

**Sunil Pandey Vs. Customs**

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**Court :** Delhi

**Decided On :** Jul-30-2007

**Reported in :** 2007(218)ELT512(Del)

**Judge :** S. Ravindra Bhat, J.

**Acts :** Customs Act - Sections 108 and 135(1); Evidence Act - Sections 25; Food Adulteration Act - Sections 14; Essential Commodities Act - Sections 7; Bombay Public Trust Act, 1950; Foreign Exchange Regulation Act - Sections 10(1) and 23(1); Gold (Control) Act - Sections 85 and 86; Code of Criminal Procedure (CrPC) - Sections 227 and 228; Indian Penal Code (IPC) - Sections 120B; Sea Customs Act - Sections 171A

**Appeal No. :** Crl.Rev.P. 482/2003

**Appellant :** Sunil Pandey

**Respondent :** Customs

**Advocate for Def. :** Satish Aggarwal, Adv.

**Advocate for Pet/Ap. :** Puneet Mittal, Adv

**Disposition :** Petition dismissed

**Judgement :**

## **S. Ravindra Bhat, J.**

1. In this revision an order of the learned Additional Metropolitan Magistrate dated 21.03.03 charging the present petitioner for committing the offence punishable under Section 135(1)(a) of the Customs Act, has been assailed.

2. According to the complainant/Customs Department, on 18.07.97, a passenger disembarking from a Singapore flight was carrying a black zipper bag. His name was Satpal Singh. He was a Malaysian passport holder. He allegedly entered the customs area and proceeded to the green channel. Upon being questioned about whether he had any dutiable items like gold etc. he responded in the negative. The X-ray screening of his hand bag did not indicate anything but the metal detector indicated presence of some objects on his person. After giving notice, he was searched in the presence of two witnesses. He was found wearing a specially designed bag of velvet cloth underneath his clothes. These contained seven gold bars of foreign origin of one kg. each. The contraband was valued at Rs. 31.5 lakhs and Rs. 41.67 lakhs. In addition, a visiting card bearing the name of 'Monica Sarees' was recovered.

3. During the course of investigations, the said accused Satpal Singh recorded a statement under Section 108 of the Customs Act. The material portion of that statement reads as follows:

On enquiry, I state that the gold belongs to one Malaysian, Abdul Mohammad having business in both Malaysia and Singapore. This gold was to be given to one person Sunil in Delhi. This is the same person whose name appears on the reverse of the visiting card of Monika Sarees. This card was given to me when I came to India a couple of years ago and had gone to Chandni Chowk to buy some sarees for my wife and the shopkeeper must have given me its card and when I started carrying gold for Abdul Mohammad. He told me that the person named Sunil will meet me at the Airport and by telling his name take delivery of the gold from me whenever I carried gold, Sunil used to meet me outside the Airport and take the gold from me in the taxi and used to drop me at Sis Ganj Gurudwara, where I used to stay. I do not know the address or telephone number of Sunil. Sunil is about 30 years, fair, slim of average height with a moustache and he has

brown eyes.

I am just a carrier for Abdul Mohammad. I used to get fully paid ticket and expenses paid and about five hundred Ringlet per kilo of Gold. This time also received the free ticket and expenses given by Abdul Mohammad once I reached Malaysia for carrying nine kilo of gold. This time also Sunil was to meet me outside the Airport and take away the gold. I have stayed in Sis Ganj Gurudwara and was to go back on 23.07.99 by SQ 407.

I knew Abdul Mohammad since last 7 years because he has business. The masjor India Kuala Lumpur. I first came to know him when he hired my van. I used to drive the van myself at that time he used to come acess...and knew that I was not making enough money. About two years back, he suggested that if I carry gold for him, he would given me good money and I agreed. Whenever he wanted to send the gold to India, he used to call me at his office in Kuala Lumpur in the name of S.M. Mohammad and gave the gold to me along with enough money to buy air ticket and to carry my expenses. I used to buy the ticket of my own and informed Abdul Mohammad about the date and time of the flight. This time also, Abdul Mohammad give me gold on 16.07.97 and gave me money to buy air ticket...on 17.07.97 by SQ 45/SQ 408 and back by SQ 407 on 23.07.97. I expected Sunil to meet me outside Airport....

The custom officer took me outside the Airport as I told them that Sunil may be waiting outside, I strolled about for sometime with the custom officer watching me from a distance. But Sunil did not come. After waiting for sometime, the officer escorted me back to the custom room.

4. The employer of the present petitioner, (who was arrayed as second accused) was summoned for his statement. He recorded that the petitioner was about 29-30 years and he worked as a Salesman in his shop. According to him the petitioner was married and had children; and all his brothers were also residing with them.

5. Mr. Puneet Mittal, learned Counsel urged that the materials on record were so scanty that the Court was not justified in framing the charge, as it did. Counsel submitted that the entire justification for the impugned order appeared to be

statement of the co-accused Satpal Singh. That was inadmissible so far as the petitioner was concerned and in any event if the matter went to trial, it could never be the sole foundation for a conviction. Learned Counsel relied upon the judgment of Supreme Court as Haricharan Kurmi v. State of Bihar : 1964 CriLJ344 . That was a judgment by Constitution Bench; it held 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; if it feels the necessity of seeking assurance in support of its conclusion deducible from it. He also relied upon the judgment of this Court in Om Prakash Baksh v. State 1989 Cri.L.J. 1207.

6. Learned Counsel urged that the only material to establish a link between the present petitioner and a co-accused was the allegedly recovered visiting card. That objective material apart from the inadmissible statement if taken together could establish nothing. In these circumstances, requiring the petitioner to stand trial would not only be a futile exercise but may put him to the rigours of an avoidable proceeding.

7. Mr. Satish Aggarwal, learned Counsel contended that the Court while framing the charges was alive to all the materials. It carefully weighed the arguments led on behalf of the petitioner and yet proceeded to frame charges. In these circumstances, this Court should be slow in interfering with its order.

8. Learned Counsel relied upon the judgment of this Court reported as Paramjit Singh v. Commissioner of Customs 2002 (2) JCC 916 and contended that in identical circumstances the charges framed by the trial Court on the basis of confessional statements of co-accused in a case of recovery of 27.17 kgs. of gold, were upheld. Learned Counsel relied upon the judgment reported as Naresh Sukhwani v. Union of India 1996 SCC 76. According to his submission, the statements of co-accused under Section 108 constitutes relevant and admissible evidence. therefore, the Court would be justified in framing a charge. It was also contended that the Court should not interfere with the impugned order, on the basis of relative merits of the evidence. If there is some material - as indeed there is in the present case, justifying the charge, its worth, should not be looked into under Section 227 and 228 of the Code of Criminal Procedure. It was lastly

contended that the Court was also influenced by the petitioners conduct; he did not cooperate and join the investigations at any stage. This was taken into consideration by the trial Court which noticed that the petitioner though served with notices under Section 108 did not respond and report to the concerned officer. He further submitted that the co-accused was absconding and not appearing in the trial.

9. It is no doubt true that in Haricharan Kurmi 's case the Supreme Court held that a confession should be taken into consideration if it is for the purpose of reassuring that the other materials indicate guilt of the accuse. Yet, in a later decision, of a Constitution Bench, i.e Illias v. Collector of Customs : 1970 CriLJ998 the Supreme Court held that Customs authorities have been invested under the Act with many powers of a police officer in matters relating to arrest, investigation and search, which the Customs Officers did not have under the Sea Customs Act. Even though the Customs Officers have been invested with many of the powers which an officer in charge of a police station exercises while investigating a cognizable offence, they do not, thereby, become police officers within the meaning of Section 25 of the Evidence Act. So, confessional statements made by accused persons to Customs Officials would be admissible in evidence against them.

10. In a more recent decision of a three judge decision, K.I. Pavunny v. Asst Collector (HQ) Central Excise : 1997(90)ELT241(SC) , the Supreme Court noted the law as follows:

In Haroon Haji Abdulla v. State of Maharashtra : [1968]2SCR641 , for the offence of conspiracy punishable under Section 120B of IPC and Section 171-A of the Sea Customs Act, the question arose whether the confession of the co-accused who died pending trial before delivery of the judgment, could be used against a co-accused This Court considered the evidence of an accomplice together with the statements of two accused recorded under the Act, viz., one Bengali and another Noor Mohammad. How and what evidence could be relied upon against the other accused was the question. One of the accused who gave the evidence was an accomplice. In that case, it was held in para 9 of the judgment that the 'argument

here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice'. On consideration of the evidence, this Court had held in para 13 that the

Customs Authorities served notices upon various suspects and recorded their statements in answer to these notices. The statements of Kashinath (Ex. A) and Bengali (Ex. Z-27) were recorded on the 15th, the former by Karnik (PW 24) and the latter by Rane (PW 26). These statements were recorded simultaneously or almost simultaneously. The statement of Noor Mohammad (Ex. Z-17) was recorded by Randive (PW 22) on August 19. As there was no gap of time between the statements of Kashinath and Bengali and the incident was only a few hours' old, it is impossible that the officers could have tutored them to make statements which agree in so many details.

On consideration of the evidence it was held that 'although Noor Mohammad's statement was not used by the High Court and we have reluctantly left it out of consideration also, nothing was shown to us to destroy the conclusion about the truth of accomplice evidence. If it was, we would have considered seriously whether we should not take it into consideration. Further Haroon himself was also served with a notice like others. He was unwilling to make a statement till he had seen what the others had said. This may well be regarded as peculiar conduct in a man who now claims that he was not concerned with the smuggling.

The normal rule that accomplice's evidence requires corroboration on material particulars from independent evidence was not applied. Thus this Court had accepted the accomplice's evidence and the statements of others were used to confirm the conviction. Normally means read is an essential ingredient of the crime but this Court in the case of offences punishable under Section 14 of the Food Adulteration Act or Section 7 of the Essential Commodities Act, had held that means read is not an essential ingredient in proof of statutory offences.

28. In *State of Gujarat v. Acharya D. Pandey* : 1971 CriLJ760 while holding that even in statutory offences in certain circumstances, unless the statute excludes expressly or by necessary implication, means read is an essential ingredient. It was held that the offences under the Bombay Public Trust Act, 1950 were not of

serious nature. It was held that means read was not an essential ingredient for proving the commission of offences. In Director of Enforcement v. M.C.T.M. Corporation (P) Ltd. : 1996 CriLJ1623 a two-Judge Bench was to consider whether means read is an essential ingredient in the proceedings taken under Section 23(1)(a) of the Foreign Exchange Regulation Act. It was held that means read is not an essential ingredient to establish contravention under Sections 10(1) and 23(1)(a) of that Act. It is not necessary in this case to broach further whether means read is an essential ingredient for proving the commission of the offence under Sections 135 of the Act or Sections 85 and 86 of the Gold (Control) Act since none has raised such contention. What is required to be considered is whether voluntary statement, Ex. P-4 given by the appellant constitutes the sole basis to prove the commission of the offence under Section 135(1)(i) of the Act.

11. Though the above decisions were not adverted to in Paramjit Singh by this Court, the law appears to be that there is no absolute bar about the use of confessions of a co-accused in proceedings relating to offences under the Customs Act. Although the petitioner's grievance of having to face a trial may to some extent be justified, yet the circumstance that he did not respond to the notices- a factor noticed by the trial court, and the nature of the recoveries, constrain me to conclude that it would be unsafe for the court to surmise that he is blameless, at this stage. The added factor is that the co-accused has not appeared in the proceedings.

12. In view of the above discussion, I am satisfied that the impugned order does not suffer from any illegality or unreasonableness in approach; the charges framed against the petitioner do not require interference. However, having regard to the peculiar features of the case, i.e. the incident having occurred almost a decade ago, it would be in the interests of justice that the trial is concluded as early as possible; in any case within 10 months from today. The trial court is so directed.

13. The petition is therefore dismissed, but subject to the directions in the foregoing para.