

Ashok Kumar Singh Vs. Union of India (Uoi) and ors.

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Court : Allahabad

Decided On : Aug-24-1998

Reported in : 1999CriLJ1962

Judge : S.K. Phaujdar, J.

Acts : [Customs Act, 1962](#) - Sections 11, 107, 108, 111 and 135; [Evidence Act, 1872](#) - Sections 3, 25 and 30; Sea Customs Act - Sections 171A; Foreign Exchange Regulation Act; [Constitution of India](#) - Article 20(3); Code of Criminal Procedure (CrPC) - Sections 154 and 482

Appeal No. : Criminal Misc. Appln. No. 2921 of 1998

Appellant : Ashok Kumar Singh

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : V.K. Singh, Adv.

Judgement :

ORDER

S.K. Phaujdar, J.

1. Through this application under Section 482, Cr.P.C. the petitioner has prayed for quashing a complaint in Case No. 1512 of 1997 pending before the special C.J.M. (Economic Offences), Varanasi. The complaint in question was made by Sri A.K. Ranjan, Assistant Commissioner, Customs (P), Gorakhpur, against five persons including the present applicant. The complaint spoke of an alleged offence under Section 135 of the Customs Act (hereinafter referred to as the 'Act') committed on 29-5-1995 at Naubat Trade Tax Check-post in respect of Chinese silk yarn valued at Rs. 38,40,000/-. In addition to the said silk yarn, metal scrap worth more than Rs. 30,000 and a truck No. WMH 4911 valued at Rs. 4,00,000/- were also seized.

2. According to the complainant, the Assistant Commissioner of Customs, on 28-5-1995, the officers of the Directorate of Revenue Intelligence (in short, 'DRI') at Varanasi got some secret information and kept surveillance on the Grand Trunk Road at Parhau, District Varanasi, awaiting arrival of the truck No. WMH 4911. It was brought to the notice of the DRI officers that the truck in question was detained on that date in the trade tax check-post at Naubatpur and the officers rushed to the check-post, contacted the trade tax authorities and took the truck in their custody along with the papers produced by the driver. The materials, as indicated above, were seized but despite chances being given the owner, driver or cleaner of the truck did not come forward to claim ownership of the truck or the goods so seized. It was alleged that the aforesaid Chinese silk yarn was found concealed under metal scrap in the concerned truck.

3. The complainant further stated that there were grounds for reasonable belief that the silk yarn was of foreign origin and was smuggled into India from Nepal in contravention of notifications under Section 11 of the Act and, as such, the materials were liable to confiscation. An enquiry/investigation was taken up by the customs officials and the involvement of the accused persons named in the complaint came to light. The truck in question stood registered in the name of Pawan Kumar Khandelwal. He appeared before the concerned officer and made a statement under Section 108 of the Act and had disclosed that in his absence the driver, Ambuj Mahto, looked to the matters relating to the truck. The said truck was loaded with metal scrap on 25-5-1995 at Raniganj in West Bengal by an employee

of Deepak Transport Agency of Calcutta and this employee was addressed by his acquaintances as Pandey Ji.

4. Enquiry further revealed that metal scrap was booked by M/s. Mantri Steels, Calcutta, who were regular suppliers of iron and steel scrap to various parties and supplies were made through Deepak Transport Agency who had booked truck No. WMH 4911 from Sri Pawan Kumar Agarwal to load the scrap in the godown of M/s. Bengal Scrap Processing Agency. According to the complaint, the present applicant is the proprietor of Deepak Transport Agency and he had deputed Sri Shambhu Nath Pandey to supervise the loading of truck at Raniganj along with Sri A. Jaiswal, Proprietor of M/s. Bengal Processing Company. Statements were made during investigation of Shambhu Nath Pandey and one Ajai Kumar Jaiswal about loading of truck with scrap and about making over the documents to the owner and driver. After completion of loading Shambhu Nath had returned to Calcutta. Statement was allegedly made by the applicant also and the officials of the DRI found positive discrepancies between the statements of Pawan Kumar, Shambhu Nath and Ashok Kumar. Statement was made by one Rajneesh Agarwal as well and upon consideration of those statements and the fact of seizure, the complainant was of the view that evidence in the instant case was of a circumstantial nature and all the links did lead to an inevitable conclusion that the accused persons were in league in commission of the offence under Section 135 of the Act.

5. In the present application it was urged that there was no direct evidence against the applicant showing the applicant's involvement in any offence under Section 135 of the Act. He was not present when the alleged contraband was seized and he could not be prosecuted on the basis of certain statements - exculpatory or inculpatory - made by any co-accused persons. It was stated that he was only an agent to procure a truck for transporting the materials of others and was not at all liable for carriage of any contraband in the truck.

6. Section 135 of the Act speaks of evasion of customs duty and prescribes punishment thereof. Under this section, if any person is, in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt of any evasion

of any duty chargeable thereon, acquires possession of or is in any way concerned with carrying, removing etc. or dealing with any goods which he knows or has reason to believe are liable to confiscation, would be punishable under this section. Section 111 speaks of confiscation of improperly imported goods. In the instant case, there is no defence that the Chinese silk yarn found in the truck was not of foreign origin or was properly imported into India.

7. Reference has been made in the complaint to Sections 107 and 108 of the Act. Section 108 speaks of power to summon persons to give evidence and to produce documents. The statements of different persons, as indicated in the complaint, were taken in exercise of powers under this Act. Section 107 speaks of power of an officer of the customs to require any person to produce a document and to examine any person acquainted with the facts and circumstances of the Case. The learned State Counsel submitted that the statements under Sections 107 and 108 made by a co-accused are admissible pieces of evidence and are not hit by Section 25 of the Evidence Act.

8. Reliance was placed on a decision of an Hon'ble single Judge of this High Court in the case of Rohit Agarwal v. State of U. P. as reported in (1991) 28 All Cri C 581. This decision was given in an application under Section 482 Cr.P.C. which was moved for quashing a proceeding under Section 135 of the Customs Act. One Rajbir Singh was arrested by a customs officer and he made a statement under Sections 107 and 108 of the Act. There was a statement of Rohit Agarwal accepting that the foreign goods seized from the tanker in question belonged to the applicant - Rohit Agarwal. An objection was taken before this Court that mere statement of Rajbir Singh who was a co-accused in the case was not admissible in evidence and, as such, the proceedings in the complaint would amount to abuse of the process of the Court as otherwise there was no case under Section 135 of the Customs Act made out against the applicant. The Hon'ble Judge of this High Court relied on several decisions of the Supreme Court as reported in : 1970 CriLJ863 , : 1972 CriLJ759 and : 1974 CriLJ280 and came to a conclusion that the statements made to a customs officer were not hit by Section 25 of the Evidence Act. as the officers of the Customs department were not police officers. It was held that the customs officers enquiring into the matter about suspected smuggling

were simply making enquiry and, as such, the enquiries would not affect the statement of a person under Article 20(3) of the [Constitution of India](#). The statement under Sections 107 and 108 of the Act were not thus of a person accused in any offence and, as such, the statement of Rajbir Singh was not inadmissible in evidence and could be made the basis for the proceedings under Section 135 of the Act.

9. It is necessary to look to the case-laws that were relied on by the Hon'ble Judge. The decision reported in : 1970 CriLJ863 covered two judgments, one each from Calcutta and Bombay High Courts. Certain statements were made to a custom officer under Section 171-A of Sea Customs Act. It was held that the officer of the customs department was not a police officer and the Court also went on to say that a person against whom an enquiry is held under Section 171-A of the Sea Customs Act was not a person accused of any offence. The Court was of the view that the statements under Sections 107 and 108 of the Customs Act were not statements by a person accused of any offence. The Court was of the view that these statements are not hit by Article 20(3) of the [Constitution of India](#) and because those were not statements by an accused of any offence and because the statements were made to an officer who was not a police officer, Section 25 of the Evidence Act would not be a bar to the admissibility of such statements. Section 25 of the Evidence Act simply states that no confession made to a, police officer shall be proved against a person accused of any offence. The statements in this case were sought to be proved against the makers thereof.

10. The decision in : 1972 CriLJ759 was again a case from Bombay High Court and the prosecution was in respect of Foreign Exchange Regulation Act. The appellant in this case was found present on the back seat of the car from the dicky of which gold was recovered. There was evidence to the effect that the said car before the recovery of the gold was brought at an odd hour of 2 a.m. and taken on the Kutcha track towards salt pans near a bridge across a creek. The car was thereafter parked on a kutcha truck near that bridge and its engine was kept running. After the car was intercepted the customs/officials interrogated the appellant and other accused. At the stage the appellant did not take up any plea that he did not know about the presence of the gold in the dicky. The fact that mud

on the gunny bags containing gold was wet, showed that the gunny bags had been placed on the dicky shortly before they were examined by the customs officials. The chain of circumstances, according to the Court, clearly pointed to the guilt of the appellant. Here also there were certain statements recorded by an officer of the customs and the same were held admissible and not hit by Section 25 of the Evidence Act. Such a statement was made by the appellant and that statement was sought to be proved as Ext. 17 and the aforesaid objection was taken, but was not accepted.

11. The third decision referred to by the Hon'ble Judge of the Allahabad High Court stands reported in : 1974 CriLJ280 . Here also a question arose on the admissibility of statements under Section 107 of the Customs Act and it was held that the expression 'any person' in Section 107 includes a person who is subsequently arraigned as an accused in the trial in respect of smuggled gold. When such a person was found in possession of smuggled gold, he being acquainted with the facts and circumstances of the case would be the best person to throw light with regard to such gold. He can, therefore, be examined under Section 107 of the Customs Act. Such statement was held admissible and the conviction of the appellant was upheld.

12. In the three cases the statements which were allowed to be proved were statements of the persons who were being prosecuted and who were found at the spot at the time of seizure. These statements under Section 107 were held admissible as not hit by Section 25 of the Evidence Act as the customs officials were not police officers and more so, the statements were made during enquiry and, as such, were not statements of persons accused of any offence. In the instant case at our hands however, the applicant was allegedly not present at the spot when the contraband was seized and he is being sought to be prosecuted on the basis of statement made by another person who is a co-accused. No doubt, the statement would be admissible but the question is not of mere admissibility or mere absence of bar under Section 25 of the Evidence Act, the real question relates to a proper interpretation of Section 30 of the Evidence Act. Section 30 is quoted below in toto :

30 Consideration of proved confession affecting person making it and others jointly under trial for the same offence.-

When more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such person is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. Explanation :- 'Offence', as used in this section includes the abatement of or attempt to commit the offence.

13. It was stated that this confession of a co-accused, even if proved, cannot be the basis of a conviction and although it is evidence in the generic sense, it is not evidence in the specific sense and it could afford corroboration to other evidence and cannot be the supporting point or the sole basis of the conviction. In this respect, reference could be made to a decision of the Supreme Court in the case of Hari Charan v. State as reported in : 1964 CriLJ344 , as also to another decision of the Supreme Court reported in : 1957 CriLJ559 wherein it was held that confession of a co-accused can only be taken into consideration but it was not in itself a substantive evidence. The Privy Council also held that a confession of a co-accused was obviously evidence of a very weak type and it did not come within the definition of evidence contained in Section 3, as reported in .

14. It is necessary to have the facts behind these decisions of the Supreme Court and the Privy Council. We may proceed chronologically.

15. The case before the Privy Council was from Patna High Court in which the High Court had dismissed an appeal against a judgment and order of the Sessions Judge convicting the appellant for an offence of murder. Privy Council, however, advised His Majesty that the appeal be allowed and the judgment was recorded giving the reasons for such advice. The evidence against the appellant consisted of, (a), the evidence of Kholli Bohara who had taken part in the murder and had become an approver, (b), the confession of Trinath recorded under Section 154 Cr.P.C. which implicated both himself and the appellant in the murder, and (c) the recovery of a loin cloth identified as the one which the deceased was wearing when he was assaulted and an instrument for cutting grass. For the purpose of the

instant case, the evidence in point (b) is relevant. The Privy Council quoted Section 30 of the Evidence Act and held in paragraph 9 of the Judgment (as reported) that Section 30 was introduced for the first time in the Evidence Act of 1872 and it was the departure from the common law of England. It was observed that this Section 30 applied to confessions and not to statements which do not admit the guilt of the confessing party. It was held that statement of Trinath was a confession. Their lordships further observed that Section 30 seemed to be based on the view that an admission of an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused, their lordships continued to observe, was obviously evidence of a weaker type. It did not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act. Such statement was not required to be given on oath nor in the presence of the accused and it could not be tested by cross-examination. It was a much weaker type of evidence than the evidence of an approver which was not subject to any of those infirmities. Section 30, however, provided that the Court might take into consideration the confession and thereby no doubt made it evidence on which the Court could act, but the section did not say that the confession was to amount to proof. Clearly, there must be other evidence and confession was only one element in the consideration of all the facts proved in the case, which can be put into the scale and weighed with other evidence. Their lordships confirmed the view that the confession of an co-accused could be used only in support of the evidence and could not be made a foundation of a conviction.

16. The case before the Supreme Court, as reported in : 1957 CriLJ559 was also of murder. It was a case in which corpus delecti was not traceable and proof of murder solely depended on a retracted confession of an accused. The Court was of the view that although corpus delecti was not found, there could be a conviction if reliable evidence, direct or circumstantial, of the commission of murder was available. However, a confession of a co-accused was not in itself a substantive evidence. This view was expressed in paragraph 10 of the judgment which was, per chance, pronounced in a case arising from the Allahabad High Court. The courts below had relied on a confession of accused Ram Chandra against a co-accused, Ram Bhrose, for holding him guilty of the offences charged against him.

The Supreme Court held. 'It is rightly urged that under Section 30, Evidence Act confession of a co-accused can only be taken into consideration but is not in itself substantive evidence.' The Supreme Court, however, was satisfied that even excluding the confession as substantive evidence there was enough material against the appellant Ram Bharose to find him guilty of offence of criminal conspiracy to commit offences charged. To come to the ratio, we find that the view was affirmed that confession of a co-accused could only be considered but could not be relied on as substantive evidence.

17. The case reported in AIR 1954 SC 1184 was again from the Patna High Court. Here also a question arose as to the probative value of a confession of one accused against a co-accused. The Supreme Court dealt with the definition clause in Section 3 in the Evidence Act and Section 30 thereof, as also some earlier decisions of the Apex Court. It was observed, in paragraph 15 of the judgment, as reported, 'It is true that the confession made by Ram Surat is a detailed statement and it attributes to the two appellants a major part in the commission of the offence. It is also true that the said confession has been found to be voluntary, and true so far as the part played by Ram Surat himself is concerned, and so, it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true; and in that sense, the rending of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion, however, grave, must not be allowed to take the place of proof. As we have already indicated, it has been a recognised principle of administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trial, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is

entitled to the benefit of doubt. That is precisely what was happened in these appeals.'

18. The question that actually arises in the instant case is not on the point of admissibility of a statement made to a customs official notwithstanding the bar of Section 25 of the Evidence Act. It is really the question of use of that confession against a co-accused and this use is permissible for a limited purpose only as per Section 30 of the Evidence Act. What is the scope of Section 30 has clearly been explained in the decisions of the Privy Council and of the Supreme Court. If it is barely the statement of a co-accused against the present applicant, then there could be strong suspicion against the applicant, no doubt. But, as observed by the Supreme Court, the suspicion, however great, could not take the place of proof. The lower Court records are not before us. The trial Court is in a position to look to every bit of material on which the complainant seeks to build up his case. The trial Court would be in a better position to look to such materials to find if the present applicant is sought to be prosecuted merely on the statement of a co-accused made to a customs official or on other materials also. It is, therefore, thought proper that the trial Court will look to the complaint and the materials that the complainant proposes to rely on and the trial Court would keep in mind the decision of the courts on the point of admissibility as evidence, of a confession of a co-accused against another. If there be any material other than the confession, the trial Court would proceed and if there be none others, then the complaint against the present applicant must not be allowed to proceed and he must be discharged at the threshold itself.

19. The present application stands disposed of with the aforesaid directions to the trial Court. The above said point shall be determined before proceeding further with the case and till a decision is taken on this point, the personal attendance of the applicant before the trial Court shall not be insisted upon, provided he appears through a counsel. If at all any process has been issued against the applicant, the same shall not be executed on condition that he would appear, as directed above, within 15 days from today and take up the objections that have been taken here. The trial Court would give its decision on such objection within a reasonable time, preferably within 3 months after giving an opportunity of hearing to the

complainant and the applicant.

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