S. Fernandez Vs. the State

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Court : Kolkata

Decided On : Aug-28-1952

Reported in : AIR1953Cal219,57CWN107

Judge : Guha and ;Lahiri, JJ.

Acts : Evidence Act, 1872 - Section 25; ;Dangerous Drugs Act, 1930 - Section 23; ;Sea Customs Act, 1878 - Section 169; ;Bengal Excise Act

Appeal No. : Criminal Appeal No. 158 of 1952

Appellant : S. Fernandez

Respondent : The State

Advocate for Def. : J.M. Banerjee and ;N.K. Sen, Deputy Legal Remembrancer

Advocate for Pet/Ap. : Bibhor Kumar Lahiri, Adv.

Disposition : Appeal allowed

Judgement :

Guha, J.

1. This appeal has been preferred by S. Fernandez 'alias' Salvador Fernandez who has been convicted under Section 13 read with Section 20, Dangerous Drugs Act in connection with the seizure of a certain quantity of illicit opium. It is alleged

that on 24th October 1952, it K. G. Dock, Calcutta Port, he attempted to export and tranship by S. S. Tairea a certain quantity of opium in contravention of Section 7, Dangerous Drugs Act and thereby committed in offence punishable under Section 13 read with 3. 20, Dangerous Drugs Act. According to the prosecution version P. W. 1 W. P. Webber, a Preventive Officer of the Customs Department, received information that the appellant was in possession of some opium on board the ship mentioned above which was lying moored at 10 Kidderpore Dock; that he along with G. K. Das, Preventive Officer, Customs, caught hold of the appellant and took him to Customs for interrogation. It is further alleged that the appellant made a' confessional statement before P. W. 2 J. P. Smith, Inspector of Customs, Intelligence Branch, Mr. Das and himself. This statement was recorded by Mr. Das. The prosecution case is further that after this statement had been recorded Mr. Smith, Mr. Das and Mr. Webber went on board the Tairea and searched the place which had been indicated by the appellant, namely, berths 90 to 95 in second Class Cabin and from behind the water pipe in the cabin they recovered 27 packets of opium. It is in connection with this opium that the appellant has been convicted as mentioned above.

2. The main question in this appeal is whether this confessional statement is admissible in evidence. The learned Magistrate has held that it is not hit by Section 25, Evidence Act and in his view a Customs Officer is not a police officer within the meaning of Section 25, Evidence Act and as such the confessional statement in question is admissible in evidence with the remit that the appellant is liable to be convicted an the basis of the admissions made by him in that statement.

3. On behalf of the appellant it has been contended before us by Mr. Lahiri that the view taken by the learned Magistrate regarding the admissibility of the statement in question is erroneous. He has argued that a Customs Officer is a police officer and as such he comes within the mischief of Section 25, Evidence Act with the result that the statement recorded by G. K. Das is inadmissible in evidence. The question seems to be one of first impressions so far as this Court is concerned.

4. Under Section 25, Evidence Act which was enacted in 1872 no confession made to a police officer shall be proved against the person 'accused of any offence. As far back as 1876 it was held by Garth C. J., in the case of --'Queen v. Hurribole Chunder', 1 Cal 207, that 'in construing the 25th section of the Evidence Act of 1872. I consider that the term 'police officer' should be read not in any strict technical sense, but according to the more comprehensive and popular meaning.'

As pointed out by S. K. Ghose J., in the case of -- 'Ameen Shariff v. Emperor', 61 Cal 607(FB), at p. 655 that Courts all over India have agreed in upholding the dictum of Garth C. J.

5. In deciding the question whether a Customs Officer comes within the meaning of 'police officer' as mentioned in Section 25, Evidence Act we may refer to some observations made by Mukerji J., in the case of --- 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), referred to above which was a Full Bench decision of this Court on the point whether an Excise Officer under the Bengal Excise Act (Bengal Act V of 1909) was a police officer. As observed by Mukerji J. in that case the expression 'police officer' means officer other than a Magistrate whose duty is to prevent and detect crimes, the latter duty involving the duty of holding investigations and that it is in this sense that the term 'police officer' should be read in construing. Section 25, Evidence Act. The majority of the Judges of the Full Bench agreed with the view of Mukerji J., on the above point. It was, therefore, held in that case that an Excise Officer was a police officer within the meaning of Section 25, Evidence Act and as such hit by that section.

6. It is necessary now to examine the powers and duties of customs officers under the Sea Customs Act (Act 8 of 1878) in order to ascertain whether a customs officer can be considered to be a police officer within the meaning of Section 25, Evidence Act. It may be mentioned incidentally that this Act was passed after the enactment of the Evidence Act and that the decision of Garth C. J. was given before the Sea Customs Act was placed on the Statute book. Chapter 17 of the Sea Customs Act deals with the procedure relating to offences, appeals, etc. Sections 169 and 171 confer certain powers of search upon Customs officers. Section 173 confers powers upon them of arresting other persons on reasonable

suspicion. Section 178 confers the powers to seizure of things liable to confiscation. The powers conferred upon Customs officers and the duties imposed upon them under these sections sre clearly analogous to the powers of a police officer or for the matter of that to that of an Excise officer under the Bengal Excise Act. There is this difference, however, that the Sea Customs Act does not confer any power of investigation on a Customs officer whereas a police officer enjoys such powers and under Sections 73 and 74 of the Bengal Excise Act (Bengal Act 5 of 1909) Excise officers have been given certain powers of investigation. Now the question that falls for decision is whether by reason of the fact Customs officers have not been given powers of investigation though they enjoy other powers analogous to those exercised by a police officer or Excise officer it can be held from that circumstance alone that Section 25, Evidence Act does not apply to such Customs officers. In other words, the question is whether it can be held that the power of investigation is a governing test on the point whether Section 25, Evidence Act is applicable. We are of opinion that the question should be answered in the negative. In the case of -- 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), it was observed by S. K. Ghose J. (who concurred with the majority view) that 'it may be that the power conferred to investigate is not a complete test' though Jack J., in that case seemed to base his opinion on the question of investigation as his answer to the point referred to the Full Bench shows. Even Costello J., who took a dissentient view in the case of -- 'Ameen Sharif v. Emperor', 61 Cal 607 (FB), seems to have been of the opinion that it was wrong to hold that the power of investigation ought to be taken as being a criterion for the purpose of Section 25, Evidence Act.

7. The matter may be examined from another standpoint. As regards the applicabilityof Section 25, Evidence Act it has been held that it is not necessary that the police officer should be the investigating officer, -- 'Emperor v. Mallangowda', 42 Bom 1, nor need the crime confessed be under investigation at the time --'Shashipani Chetti v. Emperor', 38 Cri L J 323 (Mad). It has been further held that in fact it is not necessary that the confession should have been made in the course of investigation,-- 'Hussaina v. Emperor', 37 Cri L J. 740 (Lah). It would follow, therefore, that the investigation or the power of investigation is not the real or governing test for the application of Section 25, Evidence Act. It seems to us

that Customs officers under the powers conferred on them by the Sea Customs Act have got the essential powers, analogous to police powers, of prevention or detection of crimes even though they have not been vested with the powers bf investigation. Reference may in this connection be made again to the observation of Mukerji J., in the case of --'Ameen Sharif v. Emperor', 61 Cal 607 (FB), referred to before. That being so, we are inclined to hold the view that a Customs officer or, to be more precise, so far as the present case is concerned, a Preventive Officer of the Customs Department is a police officer in its extended sense within the meaning of Section 25, Evidence Act and as such no confession made to him shall be proved as against a person accused of any offence. We are fortified in coming to this conclusion by reason of the rule for placing Section 25, Evidence Act on the Statute. The reason is partly that the evidence of a police officer is untrustworthy to prove a confession and partly that the police should not be encouraged to extract confessions in the hope of gaining credit by securing convictions. These reasons, we are inclined to think, apply with almost equal force to the case of Preventive officers of the Customs Department notwithstanding the fact that they have not been invested with the powers of investigation. We may refer, in this connection to another observation of Garth C. J. in the case of -- 'Queen v. Hurribole Chunder', 1 Cal 207 referred to above. It runs thus:

'I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.'

This observation has not lost its force by the passage of time. In our opinion, therefore, though Section 25, Evidence Act was placed on the Statute Book before the Sea Customs Act wasenacted, in the interests of the purity of administration of justice Customs officers who exercise powers substantially analogous to thoseof police officers should also be subjected to the same limitations in the matter of confessions. We hold, therefore, that the confessional statement recorded by G. K. Das in the present case is hit by Section 25, Evidence Act.

8. It remains, however, to notice one Madras case, namely, the case of -- 'Mayilvahanam v. Emperor', 48 Cri L, J 326 (Mad) and decided by a Single Judge,

following certain decisionsof the Madras High Court based upon the Madras Excise Act the language of, which can be contradistinguished from the language used in the Bengal Excise Act. It was held in that case that Section 25, Evidence Act refers only to a police officer and that a statement by an accused to the Assistant Inspector of the Customs is not hit by the section and is admissible in evidence against the accused. As has been indicated already, this Madras decision is based upon certain decisions of that Court relating to Excise officers exercising powers under the Madras Excise Act. In that Madras case it was observed that

'in the Madras Excise Act, however, there are no provisions which confer the same amount of power on the excise officers in this Presidency as in the Bombay and Calcutta Excise Acts', and 'it is for this reason that this Court has, in a number of decisions, held the view that upon the construction of the Madras Excise Act excise officers in this Province cannot be deemed to be police officers within the meaning of Section 25, Evidence Act.' In the present case, however, we have to proceed on a proper construction of the relevant provisions of the Sea Customs Act, and contrast them with the corresponding provisions of the Bengal Excise Act and accordingly in spite of the decision in the case of -- 'Mayilvahanam v. Emperor', 48 Cri L J 326 (Mad), we are inclined to take the view for reasons given before that a Preventive officer of the Customs Department comes within the mischief of Section 25, Evidence Act.

9. The main point, therefore, which falls for decision in this appeal is decided in favour of the appellant. In other words the confessional statement of the appellant is hit by Section 25, Evidence Act.

10. There remains, however, for consideration a certain portion of that statement which may be said to attract the operation of Section 27, evidence Act. The only portion of the statement which is admissible in evidence under Section 27 of the Evidence Act is the last sentence in the recorded statement, namely, if a search of this cabin is made the 19 seers of opium will be made (found). Mr. Banerjee appearing for the State fairly conceded that if we come to the conclusion that the entire statement-made by the appellant comes within the mischief of Section 25,

Evidence Act only the sentence referred to above can be admitted in evidence under Section 27, Evidence Act. Even considering that it was as a result of that statement that the opium was discovered that fact by itself cannot form the basis of the conviction of the appellant under Section 13 read with Section 20, Dangerous Drugs Act.

11. In these circumstances we are of opinion that the conviction of the appellant cannot be sustained and the appeal must, therefore, be allowed and the conviction and the sentence set aside and the appellant acquitted. Under Section 34, Dangerous Drugs Act, however, the seized opium is confiscated.

Lahiri, J.

12. I agree.