

**Anil G. Merchant Vs. Director of Revenue Intelligence, Madras and ors.**

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**Court :** Chennai

**Decided On :** Mar-07-1985

**Reported in :** 1985(20)ELT292(Mad)

**Judge :** Sathiadev and ;V. Ramaswami, JJ.

**Acts :** [Customs Act, 1962](#) - Sections 104, 104(1), 107, 108, 108(3), 110, 135 and 161(2)

**Appeal No. :** Writ Appeal No. 114 of 1985 and W.P. 65, 510 and 511 of 1985

**Appellant :** Anil G. Merchant

**Respondent :** Director of Revenue Intelligence, Madras and ors.

**Advocate for Def. :** P. Narasimhan, Addl. Central Government Standing Counsel

**Advocate for Pet/Ap. :** R.M. Abdul Karim, Adv. for K.A. Jabbar, ;S. Jagadessan, ; and ;R. Gandhi, Advs.

**Judgement :**

ORDER

1. The writ appeal has been filed against an order of a single Judge dismissing W.P. No. 163 of 1985 in limine at the admission stage itself. It appears that on an examination of a consignment of 7 drums of goods declared as Alkylaryl-sulphonate S. N. (Tamol) imported by one Messrs. Sudharsan Chemicals, Station Road, Ramnagar, Bangalore, under the cover of AWB No. 085 - 76881836 which was passed out of customs charge on payment of duty on 3-1-1985, it was found that the drums contained goods other than the goods declared in the bill of Entry. The goods were detained under section 110 of the Customs Act. On 4-1-1985, another consignment of 5 drums of the same chemical imported by one Messrs. Lakshmi Chemicals, Karnataka, under cover of Bill of Entry dated 26-12-1984, was also found to contain goods other than the one declared in the Bill of Entry. On the ground that the Customs Authorities had reason to believe that the appellant is guilty of an offence under section 135 of the Customs Act arrested him at 10 a.m. on 5-1-1985, under section 104(1) of the Customs Act and produced him before the Magistrate the same evening at 3.30 p.m. The appellant thereafter was released on bail on the same day. In the affidavit filed in support of the writ petition, the appellant had stated that when he was in the Air Port at Madras on the 3rd of January, 1985, with a clearing agent, he was called by the Director of Revenue Intelligence Officials and taken to Air cargo Complex, and from there he was taken to their office in T. Nagar, Madras-17. He was taken inside a room and surrounded by two officers and other employees of the Department and was interrogated by them throughout the night. They did not allow him to sleep nor even to sit. He was severely beaten and ill treated and kept in unlawful detention till. 5-1-1985 and forced to subscribe to statement made against his will. During the above period, he was not allowed to contact anybody including his advocate in spite of specific request. In fact, it was his case that his advocate was searching for him from 3rd of January, 1985 onwards, went to the office of the Director of Revenue Intelligence on the 4th and on the 5th but he was not given any information about his presence there or about the interrogation. The advocate wrote a letter on 5-1-1985 to the Assistant Collector of

Customs stating that he understood that the appellant was in his custody since 3-1-1985 that he files his memo of appearance for him and that he may be permitted to be present at the time of interrogation if the appellant is there and is being interrogated. No reply was given to him. As already stated on 5-1-1985 at 10 A.M. the appellant was arrested and produced before the Magistrate on the same day. After he was released on bail, the Department had issued notices under section 108 of the Customs Act requiring him to be present for enquiry or interrogation on the subsequent dates at stated hours. He did appear for enquiry on 8-1-1985 and gave a statement. In the meantime, on 21-1-1985 the learned counsel for the appellant wrote a letter to the Department stating that Article 22(1) of the Constitution give a fundamental right to the appellant to consult and to be defended by a legal practitioner and requested the respondents to inform him immediately whether he will be permitted to exercise the above right during interrogation. This request of the counsel for the appellant was rejected on 30-1-1985. In the other three cases on the ground that the writ petitioners are involved in illicit export of snake skins, notices were issued to them under section 108 of the Customs Act directing them to appear before the officers in connection with the investigation and or interrogation. In those cases also the petitioners pleaded that their counsel shall be permitted to be present while they are interrogated by the Customs Officials.

2. In all these cases, the argument of the learned counsel for the appellant and the petitioners is that they have a fundamental right to have legal assistance which would include a right to a counsel to accompany them and be present during interrogation. This right is guaranteed under Articles 21, 22(1) and 39A of the Constitution and any statements obtained in infringements of the constitutional guarantee could not be used in any proceeding against the petitioners.

3. Section 107 of the Customs Act enables an officer of customs empowered in this behalf during the course of an enquiry in connection with the smuggling of any goods to require any person to produce or deliver any document or thing relevant to the enquiry and to examine any person acquainted with the facts and circumstances of the case. Section 108 gives power to any gazetted officer of customs to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods. Clause (3) of section 108 further provides that all persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct and that all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produced such documents and other things as may be required. These provisions, therefore, enable a customs officer to summon any person to give evidence or for the purpose of interrogation in connection with any enquiry which such officers is making in connection with the smuggling of any goods. Neither these provisions in section 107 nor section 108 nor any other provision in the Act or the rules framed thereunder restrict the right of the customs officer to require the person to appear only at stated hours. In the nature of things, therefore, it will have to depend on the facts and circumstances of the case and therefore the only thing which we can expect is that the time and place shall be reasonable and fair having regard to the facts in that particular case. Normally, it is expected that such interrogation or examination will be done during the normal office hours or during day time. However, we could not say that in every case it could be done only during day time or during office hours. If the circumstances demand an examination or interrogation immediately or during the nights subject to all other reasonable facilities provided to the person interrogated or examined it could be done at any time. The other thing which is expected is that the examination should be conducted in such a way consistent with human dignity and comfort and not in human, unreasonable or unfair. The provisions in the Customs Act do not also enable the customs officers to extract, coerce or use any third degree methods as mentioned by the counsel for the petitioners in the matter of examination or interrogation in exercise of powers under section 107 or section 108. The section does not enable the customs officers to take any person to custody. When a person is obliged to attend in pursuance of the summons issued under section 108 and state the truth he could not be considered while he was examined or interrogated as in the custody of the customs officials. In such a situation as he is expected to appear before the officers in obedience to the summons and in compliance with law. He cannot be considered to be a

person taken into custody. Taking them as captive prisoners, coercing them to give false statements or depriving them of elementary facilities are not authorised by the Act. It is needless to expressly prohibit such actions. If and when the officers violate any of these principles or coerce them to give false confessions, it would always be open to the person concerned to complain of the same wherever those statements are sought to be used and if the allegations are established, certainly nobody could rely or take note of those statements. In this connection we may note that a Full Bench of this Court in this decision reported in *Roshan v. Joint Secretary to the Government, Tamil Nadu, Public Dept., etc.* - : 1984(15)ELT289(Mad) = (1983 Law Weekly Criminal page 289) in paragraph 48 observed :

'If, in a given case, the Customs official detains any person required or summoned under the provisions of the Customs Act for a prolonged period, even exceeding twenty-four hours, or keeps him in closed doors as a captive prisoner surrounded by officials or locks him in a room or confines him to an office premises, he does so at his peril because Ss. 107 and 108 of the Customs Act do not authorise the officer belonging to the Customs Department to detain a person for a prolonged custody and deprive him of the elementary facilities and privileges to which he is entitled. In such a situation, the officer must be held to have over-stepped his limits, and any confessional statement obtained from such a person by keeping him in a prolonged custody has to be regarded with grave suspicion, because there is always room for criticism that such a confession might have been obtained from extorted mal-treatment or induced by improper means. As pointed out by the Supreme Court in *Nathu v. State of Uttar Pradesh* - : 1956CriLJ152 , the prolonged custody may stamp the confessional statement so obtained as involuntary one, and the intrinsic value of such a statement may be vitiated. The question whether a person has been kept in prolonged custody is a question of fact, which has to be carefully considered against the background of the circumstances disclosed in each case. So, it is neither advisable nor possible to lay down any inflexible standards for the guidance of Courts, though in the ultimate analysis, it is the Court which is called upon to decide the circumstances of a particular case.'

It is in the light of these principles the constitutional question raised by the learned counsel shall be considered.

4. The contention of the learned counsel for the petitioners is that Article 21 of the Constitution protects the personal liberty of the individual, that the right to personal liberty includes a right to consult and be defended by a legal practitioner of his choice and this right to legal assistance shall be made available in all stages of interrogation or examination whether before arrest or after arrest and that this right could be taken away only in those cases where clause (3) of Article 22 is applicable. He also contended that this right to have the advocate of his choice to be present during interrogation or examination by the customs officials does not depend or based on the possible infringement of the personal liberty or possible violation of any provision of law or the possibility of the customs officials torturing, coercing or using any third degree methods to extract any wrong confession; but it is his fundamental right under Article 21 read in the light of Article 39A of the Constitution and that therefore section 108 of the Customs Act not authorising a customs officer to take a person in to custody or using unlawful means for extracting statements or coercing to give statements is not an answer to deprive him of his fundamental right. In this connection, he referred to certain Supreme Court decisions which may be noticed at this stage. In *M. H. Hoskot v. State of Maharashtra* A.I.R. 1978 S.C. 1458 the Supreme Court held that the ingredient of fair procedure to a prisoner is lawyer's services and that

'Judicial Justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise, and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side.'

Legal aid was considered as an inalienable element of fair procedure and Article 39A requiring every State to secure equal justice and free legal aid is interpretative tool for Article 21. They further held that personal liberty cannot be cut out or cut down without fair legal procedure. All these forcible observations of the Supreme Court were made with reference to the right of appeal to a convicted prisoner and his right to be provided with every facility for exercise of his right of appeal or revision and not in regard to any

interrogation or examination of a person in pursuance of a summons under section 108 who at that time cannot even be considered to be a person in custody much less a person accused of any offence. In *Francis Coralie v. Union Territory of Delhi* A.I.R. 1981 S.C. 746 the Supreme Court considered the validity of the conditions of detention order dated 23-8-1975 issued by the Delhi Administration with reference to a person who was detained under the preventive detention provision in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. After pointing out that the right to life enshrined in Article 21 is not limited to protection of limb or faculty but includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with the fellow human beings and that any form of torture or cruelty in human or degrading treatment would be offensive to human dignity and constitute an inroad into the right to live and therefore prohibited by article 21 unless it is in accordance with procedure prescribed by law and which procedure also should stand the test of reasonableness and non-arbitrariness, invalidated clause 3 of the conditions of the detention order which was questioned there. That condition which was invalidated prescribed that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi, and the interview has to take place in the presence of an officer of the department. With reference to this provision the Supreme Court observed :

'The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law.'

In our opinion, the right to consult a legal adviser is different from requiring a lawyer or an advocate to be present while examining or interrogating a person during an investigation. The right pleaded in this case by the learned counsel throughout was a right of the lawyers of the petitioners to be present when the petitioners were examined or interrogated in pursuance of a notice under section 108. At that stage necessarily the investigation has to be secret and in fact, even the identity of the person interrogated or examined may have to be kept secret until a late stage in the investigation itself. We have to also keep in mind that the person interrogated under section 108 may be a person involved in the commission of any offence or may be a person who only knows some facts or about somebody else committing it, who is in the nature of a witness unconnected with the offence. In the nature of things the investigation will have to be discreet and secret and therefore the only thing that is expected is the procedure adopted in the matter or examination or interrogation should be reasonable and not arbitrary and as held by the Supreme Court, no law which authorises and no procedure which leads to torture, cruel, inhuman and degrading treatment can ever stand the test of reasonableness and non-arbitrariness. As already stated, section 108 does not authorise any such torture or cruelty or inhuman treatment. The decision in *A. K. Roy v. Union of India* : 1982CriLJ340 relied on by the learned counsel, in our opinion, also is of no assistance. That decision related to the right of a detenu who was detained under the National Security Act to be represented by a lawyer before the Advisory Board constituted under that Act. Of course, the ratio of the judgment is to the effect that a right to legal assistance is also part of Articles 19, 21 and 22(5). But as we have been referring to earlier, we are not concerned with a case of either a person accused of an offence or an arrested person's right to consult or to be defended by a legal practitioner of his choice. In *Nahdini Satpathy v. P. L. Dani* : 1978CriLJ968 with reference to the right of a person 'accused of an offence' to have the presence of an advocate during interrogation, the Supreme Court observed in paragraph 59 as follows :

'Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Art. 20(3), is an assurance of awareness and observance of the right to silence. The *Miranda* decision (1966) 384 US 436 has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it

shall be granted before commencing or continuing with the questioning. We think that Art. 20(3) and Art. 22(1) may, in a way, be telescoped by making it prudent for the Police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Over-reaching Art. 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the Police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project.'

We are of the view that these observations are made with reference to the right of the accused to silence and over-reaching of Article 20(3) and section 161(2) and could not be invoked in the case of an interrogation of a person in pursuance of a summons under section 108 of the Customs Act. In the same judgment, the Supreme Court observed :

'The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right.'

But this observation also has to be understood in the light of the continuing passage which reads as follows :

'The spirit and sense of Art. 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.'

Therefore, this right of a person to have his lawyer's presence during interrogation has to be tested only with reference to his right against self-incrimination. In one of the earliest cases in *R. C. Mehta v. West Bengal* : 1970CriLJ863 with reference to a statement recorded by an officer of the customs in an enquiry under section 171-A of the Sea Customs Act corresponding to section 108 of the [Customs Act, 1962](#), the Supreme Court observed :

'Under Section 171-A of the Sea Customs Act, a customs officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression 'any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a customs officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the customs officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Articles 20(3) of the Constitution. The steps taken by the customs officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The customs officer does not at that stage cause the person suspected of infringing the provisions of the Sea Customs Act, with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs : When collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act he is not accusing the person of any offence punishable at a trial before a Magistrate.'

The Supreme Court further observed in the same case as follows :

'Normally, a person stands in the character of an accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a magistrate competent to try or send to another magistrate for trial of the offence. Where a customs officer arrests a person and informs that person of the grounds of his arrest [which he is bound to do under Article 22(1) of the Constitution] for a purpose of holding an enquiry

into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the magistrate.'

It may be seen from these passages that neither before he was arrested under section 104 nor after he was arrested under section 104 he can be considered to be a person accused of any offence. These observations were quoted with approval in a later decision in *Veera Ibrahim v. State of Maharashtra* (1976 S.C.C. 302) which was a case under section 108 of the [Customs Act, 1962](#). We may also notice in this connection the following two decisions reported in *Ashadevi v. K. Shivraj A.I.R. 1979 S.C. 447* and *Sevantilal v. State of Maharashtra : 1979CriLJ645*. In *Ashadevi v. K. Shivraj A.I.R. 1979 S.C. 447*, a detention order under section 3(1) of COFEPOSA, 1974 was made against one Gopal Ghermal Mehta on the ground that it was necessary with a view to preventing him from engaging and transporting smuggled goods. The grounds of detention were served on the detenu. It was stated in the grounds that on receipt of certain information the officers of the customs kept a watch for a Fiat car and the said car with five occupants was intercepted near a railway crossing the occupants which included the detenu and 4 others were taken to the Customs Divisional Officer for examination. The detenu and the other occupants denied that they were carrying any smuggled gold or prohibited articles; but, on a search of one of the occupants, a large quantity of gold bars with foreign markings were recovered. Two statements were recorded, one statement on that day itself and another the next day in which he corroborated the version of the person from whose possession the gold with foreign markings was recovered. Briefly stated, they confessed that they were carrying the gold belonging to a different person and that they were merely carriers who used to receive remuneration for such transport. The detenu also had stated that this has been going on for about 6 to 8 months and that he had made 5 to 6 trips in a month and on each trip he used to carry 2 1/2 to 3 kgs. of gold. The order of detention was challenged on the ground that the procedural safeguards had not been followed vitiating the requisite satisfaction on the part of the detaining authority under section 3(1). It appears that when the interrogation of the detenu was going on, an advocate of the detainee addressed a letter as also a telegram making grievance about the wrongful restraint and illegal custody of the detenu by the customs officers beyond 24 hours and expressing apprehension that the detainee had been so detained with a view to obtaining confessional statement against his will. Again the advocate went in person to the customs officer and had sought permission to remain present at the time of interrogation of the detenu but that request was not acceded to as the customs officers were of the view that there was no provision in law permitting an advocate to remain present at the time of interrogation. The detenu was arrested and remanded to judicial custody and while he was in judicial custody also, he was interrogated. During such interrogation he resiled from his earlier confessional statement and squarely repudiated the facts stated therein. Thereafter the Chief Secretary to the Government of Gujarat passed the impugned detention order. One of the contentions raised against the validity of the detention order was that the satisfaction of the detaining authority must be regarded as vitiated inasmuch as some vital facts which had a material bearing and would have influenced the mind of the detaining authority one way or the other were neither placed before nor were considered by the detaining authority before passing the detention order. One of the vital facts which according to the learned counsel was not placed before the detaining authority was that during interrogation in spite of request, neither the presence of nor the consultation with an advocate was permitted. After noting that it is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order, the Supreme Court considered whether the non-communication to the detaining authority that during interrogation of the detainee in spite of request neither the presence of nor the consultation with an advocate was permitted would vitiate the order. Through the Supreme Court quoted the passage in *Nandini Satpathy's case : 1978CriLJ968* which we have extracted above and said that owing to some misconception of the legal position the request for the presence/consultation of a lawyer was turned down, it did not hold that there was a Constitutional guarantee even during

interrogation under section 108 of the Customs Act to have the presence of a lawyer; but that the detention order is vitiated by the fact that this vital fact of refusal to permit the presence of a lawyer during interrogation should have been communicated to the detaining authority because that and a bearing on the question whether the statements could be treated as voluntary or given under duress on the acceptance or rejection of the statements or the answers given during interrogation. We are therefore of the view that there is no fundamental right to a person who is summoned under Section 108 to give evidence or to answer queries to have the presence of a lawyer of his choice during examination or interrogation. However, it is advisable for the department to permit the presence of the lawyers during such examination or interrogation taking such precautionary measures as may be considered necessary to keep the confidential nature of the statement and the secrecy of the enquiry. They should also keep in view that if the presence of a lawyer during examination or interrogation is refused, the ultimate statements recorded themselves will become questionable as not voluntary or were statements which were obtained under duress and thereby making them not reliable statements in any proceeding.

4. For the foregoing reasons, we are of the view that the appeal and the writ petitions are liable to be dismissed and they are accordingly dismissed. W.A. No. 114 of 1985 and W.P. 65, 510 and 511 of 1985 :-

V. Ramaswami J.

Learned counsel for the petitioners makes an oral request under Art. 134A of the Constitution of India for grant of leave to appeal to Supreme Court. We are not satisfied that any substantial question of law as to the interpretation of the Constitution arises out of the order of that any substantial questions of law of general importance which need be decided by the Supreme Court arise in this case. Accordingly, we reject the request for grant of leave.

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