

Manka Vs. the State and anr.

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Court : Rajasthan

Decided On : May-05-1960

Reported in : 1961CriLJ406

Judge : Jagat Narayan, J.

Appellant : Manka

Respondent : The State and anr.

Judgement :

ORDER

Jagat Narayan, J.

1. This is a revision application by one Manka son of Kewal Ram resident of village Lilma District Barmer who has been convicted under Section 167(81) of the Sea Customs Act in respect of 69 Tolas 9 Mashas gold which was seized from: his possession and sentenced to undergo rigorous imprisonment for eight months.

2. It is not disputed that on 6-12-56 the applicant boarded a train bound for Barmer at Lilma Railway Station in the Indian territory near the Indo-Pakistan border. He was arrested at Banner by Bhanwar Lal (P. W. 1) Inspector Land Customs who was heading a Customs Escort Party on this (train and was taken before the Deputy Superintendent of Land Customs Barmer Shri R. C. Jindal (P. W. 3). Upon a search 7 bars of gold were recovered from his person-5 from the pockets on his

waist-coat and 2 from the anti of his Dhoti.

All the seven bars were marked No. 999 and they weighed 69 tolas 9 Mashas. This gold was seized under Section 178 of the Sea Customs Act. The applicant was prosecuted under Section 167(81) of the Sea Customs Act read with Section 23 of the Foreign Exchange Regulation Act for a contravention of Notification No. 12(11) F. 1/51 dated 27-2-51 issued under Section 8(1) of the Foreign Exchange Regulation Act prohibiting the import of gold except with the permission of the Reserve Bank and On payment of the prescribed fee.

He was convicted of this offence and was sentenced to rigorous imprisonment for 8 months and to pay a fine of Rs. 300/- by First Class Magistrate Barmer. On appeal the conviction and sentence of rigorous imprisonment for 8 months were confirmed by the Sessions Judge Balotra. The sentence of fine was set aside. The applicant was also prosecuted under Section 23 of the Foreign Exchange Regulation Act for importing gold in contravention to Section 8(1) but was acquitted of this charge by the learned Magistrate.

3. The conviction of the applicant was challenged before me on a large number of grounds. The main grounds are that the essential ingredients of offences were not made out, that Section 178A of the Sea Customs Act which had been called in aid by the lower courts to sustain the conviction was unconstitutional, that the presumption raised under it was not available for fastening criminal liability on any one, that in any case no presumption could be raised in the present case as the essential pre-requisite for raising it, namely, the subjective belief of the Customs Officer before seizure that the gold was smuggled one was lacking that the trial was defective inasmuch as the essential ingredients constituting the offence were neither embodied in the charge nor put to the accused in his examination under Section 342 Cri. P.C. that important circumstances on which the prosecution relied for the proof of the offence were not put to him in his examination and he had no opportunity of meeting them, and that inadmissible evidence had been admitted and relied upon for convicting the applicant.

4. In order to appreciate the points involved in the case it is necessary to give a brief history of the legislation restricting the import of gold into the country. Upto

September 4, 1939 there was no restriction on the import of gold in India. On that day notification No. 53 dated September 4, 1939 was issued by the Finance Department of the Central Government in exercise of the powers conferred by Section 19 of the Sea Customs Act. It prohibited import or export of gold into British India from or to any place other than Burma.

On March 25, 1947 the Foreign Exchange Regulation Act came into force and on the same day in exercise of the powers conferred on the Central Government under Section 8(1) the Central Government issued a notification prohibiting the import of gold except with the permission of the Reserve Bank of India. This notification superseded the aforesaid notification dated September 4, 1939 issued under Section 19 of the Sea Customs Act. The notification dated March 25, 1947 was superseded by other notification the contents of which were similar.

No duty was levied on the import of gold till April 1, 1946. But thereafter a duty was imposed. Section 23 of the Foreign Exchange Regulation Act provides for penalties to respect of contravention of the provisions of the Act. Section 23-A provides that the restrictions imposed under Section 8(1) shall be deemed to have been imposed under Section 19 of the Sea Customs Act and all the provisions of the latter Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted.

5. The combined effect of the aforesaid provisions of the two Acts and the notification is that the provision of the Sea Customs Act are applicable in respect of contravention of the notification issued under Section 8(1) of the Foreign Exchange Regulation Act. Offences and penalties are provided in Section 187 of the Sea Customs Act which shall hereinafter be referred to as the Act. Items 8 and 61 of Section 167 run as follows:

1 2 3

Offences. Section of Penalties.

this Act to

which offence

has reference.

8. If any goods, 18&19 Such gooda

the importation shall be liable

or exportation to confiscation;

of which is for and any person

the time being concerned in any

prohibited or such offence shall

restricted by or be liable to a

under Chapter IV penalty not

of this Act, be exceeding three

imported into or times the value

exported from India of the goods,

contrary to such or not exceeding

prohibition or one thousand rupees.

restriction; or

81. If any person General Such gooda

knowingly, and with shall be liable

intent to defraud to confiscation;

the Government of and any person

any duty payable concerned in any

thereon, or to evade such offence shall
any prohibition or be liable to a
restriction for the penalty not
time being in force exceeding three
under or by virtue times the value
of this Act with of the goods,
respect thereto or not exceeding
acquires possession one thousand rupees.

of or is in any way
concerned in carrying,
removing, depositing,
harbouring, keeping or
concealing. In or any
manner dealing with any
goods which have been
unlawfully removed from
a warehouse or which are
chargeable with a duty
which has not been paid
or With respect to the

Importation or exportation
of which any prohibition
or restriction is for the
time being in force as
aforesaid; or If any
person is in relation
to any goods in anyway
knowingly concerned in
any fraudulent evasion
or attempt at evasion
of any duty chargeable
thereon or of any
such prohibition
or restriction as
aforesaid or of any
provision of this
Act applicable to
those goods.

6. Section 173 empowers a Customs Officer to arrest any person against whom a reasonable suspicion exists that he has committed an offence under the Act. Section 178 provides that any thing liable to confiscation may be seized in any place by such an officer.

7. Section 178-A runs as follows:

(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 were 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.

8. Section 178-A and item No. 81 of Section 167 were added to the Act in 1955 as a result of the recommendation of the Taxation Enquiry Commission, The Commission recommended inter alia the amendment of the Sea Customs Act to make smuggling a criminal offence and 'to transfer the onus to prove in respect of offences relating to smuggling to the person in whose possession any dutiable, restricted, or prohibited goods are found'.

9. The Bill introduced in Parliament proposed the insertion of the following clause as Section 178-A:

Where any goods are seized) under this Act on the ground that they are smuggled goods, the burden of proving that the goods are not smuggled goods shall be on the person from whose possession the goods are seized.

A note was appended to the above clause which read):

At present when action is taken against persons who are in possession of smuggled goods, it is not always easy for customs authorities to prove that the goods are smuggled goods. This clause places the burden of proof in such cases on persons from whose possession suspected smuggled goods are seized, Such a provision is necessary in order to safeguard the revenues of the State.

In introducing the Bill the Minister for Revenue and Defence Expenditure made the following observations in his speech:

The second point is to take some additional power for controlling smuggling. It may not be quite unknown to this House that smuggling has increased rather enormously, Previously there was not such economic incentive for smuggling, but due to so many restrictions and controls, and licenses and prohibitions due to the development of indigenous industries and also due to our having long land borders after the partition of India, smuggling has become more rampant and has also become a paying proposition. Certain articles are prohibited for import and even for export, and if a smuggler can get them into or send them out of India, he can reap rich profits. This economic incentive for smuggling was lacking so long; now it has become necessary for the Government to take stringent measures and to take additional powers to stop smuggling.

The clause of the Bill as originally framed was however not accepted by the Parliament and two material changes were effected in enacting Section 178A. The burden is imposed on a person only when gold is seized from his possession in the reasonable belief that it is smuggled gold and not when it is seized on the ground that it is smuggled as originally proposed.

In the second instance, the amendment proposed was of general application to all smuggled goods. By enacting Clause (2) Parliament limited it only to gold, gold manufactures, diamond and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may by a notification in the Official Gazette specify in this behalf. In other words the section is only applicable to articles which can be easily smuggled.

10. The contention on behalf of the applicant is that Section 178A violates the rights guaranteed under Article 19(1)(f) and (g) of the Constitution namely, the right to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business. Gold is a commodity which is capable of acquisition. Trading in gold is also not prohibited. The aforesaid section makes it well nigh impossible for a citizen to exercise these rights on account of the heavy burden that is cast on him by Sub-section (1) of Section 178-A to prove that the

gold in his possession is not smuggled one.

The burden cast is impossible to be discharged. By looking at gold it is not possible to tell whether it was imported into India before September 4, 1939 or whether it is of Indian origin and yet a citizen is called upon to prove that it is not smuggled gold. It affects a person's right to acquire hold and dispose of gold and also to carry on trade and business in gold. A person would be afraid of purchasing gold. This also affects trade and business.

The burden imposed is excessive and arbitrary. There is no rational connection between reasonable belief of the Customs Officer seizing the gold and the burden which a citizen is called upon to discharge namely that gold is not smuggled one. Reliance is placed on an unreported decision of Mr. Justice K. T. Desai in *Ami Chand v. M.G. Abrol* Misc. Appln. No. 21 of 1957(Bom), and the decision of the Division Bench of the Madras High Court in *N. S. Chetty v. Collector of Customs* : AIR1959 Mad142 .

11. The constitutionality of the above provision-was challenged before their Lordships of the Supreme Court in *Babulal v. Collector of Customs Calcutta* (S) : 1983ECR1657D(SC) on the ground that it offends Article 14 of the Constitution. After reviewing the relevant provisions of the Act it was held that successive remedies were provided to an aggrieved person from whom articles had been seized and confiscated and these afforded sufficient safeguards against illegal or unjustified orders.

It was recognised that a heavy and onerous duty is cast on an innocent possessor who for aught one knows, may have bona fide paid adequate consideration for the purchase of the articles without knowing that the same had been smuggled, the only pre-requisite for the application of the section being the subjectivity of the customs officer in having a reasonable belief that the goods are smuggled.

It was found that the object of enacting Section 178A was to prevent smuggling, that it applied only to certain goods which could be easily smuggled and 'which have been seized under the Act in the reasonable belief that they are smuggled goods, Taking into consideration the safeguards provided for affording relief and

redress in the case of illegal or unjustified orders and the fact that the provision directly helps in preventing smuggling it was held that Section 178A did not offend Article 14 of the Constitution.

12. The right conferred by Article 19(1)(f) and (g) can be curtailed by the Legislature under Clause (5) provided the restriction imposed is by 'law, is reasonable and is in the interest of the general public. The restriction imposed under Section 178-A is by law and is undoubtedly in public interest. All that has to be seen is whether it is reasonable in the circumstances of the case. In other words whether hardships which the shifting of burden of proof entails is not excessive considering the evil which it seeks to remedy.

As was held by their Lordships of the Supreme Court in Babulal's case (S) : 1983ECR1657D(SC) the burden cast is not unreasonable taking into consideration the evil which the provisions seek to remedy and the safeguards provided in the Act for seeking remedies against illegal and unjustified orders of customs officers. I accordingly hold that the provisions of the section are not hit by Article 19, so far as gold is concerned.

13. Provisions similar to Section 178-A casting the burden of proof on an accused in a criminal case are to be found in other enactments also, both Indian and English, e.g. the Prevention of Corruption Act of India and the Customs Laws Consolidation Act 1876 of Great Britain, The latter is a parallel enactment to the Sea Customs Act of India, Section 186 of the Customs Laws Consolidation Act corresponds to entries 8 and 81 of Section 167 of the Sea Customs Act and Section 259 Corresponds to Section 178A. It runs as follows:

If in any prosecution in respect of any goods seized for nonpayment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Act, any dispute shall arise whether the duties of Customs have been paid In respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the Exchequer Division of the High Court of Justice on the Revenue side, the defendant shall be

competent and compellable to give evidence.

14. It will be seen that the above provision is similar to Clause (14) of Bill No. 48 of 1954 referred to above and the presumption is available where any goods are seized on the ground that they are smuggled goods. I may here refer to *Beck v. Binks* (1948) 2 All ER 1058 and *R. v. Cohen* (1951) 1 All ER 203 in which substantive sentences of imprisonment were awarded relying on the presumption under Section 259.

15. Section 178-A has now; been on the statute book over 5 years. It has not in any way adversely affected the lawful trade of dealers in gold. In the practical aspect of the matter also the restriction cannot be regarded either as excessive Or unreasonable.

16. The constitutionality of Section 178-A was considered by a Division Bench of the Bombay High Court in *Pukhraj Champalal Jain v. D.R. Kohlij* 61 Bom LR 1230 andl by a Division Bench of the Punjab High Court in *Gian Chand v. State of Punjab*, Criminal Revn. No. 1566 of 1958, decided on 2-3-60. A similar view-was taken in both the above decisions. The cases relied upon by Mr. Magh Raj were considered in these decisions and were dissented from.

17. I accordingly hold that Section 178-A is not| hit by Article 19(1)(f) and (g) of the Constitution.

18. Mr. Magh Raj next argued that the above presumption is only available for imposing penalties for customs offences cognizable under Section 182| of the Act by officers of customs, but is not, available for imposing sentences in criminal cases. His reasoning was three-fold. Firstly he contended that the object of the Act being to prevent smuggling the presumption raised is only limited to that extent and is not available for purposes of holding the person; from: whose possession gold is seized criminally liable.

In this connection he has relied on the observations made to that effect in *Pukhraj's* case reported in 61 Bom LR 1230 at P. 1240, Secondly he contended that Section 178-A was contained in Chapter XVII which deals only with the

procedure relating to customs offences 'triable' by customs officers under Section 182. Thirdly he contended that the provisions of Section 178-A being against the normal rule of evidence in criminal cases the Legislature would have used appropriate words to make its intention clear if it intended that the presumption should be available for holding persons from whose possession gold is seized criminally liable.

19. In this connection Mr. Chatterji drew my attention to a Division Bench decision of the Bombay High Court in State v. Suleman Ibrahim Criminal Appeals Nos. 95 and) 96 of 1957 decided on 1st March 1957 reported in the Compilation of Judgments in Customs Cases 1957 at page 44 in which it was held that the presumption under Section 178A is available in criminal prosecutions under the Act. He also contended that the aforesaid observations made in Pukhraj's case 61 Bom: LR 1230, are obiter. The reasoning of their Lordships was as follows:

Mr. Parpia has drawn our attention to the preamble of the Act, which states that the object of the Act was to consolidate and amend the law relating to the levy of Sea Customs duties. He has also referred to the observations at page 82 of Maxwell's Interpretation of Statutes, 1953 Edition, that general words and phrases, however, wide and comprehensive they may be in literal sense, must usually be construed as being limited to the actual object of the Act. Mr. Parpia has, therefore, contended that Section 178-A of the Act must be held to apply only to proceedings before the Customs Officers and not to prosecutions for offences under the Act. We are unable to accept this argument of the learned Advocate. Section. 178-A was inserted in the Act by Act No. XXI of 1955. By the same Act Clause (81), for the contravention of which the accused have been prosecuted in this case, was also inserted in Section 167 of the Act. Both these Sections 167 and 178-A also occur in Chapter 18 of the Act, the heading of which is 'Offences and Penalties'. This Chapter contains provisions both for proceedings before the Customs Officers and also for prosecution for the offences against the Act (See for instance Sections 187 and 187-A. There is, therefore, no reason why the application of Section 178-A which is worded in wide and general terms, should be limited to proceedings before the customs authorities.

Mr. Magh Raj pointed out that the reasoning is defective inasmuch as Section 167 and Section 178-A do not occur in the same chapter as was assumed by their Lordships.

20. This slight inaccuracy however does not affect the main reasoning of their Lordships. Section 178-A is in Chapter 17 which is headed 'Procedure relating to offences, appeals etc.' Section 167 is contained in Chapter 16 which is headed 'Offences and Penalties'. Most of the so-called offences are 'triable' under Section 182 by customs officers. Only a few of them are criminal offences. Their procedure is governed by the Code of Criminal Procedure generally.

But some special rules of procedure are laid down in Chapter 17 which are applicable to these criminal offences. They are applicable to criminal cases under the Act in view of Section 5 of the Code of Criminal Procedure. Section 187 lays down that all offences against the Act other than those cognizable under Section 182 by officers of Customs, may be tried summarily by a Magistrate.

This is a rule of procedure applicable to criminal cases under the Act. Section 187-A which was added in 1955 by the Sea Customs (Amendment) Act No. 21 of 1955 provides that no court shall take cognizance of any offence relating to smuggling of good is punishable under item 8.1 of Section 167 except upon complaint in writing made by the Chief Customs Officer or some other officer not lower in rank than an Assistant Collector of Customs authorised in this behalf by the Chief Customs Officer. This again is a rule of procedure similar to rules enacted in Sections 195 to 199 of the Code of Criminal Procedure. It cannot therefore be said that Chapter 17 only prescribes the procedure for customs offences cognizable by customs officers under Section 182.

21. The object of enacting the Sea Customs (Amendment) Act, 1955 was to reduce smuggling which had increased greatly on account of various facts and had disturbed the economy of the country. The law was accordingly made more stringent by making smuggling a criminal offence by adding item 81 to Section 167 and by transferring the onus of proof in respect of certain goods seized in the belief (that they were smuggled to the person from whose possession they were recovered. With all respect therefore I do not see why the provision of Section

178-A should be confined to customs offences cognizable by customs officers.

The onus placed under Section 178-A is not only against the normal rule of evidence in criminal cases but is also against the normal rule in other cases as well. Normally the onus is on the plaintiff and not on the defendant. It was therefore not necessary for the Legislature to state specifically that; the presumption under it would be available both in cases cognizable by customs officers and in cases triable by Magistrates. The intention that it will be available for proving all the offences described in Section 167 is sufficiently made clear by including Section 178-A in Chapter 17 which deals with the procedure to be followed in both types of cases.

It may be mentioned here that it would rarely be possible to bring home a charge under Section 167; (81) in respect of gold or similar articles without the aid of the presumption raised under Section 178-A. As has been pointed out above such a presumption is available in criminal cases under the Customs Laws Consolidation Act 1876 and the Legislature could not have intended the enactment of item 8U of Section 167 without making the presumption under Section 178-A available in criminal cases. In the absence of such a presumption the addition of See, 167(81) would be practically nugatory,

22. I accordingly hold that the presumption under Section 178-A is available in criminal offences' also.

23. It was laid down by their Lordships of the Supremo Court in Babu Lal's case (S) : 1983ECR1657D(SC) that the pre-requisite for the application of Section 178-A is the subjectivity of the Customs Officer in having a reasonable belief that the goods are smuggled. In the present case the applicant was arrested by Inspector Bhanwar Lal and was taken to the Deputy Superintendent Shri R. C, Jindal. He was searched under the orders of R. C. Jindal and the gold which was recovered from his possession was seized.

Both Bhanwar Lal and R. C. Jindal were examined as prosecution witnesses in this case. Neither of them stated that he seized the gold in the reasonable belief that it was smuggled gold. Both the learned Magistrate and the learned Sessions

Judge however presumed from the other evidence produced in the case that the gold was seized under the reasonable belief that it was smuggled and held that the provisions of Section 178-A were applicable.

The learned counsel for the applicant argued that it was not open to them to do so as the subjective belief cannot be presumed. In this connection he relied on a Division Bench decision of this Court in *Chauthmal v. State of Rajasthan*. In that case the Government had superseded a municipal in exercise of powers under Section 203(1) of the Rajasthan Town Municipalities Act.

The pre-requisite for the exercise of such powers was the subjective satisfaction of the Government that the Municipal Board is not competent to perform, or persistently makes default in the performance of, the duties imposed on it or exceeds or abuses its powers. In the notification issued by the Government, however, it was not stated that they were satisfied that the Board was incompetent.

An affidavit was filed on behalf of the State showing that an enquiry had been held by an officer who was satisfied of the truth of the allegations brought against the Board and that the Government issued the notification only after a perusal of his report. The Court declined to presume from these facts that the Government were satisfied, that the Board was incompetent or made defaults in the performance of its duties or abused its powers. The order of supersession was set aside.

24. He also relied on the decision of the Madras High Court in : AIR1959 Mad142 in which it was held:

We must uphold the contention of the learned counsel for the petitioners that unless it is established that the gold was seized in the reasonable belief that it was smuggled gold, Section 178-A(1) cannot apply. The reasonable belief must be that of the officer who effected the seizure, (it is belief and reasonable belief that the section requires, and not for instance mere suspicion) which is all that Section 178 requires to justify arrest, or Section 180 requires to justify seizure and detention of goods. The reasonable belief that precede or at least coincide with the seizure; formation of the belief subsequent to the seizure, (however well-founded that belief

is will not satisfy the requirements of Section 178-A(1).

25. The attention of their Lordships was drawn to the facts and circumstances of the case on the basis of which it could be said that the Customs Officers might have entertained a reasonable belief that the gold seized by them was smuggled gold. But they pointed out:

What is relevant is, what was the belief of the officer who seized the goods on 26-6-1956 at the time of that seizure.

In the absence of direct evidence of the seizing officers that they did entertain such a reasonable, belief their Lordships held that Section 178-A(1) was not applicable.

26. Mr. Chatterji however contended that it is open to the Court to come to a finding as to whether or not the gold was seized by the customs officers in the reasonable belief that it was smuggled gold even in the absence of a statement to that effect by them.

27. The relevant portion of the complaint runs as follows:

That on 6-12-56 Shri Manka was noticed by the Customs Escort party headed by Shri Bhanwar Lal Inspector, Customs coming in the train from Lilma to Barmer. A close watch was kept on the activities of Shri Manka on the way.

That on arrival at Barmer Railway Station Shri Manka was brought to the Customs Examination yard as he was suspected to be in possession of gold) of foreign origin smuggled into India, Shri Manka was asked by the Land Customs Officer Shri Bhanwar Lal to declare if he had any gold or silver with him to which he replied in negative, That during the course of his personal search seven bars of gold bullion weighing 69 tolas and 9 mashas bearing mark '999' were recovered concealed) in the Sadri and Dhoti.

That Shri Manka on being asked by the Customs Officer whether he had a permit from the Reserve Bank of India to import the gold into India, to which he replied in negative. The accused admitted the ownership of the gold in the court of 1st Class

Magistrate, Barmer on 7-12-1956.

That the above mentioned facts gave rise to a reasonable belief in the mind of the customs officer that the gold had been imported into India from a foreign territory in contravention of the prohibitions imposed on the import of gold by the Government of India.

This complaint was however filed by the Assistant Collector of Central Excise and Customs Ajmer who was not present at the time of the seizure of the gold.

28. In Detention Receipt Ex. P. 1 the reason of detention was mentioned as 'import prohibited.' This was signed by Bhanwar Lal. He did not mention in it as one of the reasons of detention that he had reasonable belief that the gold was smuggled gold. In the show cause notice Ex. P. 3 which was signed by R. C. Jindal Deputy Superintendent it was not mentioned that the gold was seized under the reasonable belief that it was smuggled one.

29. Bhanwar Lal' stated in court:

Manka boarded the train at Lilma. His conduct and manner of sitting aroused my suspicion and I kept close watch on him and alerted my staff. At Gagaria Railway Station I learnt that he was a notorious smuggler.... I produced him before the Deputy Superintendent of Customs when the train reached Barmer. I searched the accused on the orders of the Deputy Superintendent. Before searching him I asked him if he had any gold in his possession. He said he had none. On search I recovered 7 bars of gold from his waist-coat and Dhoti bearing mark 999 and weighing 69 Tolas and 9 Mashas. I gave him Detention Receipt Ex. P.1.... The accused told me that he had purchased the gold from a Pakistani. He refused to give me his name etc.,... A case was registered against him earlier also and a penalty of Rs. 500/- was levied by the order of Assistant Collector of Excise and Customs Ajmer dated 9-8-54.

R.C. Jindal Deputy Superintendent, Customs stated in Court.

On 12-6-56 I was posted at Barmer and searched Manka. About 70 Tolas of gold marked 999 was recovered from his Dhoti. I prepared a seizure memo. (This

seizure memo was not produced in court) Ext. P. 1 is the Detention Receipt which was given to the accused. I took the statement of Manka which is Ex. P. 2. Ex. P. 3 is the show cause memo which was handed over to him, I have caught several similar cases. On the basis of my experience I say that the gold is of foreign origin. Gold bearing mark 999 is not available in India. Such gold is only found with persons coming from Pakistan.

It may be mentioned here that the Inspector admitted in cross-examination that the mark 999 indicates the fineness of the gold and did not indicate that it was of foreign origin. Mr. Chatterji did not rely on this part of the statement of R. C. Jindal.

30. 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 whether 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

31. 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. It is conceded that the prosecution has not succeeded in proving in the present case that the gold seized from the possession of Manka was smuggled one. As such he cannot be held guilty of an offence punishable under Section 167(81).

32. Both the learned Magistrate and the learned Sessions Judge were under the impression (that all that was needed to make out an offence under Section

167(81) was to prove that the gold recovered from the possession of the accused was smuggled one. They have based the conviction of the applicant merely on the recovery of the gold and 'his inability to prove that it was not smuggled gold. Section 167(81) when analysed would run as follows:

If any person (1) knowingly, and (2) with intent -

(i) to defraud the Government of any duty payable thereon, or

(ii) to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto.

(3) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, or concealing, in any manner dealing with

(4) any goods which

(a) have been unlawfully removed from a warehouse, or

(b) are chargeable with a duty which has not been paid, or

(c) with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid, he shall be punished in the manner provided here-in.

The first ingredient is that the person from whom the goods are seized must know that they are smuggled goods. Even in cases in which a presumption can be drawn under Section 178-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 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 hat it is smuggled. There is no finding in the present case that Manka knew that this gold was smuggled one.

33. The second essential ingredient of the offence is that the accused must have one or both of the intents mentioned in the section, namely, (1) to defraud the Government of any duty and (2) to evade any prohibition or restriction in force. In

Frailey v. Charlton (1920) 1 KB 147 the export of soap had been prohibited by Royal Proclamation. The respondent, a ship's steward, had on board his ship thirty tablets of soap which was intended for the use of passengers on the voyage. The respondent was not aware of the fact of prohibition. It was held that his ignorance of the prohibition afforded a good defence inasmuch as it could not be said that the act complained of was done with intent to defraud His Majesty of any duties or to evade the prohibition or restriction applicable to the goods.

34. In this view of the matter the charge framed in this case was defective. All that was mentioned in the charge was that the applicant was found in possession of smuggled gold. It was not mentioned in the charge as should have been done that he knew that the gold was smuggled gold and that he was carrying it or had acquired possession of it with intent to defraud the Government of any duty or to evade any prohibition or restriction.

35. In his examination under Section 342 Cri. P.C. also these essential ingredients of the offence were not put to the applicant. Only the following questions were put to him:

1. Q. Were you found in possession of 69 Tolas and 9 Mashas of smuggled gold on 6-12-56?

A. 69 Tolas and 9 Mashas gold was recovered from my possession.

2. Q. Did you have any permit for this gold?; A. I was bringing this gold from my house.

So I had no permit for it.

3. Q. Have you anything else to say?

A. I had Indian gold with me and not Pakistani gold. Gold bars bearing similar mark were seized from one Dangia Brahmin but were returned to him.

The prosecution relied on the following circumstances in this case which were also not put to the accused in his examination:

(1) That lie stated upon enquiry that he purchased this gold three years ago from a Mohammedan whose name he did not remember.

(2) That he also stated that there was no entry in his account books pertaining to this purchase of gold.

The trial of the applicant was vitiated by these defects as serious prejudice was caused to him in his | defence thereby.

36. Further the learned Sessions Judge relied on the circumstance that the applicant was not a regular businessman in gold) bullion and was an ordinary shop-keeper. There is no evidence on record to show that the applicant does not deal in gold.

37. On behalf of the applicant it was also contended that the statement made by him before the Customs Officers is inadmissible in evidence under Section 162 CrI. P. C as they have been clothed with most of the powers of a police officer under the Code of Criminal Procedure. There is a conflict of judicial opinion on the point. It is unnecessary to refer to these cases at length in view of the fact that the revision application is being allowed on another ground.

However as the matter was canvassed before me I would like to say that the better view appears to be to hold that neither Section 25 of the Evidence Act nor Section 162 of the Code of Criminal Procedure is in terms applicable to statements made by an accused before Customs Officers. But before accepting any such statement the court should keep in mind the fact that Customs Officers are persons in authority who enjoy powers similar to those of police officers.

If the accused has not made a particular statement attributed to him he should say that he did not make it. If on the other hand he has made a statement involuntarily under undue influence then also he should make a specific allegation in that behalf and support it by such evidence as he is able to give or such circumstance as he is able to show in his defence;.

38. I the result the application is allowed and the conviction and sentence passed against Manka applicant are set aside. He is on bail. He need) not surrender. His

bail bonds are cancelled.

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