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Court : Rajasthan

Decided On : Feb-19-1962

Reported in : 1962CriLJ584

Judge : I.N. Modi and; L.N. Chhangani, JJ.

Appellant : The State

Respondent : Padmaram

Judgement :

I.N. Modi, J.

1. This is an appeal by the State against a judgment and order of the First Class Railway Magistrate, Jodhpur, dated the 2nd January, i960, acquitting the accused respondent Padmaram of as offence Under Section 167(81) of the Sea Customs Act 1878, (Act VIII of 1878) read with Section 23 of the Foreign Exchange Regulation Act, 1947 (Act VII of 1947).

2. The prosecution case was briefly this. It was alleged that on the 18th October, 1957, information having been received that smuggled gold was being carried by certain passengers, (whose names were not mentioned,) travelling by the railway train bound from Barmer for Jodhpur, P.W. 5 Kuberdany a Deputy Superintendent of Policy who was deputed on special duty at Jodhpur in connection- with anti-smuggling operations and P.W. 2 S. S. Chawla, a Deputy Superintendent of

Customs at Barmer who was also at Jodhpur on that date, in the same connection, reached the Jodhpur Railway Station at about 6-30 A.M. which was the time when the said train was to arrive at Jodhpur. They were accompanied by P.W. 1 Mohansingh, an inspector of the Central Excise Department and P.W. 3 Lalsingh a Sub-Inspector of Police who also formed part of the-anti-smuggling squad. P.W. Mohansingh was-standing on platform No. 3 of the Jodhpur Railway Station when he saw that the accused Padmaram got down from the train towards the second line and was going towards the station platform. Mohansingh stopped the accused as he was carry-'ing a bag in his hand asked him what he .had1 therein. The accused told Mohansingh that he did not -know what was in the bag. We have it from Mohansingh further that the accused did tell him at the time that the bag had been given over to him by some merchant (the exact word used in this connection is 'Bania') who was travelling with him in the same compartment but lie did not know what it contained. This naturally excited his suspicion and he brought the accused on the-platform with the bag. The accused was then searched in the presence of Kuberdan, S. S. Chawla and two Motbirs P.W. 4 Kishanchand, and P.W. 5 Sheodutt, and it was found that tied in two pieces of cloth (and these pieces were in turn wrapped in a towel), there were two lots containing ten flat pieces of gold biscuit shaped, and each of these pieces, weighing ten tolas, had a seal on it bearing the name of 'N. M. Rothchild and Sons' and further bearing the figures 999 therein, the latter mark presumably ipdicating the quality of the gold. A recovery list (Ex. P-i) was immediately made and signed by P.Ws. Kuberdan, S. S. Chawla and Lalsingh. and three Motbirs Arjunsingh, an Assistant Station Master at Jodhpur, and Sheodutt, a Travelling Ticket Examiner, and by Kishenchand, a hotel-keeper, and the last two were produced by the prosecution at the trial.

A complaint was consequently filed by the Assistant Collector of Central Excise and Customs, Ajmer, in the court of the Railway Magistrate, Jodhpur. On the 27th June, 1958, on the aforesaid allegations, and further stating that the marks inscribed on the pieces of gold recovered from the; accused indicated that the same were of foreign origin and that the officers concerned had seized the same in a reasonable belief that they had been smuggled from foreign territory in contravention of the prohibition imposed on the import of gold by the Government of India vide notifications Nos, 12 (II) FI/48 dated 25th August, 1948, and 12 (II)

FI/51 dated the 27th February, 1931, issued under Section 8(1) of the Foreign Exchange Regulation, Act, 1947, and, therefore, it was alleged that the accused committed an offence Under Section 167 (81) of the Sea Customs Act 1878 read with Section 23A of the Foreign Exchange Regulations Act, 1947.

It was also stated in the complaint that the Assistant Collector of Central Excise at Ajmer had authority to lodge the complaint according to a certain notification referred to therein; but we need not mention any details in that connection as the authority of the officer concerned to file the complaint is not the subject-matter of any controversy whatever.

3. The accused respondent Padmaram pleaded not guilty to the charge which was levelled against him. His case, put briefly, was that he was not the owner of the gold in question nor was the gold ever recovered from his possession. According to him, two merchants were travelling with him in the same compartment and the bag from which the gold was recovered belonged to them. What bad really happened, according to the version of the accused was that the Thanedar had caught hold of all these three persons in the railway compartment itself and when the Mahajans saw the Thanedar coming, they kept the bag on the seat on the other side whereof the accused was -sitting. The Thanedar asked each one of them -to whom the bag belonged and to this' question the Mahajans as well as the accused replied in the negative. Thereafter, the said officer brought all the three of them to the station platform and the rage was opened there in the presence of the Motibirs and gold was found therein. Thereafter the (police officer somehow left the Mahajans scot free and implicated him. The accused produced two witnesses in his defence and we shall have occasion to refer to their evidence at the proper place.

4. In support of its case, the prosecution produced P.W. 2, S.S. Chawla, the Deputy Superintendent of Central Customs and P.W. Kuberdan, the Deputy Superintendent of Police, and P.W. 1 Mohansingh, the Inspector of Central Excise and P.W. 3 Lalsingh the Sub-Inspector of Police, apart from P.Ws. 4 and 6 the Modifiers in whose presence .the accused was searched and gold was recovered from. him. As it transpired, the Motbirs staged a somersault, and memo or less

repudiated the recovery of gold which had been made from the accused vide Ex. P-I. Apparently, the learned Magistrate was inclined to prefer the evidence of the Motbirs as against that furnished by the various officials referred to aboyi1 and came to the conclusion that the recovery of gold from the possession of the accused had not been satisfactorily established. The learned Magistrate also relied on certain contradictions to which we will have occasion, to refer hereafter.

He also found that Section 178A of the Sea Customs Act upon which the prosecution placed its-reliance was violative of Article 19 of the Constitution, and reliance was placed in coming to this conclusion on N. S. Chetty v. Collector of Customs : AIR1959 Mad142 . Therefore, according to the learned Magistrate, the burden of proving that the gold was smuggled lay on the prosecution and this burden it had failed to discharge. The learned Magistrate, however, was clearly of the opinion that the defence evidence led by the accused was entirely unworthy of belief; but as ha was of the view that the prosecution had failed to prove its own case, the worthlessness of the defence evidence was of no consequence, and in that view of the matter, he acquitted the accused. Hence the present appeal.

5. The learned Government Advocate has strenuously attacked the judgment of the trial. Magistrate, and we shall deal with his grounds one by one.

6-11. The learned Government Advocate' first ground of attack was that the finding of the learned Magistrate that twenty gold pieces were not proved to have been recovered from the possession of the accused was entirely wrong and almost bordered on perversity. It was submitted in. this connection that there was no reason to doubt the evidence of the witnesses for the prosecution having regard to all the circumstances of the case, the more so as the learned Magistrate had entireh-disbelieved the defence evidence on this aspect of the case. There is force in this submission. (After considering the evidence his Lordship concluded:) In these circumstances, we have no hesitation in coming to the conclusion that the finding of the learned Magistrate that the gold was not proved to have been recovered from the possession of the accused is completely wrong and we are fully satisfied that there is no valid reason not to accept the case of the prosecution at its face value so far as this aspect thereof is concerned. We hold accordingly.

12. This brings us to the next question pertaining to the unconstitutionality of Section 178-A of the Sea Customs Act On account of its alleged conflict with Article 19(1)(f) and (g) of the Constitution. Section 178-A reads as follows;

178-A. Burden of proof. (1) Where any goods to which this Section applies are seized under this Act in 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 are seized.

2. This Section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf.

3. Every notification issued under Sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued.

Fortunately for us, it is unnecessary to canvass this contention at any length as in the meantime this very controversy happened to engage the attention of their Lordships of the Supreme Court in Collector of Customs, Madras v. Nathella Sampathu Chetty Civil Appeals Nos. : 1983ECR2198D(SC) , This decision is still unreported but a blue print thereof is before us for our perusal, and after an ebaborate discussion of; all the relevant grounds of attack, if we may say so with all respect it was held by their Lordships that the rule of evidence contained in Section 178-A was in the interest of general public and that it was not correct to say that the rule travelled beyond the due bounds of reasonableness because it could not be said that the social good to be achieved by this kind of legislation was disproportionate to the importance of the object to be' achieved by it, namely, the prevention and eradica tion of smuggling. That being so, the view entertained by the learned Magistrate based on : AIR1959 Mad142 (supra) must be held to be no longer tenable and has to be vacated, and the prosecution would undoubtedly be entitled to the benefit of this provision provided that it can properly bring itself within the four walls of this rule.

13. Therefore, there can be no doubt that if any goods, to which Section 178-A applies were seized in this case under the reasonable belief that they were

smuggled, then the prosecution are relieved from the burden of proving that the goods are smuggled ones and the burden of proving that they are not smuggled must rest on the person from whose possession the goods were seized. Now, it is not the contention of the defence that the kind of goods, namely gold, which was seized in this case does not fall within the mischief of this section.

The only question, therefore, is whether they were seized by the person or persons concerned in the reasonable belief that they were smuggled. Our attention has been drawn in this connection to the decision of a learned single Judge of this Court in Manka v. The State ILR (1960) 10 Raj 1274 : 1961 (2) Cri LJ 406 in so far as it bears on the question of reasonable belief, and it is submitted that the question of reasonable belief is a subjective affair for the officer making the seizure, and, therefore, where affirmative evidence as to such officer having entertained the requisite belief has not been given, as in the present case, it will not be right for the Court to infer from the circumstances which might have been before him and which might have inspired a reasonable belief that the goods were smuggled that that officer had entertained a 'reasonable belief to that effect. And that being so, fully granting that Section 178-A is valid, the prosecution would still not be entitled to the benefit of the rule contained in Section 178-A, and the burden of proving that the goods west smuggled would still lie on it where such evidence is not orthcoming.

It would not be inappropriate, if we state the learned Judge's view in his own words before we proceed to consider it :

It will be seen that neither of the two officers stated that he seized the gold in the reasonable belief that it was smuggled. 'The evidence and circumstances appearing in the statements of these two officers are such that it was possible for them to have entertained a reasonable belief that the gold recovered from the possession of Manka was smuggled gold.' But whether or not they did actually entertain such a belief or merely a suspicion they alone could have known. The court can only infer on the basis of the evidence and circumstances proved in the case where there were reasonable grounds existing on the basis of which the officers could have entertained a reasonable belief. But the Court cannot say

whether or not they did entertain such a belief or merely a suspicion. Belief is a subjective matter. For a belief to exist there must be a believer and it is. that believer who must believe that the gold is smuggled gold at the time he seizes them. Then alone the provisions of Section 178-A are attracted.

I accordingly- hold that in the present case it has not been proved that the gold was seized by the customs officers under the reasonable belief that it was smuggled one. The provisions of Section 178-A are accordingly not attracted. The burden,, therefore, lay on the prosecution to prove that the gold was smuggled one.

With respect, it appeared to us at the time of the arguments that the view of 'reasonable belief which is propounded in the paragraphs extracted above was perhaps unduly narrow. The reason is that the real requirement of the provision is not a mere belief which would be entirely subjective, but a 'reasonable belief, that is a belief which should be supported by reasons. And to prove such a requirement, the mere repetition on the part of the seizing officer that he had a reasonable belief should hardly improve matters so far as the satisiaction of this particular requirement goes. What we mean to say is that the Legislature could have hardly considered sufficient a mere repetition of the phrase 'reasonable belief' as a sort of an incantation unless the belief could be supported by reasons.

Therefore, where no reasons can be shown for the mere subjective belief on the part of the officer concerned that the goods were smuggled, Section 178-A would, in our opinion, not be satisfied even if the officer making the seizure repeated these words. Per contra, it seems to us that whether the officer repeated these words or not, if it can be shown on the material before the Court that he did or could have had a reasonable belief that the goods were smuggled and therefore he had it, no matter that he did not use the specific words in the evidence he gave in court, even then the requirements of this Section would be satisfied, and then the presumption contained therein would arise in favour of the prosecution and then it would be for the accused to prove that the goods were not smuggled. In other words, the requirement of reasonable belief' is in fact an objective requirement and there is no reason in logic or in common-sense why it should not

be held to be satisfied if there happen to be evidence and circumstances appearing in the prosecution ease on the basis whereof the officer seizing the goods could have enteratined a reasonable belief that the goods recovered were smuggled.

14. We feel greatly fortified in the view we have propounded above by certain observations made by their Lordships of the Supreme Court in : 1983ECR2198D(SC) (supra). As one of the grounds on which the validity of Section 178-A was attacked before the Supreme Court, it was urged that the requirement of Section 178-A, namely, that the belief of the officer seizing the goods should rest on reasonable grounds provided no safeguard to the citizen, as the seizing-officer would entertain such a belief on improved information gathered from sources which most often are not and in practice cannot be expected to be disclosed to the party affected, and in that connection it was further urged that the reasonable belief of the officer was one entirely for his subjective satisfaction and that this rendered the protection wholly illusory and, therefore, unreasonable. And in support of this submission, a passage from an earlier decision of the Supreme Court in Babulal Amthalal Mehta v. Collector of Customs, Calcutta : 1983ECR1657D(SC) was relied on which runs as follows:.

the only pre-requisite for the application of the Section is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled.

The learned Solicitor-General, who appeared on behalf of the Collector of Customs, candidly accepted that the passage quoted above was 'just an observation and that he would not support it.' and it was accepted that a seizure to which Section 178-A was applicable was merely a preliminary to proceedings before a quasi-judicial authority Under Section 182, and that when the matter came up for adjudication before that authority, the latter would have to be satisfied that the seizure was made 'in the reasonable belief' that the goods seized had been smuggled ones, and that such satisfaction would necessarily involve the examination of the grounds upon which that belief has entertained with a view to ascertain whether the belief was reasonable. Their Lordships obviously accepted, this view and observed as follows:

It is, no doubt, true that in some cases there might be pieces of information on the basis of which the seizure was effected which might not be capable of being disclosed to the affected party because it might consist of information supplied by customs informers, but if that information would have to stand the test of scrutiny as to credibility by an independent officer dealing with it in a quasi-judicial capacity it cannot be said that the protection is illusory. It has also to be added that at the stage of appeal or revision from the orders of the officer adjudging confiscation Under Section 182 of the Act each successive appellate or Revisional authority has also to address itself to this requirement.

Earlier, their Lordships had also observed in their judgment that although there was no doubt on the language of Section 178-A that the presumption of the goods being smuggled would arise only when the seizure was made by an officer entertaining a reasonable belief that the goods are smuggled, and in that sense the reasonable belief of the seizing officer was a pre-requisite for the statutory onus to arise, but it was also to that at the stage of the adjudication the reasonableness of the belief of the officer effecting the seizure that the goods were smuggled would be the subject-matter of investigation by the adjudicating officer. All that we should like to add further in this connection is that what their Lordships observed as respects the necessity of satisfying the adjudicating authority Under Section 182 as to the reasonableness of the belief on the part of the officer seizing the goods that they were smuggled ones would a fortiori apply in the case of a criminal trial which is before a court of law. In other words, before the prosecution can be allowed to rely on the presumption arising Under Section 178-A, it must prove that there were facts and circumstances on the basis of which the officer seizing the goods could have entertained the reasonable belief that the goods were smuggled. We hold accordingly.

15. The true question for determination, therefore, as a pre-requisite for the application of Section 178-A would be whether it can be said on the circumstances and facts of the present case that the seizing officer had at the time of the seizure of the goods reasonable grounds to entertain the bet the that the goods seized had been smuggled, and a mere repetition of the words 'reasonable belief' at the trial or a mere failure to do so on the part of such officer could not really be

decisive.

16-18. Now, let us look at the evidence offered by the prosecution in this case in the light of the principle we have enunciated above. (After summarising the facts and considering the circumstances his Lordship proceeded:). The short question on the facts and circumstances narrated above was whether the officer or officers affecting the seizure could be said to entertain a reasonable belief that the goods were smuggled within the meaning of Section 178-A. Our answer to this Question is positively yes. We have, therefore, no hesitation in holding that the seizing-officer or officers had, at the time of effecting the seizure, a reasonable belief -that the goods recovered from the accused were smuggled ones. It must follow therefore that the burden that the goods were not smuggled statutorily shifted on to the shoulders of the accused. Such proof is utterly lacking in this case. There is, therefore, no escape from the conclusion that the goods must be held to have been proved to be smuggled ones within the meaning of the Sea Customs Act.

19. The next question that falls for determination is whether the other requirements as to knowledge and intention which are the essential ingredients of an offence Under Section 167 (81) are fulfilled in this 'case. Firstly, as to whether the accused was knowingly carrying smuggled goods: what does this requirement involve? Our attention in this connection has again been invited to certain observations in Manka's case ILK. 1960) 10 Raj 1274 : 1961 (2) Cri LJ 406) (supra)

Even in cases in which a presumption can be drawn Under Section 17 8-A, it has further to be established that the person knew that the goods were smuggled ones. For the presumption raised under that Section is not that the person from whom the gold is seized under a reasonable belief is a smuggler or is in any manner concerned in smuggling of that gold or that he is in possession of it knowing that it is smuggled'.We have carefully considered this matter and are disposed to hold that where Section 178-A has once rightly come into play, then the burden of proving that the goods were not smuggled shifts by force of statutory law on to the accused, and the prosecution is relieved of the duty of affirmatively proving that the goods were smuggled, and that in that class of case, therefore, where the accused fails to give any satisfactory explanation for his possession,

then all that would be further necessary for the prosecution to establish would be that the accused was doing any one of the things mentioned in Section 167 (81) knowingly, that is, consciously, or, if we may say so, otherwise than by sheer accident. We are, therefore, unable to see any merit in the view that the prosecution must still establish in a case of this character by evidence aliunde that the goods which he was in possession of or was otherwise concerned with were 'smuggled'.

It may be that the accused in a conceivable case does succeed in explaining his possession even where a presumption is raised Under Section 178-A such as by proving that the goods had been dumped into his godown by an inimical rival without his knowledge or that he had purchased the goods in the open market for a fair price in the normal course of his trade and had, therefore, no reason to suspect that the goods were smuggled, and in this class of case we think that it would be certainly for the prosecution to establish the two-fold ingredient of (1) knowingly and (2) possessing or being otherwise concerned with 'smuggled' goods. But in a case where a presumption can be properly raised Under Section 178-A and the accused has furnished no explanation whatever for his possession of a dutiable or a prohibited commodity and or the explanation offered by him is unworthy of credence, then, in our opinion, all that would be necessary to satisfy the ingredient of knowledge within the meaning of Section 167 (81) would be for the prosecution to prove that the accused was in conscious possession of the goods in question or was otherwise consciously connected with them in any one of the modes mentioned therein. If that is a correct exposition of the law on this aspect of the ,case as we think it is, then we find ourselves unable to agree with the view propounded if Manka's case ILR (1960) 10 Raj 1374 : Quoin (2) Cri LJ 406) (supra), if and in so far as it lays down anything to the contrary and would hold that it-is not sound.

20. Let us now apply the aforementioned principles to the present case. We have already held that Section 178-A was rightly attracted into application in this case. We have also held that 20 to has of gold was recovered from the possession of the accused. There was, therefore, a strong prima facie case against the accused. The explanation offered by the accused for his possession has also been held to

be entirely incredible and therefore) the burden to prove that the goods had been duty paid or had been imported lawfully lay on the accused which has not been discharged. The question then is was the accused harboring the goods knowingly? We have no doubt that the accused was knowingly, that is consciously carrying the goods in the present case. There can be no question that the bag in which the gold was contained, and this gold was weighing 200 tolls, could have been carried by him accidentally or that some body had forcibly thrust it into his hand of which there is neither an allegation nor proof. Again, it is not the case of the accused that he-had purchased these goods from some body in the of the market and in the ordinary course of trade, and, therefore, he had no knowledge or reason to believe that the goods were uncustomed. We, therefore, hold that the requirement of knowinglv carrying smuggled goods is fully established in this case.

21. The only other question is whether the necessary intent to defraud the Government of any duty payable thereon or to evade any prohibition or restriction for the import of gold into India can be held to have been established as well. Now, the law is well-settled that intention is not a matter which can be directly proved and has to be inferred on the facts and circumstances of a particular case. Where, therefore, the prosecution is i able to prove that the goods were smuggled and I that the accused had them in his conscious possession for use or sale, it would as a rule follow in the absence of any other circumstance that he intended to defraud the revenue or evade the restrictions imposed on the import of the goods which were recovered from his possession. See R. v. Cohen (1951) 1 All ER 203 and Soyce v. Coupe (1952) 1 All ER 715 in this connection. It may perhaps be possible to conceive of cases where such an intent may be negatived; but we see no such circumstances in the present case, and, therefore, hold that the requisite intent prescribed Under Section 167 (81) also stands proved.

22. From what we have said above, we hold that the accused is guilty of an offence Under Section 167 (8r) of the Sea Customs Act read with Section 23 of the Foreign Exchange Regulation Act.

23. In the result, we allow this appeal, set aside the judgment and order, of the learned Magistrate and hereby convict the accused respondent of an offence

Under Section 167 (8r) of the Sea Customs Act read, with Section 23 of their Foreign Exchange Regulation Act, suit sentence, him to one year's rigorous imprisonment. As the accused is out on bail, we hereby direct the District Magistrate, Jodhpur, to take the necessary steps to arrest him and send him to jail to undergo the sentence we have awarded to him.

24. A prayer for grant of a certificate to appeal to the Supreme Court is made; but we see no sound reasons to grant the same. The prayer is rejected.