

Air Customs Vs. Ram Chander

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Court : Delhi

Decided On : Feb-14-2012

Appellant : Air Customs

Respondent : Ram Chander

Advocate for Def. : Mr. Sidharth Luthra, Ms. Smiriti

Advocate for Pet/Ap. : Mr. Satish Aggarwala

Judgement :

* THE HIGH COURT OF DELHI AT NEW DELHI + CrI. L.P No.175/2006 Date of Decision: 14.02.2012 AIR CUSTOMS PETITIONER Through: Mr. Satish Aggarwala, Advocate Versus RAM CHANDER Respondent Through: Mr. Sidharth Luthra, Senior Advocate with Ms. Smiriti, Advocates CORAM: HON'BLE MR. JUSTICE M.L. MEHTA M.L. MEHTA, J..

1. This is a criminal leave petition under Section 378(3) of the Code of Criminal Procedure, 1973 preferred by the petitioner seeking special leave to appeal against the judgment dated 11.7.2006 passed by learned ACMM whereby the accused (respondent herein) was acquitted of charge under Section 135(1) (a) of the Customs Act, 1962..

2. This is a case of recovery of 24 gold biscuits from the Arrival Immigration Hall of IGI Airport on 20/01/1994. The said gold biscuits were lying below the wash-basin in the toilet for handicaps and were wrapped in brown plastic adhesive tape. When

the officers, acting on specific information, reached the spot, the respondent Shri Ram Chander, who was also standing there, tried to flee and struck at PW7 Duli Chand, Customs HC. Crl.LP No.175/2006 *Page 1 of 12* It may be noted that at the relevant time the respondent was posted as constable of Delhi Police..

3. The respondent/accused initially resisted arrest but was overpowered by the officers of the appellant department. He was searched but no gold was recovered from his possession. The custom officers recovered a cloth belt from the possession of the accused which had been tied to his waist under his trousers. The belt had a pocket stitched on it, which was intended to be used for concealing the gold biscuits. The incriminating articles were seized..

4. The packet was examined. The gold biscuits were found to bear Swiss markings and weighed 2.819kgs. The purity of the biscuit of yellow metal claimed to be gold were tested by a goldsmith PW6, who opined them to be of 24 carats purity and valued at Rs. 13,02,000/-..

5. A voluntary statement was tendered by the accused under Sec 108 of The Customs Act in which he admitted the recovery and seizure of the aforesaid gold biscuits; and also that he was to pick up the recovered gold from the said toilet and to deliver the same to one Bhagirath. He further stated that on 18/01/94, Bhagirath had told him that he will bring 5kgs. gold through one Surjit, which he should attempt to take out, otherwise he will clear it on payment of customs duty; that this was discussed when they travelled to his village in Bhagirath's car; that on 20/01/94, around 8.50 in the morning, he met with Bhagirath at the Departure where Bhagirath had told him that one Surjit, wearing a black cap, would keep the goods in the toilet meant for the handicapped, and that he should pick up the same from there, and for this he was given one cloth belt with pocket stitched over it to keep Crl.LP No.175/2006 *Page 2 of 12* the goods recovered; that he tied that belt on his waist; that for all this he was to be paid Rs. 30000/-..

6. He further stated that around 10.30/10.45 hrs he identified and verified the person wearing black cap as Surjit in the left immigration counter; that he was told that the gold was kept in the toilet for the handicaps; that he went inside the handicap's toilet and saw a bag lying below the wash basin; that the lady sweeper

present over there obstructed his entry into the toilet but he pushed her and went inside the toilet and picked up the bag; that he gave the lady sweeper some money and left for the Departure; that outside the Departure hall, he met with Bhagirath and handed over the bag, which he brought by concealing under his pants; that he was sent back by Bhagirath as the goods retrieved were found short; that on returning to the toilet he was again confronted the lady sweeper PW4 and that she did not let him enter the toilet. At that time the customs officers reached there and started enquiry from him..

7. The contention of the learned counsel for the petitioner department was that the recovery of the gold from the toilet meant for handicaps where the respondent/accused had no occasion or reason to go, but was found present alone would constitute the possession of contraband items by him. He submitted that the mere fact that he had been exonerated in departmental proceedings or the revisional proceedings will not entitle him to escape the prosecution in the criminal proceedings which are independently maintainable. He also submitted that the respondent/accused being the police official, there was no allegation of any enmity against him or the reason for his false implication in the present case. Crl.LP No.175/2006 Page 3 of 12.

8. On the other hand, learned counsel appearing for the respondent /accused submitted that there was no recovery of contraband gold effected from the respondent and that he has been falsely implicated due to enmity with the officers of the Customs Department and further that the revisional authority has exonerated him..

9. Before proceedings to advert to the submissions of learned counsel for the petitioner/ department and learned counsel for the respondent/ accused, it may be noted that it is trite that an appeal against an order of acquittal is extraordinary remedy and the power to appeal is to be exercised by the government sparingly. Though, the discretion to exercise that power is not subject to the control of this Court, but this Court can, however, exercise and check against arbitrary exercise of power of filing an appeal against an order of acquittal by not granting leave and thus not entertaining the appeal. Needless to state that the appeal against an

acquittal would lie on facts as well as law. While entertaining the petition of leave to appeal, I am conscious of the principle of overwhelming presumption of innocence of the accused in our criminal law and also the fact that the same has been further reinforced and strengthened by the order of acquittal by the learned trial court..

10. In this backdrop of legal proposition it would be required to be considered if there are some errors in the judgment of acquittal of learned ACMM. In proceeding to arrive at some findings in this regard, this would also be in the domain of this Court to see if the trial court committed any gross error in the appreciation of evidence and took into consideration the inconsequential circumstances and acted with material irregularity..

11. The prosecution had examined as many as 9 witnesses. PW2 Mr. S.S. Siddiqui was the main complainant and he was a witness of search and CrI.LP No.175/2006 *Page 4 of 12* recovery and seizure. He had proved the panchnama, certificate of purity of goldsmith and paper slip and also the case property in addition to the identity card of the accused/ respondent. He was also a witness to the recovery of cloth belt with stitched pocket from the waist of the accused/respondent. The testimony of this witness has not been properly appreciated by learned ACMM inasmuch as though no gold was recovered from the person of the accused/respondent, nor it was the case of the prosecution, this witness categorically maintained the presence of the accused/respondent near the place from where the recovery was effected and he also categorically denied that he was not present there in the toilet. In addition to the recovery of incriminating article, he also deposed as to the conduct of the accused/respondent particularly his attempt to escape on knowing of the search. The learned ACMM though has taken note of the conduct of the accused /respondent being relevant, but has overlooked this aspect to be very relevant. The learned ACMM has overlooked this aspect of the conduct by stating that this was not abnormal in view of the explanation given regarding the history of dispute in pursuance of which a case under Section 186/353 IPC was registered. The registration of a case under Section 186/353 IPC against the accused is rather indicative and supportive of the prosecution case of his trying to escape and when apprehended he tried to

obstruct the public servant. The acquittal of the accused in the said case under Section 186/353 IPC was not to be taken in favour of the accused/respondent, but rather supportive of prosecution version. PW7 Dulichand also corroborated the testimony of PW2 by specifically stating that on seeing the custom officials, the accused rushed and struck against him and as a result of which he fell down and sustained CrI.LP No.175/2006 *Page 5 of 12* injuries. The entire testimony of PW7 remained unassailed by the accused/respondent..

12. There are various other factors and circumstances indicating the conduct of the accused/respondent. It remained to be explained as to how and under what circumstances, the accused went inside the toilet meant for handicapped persons when he being the police official working there was supposed to know the said toilet to be meant for handicapped persons. Even otherwise, the circumstances of his going towards that side also remained unexplained. If he was not guilty and happened to be there by chance, he when confronted by PW4 Sudesh, would not have tried to run away and in the process hit PW7. The testimony of PW2 completely appears to be supporting the prosecution version. He categorically supported the fact that when he searched the pocket and found the accused/respondent there, he tried to run away and scuffled with Hawaldar (PW7). This fact cannot be ignored outrightly..

13. Likewise, the testimony of PW3 Mr. Anil Khanna needed appropriate appreciation and consideration. He had recorded the statement of accused. He categorically denied the suggestion that the accused was physically and mentally tortured and his statement was extracted forcibly. He also denied that statements of PW4, PW8 and PW9 were not recorded by him and he obtained their signatures without explaining the contents thereof. From the testimonies of these witnesses, it would be prima facie seen that they had given minute details of themselves which could not be available with PW3 or other officers of the department and these details could be given by them only. Further their statements so recorded under Section 108 of the Customs Act having not been retracted are apparently admissible. Though these CrI.LP No.175/2006 *Page 6 of 12* witnesses have been employed on contract basis doing conservative and menial jobs, as observed by learned ACMM and had turned hostile, but their testimonies, particularly those part

which supported the prosecution case need to be appreciated in right perspective. Turning of such witnesses hostile per se in some aspect would not materially impact the prosecution case. Learned ACMM has overlooked the fact that the statements of these witnesses under Section 108 of the Customs Act were voluntary and contained relevant incriminating facts against the accused and those statements were not retracted..

14. Further PW5 Sudershan Marwah clearly stated that statement of PW4 Sudesh was recorded in her presence and that her signatures were not taken on pre-recorded statement. The testimony of this witness has also not been appreciated in right perspective by learned ACMM..

15. PW6 is a jeweler who had tested the recovered gold biscuits and issued purity certificate. He stated having conducted the drilling test. He had denied that he had issued a certificate at his shop and had not gone to the Airport for testing. The testimony of this witness has been ignored on the ground that the purity of gold biscuits was not tested by drilling. The learned ACMM seems to have overlooked the fact that this witness was having experience of about 15 years and already similar types of certificates had been issued by him based on similar test method..

16. Though PW8 and PW9, as noted above, were also declared hostile for having resiled from their earlier statements, but it is to be noted that their statements under Section 108 of the Customs Act, have not been retracted till date. In their statements also, they have revealed large number of personal details which would not have been known to anyone, unless disclosed by CrI.LP No.175/2006 *Page 7 of 12* them. That would prima facie reinforce that the statements were recorded at their dictates and were not pre-recorded..

17. The observations of learned trial court that it is but natural that PW4, PW8 and PW9 who were employees of the contractor would not have made statements or signed the documents without the specific knowledge of contractor and the possibility of their having signed statements made to the custom officers without knowing their contents at the instance of said contractor, cannot be ruled out, is all imaginary and without any basis. It is prima facie seen that the statements of these witnesses, though not in their handwriting, are made by them. With regard to the

voluntary statement of PW4, this fact is confirmed by PW5 and this is also further confirmed from the nature of contents of her statement. All these aspects need further consideration..

18. Learned ACMM has herself recorded that the testimony of PW2 established involvement of accused coupled with recovery of incriminating articles and that it is further corroborated by testimony of PW7 which has remained un-assailed. It has also been observed by her that admittedly once the recovery has been proved, the conviction could be passed even on the statement of hostile witness under Section 108 of Customs Act. The statements of witnesses under Section 108 of Customs Act remained unrebutted and that of the accused having been retracted much later, have also not been considered by learned trial court in right perspective..

19. Much reliance has been placed by learned ACMM on the order of Revisional Authority to record that gold was not recovered from the possession of accused/respondent. In the revisional order dated 27.12.2006, the Joint Secretary exonerated the respondent/accused on account of benefit CrI.LP No.175/2006 *Page 8 of 12* of doubt. The basis of such findings was that (i) no evidence of recovery of gold from the accused or other applicants; (ii) Smt. Sudesh, Ram Chander and Hahender (PW4, PW8 and PW9) have denied their statements and resiled from statements under Section 108 of Act; (iii) nothing on record to prove the involvement of applicant, Surjit and Bhagirath ever involved in smuggling of gold or any contraband goods; (iv) the charges of smuggling of gold having not been proved against the accused in departmental enquiry..

20. The question as regards to the exoneration of the respondent /accused in departmental adjudication proceedings and the effect thereof on the criminal proceedings has been considered in various judicial decisions. It is trite that adjudication proceedings as well as criminal proceedings can be initiated simultaneously and that the findings of the departmental or adjudication proceedings would not amount to res judicata and that initiation of criminal proceedings would not be treated as double jeopardy. The findings of adjudication proceedings would have no bearing on the criminal case and that the criminal proceedings are to be determined in its own merits in accordance with law,

uninhibited by the findings of the Tribunal or the adjudicating authority. It is also trite that where the accused person is exonerated by the competent authority/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether the criminal proceedings could still continue. If the exoneration is on technical ground or by giving benefit of doubt and not on merits or that adjudication proceedings were on different facts or that the adjudication proceedings lacked proper appreciation of evidence, it would have no bearing on the criminal proceedings. If the exoneration in the adjudication proceedings is on merits and it is found that the allegations are not substantiated and the accused CrI.LP No.175/2006 *Page 9 of 12* is innocent, the criminal proceedings on the same set of facts and circumstances may not be allowed to continue [Sunil Gulati v. R.K. Vohra [2007 (1) JCC.

220. 21. Thus, it comes to be that a distinction has been drawn where exoneration in an adjudicating proceeding on a given set of facts and evidence is on merits vis--vis where exoneration in adjudicating proceedings is either not on merits or criminal proceeding is based upon different set of facts and evidence. The adjudicating authority in this case prima facie had found the respondent/accused guilty of possession of confiscated gold weighing 2.80 kg concealed in the cloth belt with pockets. A show cause notice was issued to him. The respondent/accused preferred an appeal before the Commissioner of Customs which upheld the order of adjudicating authority. The respondent preferred a revision before the Competent Authority which, as noted above, vide order dated 27.12.2006 exenorated the respondent/accused..

22. In the revisional order that was passed on 26.6.2008, after remand by this Court, the respondent/accused was also exonerated almost on identical grounds..

23. It would be seen that adjudicating authority as also the appellate authority both found the respondent guilty on merits but the revisional authority exenorated him on account of benefit of doubt. Both the revisional authorities have also not properly appreciated the evidence. Both the revisional authorities have also primarily based their decisions stating that there was no evidence on record that the impugned gold was recovered from the respondent/accused or from Surjit

Kumar and Bhagirath. In fact, both of them have recorded in similar words that, "the investigation has not been able to recover the said packet containing gold/ contraband goods which was said CrI.LP No.175/2006 *Page 10 of 12* to have been taken out by Ram Chander (respondent/accused) and handed over to Bhagirath or the said vehicle which was stated to be waiting outside the airport". It is also recorded by both the authorities that there is nothing on record to prove that these persons were ever involved in smuggling of gold or any contraband and further that in the departmental enquiry conducted against the respondent/accused charges of smuggling of gold could not be proved..

24. The findings of revisional authorities, as noted above, would not bar the instant criminal proceedings. Having noted above, the appreciation of facts and the consideration which prevailed before the revisional authority, I am of the considered view that their findings would not have any bearing on the present criminal proceedings. The observations of revisional authorities that gold having been not recovered from the possession of accused/ respondent and the retraction of statements of witnesses PW4, PW8 and PW9 and also the accused/respondent and also some of the witnesses turning hostile, are apparently not factually correct. The findings on facts of the Adjudicating Authority are final..

25. It has already been discussed above that there is no retraction of statement under Section 108 of the Customs Act by the aforesaid 3 witnesses and retraction of statement of accused/ respondent is highly belated. The recovery of gold from near the place where the accused/ respondent was standing alone and where he had no reason or occasion to be present, prima facie makes the recovery to be from the possession of respondent/accused. It is more so keeping in view the fact that no explanation is given by respondent/ accused at that time and on the other hand he tried to escape and run away and in the process also had a scuffle with the officials of the department. There is nothing on record to suggest of any enmity of the CrI.LP No.175/2006 *Page 11 of 12* respondent/accused with any of the officials of the petitioner department and also there is nothing to suggest as to why he would have been falsely implicated in such a serious offence..

26. Having regard to the foregoing facts and circumstances, I am of the considered view that the case requires full consideration and re-appreciation of entire prosecution case. Consequently, leave is granted to the petitioner/department for filing an appeal against the impugned order of acquittal. Leave granted accordingly..

27. Nothing contained in this order shall amount to expression of opinion on merits of the case. Crl. Appeal No. _____/2012 (to be registered) List this appeal for hearing on 16.03.2012. M.L. MEHTA, J. February 14, 2012 rd Crl.LP No.175/2006
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