

ATSISTANT COLLECTOR OF CENTRAL
EXCISE, CALICUT

v.

V.P. SAYED MOHAMMED

January 12, 1983

[E.S. VENKATARAMIAH AND R.B. MISRA, JJ.]

Evidence—Benefit of doubt to accused—Doubt must be reasonable, real and substantial arising out of entire evidence.

The respondent was charged under s. 135 (b) of the Customs Act, 1962 read with s. 85 (ii) of the Gold (Control) Act, 1968. The case against him was supported *inter alia* by the oral evidence of the Inspector who had seized 28 gold bars from him at a railway station, the ticket collector on duty at the time of seizure and the goldsmith who had certified the purity and weight of the gold bars seized. The goldsmith had deposed that he could by experience assess the purity of gold by rubbing it on a touch-stone. The documentary evidence included a statement made by the respondent before the Customs Superintendent admitting that the gold bars had been seized from him and that the same had not been legally imported. That the respondent had made this statement of admission had been affirmed by the Inspector in his deposition. In his examination under s. 342 Cr. P.C., when the respondent was asked what he had to say regarding the deposition of the Inspector, he stated :

It is true that gold was recovered from my box. It was not mine. It was handed over to me by the person called Mammu asking me to give it in his house. I had no knowledge that it was gold."

The respondent was convicted and sentenced by the District Magistrate. After his appeal against the same was rejected by the Sessions Judge the respondent filed a revision petition which was allowed by the High Court on the ground that the prosecution had failed to establish that the metallic bars seized from the respondent were gold bars.

The High Court rejected the evidence of the goldsmith on the ground that he did neither have the training nor the qualification in the art of testing gold and that he had not conducted either the furnace test or the specific gravity test to determine the character of the metallic bars. According to it, the goldsmith had miserably failed in the witness box to give the impression that he was a competent person to certify that what were seized from the respondent were gold bars. The High Court was of the view that no importance could be given to the respondent's statement of admission before the Customs Superintendent as the same had not been put to him under s. 342,

A Cr. P.C. and the person who recorded it had also not been examined. In so far as the answer given by the respondent to the question put by the court under s. 342, Cr. P.C. the High Court observed that even assuming that it would have some value, the prosecution could not seek to split the same into various parts and rely on what it considered to be advantageous to establish its case.

B Allowing the appeal against acquittal,

C **HELD :** The onus of proving the facts essential to the establishment of the charge against an accused lies upon the prosecution and the evidence must be such as to exclude every reasonable doubt about the guilt of the accused. If a reasonable doubt arises in the mind of the court after taking into consideration the entire material before it regarding the complicity of the accused the benefit of such doubt should be given to the accused but the reasonable doubt should be a real and substantial one and a 'well founded actual doubt arising out of the evidence existing after consideration of all the evidence'.

[230 C-E]

Woodroffe & Ameer Ali's Law of Evidence, 13th ed. Vol. I, pp. 203-204, referred to.

D In the instant case the doubt entertained by the High Court about the nature of the metallic bars cannot be considered to be a reasonable doubt. It is well known that persons who are goldsmiths by profession are able to find out whether a piece of metal is gold or not by the colour of the streak produced by rubbing it on a touch-stone used by them even though their assessment of its purity may not be exact. Further, the respondent did not dispute that gold had been recovered from his box. Reading his answer to the question put under s. 342, Cr. P.C. as a whole, it means that he knew that when his steel trunk was opened and searched there was gold in it but he had no knowledge that the packet contained gold when it was handed over to him by Mammu. The High Court erred in holding that the statement of the respondent that the gold was seized from him could not be used against him on the ground that it would result in the splitting up of the statement which was on the whole exculpatory. [230 H. 231 A-E]

E In this case even without the aid of the statement made by the respondent before the Customs Superintendent it is possible to hold that the metallic bars seized from the respondent were gold bars in view of the evidence of the Inspector, the ticket collector and the goldsmith and the statement of the respondent before the Court. Further, in the circumstances in which the gold bars had been seized from the respondent, the burden of proving that they were not smuggled goods was on respondent under s. 123 of the Customs Act. [231 E-G]

G **CRIMINAL APPELLATE JURISDICTION :** Criminal Appeal No. 44 of 1976.

H Appeal by Special leave from the judgment and order dated the 5th January, 1973 of the Kerala High Court in Criminal Revision Petition No. 426 of 1972.

G.S. Narain and Miss A. Subhashini for the Appellant. A

M.M. Abdul Khader and E.M.S. Anam for the Respondent.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. The Assistant Collector of Central Excise, Calicut has filed this appeal after obtaining the special leave of this Court against the judgment and order dated January 5, 1973 of the High Court of Kerala in Criminal Revision Petition No. 426 of 1972. B

Briefly stated, the facts of the case are these : In the early hours of August 9, 1969 the respondent alighted from the Kerala Express at the Trichur Railway Station with a steel trunk in his hand. C.C. Mathan, Inspector of Central Excise Special Customs, Preventive, Trichur (P.W. 1) who was on patrol duty at the Railway Station suspected that the respondent was carrying contraband goods and on coming to know from the Ticket Examiner that the respondent had arrived from Bombay he asked the respondent to hand over the steel trunk which he was carrying. When C.C. Mathan (P.W. 1) opened and searched the steel trunk, he found in it 28 gold bars with foreign markings. The respondent was arrested by C.C. Mathan (P.W. 1) and when questioned by P.W. 1, the respondent did not produce any authorisation entitling him to keep the 28 gold bars in question which were valued at Rs. 56,030/-. A mahazar (Exh. P.1) was prepared for having seized the 28 gold bars. A sum of Rs. 1,380/- which was found in the steel trunk was also seized. Later on, it is stated, that the 28 gold bars in question were confiscated in a proceeding under section 111(d) of the Customs Act, 1962 read with section 23-A of the Foreign Exchange Regulation Act, 1947 before the Additional Collector of Customs, Cochin. The steel trunk also was confiscated under section 119 of the Customs Act, 1962. A penalty of Rs. 500/- was imposed on the respondent under section 112(b) of the Customs Act, 1962. The amount of Rs. 1380/- which had been seized from the respondent was, however, ordered to be returned to him. Thereafter the Assistant Collector of Customs and Central Excise, Kozhikode after obtaining the required sanction under section 137(1) of the Customs Act and section 97(1) of the Gold (Control) Act, 1968 from the Additional Collector of Customs, Cochin and the Collector of Customs and Central Excise, Cochin respectively filed a complaint before the District Magistrate (Judicial). C
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A Tellicherry against the respondent for offences punishable under section 135(b) of the Customs Act read with section 85(ii) of the Gold (Control) Act, 1968. In support of the said prosecution four witnesses were examined by the complainant. C.C. Mathan, P.W.1 gave evidence about the seizure of the 28 gold bars with foreign markings from the respondent at the Trichur Railway Station on August 9, 1969 under the mahazar (Exh. P.1). He also produced Exh. P.2 which contained the statement made by the respondent before the Special Customs Preventive Circle Superintendent, Kozhikode in which he had admitted that 28 gold bars with foreign markings had been seized from him under a mahazar and that the said 28 gold bars had not been legally imported to India. C.C. Mathan (P.W. 1) stated that he was present before the Special Customs Preventive Circle Superintendent, Kozhikode when Exh. P.2 was recorded and that the said statement contained the signatures of the respondent and of the Superintendent who had recorded it. K. Subramonian (P.W. 2) who was working as a Ticket Collector at Trichur Railway Station stated that the 28 gold bars in question were seized on August 9, 1969 at the Trichur Railway Station under the mahazar (Exh. P.1) which he had signed. V.M. Velayudhan (P.W.3) who was a resident of Trichur and a goldsmith by profession stated that the 28 gold bars in question had been examined and weighed by him at the Trichur Railway Station at the request of C.C. Mathan (P.W.1). He further stated that he tested the purity of the said 28 gold bars by rubbing them on the touch-stone and found that they were gold bars of 24 carats quality. He gave a certificate (Exh. P.3) regarding the purity and the weight of the 28 gold bars. V.M. Velayudhan (P.W.3) who was a certified goldsmith further stated that he could by experience assess the purity of gold by rubbing it on a touch-stone. He, however, stated that he had no technical knowledge about gold and he did not know the 'specific gravity' method by which the purity of gold could be determined. The Assistant Collector of Central Excise (P.W.4) was examined to prove the sanctions given by the competent authorities to file the case. In his examination under section 342 of Criminal Procedure Code in answer to the following question put by the Court: 'What have you to say about the deposition of P.W.1 that you on 9th August, 1969 at 7 O'clock in the morning alighted from train at Trichur Railway Station with a steel trunk and that P.W.1 on searching the box due to suspicion, found out 28 gold bars having foreign marks?' the respondent stated 'It is true that gold was

recovered from my box. It was not mine. It was handed over to me by the person called Mammu asking me to give it in his house. I had no knowledge that it was gold.' The learned District Magistrate found that the prosecution had established that the respondent had committed an offence under section 135(b) of the Customs Act and an offence under section 85 (ii) of the Gold (Control) Act, 1968 and convicted him of those offences. The respondent was sentenced to pay a fine of Rs. 500/- for the offence under section 135(b) of the Customs Act and in default of payment of fine to undergo simple imprisonment for six months. No separate sentence was, however, awarded for the offence under section 85(ii) of the Gold (Control) Act. The respondent preferred an appeal against the judgment of the learned District Magistrate before the Sessions Judge, Trichur and that appeal was dismissed. The respondent filed a revision petition before the High Court of Kerala against the decision of the learned Sessions Judge. The learned Judge of the High Court who heard the revision petition allowed it and set aside the conviction of the respondent and the sentence imposed on him on the ground that the prosecution had not established that the metallic bars which were seized from the respondent under Exh. P.1 were gold bars and, therefore, the conviction of the appellant could not be sustained. The learned Judge found that the evidence of V.M. Velayudhan (P.W.3) who was examined in the case, the statement Exh. P.2 made by the respondent before the Special Customs Preventive Circle Superintendent, Kozhikode and the answer given by the respondent under section 342 of the Criminal Procedure Code taken together were not sufficient to hold that the gold bars had been seized from the respondent under Exh.P.1. He rejected the evidence of V.M. Velayudhan (P.W.3) on the ground that he had not the training or the qualification in the art of testing gold and that he had not conducted either the furnace test or the specific gravity test to determine the character of the metallic bars. He was of the opinion that V.M. Velayudhan (P.W.3) had miserably failed in the witness box to give the impression that he was a competent person to certify that what were seized from the respondent were gold bars and that in the absence of any training or qualification to the credit of V.M. Velayudhan (P.W.3), it would be unsafe to rely on his evidence and conclude that what was seized from the respondent was gold. So far as Exh. P.2 was concerned the learned Judge was of the opinion that as the said statement had not been specifically put to the respondent under section 342 of the Criminal Procedure Code and as the person who had recorded it had not been

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A examined, no importance could be given to it. In so far as the
answer given by the respondent to the question put by the Court
under section 342 of the Code of Criminal Procedure which is set
out above is concerned, the learned Judge observed that even
B assuming that it would have some value the prosecution could not
seek to split that statement into various parts and rely on what it
considered to be advantageous to establish its case. Accordingly
the learned Judge acquitted the accused.

C The principal point which arises for consideration in this
case is whether the prosecution had established that smuggled gold
bars had been seized from the respondent on August 9, 1969 at the
Trichur Railway Station under Exh. P.1. It is true that the onus
of proving the facts essential to the establishment of the charge
against an accused lies upon the prosecution and the evidence must
D be such as to exclude every reasonable doubt about the guilt of
the accused. An accused cannot be convicted of an offence on the
basis of conjectures or suspicions. If a reasonable doubt arises
in the mind of the Court after taking into consideration the entire
material before it regarding the complicity of the accused the
benefit of such doubt should be given to the accused but the
reasonable doubt should be a real and substantial one and a 'well
founded actual doubt arising out of the evidence existing after
E consideration of all the evidence'. "Hence a mere whim or a
surmise or suspicion furnishes an insufficient foundation upon which
to raise a reasonable doubt, and so a vague conjecture, whimsical
or vague doubt, a capricious and speculative doubt, an arbitrary,
imaginary, fanciful, uncertain chimerical, trivial, indefinite or a
mere possible doubt is not a reasonable doubt. Neither is a
F desire for more evidence of guilt, a capricious doubt or misgiving
suggested by an ingenious counsel or arising from a merciful
disposition or kindly feeling towards a prisoner, or from sympathy
for him or his family" (See Woodroffe & Ameer Ali's Law of
Evidence, 13th Edn. Vol.I pp. 203-204).

G On a reading of the evidence of C.C. Mathan (P.W.1),
V.M. Velayudhan (P.W.3) and the statement of the respondent
under section 342 of the Criminal Procedure Code which is referred
to above, we are of the view that the doubt which the learned
Judge of the High Court entertained about the nature of the
H metallic bars which were seized from the respondent under Exh. 1
cannot be considered to be a reasonable doubt. It is well known
that persons who are goldsmiths by profession are able to find out

whether a piece of metal is gold or not by the colour of the streak produced by rubbing it on a touch-stone used by them even though their assessment of its purity may not be exact. It may not be a scientific way of proving that the metallic bars were gold bars. In the instant case, however, the respondent did not dispute that gold had been recovered from his box under Exh. P.1. His plea was that it was true that gold was recovered from his box but that it did not belong to him; that it had been handed over by a person called Mammu asking him to give it in his house and that he had no knowledge that it was gold when the packet containing it was handed over to him. Reading the answer of the accused as a whole it means that he knew that when his steel trunk was opened and searched, there was gold in it but he had no knowledge that the packet contained gold when it was handed over to him by Mammu asking him to hand it over in his house. The answer consists of two parts and they refer to two distinct matters. The first part relates to seizure of gold from him and the latter part relates to what had happened earlier when the packet was handed over to him. The case might have been different if he had said that no gold was recovered from his box. The High Court, therefore, erred in holding that the statement of the respondent that the gold was seized from him could not be used against him on the ground that it would result in the splitting up of the statement which was on the whole exculpatory. Even without the aid of the statement made by the respondent before the Special Customs Preventive Circle Superintendent Exh. P.2, it is possible to hold in this case that the metallic bars seized from the respondent under Exh. P.1 were gold bars in view of the evidence of P.Ws. 1, 2 and 3 and the statment of the respondent before the Court. The High Court was in error in coming to the conclusion that gold had not been seized from the respondent by P.W.1 as per Exh. P.1 at the Trichur Railway Station. These gold bars were seized by P.W.1 in the reasonable belief that they were smuggled goods. Under section 123 of the Customs Act, in such circumstances, the burden of proving that they were not smuggled goods would be on the respondent from whose possession they were seized. In the instant case, the respondent had not discharged the burden which lay on him. P.W.1 has stated that the said gold bars had foreign markings on them and Exh. P.1, the mahazar corroborated his statement. The respondent had no authorisation to keep the said gold with him. It is in evidence that the said gold bars were found packed in paper and kept in the inside folds of a blanket underneath

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A some clothes in the trunk seized from the respondent. He had taken care to secrete them. He had brought them from Bombay which was a customs area. In the circumstances his explanation that he had no knowledge that he was in possession of or carrying smuggled gold bars cannot be believed, as rightly held by the learned Sessions Judge. The prosecution has clearly established the guilt of the respondent. The judgment of the High Court is, therefore, liable to be set aside and it is accordingly set aside. The conviction of the respondent and the sentence imposed on him by the learned District Magistrate which were affirmed on appeal by the learned Sessions Judge are restored. The appeal is accordingly allowed.

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Appeal allowed.