

**HIGH COURT OF TRIPURA**  
**AGARTALA**

**Crl. A. No. 47 of 2006**

Union of India  
 Represented by  
 Deputy Commissioner of Customs  
 Agartala Division, Agartala.

.....**Appellant**

**– Vs –**

Sri Dulal Chowdhury  
 S/o. Sri Chakradhar Chowdhury  
 R/o. Vill. Amtali, P.O. Amtali  
 Dist. West Tripura.

.....**Respondent**

**B E F O R E**  
**THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellant	: Mr. P. Datta, Advocate.
For the respondent	: Mr. A. Das, Advocate.
Date of hearing	: <b>10.04.2013</b>
Date of delivery of Judgment & order	: <b>31.07.2013</b>

**JUDGMENT & ORDER**

**01.** This is an appeal by the Union of India under Section 378 of the Code of Criminal Procedure, 1973, Cr.P.C. in short, against the judgment and order of acquittal dated 30.06.2005 passed in Criminal Appeal No.45(3) of 2004 by the Additional Sessions Judge, West Tripura, Agartala reversing the judgment of conviction and order of sentence dated 22.06.2004 under Section 135(1), (a), (b), (i) of the Customs Act, 1962 in CR No.1333 of 1998.

**02.** The respondent was intercepted by the Custom officials on 26.12.1990 at Chakmaghat on Assam-Agartala Road and allegedly the custom officials had recovered ten numbers foreign gold biscuits from him as the

respondent failed to justify such possession in presence of the independent witnesses, those gold biscuits were seized on preparing a seizure list and taken to the custody. The respondent had made purportedly a voluntary statement in writing in presence of two independent witnesses stating that those gold biscuits were procured from Madhabpur, Bangladesh for handing over to their owner at Howrah Railway Station, Kolkata.

**03.** In a custom proceeding as drawn under Section 108 of the Customs Act, 1962 those gold biscuits were confiscated and a fine of Rs.2000/- was imposed on the respondent. Thereafter, a complaint was filed for prosecution under Section 135(1), (a), (b) read with Section 135(1) (i) of the Customs Act, 1962.

**04.** The complainant adduced 7 witnesses and admitted as many as 9 documents, Exbt.1 to 9, for substantiating the charge under Section 135(1), (a), (b), (i) of the Customs Act, 1962, against which the respondent had pleaded not guilty and claimed to be tried.

**05.** On appreciation of the evidence, the Chief Judicial Magistrate, West Tripura, Agartala returned the finding of conviction and sentence directing the respondent to suffer rigorous imprisonment for a term of 4 years.

**06.** Being aggrieved, the respondent filed an appeal under Section 374 of the Cr.P.C. against the said judgment and order dated 22.06.2004 as passed by the Chief Judicial Magistrate in CR No.1333 of 1998 in the Court of the Sessions Judge, West Tripura, Agartala. In due course the appeal being

Criminal Appeal No.45(3) of 2004 was transferred to the Court of the Addl. Sessions Judge, No.2, West Tripura, Agartala.

**07.** By the impugned judgment and order, the appellate court set aside the judgment and order dated 22.06.2004 as passed by the CJM, West Tripura, Agartala on the ground that the statement of the respondent recorded under Section 108 of the Customs Act, 1962 even though has been made the basis of the conviction was not proved in accordance with law inasmuch as PWs 5 and 6 have categorically stated without any ambiguity that they had signed in a statement as prepared. The Addl. Sessions Judge, West Tripura, Agartala thus held that since the accused has denied to admit the recovery of any gold biscuits from his possession, the benefit thereof must go to the accused.

**08.** Mr. P. Datta, learned counsel appearing for the appellant has seriously criticised the said judgment for being bereft of cogent reasons and interpreting the law whimsically. He has contended that when the statement was made voluntarily to the custom officer authorized to record such statement under Section 108 of the Customs Act, 1962 such inculpatory statement is admissible in the evidence and those can be fully relied for returning the finding of conviction. He has made a reference as to the authority of the custom officer to record such statement to a decision of the apex court in ***Naresh J. Sukhawani vs. Union of India*** reported in ***AIR 1996 SC 522*** where the apex court has held that ***It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials***

***under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as the said statement clearly inculpates him. Such statement also can be used as substantive evidence to prove the charge against the person with the contravention.*** In another decision in ***K. I. Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin*** reported in ***(1997) 3 SCC 721*** the apex court has held as under:

***"17. It would thus be clear that the object of the Act empowering Customs Officers to record the evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act so as to initiate proceedings for further action of confiscation of the contraband or imposition of the penalty under the Act etc. By virtue of authority of law, the officer exercising the powers under the Act is an authority within the meaning of Section 24 of the Evidence Act.***

***(1) Though the authority/officer on suspecting a person of having committed the crime under the Act can record his statement, such a person perforce is not a person accused under the Act.***

***(2) He becomes accused of the offence under the Act only when a complaint is laid by the competent Customs Officer in the Court of competent jurisdiction or Magistrate to take cognizance of the offence and summons are issued. Thereafter, he becomes a person accused of the offence.***

***(3) A statement recorded or given by the person suspected of having committed an offence during the inquiry under Section 108 of the Act or during confiscation proceedings is not a person accused of the offence within the meaning of Section 24 of the Evidence Act.***

***(4) Though the Customs Officer is an authority within the meaning of Section 24 of the Evidence Act, by reason of statutory compulsion of recording the statement or the accused giving voluntary statement pursuant to his appearing either after issuance of summons or after the appellant's surrender, such statement cannot be characterised to have been obtained by threat, inducement or promise.***

***(5) The collection of evidence under Section 108 and other relevant provisions relating to search and seizure are only for the purpose of taking further steps for confiscation of contraband and imposition of penalty.***

***(6) The selfsame evidence is admissible in evidence on the complaint laid by the Customs Officer for prosecution under Section 135 or other relevant statutes."***

**09.** Mr. Datta, learned counsel for the appellant based on the enunciation made in ***K. I. Pavunny*** (supra) has contended that when the respondent was making the statement inculcating him he was not charged under Section 135(1), (a), (b), (i) of the Customs Act, 1962 and the respondent had made the statement voluntarily, without any threat, inducement or promise. Therefore, the said statement has been lawfully admitted in the evidence by the prosecution to substantiate the charge under Section 135(1), (a), (b), (i) of the said Act. A reference has also been made to ***Kashmira Singh vs. the State of Madhya Pradesh*** reported in ***AIR 1952 SC 159***. But the said decision has no relevance in this context inasmuch as ***Kashmira Singh*** (supra) is celebrated for its elucidation as to the testimony of the accomplice whether can be used to corroborate against the other. In ***Kashmira Singh*** (supra) it has been held that:

***"The tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger.... The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused."***

**10.** Mr. Datta, learned counsel for the appellant has further contended that the seizure has been made illegally will not overturn the prosecution case in view of the apex court's decision in ***State of***

***Maharashtra vs. Natwarlal Damodardas Soni*** reported in ***AIR 1980 SC***

**593** where it has been enunciated that:

***"Taking the first contention first, it may be observed that the police had powers under the CrPC to search and seize this gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs."***

**11.** Mr. Datta, learned counsel for the appellant has further contended that the appellate court below did not properly read the documents Exbts.7, 8 and 9 and had those documents been read properly the appellate court below would not have reversed the judgment and order of the conviction and sentence.

**12.** From the other side, Mr. Das, learned counsel appearing for the respondent has contended that the custom officers had trampled the procedural safeguards and implicated the respondent mala fide in this case. Even if the prosecution's version is believed then also it would surface without ambiguity that there is no evidence of voluntariness in making the statement as recorded in exercise of the power as conferred by Section 108 of the Customs Act, 1962. Apart that, while making the seizure in exercise of powers so conferred under Section 102 of the Customs Act, 1962, the respondent was not stated that he had right not to make any disclosure to those officers. In support of his contention, Mr. Das, learned counsel for the respondent, referred to a decision of the apex court in ***Superintendent of Customs vs. Bhanabhai Khalpabhai Patel and another*** reported in ***AIR 1992 SC 1583*** where it has been held that:

***"We have gone through the records and found that the finding of the High Court is not liable to be interfered with since it is the admitted case of the prosecution itself that the jeep has been sold to the acquitted accused No. 7. Coming to the statements recorded from A1 and A3 under Section 108 of the Customs Act, the High Court has correctly pointed out that the first Appellate Court was not at all justified in taking those statements of the accused persons as corroborative pieces of evidence to that of witness No. P.W. 7 (who was arrayed initially as accused No.2 in the complaint). When these two pieces of evidence, namely, the evidence of P.W. 7 and the statements of A1 and A3 given before the Customs Officers are eschewed from consideration as correctly pointed out by the High Court there is absolutely no evidence worth mentioning to sustain the conviction of the first respondent as recorded by the trial Court and subsequently confirmed by the first Appellate Court. In fact, the High Court has analysed the evidence adduced by the prosecution in the proper perspective and arrived at a correct conclusion that the prosecution has miserably failed to establish the charge against the first respondent."***

**13.** Mr. Das, learned counsel for the respondent has also relied on a decision of Bombay High Court in ***Pascoal Dias vs. Assistant Collector of Customs*** reported in ***2003(157) ELT 132 Bom*** where the Bombay High Court has stated that:

***"I have perused the evidence of the prosecution witnesses, the complaint and the panchnama and it appears that the right available to the accused under Section 102 of the Customs Act of being searched in the presence of either a Gazetted Officer or a Magistrate has not been informed to the accused. There are no averments in the evidence, in the complaint or in the panchnama that the accused was apprised of his right under Section 102 of the Customs Act. Section 102 of the Customs Act provides that in case the search and seizure is made in pursuance to the powers thereof conferred under Sections 100 and 101, the accused, if he so desires, may be produced before a Gazetted Officer or a Magistrate. The rigour of Section 102 and of Section 50 is identical. Admittedly, in this case P.W. 2 Shridaran was exercising his powers of search and seizure under Section 101 of the Customs Act. The mandatory requirement of apprising the applicant/accused of his right under Section 102 has not been complied with. In the face of this non-compliance of Section 102, the conviction and sentence passed against the applicant/accused is unsustainable."***

**14.** For appreciating the contention of the learned counsel appearing for the parties, it would be appropriate to make a re-appreciation of the evidence so recorded by the learned trial court.

**15.** PW-1 who lodged the complaint on having accorded the sanction for prosecution (Exbt.1) from the competent authority has stated that Mr. D. K. Nath, Inspector (PW-3) had seized 10 pieces of gold biscuits of the foreign mark from the possession of the respondent. In his cross-examination, he has categorically stated that the accused was not given statutory warning while recording his statement vide Annexure-C and Annexure-E, even though PW-1 has denied that this statement was obtained under threat or coercion.

**16.** PW-2 is a seizure witness who did not disclose anything beyond the fact of seizure.

**17.** PW-3 is the officer who seized the gold biscuits from the respondent on 26.12.1990 has stated that he recovered the biscuits from the respondent and he had recorded the statement of the driver of the truck, namely, Uttam Saha, whom the respondent was travelling with and one passenger, namely, Gopalendu Sinha on the spot. He has further stated that the statement made by the accused in the question and answer form (Exbt.8) was recorded by another Inspector, namely, S. K. Chowdhury, (PW-4) in his presence.

**18.** S. K. Chowdhury, PW-4, has deposed in the court that the respondent was brought out from the vehicle and in presence of two



independent witnesses the gold biscuits of the foreign mark were seized. He has stated that the accused had voluntarily made the answers to his question.

**19.** PW-5, namely, Goutam Pal, appears to be a stock witness who has stated that "one custom officer obtained my two signatures in two separate statements". He did not state anything more. Even though he was adduced by the prosecution to prove the voluntariness of the statement (Exbt.8).

**20.** PW-6, namely, Sanjoy Roy, has stated in the similar vein that of PW-5. Both PWs 5 and 6 have categorically stated that no statement was made before them and they did not know what was written there.

**21.** PW-7, namely, Gopeswar Saha, was a co-traveller who has stated how the search was carried out and he has admitted that he was also searched. He has admitted the seizure list in the evidence.

**22.** There is no evidence that the respondent has made the statement voluntarily and moreover, PWs 5 and 6 have categorically stated that no statement was made before them even though they had signed the statement as the witnesses. There is no reliable evidence as to the voluntariness of the purported inculpatory statement. Even though PW-4 has stated that the statement, Exbt.8, is recorded in the question and answer form but it appears from the Exbt.8 that it is a simple statement made by the respondent in presence of PWs 5 and 6. The last paragraph of the said statement reads as under:

***"I have written out the above statement voluntarily in front of the witnesses on knowing it to be true and put my***

***signature below and (I) do acknowledge receipt of one copy of this statement."***

But PWs 5 and 6 have categorically denied their presence at the time of making the statement or preparation of the same. Apart that, the respondent was never apprised of his right as provided under Section 102 of the Customs Act, 1962 which provides that:

***"(1) When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of the customs shall, if such person so requires take him without unnecessary delay to the nearest gazetted officer of customs or magistrate."***

**23.** In ***Pascoal Dias*** (supra) the Bombay High Court has interpreted this clause and enunciated that the existence of such right in favour of the accused has to be apprised by the officer who has to search and seize any materials from him. Unless such right is apprised of, the search and seizure would be rendered illegal.

**24.** On appreciating the statement as recorded under Section 313 of the Cr.P.C. it has surfaced that the appellant has pleaded innocent even though without much explanation.

**25.** For the reasons and infirmities as discussed above, this court is not inclined to interfere with the impugned judgment and order of acquittal and as such this appeal stands dismissed.

Send down the LCRs forthwith.

**JUDGE**

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