3 and bargain was not struck, and, therefore. P. W. 3 went and brought P. W. 1 and by that time Jaffer had gone away.

It is apparent that this version is on the face of it unbelievable. If bargain had not been struck between P. W. 3 and Jaffer. Jaffer would have taken away the sold billets. If by that time Jaffer. being afraid of information being given by P. W. 3 to the Excise Officers, had left the sold biscuits there and made good his escape. P. W. 3 would certainly have not brought P. W. 1 because P. W. 3 would have been evidently benefited to the extent of sixty tolas of pure sold and he would have been happy to convert the six pieces to his use because he is himself a gold-smith.

P. W. 3 has admittedly his shop and workshop in the temple premises. It is elicited in his evidence that he has no workers in the workshop and that he himself works there. It is also elicited that he does not sell or buy sold, but does his business according to the rules. In view of these facts, it is apparent that the presence of P. W. 3 in the temple premises at that point of time is quite natural. P. W. 3 has explained that by about 11.00 a. m. he had gone to take coffee in Tai Mahal Hotel and was returning to his shop when P. W. 1 called him and he suggested that the search could be conveniently made in his shop, and therefore, they proceeded with the petitioner to the workshop of P. W. 3 where search of the person of the petitioner was made. I am unable to see anything artificial in the evidence of P. Ws. 2 and 3.

In regard to the evidence of P. Ws. 2 and 3 themselves. Sri Havanur urged that strangely enough P. W. 1 has at about 3.30 p. m, or so on the very day. again gone after P. Ws. 2 and 3 and taken them to P. W. 4 so as to make them witnesses to the recording of Exhibit P-3. He contended that certainly so many persons near about the office of P. W. 4 would have been available to act as witnesses at that point of time. and this conduct on the part of P. W. 1 would go to

show that P. W. 1 had deliberately selected P. Ws. 2 and 3 as witnesses in this case. and. therefore, it is very suspicious circumstance. P. Ws. 2 and 3 have stated how P. W. 1 contacted them at about 3-00 p. m. or 3-30 p. m. on that day and how they were taken in a car to the office of P. W. 4.

P. W. 1 has in this connection stated that P. W. 4 directed him to bring the very same witnesses who had attested the panchanama Ext. P-1 at the time of the seizure of six sold biscuits and as such he contacted P. Ws. 2 and 3 wherever they were at that point of time and took them to P. W. 4. P. W. 4 has corroborated this say of P. W. 1. The reason why P. W. 4 was particular in securing these very witnesses, is. in my opinion, on the face of it clear. P. W. 4 having come to know that it was in the presence of these witnesses that the gold biscuits were found and seized from. the person of the petitioner has as such thought that they would be better witnesses in regard to what the petitioner had to state to P. W. 4.

I find that in case P. W. 4 had chosen two other panchas and not P. Ws. 2 and 3. it could have been very well argued that no reason had been put forward by the prosecution as to why fresh panchas were secured and not P. Ws. 2 and 3. It would also have been argued that such fresh panchas had, been secured because they were under the thumb of P. Ws. 1 and 4. These reasons show that the contention put forward by Sri Havanur does not carry any force.

8. In view of the foregoing reasons. I agree with the findings recorded by the two courts below that six sold biscuits, each weighing ten tolas and bearing foreign marks as 'Johson Mathey. 9990'. were found in a cloth belt with pouches M. O. 7 on the waist of the petitioner and they were seized under panchanama Ext. P-1.

9. Sri Havanur vehemently contended that the prosecution has not at all established that the yellow metal alleged to have been found on the person of the petitioner is gold and that too of 24 carat purity. In this connection, he pointed out that the only reliable evidence produced by the prosecution is in the shape of six certificates. Exts. P-8 to P-13 issued by the Mint Master at Bombay, and those certificates are not at all admissible in evidence because the provisions of Section 510 of the Criminal Procedure Code would not be applicable. His reasoning is that the six biscuits corners, viz.. M. Os. 1 (a) to 6 (a) had been sent to the Mint Master

at Bombay much prior to this complaint being instituted and that the proceedings held by the customs officers earlier to the institution of this complaint against the petitioner, i. e. on 15-9-1967 could not at all be regarded as the proceedings under the Code of Criminal Procedure and. therefore, the provisions of Section 510 of the Criminal Procedure Code would not be applicable to these certificates issued by the Mint Master.

He placed reliance on the decision in *Chauth Mull v. Emperor* AIR 1919 Pat. 139 (2). In this decision it is laid down that the provisions of Section 510 of the Criminal Procedure Code would be applicable only if the report of the Chemical Examiner has been made in the course of any proceedings under the Code of Criminal Procedure and that the prosecution in that case had started upon the complaint lodged on 7-9-1917. and the report had been received by 2-9-1917, i. e., prior to the initiation of the prosecution, and therefore, it could not be a report made in the course of any proceedings instituted under the Code of Criminal Procedure. In that case the Chemical Examiner's Report had been secured when the proceeding under the Bengal Municipal Act in regard to the Point of adulteration of ghee, was being conducted by the concerned officers.

The learned State Public Prosecutor pointed out that in *Public Prosecutor v. Pamarti Venkata Chalamai* AIR 1957 Andh Pra 286 the said decision in *Chough Mull's* case has been dissented from and it has been held that in regard to the Chemical Examiner's report received prior to the initiation of prosecution, the provisions of Section 510 of the Criminal Procedure Code would be applicable. It is seen that the facts in AIR 1957 Andh Pra 286 are that investigation by the Police under the Madras Prohibition Act was going on and even prior to the initiation of the prosecution, the Chemical Examiner's report had been secured, and a contention was raised that the provisions of Section 510 of the Criminal Procedure Code would not be applicable to such a report. Reliance was also placed on the decision in *Chauth Mull's* case. His Lordship Chandra Reddy J. dissented from the view expressed in *Chauth Mull's* case and held that the provisions of Section 510 of the Criminal Procedure Code would be attracted. In my opinion, there is a basic distinction on facts in the above cited two decisions.

Section 510 (1) of the Criminal Procedure Code reads as follows:

any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an officer of the Mint, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceedings under this Code, may be used as evidence in any inquiry trial or other proceeding under this Code.

The words 'in the course of any proceedings under this Code' appearing in the above said provision have been now held to mean that these words do not necessarily refer to judicial proceedings only. It is now well settled that if such a report is made in any kind of proceeding under the Code of Criminal Procedure that can be used as evidence in any enquiry, trial or other proceeding under the Code.

The facts in Chauth Mull's case go to show that prior to the initiation of prosecution for an offence of adulteration, proceeding was being conducted by Municipal servants under the provisions of the Municipal law and they sent the sample to the Chemical Examiner for analysis and report and on receipt of the report they instituted a criminal case against the accused concerned. It is, hence, clear that the proceedings that were being conducted prior to the institution of the complaint were not being conducted by the Police, and therefore, were clearly not proceedings under the Code of Criminal Procedure : while the facts in AIR 1957 Andh Pra 286 go to show that the proceedings i.e. prior to the initiation of the prosecution were being conducted by the Police in exercise of the powers vested in them by the provisions of the Code of Criminal Procedure. That makes it abundantly clear that the proceeding that took place prior to the initiation of the prosecution in the said case was a proceeding under provisions of the Code of Criminal Procedure and therefore, the provisions of Section 510 of the Criminal Procedure Code were applicable to the report of the Chemical Examiner in that case.

10. Now, in regard to the nature of the powers vested in customs officers while investigating offences under the provisions of the Act, the Supreme Court has

consistently laid down that such customs officers are not at all Police Officers. In *Badku Joti v. State of Mysore* : 1966 CriLJ1353 . their Lordships while dealing with the provisions of the Sea Customs Act 1878 have laid down as follows:

Section 21 (2) confers on the Central Excise Officer the same powers as on Officer-in-charge of the Police Station, has when investigating a cognizable case. But this power is conferred for the purpose of Sub-section (1) which gives power to a Central Excise Officer to whom any arrested person is forwarded to enquire into the charge against him. It does not however appear that a Central Excise Officer under the Act has power to submit a charge-sheet Under Section 173 of the Code of Criminal Procedure. Thus, though Under Section 21 (1) an Officer has powers of an Officer-in-charge of Police Station when investigating a cognizable case the power is for purpose of enquiry Under Section 21 (1) and the power does not include power to submit a charge-sheet Under Section 173. Criminal Procedure Code-Even if the broader view. viz.. that a Central Excise Officer is a 'Police Officer' is accepted, mere conferment of powers of investigation like an Officer-in charge of a Police Station into Criminal Offences Under Section 9 of the Central Excise Act does not make the officer a Police Officer.

Further in *Ramesh Chandra Mehta v. State of West Bengal* : 1970 CriLJ863 . Their Lordships while dealing with the powers of a Customs Officer under the Customs Act (1962) (the Act now in Question), have laid down as follows:

The customs officer Under Section 104 (3) is. it is true, invested with the powers of an officer-in-charge of the Police Station for the purpose of releasing any person on bail or otherwise. The expression 'or otherwise' however does not confer upon him the power to lodge a report before a Magistrate Under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence and power to search premises or conveyances without recourse to a Magistrate do not make him an officer-in-charge of a Police Station. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue. Thus a Customs Officer is under the Act of 1962, not a Police Officer within the meaning of Section 25 of. the Evidence Act and the statements made before him by a person who is arrested or against whom an

inquiry is made are not covered by Section 25 of the Evidence Act.

The Supreme Court has also laid down in Badku Joti's case. : 1966 CriLJ1353 that a Central Excise Officer can only make a complaint under Clause (a) of Section 190 (1) of the Criminal Procedure Code in order to request a Court to take cognizance of an offence and that a mere report by a Central Excise Officer cannot be regarded as a report made by a Police Officer incharge of Police Station. In this case also the complaint against the petitioner has been instituted by the Asst. Collector of Central Excise and cognizance of the offence has been taken by the learned Magistrate Under Section 109 (1) (a) of the Criminal Procedure Code, The trial has proceeded as per the provisions of Section 252 of the Criminal P. C. regarding the complaint filed by the Assistant Controller as a private complaint.

11. In view of the above, I am clearly of the opinion that the proceedings conducted by P. Ws. 1, 4, and 6 prior to the institution of the complaint on 15-9-1967 cannot at all be regarded as proceedings under the Code of Criminal Procedure, and, therefore the provisions of Section 510 of the Criminal Procedure Code would not be applicable to the six certificates. Exhibits P-8 to P-13 issued by the Mint Master at Bombay, and sent under his covering letter Exhibit E-14.

12. I am of the opinion, that it cannot be said as contended by, Sri Havanur that the only reliable evidence adduced by the prosecution to prove that the yellow metal seized from the person of the petitioner is Sold. is in the form of Exhibits P-8 to P-13. There is the evidence of P. Ws. 3 and 5 in proof of this fact. P. W. 3, has sworn that he is a goldsmith and that he is running a shop in the premises of Lakshminarayana temple and that he prepares(sic) gold jewels and ornaments in his workshop. This aspect of the matter is not. at all challenged in his cross-examination; on the other hand, it is elicited in his cross-examination that, he has no workers in his workshop. That goes to show that he personally attends to the preparation of gold ornaments and jewels. These facts prove beyond any doubt that P. W. 3 is well versed in his job and that he is an expert in preparing gold ornaments and jewels and therefore, also an expert in testing and recognising whether a particular metal is sold and what is its purity. He. has sworn that he

tested each one of the six biscuits on seizure from the person of the petitioner, by means of a touch-stone and found that each one of the biscuits was 'gold of 24 carat purity. His evidence in, this behalf is not at all challenged in his cross-examination. It is not even disputed in his cross-examination that he is not an expert in testing gold.

I find that it is for the first time during the arguments in this petition that the point whether the biscuits that were seized from the person of the petitioner are not gold, is raised. On the other hand, the defence put forward all through is that the said Jaffer had brought gold biscuits and he tried to sell them to P. W. 3 and on P. W. 3 sending information to the Customs Officers. Jaffer made good his escape. This indicates that this petitioner was also not disputing that the biscuits seized were -of gold.

13. P. W. 5 also has sworn that he is a Jeweller and is a dealer in gold and that he runs his shop in Car Street. He has further sworn that, he was sent for by P. W. 6 and asked to cut pieces from the corners of these six sold biscuits M. Os. 1 to 6 and he cut those pieces and those are M. Os 1 (a) to 6 (a). He has also sworn that this proceeding was done and noted as per the contents of Exhibit P-6, the Panchanama, A reference to Exhibit P-6 goes to show that the biscuits M. Os. 1 to 6 were gold and that six pieces from the corners of those M, Os. 1 to 6 were cut. The mahazar describes the weight of six pieces individually. This evidence of P.W. 5 is not at all challenged in his cross examination. In this connection. Sri Havanur contended that a test carried out by these witnesses by means of a touch-stone is a crude one and they cannot be regarded as experts in this business and, therefore, it should be held that the prosecution had not established by adducing satisfactory evidence that the six biscuits in question are gold biscuits. I am unable to agree with this contention.

It is commonly known and recognised that such tests by means of a touch-stone by experienced gold-smiths in regard to finding put whether a particular fellow metal is gold or not and if gold in regard to its exact purity, are reliable. Many transactions are carried on on the basis of such tests. When it is shown that P. Ws. 3 and 5 are experts in this job. I see no reason to disagree with the opinion

expressed by them and based on the tests made by them by means of a touch-stone that the six biscuits are gold and that the purity of that gold is 24 carats. Simply because chemical tests are not carried out by these witnesses, it cannot be said that their opinion suffers from any infirmity, when it is seen that a test by means of a touch-stone cannot at all be regarded as an unreliable test. In the *Suodt. of Central Excise v. U.N. Malavjva* (1968) 1 Mys LJ 17 a Bench of this High Court has, on the basis of the evidence of a Jeweller that the 43 pieces of gold seized in that case were of 24 carat purity, held that the prosecution had satisfactorily established that fact. What is observed in that decision in this connection is P. W. 3 Acharya who is a Jeweller and appraiser of the Canara Syndicate Bank has stated that these 43 pieces of sold were of 24 carat parity and were of foreign origin'. This, opinion of P. W. 3, has been accepted and relied upon in that decision. In the result. I have no hesitation in holding that the prosecution has through the evidence of P. Ws. 3 and 5 which has remained unchallenged in regard to this aspect of the matter, satisfactorily established that the six biscuits seized from the person of the petitioner are gold and the gold is 24 carat purity.

14. It was nextly contended by the learned Counsel for the petitioner that the prosecution has not at all established that these Hold biscuits were of foreign origin. The established facts on this point are : (1) on getting down from the bus the petitioner proceeding in an hesitating and nervous manner; (2) the six sold biscuits were found in specially made pouches in a cloth-belt M. O. 7 tied hidden at the waist of the petitioner : (.3) all the six biscuits bore foreign markings as 'Johnson Mathev. 9990' : and (4) the petitioner had no explanation for possessing these six gold biscuits. In the above cited Bench decision of this Court in (1968) 1 Mys LJ 17 the facts that 43 pieces of sold seized from U. N. Malavjva bore foreign markings and that they were found concealed with U. N. Malaviya, have been held sufficient to establish that the 43 gold pieces were of foreign, origin. Same reasoning holds good in this case also.

In *Issardas Daulat Ram v. Union of India* : 1966 CriLJ1507 , there Lordships have reliving on the conduct of the appellants in that case, held that the gold in question had been smuggled into this country after March 25. 1947 when the first notification under the Foreign Exchange Regulations Act placing a ban on the

importation of gold was issued, That goes to show that even though direct evidence in proof of the gold being smuggled one is not available reliance can be placed on the conduct of the persons who possessed gold in order to reach such a conclusion. In this case, the nervousness depicted by the petitioner while proceeding from the bus and the hesitating movements made by him and the way in which he had kept concealed these gold biscuits on his person in specially made pouches in M. O. 7. in my opinion depict such conduct, as can be safely relied upon to draw an inference that the six biscuits of gold are of foreign, origin. This conduct coupled with the stampings found on the six gold biscuits, make such an inference a conclusive one.

In *Kewal Kishan v. State of Punjab* AIR 1967 SC 737 it has been observed and held as follows:

Two customs officers appeared as witnesses. Inspector Satana Singh and Deputy Superintendent A. N. Kapur. the 'former is an Inspector of Land Customs and the latter a Deputy Superintendent of Customs. There is nothing to indicate in their cross-examination that the officers did not have a reasonable belief that the goods were smuggled gold and the question that the officers did not have reasonable belief is not suggested either from the cross-examination of these witnesses or from the 'findings of the Courts below. Even in his statement of case, it is contended that the mere existence of stamp of foreign companies on gold does not necessarily prove that the gold is of foreign origin. It might be put on spurious gold which may be of Indian origin. In our opinion apart from the fact that this question has not been raised, it is quite clear that when Section 178-A of the Sea Customs Act provides that when the goods are seized in the reasonable belief that they are smuggled then the burden of proving that they are not smuggled goods is on the person from whose possession the goods are seized. The onus is on him to show that the goods are not smuggled, that is. not of foreign origin on which duty is not paid. The onus is not on the prosecution to show that the goods are : not of Indian origin.

In third case also the evidence of P. W. 1 discloses on what basis he entertained reasonable belief that the petitioner appeared to be having in his possession

contraband articles and how the six gold biscuits in question were found on the person of the petitioner and were seized. There has been no cross-examination of P. W. 1 on the point of his having entertained reasonable belief that the petitioner was carrying contraband articles in his possession.

It is also contended by Shri Havanur that the mere existence of a stamp of foreign company on the six gold biscuits does not necessarily prove that these gold biscuits are of foreign origin. and that the six gold biscuits might be of the Indian origin and spurious markings might have been put on them. Section 123 of the Act is absolutely similar to Section 178-A of the Sea Customs Act. 1878, which was considered by their Lordships of the Supreme Court in Kewal Kishan's case. AIR 1967 SC 737. The petitioner has not at all made any attempt to prove that these six gold biscuits M. Os. 1 to 6 are not smuggled gold biscuits. In the result. I hold that the prosecution has satisfactorily established that these six gold biscuits are of foreign origin, and they have found their entry into this country by smuggling.

15. Sri Havanur nextly contended that the prosecution has not at all produced on record the notification issued by the Central Government prohibiting import of gold from foreign countries. He urged that unless such notification is produced on record, it cannot be concluded that the petitioner has committed breach of any of the provisions of the said notification. In support of this contention, he placed reliance on a decision in Maddu Suvarna v. State of Mysore (1970) 1 Mys LJ 147. In that case, the prosecution was for an offence Under Section 92 of the Mysore Police Act. The Prosecution contended that the provisions of that section had been extended by means of notification issued by the State Government to the area in which the offence was alleged to have been committed. Such notification had not been produced on record. . His Lordship Somnath Iyer, C. J. held that in the absence of production of such a notification, it must be concluded that the prosecution had not produced evidence to establish that the said provisions had been extended to the area in question.

It is nowhere seen from the facts narrated in Maddu Suvarna's case that any attempt was made by the prosecution to show that such a notification had been published in the Gazette. It appears that such a Gazette copy was not brought to

the notice of the Court. The learned State Public Prosecutor has now shown that the notification in question has been issued by the Central Government under the provisions of the Foreign Exchange Regulations Act. He also pointed out that this notification has been cited by the Supreme Court in *Collector of Customs, Madras v. Sampathu Chetty* : 1983ECR2198D(SC) . He further pointed out that this notification is also found in the book title 'The Law Relating to Foreign Exchange' by Shri Shivax R. Vakil (III Edition) at page 97. On this basis he contended that in view of the provisions of Sections 56 and 57 of the Indian Evidence Act. the Courts have to take judicial notice of this notification. He placed reliance on the decisions in *Public Prosecutor v. Thippawa* AIR 1949 Mad 459 and *State v. Gopal Singh* AIR 1956 Madh Bha 139.

In AIR 1949 Mad 459 it has been held that a Court should take judicial notice of the facts mentioned in Section 57 and it can take such notice if unimpeachable books or documents are put before it or otherwise accessible for its reference. Now it is seen that unimpeachable books are placed for reference by the State Public Prosecutor in this case in order to show that such a notification prohibiting import of gold from foreign countries has been issued by the Central Government by virtue of the powers vested in it under the Foreign Exchange Regulations Act.

In AIR 1956 Madh Bha 139 it has been held that there can be no doubt that if a notification is a part of any Act, Ordinance or Order, it would be within the definition of Law or existing law and judicial notice can, therefore, be taken of such a notification, issued by the Government or any competent authority in the exercise of delegated power of legislation as such a notification would be a part of law itself, This principle would be applicable on all fours to the facts of the case on hand. I respectfully agree with their Lordships on the principle of law laid down in AIR 1949 Mad 459 and AIR 1956 Madh Bha 139. As already pointed out such facts were not brought to the notice of this Court while dealing with *Maddu Suvarna's* case. (1970) 1 Mys LJ 147 to enable the Court to take a judicial notice of the notification alleged to have been issued by the State Government extending the provisions of Section 92 of the Mysore Police Act to the area in question. In the result. I see no force in this contention.

16. Sri Havanur then contended that Ex. P-2 showing that all officers of Customs except clerks and Class IV officers, have been empowered to make searches as per the provisions of the Act, has not been proved in this case and therefore, it will have to be held that P. W. 1 had no power of making the search of the person of petitioner and as such seizure of M. Os. 1 to 6 from the person of the petitioner cannot constitute evidence on the basis of which the petitioner can be convicted. In my opinion this contention has to be rejected in view of the law laid down in Radha Kishan v. State of Uttar Pradesh : (1963)11LLJ667SC . Their Lordships have held as follows:

It may be that where the provisions of Sections 103 and 165, Criminal P. C. are contravened the search can be resisted by the person whose premises are sought to be searched. It may also be that, because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues and the seizure of the articles is not vitiated.

It has been already shown how there is no reason to disbelieve the testimony of P. Ws. 1 to 3 in regard to finding of these gold biscuits M. Os. 1 to 6 in M. O. 7 cloth belt containing pouches, on the person of the petitioner. In the result, even if, it is for the sake of arguments, assumed that Ex. P-2 has not been satisfactorily proved by the prosecution and that therefore. P. W. 1 had no power to search the person of the petitioner, no further consequence ensues. The seizure of M, Os. 1 to 6 cannot at all be vitiated. I find that even in regard to Ex. P-2. the court is to take judicial notice of the facts mentioned in Ex. P-2 in view of the provisions of Sub-section (7) of Section 57 of the Indian Evidence Act, which reads as follows:

The court shall take judicial notice of the following : (7) The accession to office names, titles. functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any official Gazette.

Ex. P-2 is signed by N. Mookerjee Collector of Customs. my sore Central Excise Collectorate, Bangalore on 1-2-63. When the signature of N. Mookeriee found in Ex. P-2 is taken judicial notice of. it will have to follow that the court has to take

judicial notice of the contents of Ex. P-2 also. Ex. P-2 discloses that all officers of Customs, except clerks and Class IV officers are empowered by N. Mookherjee, the Collector of Customs, with powers of search under the Act. That goes to show that even on the question of the fact, the contention put forward by Sri Havanur has to fail because it is satisfactorily established that P. W. 1 had been empowered to exercise powers of search under the Act,

17. In this very context itself, another contention put forward by the learned Counsel for the petitioner may be conveniently dealt with. That contention is that the prosecution has not at all satisfactorily established by adducing necessary evidence that sanction to prosecute the petitioner under Section 137 of the Act, found at Ex. P-5 and consent to prosecute the petitioner under the Rules, as per Ex. P-4. have not been proved. He pointed out that the only evidence available is that of P. W. 6 and all that P. W. 6 has stated is that sanction to prosecute the petitioner as per Ex. P-5 and consent to prosecute the petitioner as per Ex. P-4 were received and that he has not at all stated that these two documents have been signed by the Collector of Customs, C. T. A. Pillai.

In my opinion, this contention is to be rejected by virtue of the very same reasoning narrated in the preceding paragraph while dealing with the contention of the learned Advocate in regard to Ex. P-2. Exs. P-5 and P-4 are found signed by C. T. A. Pillai. They are not copies. In the result, by virtue of the provisions of Section 57 (7) of the Indian Evidence Act. the court is to take judicial notice of the signatures found on Exs. P-5 and P-4. The same is the view expressed by their Lordships of Allahabad High Court in regard to sanction issued by the District Magistrate for prosecuting under the Arms Act. In *Gaya Din v. State* : AIR1958 All39 . it has been held that the signature of the District Magistrate on his sanctioning order need not be separately proved, for under the combined effect of Sections 56 and 67 Evidence Act, the court can take judicial notice of the signature and can justifiably make a presumption that the signature under the order of sanction is the genuine signature of the authority concerned. and that the said authority as described under the signature is the District Magistrate who is the person authorised to grant sanction for such a case.

In *Dhanpat v. State* : AIR1960 All40 it is laid down that judicial notice can be taken of the signature on the sanction and it will have to be held that the words 'Prosecution sanctioned' in the sanctioning order were also proved.

18. The next contention put forward by Sri Havanur is that the prosecution has not at all established an offence under Rule 126-11 (2) (d) of the Rules, because it has not adduced evidence to show that these six gold biscuits had been 'acquired' by the petitioner. In order to appreciate this contention, it is necessary to quote the said provision, and it reads as follows:

126-H (2) Save as otherwise provided in this part:

(d) no person other than a dealer licensed under this part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold not being ornament, except.

(i) by succession, intestate or testamentary. or

(ii) in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may, by general or special order make in this behalf:

Provided that a refiner may buy or accept gold from a dealer licensed under this part.

Sri Havanur pointed out that it is not the prosecution case that the petitioner had either agreed to buy or had bought the gold in question and that the case is that the petitioner had in his possession the six gold biscuits and therefore had acquired the gold biscuits. He urged that in the absence of proof of acquisition, it cannot be said that the petitioner has contravened the said provision. His argument is that in order to show that possession of an article by a person amounts to acquiring, it must be proved that the person in possession has some more interest in the article and that such interest on the part of the petitioner in the gold biscuits in question is not established by the prosecution.

The learned State Public Prosecutor met this reasoning by placing reliance on Sub-rule (ii) of Rule 126 I of the Rules. It reads as follows:

126-I (11). Any person in possession or control of any gold, not being ornament, shall be presumed, until the contrary is proved, to be the owner thereof.

In my opinion this provision knocks the bottom out of the contention of the learned Counsel for the petitioner. The petitioner has not produced any evidence to show that he was not the owner of these gold biscuits. In this connection Sri Havanur attempted to place reliance on certain parts of Ex. P-3 the statement alleged to have been narrated by the petitioner and reduced to writing. The petitioner cannot be allowed to place reliance on a part of this statement when it is also the contention of the petitioner that such a statement has not been made by him. In this statement, it is made to appear that the petitioner had been entrusted with this gold by somebody for sale and despatch of the sale proceeds to a person at Bombay on payment of commission. But, in view of the petitioner having denied Ex. P-3 in toto, such a contention does not survive.

It may be pointed out at this stage itself that I deem it unnecessary to go into the question of the genuineness or otherwise, of Ex. P-3 in view of there being abundant reliable material put forward by the prosecution in proof of its case against the petitioner. In the result. I hold that the prosecution has satisfactorily established that this petitioner has committed an offence under Rule 126-H (2) (d) of the Rules.

19. It has been pointed out that the petitioner has been convicted for both the offences under Section 111 (d) read with Section 135 of the Act and Rule 126-H (2) (d) read with Rule 126-P (2) (ii) of the Rules and that the sentences on both the counts are directed to run concurrently. Sri Havanur contended that conviction on both the counts is unwarranted on law as both the said offences are based on the same set of facts. He placed reliance on the decision in *A. M. Sinha v. Prohlad Chandra* : AIR1970 Cal437 . In this decision, it is held by their Lordships that no provision of the General Clauses Act bars such conviction and sentence under Section 135 of the Act and Rule 126-P of the Rules, but the rules apply only to legal gold and not to smuggled gold. Their Lordships have observed as follows:

Rule 126-P makes possession of undeclared gold punishable. Obviously declaration under Rule 126-P 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 Central Order and the time and manner in which it came in Statute Book, it seems that declaration under Rule 126-P 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 126-P is. therefore uncalled for and their convictions under Rule 126-P and the punishment inflicted are set aside.

I am clearly of the opinion that such a contention cannot lie in view of the decision of a Bench of this High Court in (1968) 1 Mys LJ 17. In this decision it has been held by this Court as follows:

Hence, in our opinion, the charge under Rule 126-P (2) of Defence of India Rules that he was in possession or had in his control some quantity of gold in contravention of the Defence of India Rules, has been clearly made out. Rule 126-P (2) of the Defence of India Rules is entirely different and not covered by Section 135 of the Customs Act 1962.

The Court proceeded to set aside the acquittal of U. N. Malavjva and convict and sentence him on both the counts. The sentences were directed to run concurrently. Sri Havanur attempted to derive support by the provisions of Section 26 of the General Clauses Act. but. in my opinion, the contention is not at all available to him in view of the decision of this Court in (1968) 1 Mys LJ 17.

20. Sri Havanur. the learned Counsel for the petitioner, lastly contended that this Court may be pleased to give the benefit of provisions of Section 4 of the Probation of Offenders Act to the petitioner in view of the fact that the petitioner is young and he is a first offender. The only facts found in this case, pertaining to this contentions are : that this is the first offence proved against the petitioner and that the petitioner according to his own statement recorded under Section 342 of Criminal Procedure Code was 28 years old on 23-9-1968. In *Dasappa v. State of Mysore* (1964) 2 Mys LJ 342 : AIR 1965 Mys 224 it is laid down as follows:

It is only when the Court forms an opinion that the offender in a given case should be released on probation of good conduct that it has to act as provided by Section 4 of the Act. It was for the accused to have placed all the necessary material before the court which could have enabled it to consider that the first accused was an offender to whom the benefit of Section 4 would be extended.

Apart from the above said material available in this case, the petitioner has not placed any other material to enable the court to consider whether the benefit of Section 4 of the Probation of Offenders Act would be extended to the petitioner. In *Rattan Lal v. State of Punjab* : 1965 CriLJ360 their Lordships while dealing with the provisions of Sections 4 and 6 of the Probation of Offenders Act have laid down that in case any person under 21 years of age is found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life, the court shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him either under Section 3 or under Section 4 of the Probation of Offenders Act; but in case of other persons viz. above 21 years of age, it is not compulsory on the court to consider whether it would be desirable to deal with him either under Section 3 or under Section 4 of the Probation of Offenders Act. It is hence, in my opinion, seen that unless there is some material made available by an accused to the court to make the court feel that under the circumstances of the case and in view of such material it would be desirable to deal with such an accused under Section 4 of the Probation of Offenders Act. the court especially while sitting in revision in a particular case, need not enter into such question. In view of the absence of any such material. I am of the opinion that this contention has no force in it. On facts. I find that there is no reason to extend the benefit of the provisions of Section 4 of the Probation of Offenders Act to the petitioner.

21. In view of the foregoing reasons, it is seen that there is no substance in this petition and hence the same is dismissed.