Collector Of Customs, New Delhi vs Ghulam Sarwar And Ors on 24 March, 1970

Equivalent citations: AIRONLINE 1970 SC 81

Bench: V. Bhargava, C. A. Vaidialingam

PETITIONER:
COLLECTOR OF CUSTOMS, NEW DELHI

Vs.

RESPONDENT:
GHULAM SARWAR AND ORS.

DATE OF JUDGMENT:
24/03/1970

BENCH:
[V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.]

ACT:
Criminal trial--Delay in putting up conspiracy case--Accused praying for separation of trial of his case and pleading guilt--Procedure to be followed by Court.

HEADNOTE:
The respondent was a Pakistani national and was arrested on 8th May 1964, and immediately after his arrest he made a confession before a Magistrate. The confession disclosed that- he was involved in two different and separate conspiracies with various co-accused. But the customs authorities assumed that there was only one conspiracy and that the respondent had incorrectly shown two separate conspiracies. Three cases were filed against him charging him with offences under the Registration of Foreigners Act, 1939, and Sea Customs Act, 1878, and the offence of conspiracy and other offences under various enactments. He was convicted on his plea of guilty and sentenced to various terms of imprisonment. He was also detained under the Foreigners Act, 1946. After fuller investigation, the respondent was again put up for trial for the second conspiracy and for offences under other Acts. The respondent moved the High Court for quashing the proceedings on the ground that he having been convicted for a conspiracy

could not be retried for the same offence again. He also pleaded various alternatives in the event of the Court not quashing the proceedings, and one of the pleas was that proceedings against him should be separated from other co-accused and his plea of guilty be accepted.
The High Court quashed the proceedings.
In appeal to this Court, HELD : (1) Since the second trial was for a different and distinct conspiracy, the High Court's order was not justified. [117 D]
(2) Since the offences for which the respondent was being tried were likely to have far-reaching implications, it was not in the public interest that the trial should be given up merely because, he had already served various terms of imprisonment, or there has been delay in putting him up for trial for the second conspiracy, especially when there was no material to suggest that the prosecution deliberately prolonged the investigation or delayed bringing up the case before Court. Further, the trial for the second conspiracy could not have been combined with the earlier one, because, the two are separate and distinct. [117 D-E]
(3) In the circumstances however, his alternative plea of separating his case from the other co-accused should be accepted and the prosecution allowed a period of not more than two months for producing the evidence so that the court could on a consideration of the evidence, either frame a charge or discharge the respondent. The contention of the prosecution that he should be tried along with the others to enable the court to take his confession into consideration against the co-accused is, not a ground
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for joint trial especially when the respondent could be called as a witness against the other co-accused. 1118 B)

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.207 of 1969.

Appeal by special leave from the judgment and order dated September 11, 1969 of the Delhi High Court in Criminal Misc. (Main) No. 53 of 1969.

V. A. Seyid Muhammad and S. P. Nayar, for the appellant. R. Jethamalani, Harjinder Singh, Kumar Mehta, H. K. Puri and Rameshwar Nath, for respondent No. 1.

The Judgment of the Court was delivered by Bhargava, J Respondent No. 1, Ghulam Sarwar (hereinafter referred to as "the respondent"), who is a Pakistani national,was arrested on 8th May, 1964 under section 104 of the Customs Act, 1962. Immediately after his arrest, he made a confession before a Magistrate. Since then, he has been in custody part of the time under section 3 (2) (g) of the Foreigners Act, 1946, part of the time as a convict in various offences for which he was convicted,

and part of the time as an under-trial prisoner. The first regular case filed against him was under section 5 of the Registration of Foreigners Act, 1939 in which he was convicted on 29th January, 1965 and sentenced to undergo six month's rigorous imprisonment after he had pleaded guilty. While he was undergoing that sentence, a second case was filed against him for an offence under section 135 of the Customs Act in which he was convicted and sentenced to nine months' rigorous imprisonment and a fine of Rs. 2,000 again after he had pleaded guilty. This conviction was recorded on 29th May, 1965. After he had undergone this sentence, he was again put in detention under s. 3 (2) (g) of the Foreigners Act. This detention was challenged by him by filing two writ petitions in the High Court of Punjab, and in this, Court, but both the writ petitions were dismissed. Then, on 17th January, 1967, a case was filed in the Court of Miss K. Sen Gupta, S.D.M., New Delhi, for a substantive offence under s. 135 of the Customs Act, for an offence under section 120-B of the Indian Penal Code read with S. 135 of the Customs' Act and s. 23 (1) (a) of the Foreign Exchange Regulations Act, and an offence under section 23 (1) (a) of the Foreign Exchange Regulations Act read with sections 109 and 114 of the Indian Penal Code. The respondent again pleaded guilty, was convicted on 31st January, 1969, and was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 2,000. In this case, 17 other persons were prosecuted as his co-accused.

During the pendency of this case,, another case was filed in the Court of Shri N. C. Jain, S.D.M., New Delhi, on 18th March, 1968 against the respondent and 45 other persons charging them with offences under s. 120, I.P.C., read with s. 135 of the Customs Act, section 167(81) of the Sea Customs Act and section 23 (1-A) of the Foreign Exchange Regulations Act, as well as substantive offences under section 135 of the Customs Act, section 167(81) of the Sea Customs Act, and section 23(1-A) of the Foreign Exchange Regulations Act. Having already been convicted for some of the offences, particularly the offence of conspiracy in the earlier case, on the 31st January, 1969, the respondent moved a writ petition in the High Court on 4th April,, 1969, for quashing these last proceedings on the ground that, having been convicted for a conspiracy earlier, he could not be retried for the same conspiracy, so that this trial was invalid. In the alternative, the respondent prayed that, in case the proceedings are not quashed, the proceedings against him be separated from other co-accused, his plea of guilty be recorded, and he be convicted in? accordance with law. Two other alternative prayers were that, in case the first two prayers were not accepted, the trial Court may be directed to record the plea of guilty of the respondent and convict him in accordance with law even in the joint trial, and, in the alternative, the trial Court be ordered to take up the proceedings day to day and a time-limit may be fixed by which the complainant should furnish the evidence against the respondent before the Court. The High Court, by its order dated 11th September, 1969, accepted the plea of the respondent, held that this second trial for the offence of conspiracy was barred as a result of the earlier trial in which the respondent had been convicted on 31st January, 1969, and, consequently, quashed the proceedings in respect of this offence. The Court also quashed the proceedings in respect of specific offences under s. 135 of the Customs Act and section 23(1-A) of the Foreign Exchange Regulations Act insofar as they related to smuggling of 52 kilograms of gold into India on or about 8th May, 1964 on the ground that the respondent had already been convicted and sentenced in respect of these offences. The High Court, however, added a sentence that, if the respondent is accused of any other specific acts of smuggling-, there will be no bar against the continuation of prosecution proceedings in respect of them. It is this order which has been

challenged before us in this 'appeal by special leave.

In this case, it was very unfortunate that, when the writ petition was heard by the High Court, the very first confession made by the respondent, which was to a great extent the basis of the various prosecutions, was not placed before the High Court and was not brought to its notice. Obviously, there was carelessness on the part of the prosecution in not bringing it to the notice of the High Court. At the same time, the respondent, who had challenged the prosecution, also owed a duty to bring that confession to the notice of the High Court as the burden lay on him to show that the prosecution going on against him was illegal and liable to be quashed; and he had moved the High Court to exercise its extra-ordinary writ jurisdiction to obtain this relief. In his writ petition, the respondent had offered to produce the copy of the confession for perusal of the Court, but the Court lost sight of this offer and proceeded to pass the order without examining the confession. The importance of this omission lies in the fact that a reading of the confession itself makes it manifest that there were two different and separate conspiracies, one which was, headed by a person known as Abid Hussain, and the other by another person known as Allau-din. The respondent, in the confession, made statements which indicated that these two conspiracies were distinct and separate ones, though a few of the persons involved in the two conspiracies were common. In fact, the confession showed that, at one stage, he was given in- structions by the head of one of the conspiracies to see that his part in that conspiracy did not come to the knowledge of the head of the other conspiracy. It is true that, at the initial stage, the customs authorities, even after, the confession, proceeded on the view that, very likely, there was one single conspiracy and that the respondent had incorrectly tried to show that there were two separate conspiracies in which he was involved. That appears to be the reason why, at the early stages, in the various documents put forward before the courts, the authorities used language indicating that there was one single conspiracy in respect of which the respondent was being held in custody and was going to, be prosecuted. It appears that it was much later, after detailed investigation, that the authorities became satisfied that there were two separate conspiracies and, consequently, came forward with a second prosecution of the respondent in respect of the conspiracy which was not the subject-matter of the first complaint on the basis of which the respondent was convicted on 31st January, 1969. That the authorities were under the impression that there was only one single conspiracy at the earlier stages is apparent from the facts stated in the complaint dated 5th April, 1965 in respect of the substantive offence under section 135 of the Customs Act, and even later, in an affidavit filed on 5th January, 1966 by the Under Secretary to Government in reply to the habeas corpus petition filed by the respondent in the High Court, the allegations made out as if there was one single conspiracy which was engineered by a syndicate headed by Abid Hussain. Even at the time of the prosecution for the first conspiracy on 17th January, 1967, the facts given in the complaint created the impression that there was one single conspiracy and that Allau-din was one of the conspirators in that conspiracy and was not the head of that separate conspiracy for which the respondent and 17 others were prosecuted. These circumstances were partly explained in a later affidavit of H. K. Kochhar, Assistant Collector of Customs, sworn on 12th May, 1969, and filed in the High Court in reply to the petition under Art. 226 of the Constitution on which the High Court passed the present impugned order. The High Court preferred to attach greater weight to the affidavit of the Under Secretary to Government and did not choose to act at all on the affidavit of H. K. Kochhar, considering that the former affidavit was by a senior officer on behalf of the Government, while the,,

latter affidavit had been sworn by an Assistant Collector of Customs only. In adopting this course, the High Court lost, sight of the. circumstance that the affidavit of the Under Secretary was filed in January, 1966 when the investigation of the various facts was at a fairly early stage, while Kochhar's affidavit was filed in May, 1969, by which time fuller investigation had been made by the authorities and they had discovered that their first impression that there was one single conspiracy was incorrect. The position has been further clarified before us in the affidavit of the Collector of Customs, R. Prasad, filed in reply to the petition for revocation of special leave to appeal on the basis of which this appeal has 'been heard by us. These facts made it clear that the High Court misdirected itself in accepting the plea of the respondent and in quashing the proceedings. In fact, Mr. Jethmalani, counsel for 'the respondent, did not make any serious effort to justify the order of the High Court after we had gone through the confession of the respondent, so that it is obvious that the order of the High ,,Court quashing the proceedings was not justified.

Mr. Jethmalani, however, urged that, even though the order of the High Court may not be justified, the circumstances of this case do not require that this Court should exercise its special powers under Art. 136 of the Constitution to order a trial of the respondent and reopen the proceedings. He drew our attention to two decisions of this Court K.V.Krishnamurthy Iyer and others v. The State of Madras(1), and The State of Bihar v. Hiralal Kejriwal and another(2) in which this Court declined to ,order a re-trial in exercise, of its powers under Art. 136 of the ,Constitution even though the orders in which the trials had terminated were held to be incorrect and set aside. In both the .,cases, the principle laid down was that public interest or th interest of justice did not require that there should be a fresh trial. Reliance was also placed on the views expressed by 'Bombay High Court in Chudaman Narayan Patil v. State of Maharashtra(3). On the basis of the views expressed in those (1) A.I.R. 1954 S.C. 406.

(2) [1960] 1 S.C.R. 726.

(3) A.I.R. 1969 Bom. 1.

cases, he urged that, in this case, the respondent had been in.. custody for a period of-about six years since his arrest and was being harassed by prosecutions launched one after the other, while. being kept in custody under s. 3 (2)

(g) of the Foreigners Act. during the period when he could not be detained either as a convict or as an under-trial prisoner. He also emphasised the frank confession of his part in the conspiracies and that, every time. frank confession of his part in the conspiracies and that, everytime a case was brought up against him, he stuck to that confession. and pleaded guilty in court. He was also given the impression, when the earlier case of conspiracy was started on 17th January., 1967, that after the- trial of that case, his woes will be over and. he will not have to face any further trials.

We have considered these aspects, but we do not think that. this is a fit case where we should uphold the order of the HighCourt quashing the proceedings which were validly started and which related to an entirely distinct and separate offence of cons-piracy apart from the one for which the respondent has already been convicted. The offences for which he is now being tried. are of such a

nature that they may have far-reaching implications, and we do not think that it will be in the public interest that the trial should be given up merely because there has been delay in, sending up the case. The case related to a conspiracy and we can very well appreciate that investigation of an offence of cons- piracy is necessarily prolonged and requires considerable work by the investigating authorities, so that certain amount of delay is bound to take place in putting the case before the court. In the present case, the matters appear to have been complicated by the fact that, at the earlier stages, the authorities were under the impression that there was one single conspiracy. We are unable to find any material to suggest that the prosecution have deliberately prolonged the investigation or delayed bringing the case before the court. We may also add that we are not impressed by the argument advanced by Mr. Jethmalani that the respondent could have been charged for this conspiracy even in the earlier case in which he was convicted on 3 1 st January, 1969 under the provisions of section 236 of the Code of Criminal Procedure, because the two conspiracies, according to the prosecution, are two entirely separate and distinct ones and are not based on allegations of identical acts having been committed by the offenders. In this case, therefore, it appears to be appropriate that the respondent should be tried for the conspiracy on the basis of which proceedings are being taken which have been quashed by the High Court.

We, however, consider that, in view of the long delay and in view of the circumstance that the respondent has been pleading guilty, his second alternative request in the writ petition is justified. Merely because he is a co-accused with 45 others there is no justification that he should be subjected to a prolonged trial, specially because we have been assured by the counsel for the respondent that the respondent is still sticking to his confession and will, very likely, plead guilty as soon as a charge is framed against him. In the circumstances, while allowing the, appeal and setting aside the order of the High Court, we direct that the trial of the respondent shall be separated from all other 45 co-accused and will be proceeded with separately. Dr. Seyid Muhammad, counsel for the appellant, opposed this separation of the trial of .the respondent on the ground that, if there is a joint trial, the confession of the respondent can be taken into account by the court trying the case against his co-accused which will not be permissible if the respondent is separately tried.'. That is no ground for unnecessarily delaying the trial of the, respondent specially when, if the prosecution desire, they can either apply to the Court to make the respondent an approver or can even produce the respondent as a witness in the case against others after his ,conviction. In fact, if any of these two alternative courses is adopted. it will be fairer to the other co- accused who will then have an opportunity of cross-examining the respondent before his statement is taken in evidence against them.

On our enquiry, Dr. Seyid Muhammad stated that it will be 'possible for the prosecution to produce sufficient evidence to make out a prima facie case on the basis of which a charge can be framed by the court, if a period of two months is allowed to the prosecution to produce evidence in the trial. On behalf of the respondent, a request was made that we. should fix a timelimit for completion of the whole trial in view of the long delay. We, however, consider that it is sufficient to make a direction that the Magistrate will allow a period of not more than two months to the prosecution to produce evidence to make out a prima facie case against the respondent, calculated from the date on which .the copy of our order is received by the trial Court. On the expiry of the period of two months, the Court will proceed either to frame a charge or to discharge the respondent in accordance with his judgment whether the evidence produced does or does not make out a prima facie case to justify

framing of a charge. It is to this extent only that we are laying down a time-schedule for the trial Court which we consider necessary to avoid possible harassment of the respondent.

V.P.S. Appeal allowed directions for retrial given