

Union of India (Uoi) Vs. Phoolchand

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Court : Madhya Pradesh

Decided On : Dec-07-1979

Reported in : 1985(19)ELT49(MP)

Judge : G.L. Oza, J.

Acts : Gold (Control) Act, 1968 - Sections 2, 85(1) and 86(1) ; Code of Criminal Procedure (CrPC) - Sections 377(2) and 577(3)

Appeal No. : Criminal Appeal No. 131 of 1978

Appellant : Union of India (Uoi)

Respondent : Phoolchand

Judgement :

G.L. Oza, J.

1. This appeal has been preferred by the ppellant under Section 377(2) of the Code of Criminal Procedure for enhancement of sentence passed against the respondent who was convicted for an offence under Section 86(1)(ii) of the Gold (Control) Act, 1968 and sentenced to pay a fine of Rs. 500/-, in default rigorous imprisonment for three months by the Additional Chief Judicial Magistrate, Indore.

2. The prosecution case was that on 2nd October, 1969 at about 9.30 p.m. Central Excise Inspector Shri Tripathi (P.M. 1) apprehended the respondent on suspicion

and took him to the waiting room and on search found that he was wearing two circular gold rods (ICADAS) one in each of his arms between the elbow joint and the shoulder covered by white paper pieces under his shirt. These gold Kadas were got tested and weighed and it was found that each of them were of 116.300 grams of weight and of 24 carats purity. These KADAS described as circular rods were 'therefore, seized by the Excise Inspector treating them to be primary gold and panchnama was prepared. Statement of respondent was also recorded in the departmental proceedings. The gold was confiscated by the Assistant Collector, Central Excise and the respondent was prosecuted before the lower Court under Section 85(1)(ii) of the Gold (Control) Act, 1968 on the allegation that he was in possession of primary gold. The learned Magistrate convicted the respondent but sentenced him to a sentence of fine only. No sentence of imprisonment was awarded. Against this judgment the appellant has preferred this appeal and it was contended on behalf of the appellant that sentence of imprisonment was necessary. According to the learned counsel according to the law applicable on the date of offence the sentence of less than six months could only be awarded after giving special reasons for doing so although he frankly conceded that after the amendment as the law now stands lesser sentence could be awarded even without assigning special reasons but he contended that in view of the fact that this is an economical offence a deterrent sentence should have been awarded. Learned counsel placed reliance on a decision reported in *Balkrishan Chhaganlal Soni v. State of West Bengal* (AIR 1974 S.C. 120).

3. Learned counsel appearing for the respondent contended that in fact the conviction itself is not justified as the evidence is not sufficient to establish that the respondent was in possession of primary gold. According to the learned counsel for the respondent even from the evidence led by the prosecution it is clearly established that what was found in possession of the respondent was ornament and not primary gold. Consequently learned counsel contended that the respondent is entitled to acquittal. He further contended that in an appeal under Section 577(3) the respondent is entitled to contend that the conviction itself is not justified. In the alternative learned counsel contended that in view of the amended law and in view of the fact that Departmental action for confiscation of gold had already been taken, the sentence awarded by the learned trial Court is just and it

does not call for an interference.

4. Prosecution has examined P.W. 1 Shri Tripathi an Inspector of the Central Excise who seized these articles. This witness has attempted to suggest that the articles seized were primary gold because they were of 24 carats purity. However, learned counsel appearing for the appellant frankly conceded that this could not be the basis to hold that it is primary gold. 'Primary gold' has been defined in Section 2(r) of the Act and it reads-

'Primary gold' means gold in any unfinished form and includes ingots, bars, blocks, billets, slabs, hosts, pellets, rods, sheets, foils and wires.

Similarly 'ornament' has been defined in sub-clause (P) of Section 2 as-

'Ornament' means a thing, in a finished form meant for personal adornment or for the adornment of any idol, diety or any other object of religious worship made of or manufactured from gold, whether or not set with stones or gems real or artificial or with pearls (real, cultured or imitation) or with all or any of them and includes parts, pendants or broken pieces of ornament.

If the bangles (KADAS) which were recovered from the respondent will not fall within the definition of gold as it will not be any one of those things mentioned under the definition of primary gold. Learned counsel, however, contended that they would fall within the category of rods and according to this learned counsel the articles were unfinished. It appears that that is why an attempt was made to describe the bangles as circular rods although that definition does not appear to be correct. Rods ordinarily are supposed to be straight. As discussed earlier except P.W. 1 Shri Tripathi who treated those Kadas to be primary gold only on the basis of its purity. There is another witness examined by the prosecution who is said to be an approved gold testor of the Government of India, P.W. 3 Kishanlal. He in paragraph 7 of his deposition has stated that such gold bangles are used as ornaments by villagers who are possessed of sufficient means. This statement by P.W. 3 Kishanlal was not at all challenged by the prosecution and admittedly he is the witness examined by the prosecution and supposed to be an expert of these things as he claims to be an approved gold testor of Government of India and this

fact also has not been challenged. There is no other evidence in the case to show that what was recovered from the respondent was not ornament but primary gold. Learned counsel appearing for the appellant very much insisted on the use of phrase 'finished' and unfinished. But he had to admit that there is no criteria fixed for finished nor this could be said that what could be said to be unfinished. Accordingly to the prosecution's own witness the articles seized from the respondents were bangles which according to P.W. 3 Kishanlal were of common use in the villages amongst the villagers, who are possessed of sufficient means.

5. Learned Counsel for the appellant seriously contended that the real distinction is in finishing but he had ultimately to admit that none of the prosecution witnesses has said a word about finished ornaments. It is strange that P.W. 1 Shri Tripathi, the Excise Inspector, who seized those articles and who is even a witness of the prosecution in his deposition has stated that any ornament which is of 24 carats purity will be treated by him as primary gold. That indicates the understanding of this Inspector about the enforcement of the law. It is unfortunate that such officers are left on duty to enforce the law who even do not understand the primary law. There is no evidence on the record to suggest that the articles the respondent was carrying is primary gold. It is unfortunate that the learned Magistrate convicted the respondent without there being any evidence in that behalf and it appears that it was this obsession that the learned Magistrate dealt with the respondent very leniently by awarding a sentence of fine only but having gone through the evidence as discussed above it could not be doubted that there is no evidence at all for maintaining the conviction of the respondent.

6. In view of this, therefore, there is no question of consideration of the contention advanced by the learned counsel for the appellant on the question of enhancement of sentence. As conviction of the respondent itself could not be maintained, there is no question of sentence at all. The appeal filed by the appellant is therefore, without substance. But it is found that the conviction of the respondent could not be maintained, the conviction and sentence passed against him are set aside and it is directed that if the amount of fine has been paid, it shall be refunded to the respondent.

