

The Public Prosecutor Vs. Babulal

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Court : Andhra Pradesh

Decided On : Dec-16-1969

Reported in : AIR1971AP345

Judge : Venkateswara Rao, J.

Acts : [Customs Act, 1962](#) - Sections 123 and 135; Defence of Indian Rules, 1962 - Rule 126 (Q); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 517

Appeal No. : Criminal Appeal No. 585 of 1968

Appellant : The Public Prosecutor

Respondent : Babulal

Advocate for Def. : A. Rama Rao, Adv.

Advocate for Pet/Ap. : A. Gangadhara Rao, Adv. for ;Addl. Public Prosecutor

Judgement :

1. This appeal by the State is directed against the acquittal of the respondent herein of offences punishable under Section 135 of the Customs Act and Rule, 126-P (2) of the Defence of India Rules, 1962, by the Judicial First Class Magistrate, Gooty.

2. The case against the accused (respondent) as revealed by the evidence adduced for the prosecution is as follows: At about 8 P.M., n 16-3-67 the

Superintendent of Customs and Central Excise (P. W. 1) found the accused seated in a third class compartment of the Guntur bound train at the Guntakal Railway Station and having suspected that he was in possession of contraband gold. took him to the office of the Ticket Collector longings. The search of his attached-case ins the presence of mediators revealed that he was carrying with him concealed within that box. 1043-200 grams of primary gold and gold ornaments including three pieces (Mos 6 to 8) of gold with foreign markings. P. W. 1 seized the same under a mahazar.

On being questioned by him the next day, the accused made a statement, Ex. P-9, admitting having had gold in his possession and this statement was attested by P. W. 2. The Collector Customs and Central Excise, to whom the matter was reported by P. W. 1 adjudged the confiscation of the entire gold seized from the accused to the Government and also imposed a fine of Rs. 7,000/-. Ex. P-2 dated 23-9-1967 is a copy of the adjudication order. The Mint Master, to whom samples of the gold seized from the accused were sent for being tested, assayed the same and sent his report. Ex. P-7 to the effect that the samples are of gold and were for foreign origin.

After necessary sanction to prosecute the accused was accorded by the Collector. Customs and Central Excise. Hyderabad, the Asst. Collector of Customs s and Central Excise Hyderabad the Asst. Collector of Customs and Central Excise . Ananthapur, laid the complaint charging the accused with having committed offences punishable under Section 137 of the Customs Act and Rule 126 (P) (2) of the Defence of India Rules. 1962. When examined under Section 342 Cr. P. C. the accused admitted that he was in possession of the gold seized from him and his having made a statement to P. W. 1 but explained that he did not know what was recorded in Ex. P-9 for the reason that he could not understand either Telugu or English Properly: and that the gold, which belonged to him was seized when he was bringing it back from Bombay, to which place he had taken the same for the purpose of getting some ornaments prepared in vain as the terms for the same were not settled to his satisfaction.

On a consideration of the evidence placed before him, the learned Magistrate held that the complaint is bad for want of proper sanction and that in any view the prosecution had not been able to bring home the guilt to the accused under the charges levelled against him. He accordingly acquitted the accused of both the charges and directed that the gold and other articles seized from the accused should be returned to him. Hence s this appeal, as, according to the learned Public Prosecutor, the court below erred ins its conclusion that the prosecution is vitiated for want of the requisite sanction or that it has not been able to conclusively establish the charges framed against the accused. It is also urged that the direction given by the learned Magistrate for disposal of the property is, in any view, untenable.

3. The learned Magistrate held that the complaint against the accused for the offence punishable under Rule 126 (P) (2) of the Defence of India Rules is bad as it is not shown to have been instituted by or with the consent of the Administrator or any person authsorised by the Administrator as contemplated by Rule 126 (Q) of the Defence of India Rules. It was no doubt alleged ins paragraph 1 of the complaint that the complaint was authorised by the Collector of Customs and Central Excise, Hyderabad, to prosecute the accused for the offence of acquiring and having in his possession gold with foreign markings; but the said authoisation has not been filed into court.

The learned Public Prosecutor invited my attention to a notification said to have been issued under Rules 126 (J)(4) sand 126(X) of the Defence of India Rules on 5-11-1963, authorising the Assistant Collectors, Central Excises to institute prosecutions for offences punishable under Part XII-A of the Defence of India Rules. This circumstance does not however justify his contentions that the court below went wrong in finding that the prosecution for contravention of the Gold Control Rules is vitiated or want of necessary authorization as the notification in question was not placed before that Court.

It is contended for the respondent and rightly too, that he was denied the opportunity of showing that the notification in question is not ins accordance with the requirements of law as it was not produced and made available to him in the

trial court. Reference may be made in this context to an unreported decision of this court in S. C. R. C. No. 728 of 1965 (AP) in which it was held by Mirza, J., that failure to produce the notification authorising the concerned (sic) to institute the prosecution would vitiate the conviction. I must, therefore, agree with the Court below that the prosecution of the accused for contravention of the Gold Control Rules is vitiated for want of proof that the complainant was duly authorised under Rule 126 (Q) of the Defence of India Rules to institute the same.

4. There is likewise not much substance in the contention that the learned Magistrate erred in his conclusion that the prosecution failed to establish the charges levelled against the accused. One of the offences with which the accused is charged is punishable under Section 135 of the Customs Act. The accused had no doubt admitted that she was in possession of the Gold that was seized from him but the evidence adduced in the case does not seem to warrant the conclusion that the possession was in contravention of the provisions of Section 135 of the Customs Act.

If, among other things, a person acquires possession of or is in any way concerned in carrying, concealing etc. any goods, which he knows or has reason to believe are liable to confiscation under Section 111, he is liable to be punished with imprisonment and fine under Section 135 of the Customs Act. Section 111(d) of this Act renders goods which are imported contrary to any prohibition imposed by or under that Act or any other law for the time being in force. liable to confiscation, Section 8 of the Foreign Exchange Regulation Act 1947 empowers the Central Government to prohibit, among other things, by notification in the Official Gazette, the bringing into India any gold except with the general or special permission of the Reserve Bank and on payment of such fee as may be prescribed. It is not in dispute that the notification contemplated by this section was issued and published in the Official Gazette long ago. So, in order to render the accused liable for punishment under Sec. 135 of the M. O. 6 to 8 which alone are the subject-matter of the charge, are gold pieces of foreign origin and that they were smuggled into India.

5. Learned Public Prosecutor argued that when once possession of M. Os. 6s to 8 is admitted by the accused. it is for him to establish that they are not smuggled goods in view of Section 123 of the Customs Act. I m afraid that this section cannot, in the circumstances of the case, be called in aid by the prosecution to shift the onus to the accused. Section 123(1) lays down that where any goods to which that section applies are seized under the Act ins the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. It is therefore clear that before the accused can be called upon to prove that the goods recovered from his possession are not smuggled goods, the prosecution has to establish that those goods were seized under the provisions of the Act and in the reasonable belief that they are smuggled gods.

Section 110(1) of the Customs Act empowers 'the proper officer' to seize such goods which he has reason to believe are liable to confiscation under the Act while 'proper Officer' in relation to any functions to be e performed under the Act is defined in Section 2(34) to mean the Officer of customs who is assigned with those functions by the Board of the Collector of Customs. P. W. 1 who seized the gold in this case from the accused, did not say a word in the courses of his evidence indicating that either the Board or the Collector of Customs assigned to him the functions to be performed under the Act. Even granting that he was appointed 'proper officer' within the meaning of Section 2(34) of the Customs Act by the authority competent to do so since it was not even suggested to him in the course of cross-examination that he was not so appointed when he seized the alleged contraband from the accused, it can still not be said that the other ingredient necessary to shift the burden to the accused is made out in this case as there is nothing on record to show that the goods were seized by P. W. 1 from the accused in the reasonable belief that they were smuggled goods.

His evidence would, on the other hand, reveal that he searched the accuses and his belongings having suspected that he was carrying smuggled gold. But suspicion is not the same thing as reasonable belief. Something more than mere suspicion is necessary to give raise to a reasonable belief and even the 'proper officer' would not be justified in effecting a seizure of the goods unless he has

reason to believe that they are liable to confiscation under the Act. Simply because the search in this case happened to bring to light some gold which according to the prosecution, is smuggled gold it cannot be said that P. W. 1 seized the goods in the reasonable belief that they were liable to confiscation when he himself made it clear that he searched the accused only on suspicion that he was carrying smuggled gold.

While explaining the scope of Section 178A of the Sea Customs Act 1878 which is in pari materia with Section 123(1) of the Customs Act, 1962 it was pointed out by Shah, J. in *M. G. Abriol v. Amichand* : AIR1961 Bom227 that before any person could be called upon to prove that the goods seized from him are not smuggled goods, the Customs Officer, making the seizure, must be shown to have proceeded upon the foundation of a reasonable belief inspired in him by some definite material by way of information or otherwise so that he could be said to seize the goods in the reasonable belief that they were smuggled goods, that the belief should be present in the mind of the officer even before the goods are seized and that any subsequent acquisition of such belief would be of no avail.

When on his own showing P. W. 1 simply suspected and did not have any reason to believe that the accused was carrying smuggled goods before seizing the goods from him the prosecution cannot be permitted to invoke to its aid Section 123(1) of the Customs Act for the purpose of saying that the burden of disproving that the goods recovered from him were smuggled goods is on the accused.

6. The next question for consideration is whether M. Os. 6 to 8 are of foreign origin and were smuggled in to India. The prosecution relies on the oral evidence of P. W. 1 and a certificate, Ex. P-7 issued by the Master of the Mint at Hyderabad to prove this aspect of its case. The evidence of P. W. 1 that the words 'Johnson Mathey London 999.0' were found marked on M. Os. 6 to 8 is certainly not sufficient to hold that they are of foreign origin. He stated that the alleged foreign 'markings' are clear on only one of the three pieces and are very faint on the other two. The learned Magistrate however expressed that 'for a named eye, it is not possible to make out the seal on the three tablets as that of a foreign seal'. The inference is difficult to brush aside as we get it in the evidence of P. W. 1 himself

that M. Os. 6 to 8 were hammered and are not in their original state.

Even granting that the marks on one of the three gold pieces are clear and read as 'Jhonson Mathey London 999O' it cannot be stated with certainty that it is of foreign origin as P. W. 1 cannot be considered an expert to be able to say whether the seal is phony or genuine. It is therefore unsafe to hazard a conclusion as to the origin of M. Os. 6 to 8 on the basis of the evidence of P. W. 1

We are then left with the report of the Mint Master who is said to have assayed the gold seized from the accused. But this report, as rightly pointed out by Sri Rama Rao, the learned counsel for the accused, raises a serious doubt as to whether it relates to the gold that was seized from the accused or to some other specimen sent to the Mint Master for examination. Ex. P-3 is the letter from the Collector of Central Excise, Hyderabad with which the samples of gold seized from the accused, including one slab alleged to contain foreign markings were sent. This letter is dated 23-5-67 and it was noted in the 'subject' for this letter that the gold that was being sent for examination was seized from Babulal Hazarimal on 16-3-1967. But the Mint Master's report, Ex. P-7 would disclose that he sent it with reference to a letter dated 7-6-67 of the Collector, Central Excise. There is further nothing in this report suggesting that it related to the gold seized from Babulal Hazarimal as all that is stated in the subject of the letter is 'seized gold-assay of'.

There is yet another circumstance which makes it difficult to accept that the report contained in Ex. P-7 was made in respect of the identical gold that was seized from the accused. It was already seen that the gold seized from the accused was sent to the Mint Master along with the Collectors' letter. Ex P-3 dated 23-5-67 But Ex. P-7 shows that what was assayed by the Mint Master is gold which he received from a representative of the Collector, Central Excise, on 14-6-1967. Thus, when the prosecution has not been able to conclusively establish that M. Os. 6 to 8 are of foreign origin and were smuggled into India, the accused cannot be said to have committed any offence punishable under Section 135 of the Customs Act.

7. The only other charge against the accused is that he was in possession of the three gold pieces M. Os. s6 to 8 with foreign markings in contravention of the Gold

Control Order and is therefore liable for punishment under Rule 126 (P) (2) of the Defence of India Rules, 1962. Though the charge does not indicate which particular provision of Rule 126 (P) (2) was contravened by the accused, it was averred in paragraph 5 of the complaint that he was in possession of the gold in a manner otherwise than as provided in Rule 126 (H) (2) (d) of the Defence of India Rules.

This rule lays down that no person, other than a dealer licensed under part XII-A of the Defence of India Rules, 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 provided that a refiner may buy or accept gold from a dealer licensed under this part. As already stated, the accused does not deny having had possession of M. O.s 6 to 8. It is also no this case that he is a licensed dealer in gold or that he acquired M. Os. 6 to 8 in accordance with any permit granted by the Administrator. He does not claim to have acquired M. Os. 6 to 8 by succession either.

But it is contended that the Court below rightly acquitted him of the charge under the Defence of India Rules also as M. O.s s6 to 8, which are the subject matter of that charge are not shown to be of the required purity. Gold as can be seen from its definition in Rule 126-A should be of a purity of not less than nine carats if its possession is to be rendered liable for punishment under the Defence of India Rules. here again reliance is placed for the prosecution on the Mint Mater's report, in the main to say that M. Os. 6 to 8 are of pure gold. But I have already expressed that it is highly doubtful if Ex. P. 7 relates to the identical gold that was seized from the accused.'

The statement Ex. P-9 said to have been recorded from the accused by P. W 1 was next sought to be relied upon for the purpose of showing that M. Os 6 to 8 are of gold of 24 carats fineness. The accused no doubt admitted having made a statement to P. W. 1 but maintained that he did not know what all was written by the latter in 'Ex. P-9 and added that he could not understand either Telugu or English properly. We get it in the evidence of P. W. 2 who attested Ex P-9, that the accused was answering in Hindi the questions put to him by P. W. 1 and that

neither he (P. W. 2) nor the other attest or of Ex. P-9 knew Hindi. There is thus no other evidence except that of P. W. 1 that the accused understood the questions which he put to him and that he had in fact admitted that M. Os. s6 to 8 were of pure gold. It is also noteworthy that the statement of the accused was recorded only the next day after the gold was seized from him.

In these circumstances and in the absence of any independent evidence for the prosecution. I am inclined to think that it will be unsafe to base a conviction on the so-called admission alone by the accused that M. O.s 6 to 8 were of pure gold. I must, therefore, hold that the court below was justified in acquitting the accused of both the charges on the ground that the prosecution failed to establish the same beyond reasonable doubt.

8. I must, however, agree with the learned Public Prosecutor that the order of the Court below, directing the return of the gold to the accused cannot be sustained. It is common ground that confiscation of the gold seized from the accused was ordered by the Collector of Central Excise Hyderabad, under the provisions of the Customs Act. This is what we can gather from the relevant order, Ex. P. 2 also. Section 126(1) of the Customs Act lays down that when any goods are confiscated under that Act, such goods shall thereupon vest in the Central Government. So. the gold seized from the accused vested in the Central Government with effect from the 23rd September, 1967 as a result of the order. Ex. P-2, made on that day by the Collector of Central Excise, confiscating the property to the Government.

It is true that Section 517(1) Cr. P C., empowers the court to direct delivery of the property produced before it to any person claiming to be entitled to possession thereof; but when it is seen that the accused in this case ceased to have any manner of right to the gold that was produced before the learned Magistrate by reason of its having vested in the Central Government even on 23-9-1967 as a result of the confiscation adjudged by the Collector of Central Excise the learned Magistrate was clearly wrong in directing the return of the property to the accused.

I may refer in this context to an unreported decision of this court in Cri. R. C. Nos. 323 and 529 of 1968 (A) in which it was pointed out by Mirza. J., that an earlier order of confiscation passed by the Collector of Central Excise should not be

disturbed by the Criminal Court acting under Section 517 Cr. P. C as the jurisdiction of the court as well as the department in matters relating to disposal of property and imposition of penalty are concurrent. The order of the Court below directing the return of the gold to the accused cannot therefore, be sustained.

9. In the result, the acquittal of the respondent by the Court below of offences punishable under Section 135 of the Customs Act and Rule 126(P) (2) of the Defence of India Rules is confirmed but the order made by that court directing the return of M. O.s 1 to 12 which were confiscated by the Collector. Central Excise and had vested in the Central Government, is set aside. The appeal is accordingly allowed in part.

10. Order accordingly.

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