Tarachand vs Superintendent Of Central Excise, ... on 3 December, 1970

Equivalent citations: 1971 AIR 781, 1971 SCR (2) 908, AIR 1971 SUPREME COURT 781, 1971 MADLJ(CRI) 534, (1971) 2 SCJ 315, 1971 CRI APP R (SC) 24, 1971 2 SCR 908

Author: I.D. Dua

Bench: I.D. Dua, S.M. Sikri, Vishishtha Bhargava

PETITIONER:
TARACHAND

Vs.

RESPONDENT:
SUPERINTENDENT OF CENTRAL EXCISE, BOMBAY.

DATE OF JUDGMENT:
03/12/1970

BENCH:
DUA, I.D.
BENCH:
DUA, I.D.
SIKRI, S.M.
BHARGAVA, VISHISHTHA

CITATION:
1971 AIR 781 1971 SCR (2) 908
1970 SCC (3) 507

ACT:
Defence of India Rules 1962 rr. 126J and 126X-Notificatnons under--if enable Collector or Assistant Collector to delegate authority to institute prosecution for offence under r. 126-P(2)-Sentence--If minimum sentence to be governed by provisions of Rules or by Act 18 of 1965 when Act in Force.

HEADNOTE:
The Appellant was searched on alighting from a plane at the H.A.L. Aerodrome, Bangalore, on November 16, 1963 and a quantity of Gold was found on and seized from him. After obtaining sanction from the Collector under section 137(1)

of the Customs Act and under Rule 126-Q of Defence of India Rules, 1962, the Superintendent of Central Excise filed a complaint against the Appellant. The Trial Court did not find any evidence establishing that the Gold had been smuggled and the Appellant was therefore acquitted of the offence under section 135 of the Customs Act.

As regards the case against the Appellant under Rule 126-P(2) the Trial Court held that according to the Notification issued by the Government of India on November 5, 1963 in modification of the Notification dated January 10, 1963 issued under Rule 126-J read with Rule 126-X, either the Assistant Collector of Central Excise or the Collector of Central Excise could institute the prosecution; these officers were not authorised to delegate powers to institute prosecution. The Court, therefore, acquitted the Appellant on the view that the complaint was not filed by an Officer competently authorised. The High Court in appeal disagreed with this view holding that the Collector was lawfully empowered to authorise the Superintendent of Central Excise to prosecute the appellant. The Court convicted the appellant and sentenced him to rigorous imprisonment for six months.

Dismissing an appeal to this Court,

HELD : The plain reading of the relevant entries in the Notification of January 10, 1963 as amended by the Notification of November 5, 1963 clearly shows that it authorises the Collector to exercise the power and function in relation to the institution of prosecution for any offence punishable under Part XII-A of the Rules referred to in r. 126Q. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems clear that after the responsible officers of this Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case, further steps in the mitt& of actual prosecution including the drafting and presentation of the complaint could be lawfully carried out by others. To hold otherwise would not only mean unduly straining the unambiguous statutory language but would also tend to thwart, instead of effectuating, their real purpose. [915 C-F]

There was no force in the contention that the charge levelled against the appellant was vague or in any way different from the one for which

909

he was convicted. In fact the appellant had admitted all the relevant facts alleged by the prosecution. The facts alleged and proved clearly brought the appellant's case within the mischief of rule 126H(2)(d) and 126-P(2). Although under the new Gold (Control) Act 18 of 1965, which had repealed Part XII-A of the Rules, there is no minimum sentence of imprisonment prescribed, the present case must be governed by the law in force at the time and therefore

the minimum sentence of 6, months under rule 126-P(2) (ii) must apply. [916 D, G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 76 of 1968.

Appeal by special leave from the judgment and order dated February 8, 1968 of the Mysore High Court in Criminal Appeal No. 215 of 1966.

V.M. Tarkunde, R. Jethamalani, N. H. Hingorani and K.. Hingorani, for the appellant.

S. P. Nayar, for the respondent.

The Judgment of the Court was delivered by Dua, J. This appeal by special leave is directed against the judgment and order of the Mysore High Court on appeal setting aside in part the order of the appellant's acquittal by a Second Class Magistrate and convicting him under r. 126P(2) of the Defence of India Rules as amended in 1963- hereafter called the Rules-and sentencing him to rigorous imprisonment for six months. The order of the trial court acquitting him of the offence under s. 135 of the Customs Act was upheld.

The appellant alighted from a service plane at H.A.L. Aero- drome, Bangalore on November 16, 1963 at about 12.45 in the afternoon. E. R. Fariman, Inspector, C.I.D. had prior incriminating information about the arrival of a person whose description seemed to tally with that of the appellant. The Inspector and has staff who were on the look out waited for the appellant to take his baggage from the baggage counter. As soon as the appellant took delivery of a plastic bag and a hold-all the Inspector asked the appellant to accompany him to the Security Room. On being questioned the appellant gave his name as Tara Chand though he admitted that he had travelled under the name of J. D. Shaw. In the Security Room in the presence of Panchwatdars the plastic bag and the hold-all were opened and examined. From a pillow taken out of the hold-all were found two tape bags containing 16 pieces of gold with foreign markings. These tape bags had been put into the pillow which was then stitched. The appellant was then produced by the Inspector before his D. S. P. along with the articles seized- from him. After obtaining sanction from the Collector under S. 137(1) of the Customs Act and under r. 126Q of the Rules Shri Rasool, Superintendent of Central Excise (P.W. 3) filed the complaint.

The learned Magistrate trying the appellant found the. gold pieces to be of foreign origin. He, however, did not find any evidence establishing them to be smuggled with the result that the appellant was acquitted of the offence under S. 135 of the Customs Act. The learned Magistrate did not draw any presumption against the appellant because the seizure of the gold pieces was not by the Customs authorities but by the police who thereafter handed over the gold pieces to the office of the Collector of Central Excise and Customs.

While considering the case against the appellant under r. 126P(2) of the Rules, the learned Magistrate observed that according to the relevant notification issued by the Government of India on November 5, 1963 in modification of the earlier one issued under r. 126J read with r. 126X of the Rules, it is either the Assistant Collector of Central Excise or the Collector of Central Excise who can institute prosecution. These officers are not authorised to delegate the power to institute prosecution. According to the learned Magistrate the Collector of Excise had, therefore, no power to delegate the right to institute prosecutions with which healone had been clothed. Exhibit P/5 was in the circumstancesconsidered to be ineffective. On this reasoning the complainthaving not been filed by the officer competently authorised the appellant was acquitted. On appeal by the Superintendent of Central Excise and Customs (the complainant in the case) the High Court disagreed with the view taken by the learned Magistrate. It may be pointed out that the appeal by the complainant was confined only to the acquittal under r. 126P(2) of the Rules and the appellant's acquittal under S. 135 of the Customs Act was not questioned, it being conceded that there was no evidence on the record to bring the appellant's case under S. 135 of the Customs Act.

The High Court relying on Ex. P/5 and the two notifications issued by the Government of India came to the conclusion that the Collector was lawfully empowered to authorise the Superintendent of Central Excise to prosecute the appellant. That Court also arrived at the conclusion that the,appellant, who was not a dealer or refiner, having a licence, was found in possession of gold, of which no declaration had been made under the law and, therefore, he was guilty of an offence punishable under r. 126P(2) of the Rules. The appeal was accordingly allowed and the appellant convicted and sentenced to rigorous imprisonment for six months.

In this Court Shri Tarkunde assailed the legality of the view taken by the High Court. According to him the trial court had rightly held the prosecution not to have been instituted by a duly authorised person. Let us see if the scheme of the relevant statutory provisions supports the learned counsel.

Part XII-A of the Rules deals with Gold Control and it con- tains rules 126A to 126Z. This part was inserted in the Defence of India Rules in January 1963. Rule 126Q provides :

> "(1) No prosecution for any offence punishable under this Part shall be instituted against any person except by, or with the consent of, the Administrator or any person authorised by the Administrator in this behalf. (2) Nothing in rule 154 shall apply to any contravention of any provision of this Part or any order made thereunder."

The word "Administrator" was substituted for the word "Board" in September 1963. We are informed that no Administrator as defined in r. 126A(a) was appointed by the Central Government under power conferred on it by r. 126J(1). Under r. 126X the Central Government is empowered to perform all or any of the functions of the Administrator and also by notification to exercise all or any of the powers conferred on the Administrator by Part XII-A if considered necessary or expedient in the public interest to do so. The Administrator who is to take suitable measures : (a) to discourage the use and consumption of gold, (b) to bring about conditions tending to reduce the demand for gold and, (c) to advise the Central Government on all matters relating to gold, is enjoined by r. 126J(3) to discharge his functions subject to the general control and directions of the Central

Government. Sub-rules 4 and 5 of r. 126J provide :

> "(4) The Administrator may by general or special order authorise such person as he thinks fit to exercise all or any of the powers exercisable by him under this Part and different persons may be authorised to exercise different powers Provided that no officer below the rank of Collector of Customs or Central Excise or Collector of a district shall be authorised to hear appeals under sub-rule (3) of rule 126-M. (5) Subject to any general or special direction given or condition attached by the Administrator any person authorised by the Administrator to exercise any powers may exercise these powers in the same manner and with the same effect as if they had been coffered on that person directly by this Part and not by way of authorization."

We may bear in mind the effect of sub-rule (5) on the scheme. Rule 126H(2) (d) dealing with restrictions on possession and sale of gold by persons other than licensed holders lays down "(2) Save as otherwise provided in this Part,-

(d) no person other than a dealer licensed under this Part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold, not being ornament, except,

(i) by succession, intestate or testamentary, or

(ii)in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may, by general or special order make in this behalf :

> Provided that a refiner may buy or accept gold from a dealer licensed under this Part;"

> Turning now to the two notifications on the construction of which the fate of this case depends, we find that on January 10, 1963 the Central Government issued a notification in exercise of the powers coffered on it by r. 126X read with r. 126J(4) authorising certain officers of the Central Excise Department to exercise any or all of the powers of the Gold Board in relation to certain matters specified therein. At sl. no. 10 of the Table contained in the notification officers not inferior in rank to the Assistant Collector were authorised to exercise powers and functions in relation to the matter of "according of sanctions for the prosecution of offences" with reference to r. 126Q. We have reproduced the exact words of the entry in col. (4) of the Table. This notification was amended in certain respects on November 5, 1963. At sl. no. 10 of the amended Table officers not inferior in rank to the Assistant Collector of Central Excise Department were authorised to exercise the powers and functions in relation to the matter of "institution. of prosecution for any offence punishable under Part XII-A of the Defence of India Rules" with reference to r. 1260. Here again we have reprocessed the exact words used.

> According to Shri Tarkunde these notifications did not em- power the Assistant Collector to authorise the Superintendent of Central Excise and Customs to institute the present proceedings. The Assistant Collector, said the counsel, was authorised only himself to institute them and he could not lawfully accord consent for the institution of prosecution as he purported to do under ET. P/5. We are unable to accept this submission. The actual wording of the relevant entries in all the columns of serial no. 10 in the Table of the later notification may here be reproduced. " 10. Assistant Collector of the Central Excise Department.
>
> 126Q Institution of prosecution for any offence punishable under Part XIIA of the Defence of India Rules, 1962".

This has to be read along with the opening part of the earlier notification dated January 10, 1963 Which remains the principal notification and was amended only in certain particulars on November 5, 1963. According to the opening part of the principal notification the officers not inferior in rank to the officer specified in col. 2 of its Table were authorised to exercise any or all of the powers of the Gold Board in relation to the matters specified in the corresponding entries in cols. 3 and 4. In place of "Gold Board" we have to read the word "Administrator" and since no Administrator was ever appointed, the powers and functions entrusted to him were at the relevant time being exercised by the Central Government. We may point out that it was apparently by oversight that the word "Administrator" was not substituted for the expression "Gold Board" in the noti- fication though in September 1963 such substitution had been effected by appropriate amendment in the relevant rules. This was not controverted at the Bar and indeed no point was sought to be made on this ground. It would thus be seen that in determining the scope and extent of the powers of the officers authorised in the Table of the Notification to exercise the powers and functions of the Administrator, actually exercised by the Central Government (there being no Administrator appointed under the rules), we have to see the nature of the power and function mentioned in col. 4 and examine it by' reference to the rule mentioned in col. 3 in the light of the expression "in relation to the matters specified" in the notification which, in our opinion, to some extent widens the scope of the powers and functions de- legated by the notification.

16-L694 SupCI/71 Under r. 126Q as read in the light of the entries at serial no. 10 of the notification prosecution for an offence punishable under Part XII-A can, in our opinion, be instituted by or with the consent of an officer not inferior in rank to the Assistant Collector of the Central Excise Department. In Ex. P/5 dated September 4, 1964 Shri V. Parthasarathy, Collector of Central Excise accorded his sanction to the prosecution of the appellant as required under r. 1260 of the Defence of India Rules. He did so in exercise of the powers conferred on him by the two notifications mentioned above. The offence for which the consent was given was described in this document as under

> "WHEREAS Shri Tarachand s/o Deviraj (Devi- chand) Room No. 4, Mistry Bungalow, Duncan Road, Bombay-4was found to have acquired gold not being ornamentexcept by succession, intestate, or testamentary or in accordancewith the permit granted, either by the Administrator or by the Deputy Secretary in the office

of the Gold Control Administrator, Bombay, duly authorised in this behalf by the Government of India vide their notification No. F. 1/8/63-GC dated 20-10-1963, 16 pieces of gold of 10 tolas each bearing markings as to its origin and purity contrary to the pro-

visions of rule 126H(d) of the Defence of India Amendment Rules.

WHEREAS any person having in his possession or in his control any quantity of gold or buy or otherwise acquires or accepts gold in contravention of any provisions of Part XII-A of the Defence of India Rules renders himself liable for punishment under Rule 126P(2). And on careful study of the material placed before me and satisfying myself that the said Shri Tarachand is liable to action under rule 126P(2) of the Defence of India Amendment Rules, 1963 for reasons mentioned above, I. V. Parthasarathy, Collector of Central Excise, Mysore Collectorate, Bangalore, in exercise of the powers conferred on me by the Government of India in their Notification F. No. 25/1/63- GCR dated 5-11-63 issued under Rule 126J read with Rule 126-X of the Defence of India Amendment Rules do hereby accord consent for the institution of prosecution of the said Shri Tarachand as required under Rule 126-Q of the Defence of India Amendment Rules, 1963."

This authority, in our opinion, quite clearly falls within the notification read as a whole and the High Court was right in so construing it.

The submission that these notifications must be construed strictly because by these instruments the authority to prosecute is delegated and so construed they should be held to confer power only to prosecute but not to accord consent to the apperant's prosecution by some other person or authority has not impressed us. The attempt by the appellant's learned counsel in this connection to equate these notification with powers of attorney does not carry the matter any further. The plain reading of the relevant entries in the notifications leaves no doubt in our mind as to its meaning, scope and effect. It quite clearly authorises the Collector to exercise power and function in relation to the matter of institution of prosecution for any offence punishable under Part XII-A of the Rules referred to in r. 126Q. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems to us that after the responsible officers of this Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case further steps in the matter of actual prosecution including the drafting and presentation of the complaint can be lawfully carried out by others: That this is the real object and purpose of the notifications Is clearly brought out on plain reading of their language. To hold otherwise, as desired by 5hri Tarkunde, would not only mean unduly straining the unambiguous statutory language but would also tend to thwart, instead of effectuating, their real purpose. We are thus in agreement with the view taken by the High Court.

The counsel next submitted that the charge levelled against the appellant was different from the one for which he has been convicted. In any event the charge framed, according to the counsel, was vague and it has caused him prejudice in his defence. Here again, we are unable to agree. In the complaint all the relevant facts were stated quite clearly and it was emphasised that the appellant had been found in possession of 16 pieces of gold with foreign markings ingeniously concealed

inside long tabular pouches, in turn hidden inside a pillow case. He was stated to be guilty inter alia of offences punishable under r. 126P(2). The second charge framed by the court was as follows :

> "That you on or about the 16th November, 1963 at about 12.45 hours at H.A.L. Aerodrome, which arrived from Bomay and when you and your articles were searched, 17-L694 Sup CI/71 you were found in possession of 16 pieces of gold each bearing markings, as to its foreign origin and purity weighing 10 tolas each, having illegally imported into India in contravention of prohibition imposed by the Ministry of Finance Notification No. 1211 F1/48 dated 25th August, 1948, and without permit issued by the Gold Control Authorities as required under Rule 126H(d) under the Defence of India Amendment Rules, 1963 and thereby committed an offence under Rule 126P(2) r/w 1261(10) of the Defence of India Amendment Rules, 1963 relating to Gold Control and within my cognizance."

The appellant never complained that this charge was vague or outside the complaint. Indeed in his statement in court the appellant has admitted all the relevant facts alleged by the prosecution. The facts alleged and proved clearly bring the appellant's case within the mischief of rr. 126H(2) (d) and 126P(2). Rule 126H(2) (d) has already been reproduced earlier. Under r. 126P(2) (ii) whoever has in his possession or under his control any quantity of gold in contravention of any provision of Part XII-A is punishable with imprisonment for a term of not less than six months and not more than two years and also with fine. All the relevant salient facts alleged by the prosecution having been admitted by the appellant there can hardly be any ques- tion of prejudice having been caused to him by the wide language of the complaint and the charge, assuming the language to be wde. This argument is accordingly repelled. Lastly the counsel contended that the sentence imposed was two severe. The entire gold seized from him having been confiscated the sentence undergone should, according to the submission, be held to serve the cause of justice. We have already noticed that under r. 126P(2) (ii) the minimum period of imprisonment prescribed is six months. According to the appellant the law has since been amended and under the Gold (Control Act 18 of 1965 which has repealed Part XII of the Rules there is no minimum sentence of imprisonments prescribed. In our opinion this case must be governed by the law as in force Prior to the enforcement of the Gold (Control) Act, 1965. Our attention has not been drawn to any provision of law nor to any principle or precedent which would attract the provisions of the Gold (Control) Act of 1965 to this case in regard to the question of sentence. This appeal accordingly fails and is dismissed.

R.K.P.S. Appeal dismissed.