

A

GULAM HUSSAIN SHAIKH, CHOUGULE

v.

S. REYNOLDS, SUPTD. OF CUSTOMS, MARMGOA

OCTOBER 19, 2001

B

[D.P. MOHAPATRA AND K.G. BALAKRISHNAN, JJ.]

Customs Act, 1962 : Sections 108 and 135.

C

Confessional Statement—Contraband goods—Interception of trawler—Presence of accused on trawler—Arrest—Statement recorded by customs officer—Conviction of accused held valid—Held such a statement was neither hit by Section 164 Cr.P.C. nor Section 125 Evidence Act.

Code of Criminal Procedure, 1973 : Section 164—Applicability of.

D

Evidence Act, 1872 : Sections 24 and 25—Applicability of.

Constitution of India, 1950 :

Article 136—Appeal—Interference with concurrent findings of fact—Held not called for.

E

The appellant was prosecuted under Section 135 of the Customs Act, 1962. The prosecution case was that 207 silver ingots were clandestinely brought into Goa in a trawler. These contraband ingots were recovered on a trawler in which these were to be transported out of Goa. The appellant was also present on this trawler at the time of interception. The appellant's

F

conviction under Section 135 by Trial Court was upheld by the Appellant Court. The revision preferred by appellant was dismissed by High Court. The appellant's contention that while recording his statement under Section 108 the safeguards provided under Section 164 of the Code of Criminal Procedure, 1973 were not complied with by the customs officer was rejected by the High Court. It hold that Section 164 of Cr. P.C. was not

G

applicable to the confessional statement recorded under Section 108 of the Customs Act. Two other points were also urged by the appellant viz; (i) the prosecution had failed to establish any connection between the trawler on which contraband goods were brought into Goa and the other trawler on which the appellant was present and (ii) as the statement under Section

H

108 was recorded during period of detention under inducement and threat

the same was inadmissible under Section 25 of the Evidence Act. Both these points were rejected by the High Court as it did not feel persuaded to interfere with the concurrent findings of fact. Hence this Appeal.

Dismissing the appeal, this Court

HELD : 1. No exception can be taken against the view recorded by the High Court that a statement recorded under Section 108 of the Customs Act 1962 is neither hit by Section 164 of the Code of Criminal Procedure, 1973 nor Section 25 of the Evidence Act, 1872. [479-F-G]

2. The High Court declined to accept on the facts emerging from the evidence that the confessional statement was made under inducement and threat and physical assault. There is no scope for this Court to interfere with the order in that regard in exercise of jurisdiction under Article 136 of the Constitution. [483-B]

Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors., [2000] 7 SCC 53, relied on.

Union Textile Traders v. Shree Bhawani Cotton Mills Ltd., AIR (1970) SC 1940; *Harbansingh Sardar Lenasingh and Anr. v. The State of Maharashtra & Anr.*, AIR (1972) SC 1224; *K.T.M.S. Mohd. and Anr. etc. etc. v. Union of India*, [1992] 3 SCC 178; *Haroon Haji Abdulla v. State of Maharashtra*, [1968] 2 SCR 641; *Romesh Chandra Mehta v. State of West Bengal*, [1969] 2 SCR 461; *Percy Rustomji Basta v. State of Maharashtra*, [1971] 1 SCC 847; *Veera Ibrahim v. The State of Maharashtra*, [1976] 2 SCC 302 and *Poolpandi v. Supdt. Central Excise*, [1992] 3 SCC 259, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1080 of 2001.

From the Judgment and Order dated 28.4.2000 of the Bombay High Court in CrI. R. A. No. 6 of 2000.

V.B. Joshi and Praveen Jain for the Appellant.

M. Gaurishankar Murthy, K.C. Kaushik and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

A **D.P. MOHAPATRA, J.** Leave granted.

B Faced with dismissal of the revision application filed by him, challenging the judgment passed by the Appellate Court dismissing his appeal, the accused Gulam Hussain Shaikh Chougule has filed this appeal by special leave assailing the judgment of the Courts below convicting him of the offence under section 135 of the Customs Act, 1962 (for short 'the Act') and sentencing him to undergo imprisonment for three years and to pay a fine of Rs.25,000 in default to undergo six months simple imprisonment further.

C The gist of the prosecution case is that 207 silver ingots weighing approximately 30 kgs. valued at Rs.4,22,48,225 were clandestinely brought into Goa in an Arab Dhow and the same were to be transported in the trawler Gramdev Navdurga (for short 'the trawler'). When the said trawler was intercepted at Aguada Light House by the Officers of the Customs Department on 4th of October, 1988 the appellant was found to be present on the trawler. The investigation revealed that the trawler was stationed on the port for being used to carry and transport the contraband silver ingots.

D The respondent who was a Customs Officer issued a notice to the appellant on 5th October, 1988 and recorded his statement under section 108 of the Act. Subsequently on 6th October, 1988 the appellant was arrested and produced before the Magistrate on 7th October, 1988. Thereafter on 28th February, 1989 the respondent filed a complaint under section 135 of the Customs Act in the Court of the Chief Judicial Magistrate, Panaji. The trial court by judgment dated 18th February, 1995 convicted the appellant and others for having committed the offence under section 135 of the Customs Act and sentenced him to undergo 7 years rigorous imprisonment and to pay a fine of Rs.50,000 and in default to suffer rigorous imprisonment for one year. The Additional Sessions Judge, Mapusa by the judgment dated 28.12.1999 maintained the conviction of the appellant but reduced the sentence to three years rigorous imprisonment with a fine of Rs.25,000 in default to undergo six months simple imprisonment further. The appellant filed the Criminal Revision Application No.6 of 2000 assailing the judgment/order of the Appellate Court. The High Court by order dated 28.4.2000 dismissed the Criminal Revision Application. The said order is under challenge in the present appeal.

H In paragraph 4 of the judgment under challenge the High Court has formulated the three points urged by the counsel appearing for the appellant, namely :

1. The Customs Authorities while recording the statement under section 108 of the Customs Act, had not followed the safeguards provided under Section 164 Criminal Procedure Code; A
2. The applicants in Criminal Revision Application Nos. 4, 5 and 6/2000 had been detained by the Customs Authorities from 4th October, 1988 to 7th October, 1988, which amounts to arrest of the said applicants and the statements of these applicants were recorded under Section 108 of the Customs Act during this period of detention after giving threats and exercising duress. In this connection it is pointed out that the medical papers of the applicants show that they were assaulted and, as such, the statements of these applicants recorded under section 108 of the Customs Act, cannot be said to be voluntary; and B C
3. No link has been established between the Arab dhow and the said trawler." D

The High Court, on examination of the first point which raised essentially a question of law, rejected the contention of the applicant referring to different decisions of this Court in *Union Textile Traders v. Shree Bhawani Cotton Mills Ltd.*, AIR (1970) SC 1940; *Harbansingh Sardar Lenasingh and Anr. v. The State of Maharashtra & Anr.*, AIR (1972) SC 1224; *K.T.M.S. Mohd. and another etc.etc. v. Union of India*, [1992] 3 SCC 178, and held that the provisions of section 164 of the Criminal Procedure Code are not applicable to the confessional statement of the appellant recorded by the Customs Officer under section 108 of the Act and therefore rejected the contentions raised on behalf of the appellant that the safeguards prescribed under section 164 Criminal Procedure Code having not been complied by the Customs Officer the statement is inadmissible in evidence. The High Court held that a statement recorded under section 108 of the Act is neither hit by section 164 Criminal Procedure Code nor section 25 of the Evidence Act. E F

Regarding the other two points urged by the counsel for the appellant, the High Court did not feel persuaded to interfere with the concurrent findings of fact rejecting the contention that the statement recorded under section 108 of the Act was not voluntary one having been obtained under pressure of coercion and threat and physical assault on the appellant. The High Court also rejected the third point that the prosecution has failed to establish any connec- G H

A tion between the Dhow and the trawler on which the appellant and others were present.

B The learned counsel for the appellant reiterated the contentions raised before the High Court that the safeguards prescribed under section 164 Criminal Procedure Code for recording the confessional statement of an accused have not been followed by the Customs Officer.

Section 108 of the Customs Act, 1962 reads as follows:

C "108. Power to summon persons to give evidence and produce documents (1) Any gazetted officer of custom shall have power 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.

D (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.

E (3) All persons so summoned shall be bound to attend either in person or by an authorised agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required.

F Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

G (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

H In the case of *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors.*, [2000] 7 SCC 53, this Court held that the provision in section 164 of Criminal Procedure Code empowers a Judicial Magistrate to record any confession or statement made to him during the course of investigation. The power conferred by Section 164, Criminal Procedure

Code to record confessions and statements can be exercised only by a Judicial Magistrate. Even a police officer on whom power of a Magistrate has been conferred is forbidden from recording a confession. Sub-sections (2) and (4) deal with procedure which such Magistrate has to follow while recording inculpatory statements made by persons. Referring to section 108 of the Customs Act, this Court observed :

“Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the Magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost.

..... The ban contained in section 25 of the Evidence Act is an absolute ban. But it must be remembered that there is no ban in regard to the confession made to any person other than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.”

A In the judgment this Court quoted with approval the following observations made by Hidayatullah, J. (as he then was) in *Haroon Haji Abdulla v. State of Maharashtra*, [1968] 2 SCR 641:

B “.....These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Section 171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from someone in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him.”

C Reference was made to the decision in *Romesh Chandra Mehta v. State of West Bengal*, [1969] 2 SCR 461 wherein it was held:

D “When an inquiry is being conducted under Section 108 of the Customs Act, and a statement is given by a person against whom the inquiry is being held it is not a statement made by a person accused of an offence and the person who gives the statement does not stand in the character of an accused person.”

E This Court also referred the case in *Percy Rustomji Basta v. State of Maharashtra*, [1971] 1 SCC 847, and also the three Judge Bench decision in *Harbansingh Sardar Lenasingh & Anr. v. State of Maharashtra*, (supra); *Veera Ibrahim v. The State of Maharashtra*, [1976] 2 SCC 302 and *Poolpandi v. Supdt., Central Excise*, [1992] 3 SCC 259.

F The conclusions of the Court were summarised as follows:

G “We hold that a statement recorded by Customs Officers under Section 108 of the Customs Act is admissible in evidence. The court has to test whether the inculcating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act.....”

H In view of the position of law enunciated by this Court in the recent decision afore-mentioned with which we are in respectful agreement, no exception can be taken against the finding recorded by the High Court on the

point.

A

Regarding section 24 of the Evidence Act the case of the appellant was that since the confessional statement was made under inducement and threat and physical assault which, the High Court on examination, declined to accept on the facts emerging from the evidence in the case, there is no scope for this Court to interfere with the order in that regard in exercise of jurisdiction under Article 136 of the Constitution.

B

For the reasons discussed in the foregoing paragraphs, it has to be held that the High Court rightly rejected the contentions raised on behalf of the appellant on that score. Thus the appeal, being devoid of merit, is dismissed.

C

T.N.A.

Appeal dismissed.