V.K. Agarwal, Assistant Collector Of ... vs Vasantraj Bhagwanji Bhatia & Ors on 7 April, 1988

Equivalent citations: 1988 AIR 1106, 1988 SCR (3) 450

Author: M.P. Thakkar

Bench: M.P. Thakkar, K.N. Singh

PETITIONER:
V.K. AGARWAL, ASSISTANT COLLECTOR OF CUSTOMS

Vs.

RESPONDENT:
VASANTRAJ BHAGWANJI BHATIA & ORS.

DATE OF JUDGMENT07/04/1988

BENCH:
THAKKAR, M.P. (J)
BENCH:
THAKKAR, M.P. (J)
SINGH, K.N. (J)

CITATION:
1988 AIR 1106 1988 SCR (3) 450
1988 SCC (3) 467 JT 1988 (2) 39
1988 SCALE (1)648

ACT:
Gold (Control) Act, 1968-Whether acquittal of a person charged with offence under section Ill read with section 135 of Customs Act, 1969, creates a legal bar against his prosecution under section 85 of-on the basis of same material and facts of offence under Customs Act.

HEADNOTE:
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Respondents 1 to 3 were prosecuted for an offence punishable under section 111 read with section 135 of the Customs Act, 1969, on the basis of recovery of primary gold from their house. Respondent No. 3 was convicted and respondents Nos. 1 & 2 were acquitted. Later, the same persons were sought to be prosecuted under section 85 of the Gold (Control) Act, 1968 relying on the find of the primary gold from the very same premises at the time and on the

occasion of the same raid at the house of the said respondents, which had given rise to the prosecution under the Customs Act, as stated above. The respondents 1 to 3 contended that the new trial was barred. The trial Magistrate accepted this plea and ordered the prosecution to be dropped. The Sessions Judge confirmed the order of the trial court. The High Court affirmed the decision of the Courts below, holding that the trial was barred by virtue of section 403 (1) of the Code of Criminal Procedure, 1898 (Cr. P.C.). The State then approached this Court by this appeal.

Allowing the appeal in part, the Court,

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HELD: The ingredients required to be established in respect of an offence under the Customs Act are altogether different from the ones required to be established for an offence under the Gold (Control) Act . In respect of the former, the prosecution has to establish that there was a prohibition against the import into Indian sea waters of goods which were found to be in the possession of the offender. In respect of the offence under the Gold (Control) Act, it is required to be established that the offender was in possession of primary gold. In regard to the latter offence, it is not necessary to establish that there is any prohibition against the import of gold. Mere possession of gold of purity not less than 9 carats in any unfinished or semi-finished form would be an offence under the Gold Control Act. [454F-H; 455A]

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The respondents were tried and acquitted for the offence under the Customs Act in connection with the possession of gold. Their trial would be barred by section 403(1) of the Code of Criminal Procedure, provided they are sought to be prosecuted on the "same facts" for any offence for which a different charge from the one made against them might have been made under Section 236 and for which they might have been convicted under Section 237, Criminal Procedure Code. [455D-E]

In order to establish their plea of bar under Section 403(1), the respondents have to establish that (1) there must have been a 'doubt' as to whether the offence under the 'Customs Act' could be proved or whether the offence under the 'Gold (Control) Act' would be proved and (2) that in the context of this doubt an alternative charge could have been framed under Section 236. [456C]

On a true interpretation of Section 236, it would appear that the Section would be attracted where the offence would fall either under one or the other of the two alternative charges. It would not be attracted if an offence could fall under both of the alternative charges. What is contemplated by section 236 is framing of an alternative charge where on the facts of the case an offence would fall under one of the two alternative charges, but the act would not constitute an offence under both the charges. This point

is made clear by the illustrations to Section 236. In this case, the respondents could be found guilty of both the offences in the context of the possession of gold. If it is established that there was a prohibition against the import of gold and that the respondents were found in possession of gold which they knew or had reason to believe was liable to be confiscated, they would be guilty of that offence. They would also be guilty of an offence under the Gold (Control) Act, provided the gold was of a purity of at least 9 carats. They would have violated the provisions of 'both' the Customs Act and the Gold (Control) Act if the aforesaid ingredients were established. It is not as if in case they were found guilty of an offence under the Customs Act, they could not have been found guilty under the Gold (Control) Act or vice versa. Upon being found guilty of both the offences, the Court may impose a concurrent sentence in respect of both the offences or the sentences could be ordered to run consecutively. There was, therefore, no question of the framing of an alternative charge-one under the Customs Act and the other, under the Gold (Control) Act. If the ingredients of both the offences are satisfied, the same act of possession of gold would constitute an offence both under the Customs Act and also under Gold (Control) Act. It could not, therefore, be said that they
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could have been tried on the same facts for an alternative charge in the context of section 236 Cr. P.C. at the time of the former proceedings. The submission urged in the context of Section 403(1) could not succeed. [456C-H; 457D-F]

A separate charge could have been framed in respect of the distinct offence under the Gold Control Act. The conclusions reached by the Court brought the matter squarely within the parameters of the law settled by this Court in the State of Bombay v. S. L. Apte & Anr., [1961] 3 S.C.R. 107. [459A-B]

Section 403(1) does not come to the rescue of the respondents 1 to 3; section 403(2) of the Code clearly concludes the matter against them. The High Court was in error in holding that the subsequent trial was barred. The appeal was accepted on this point and the decision of the Courts below and the High Court was reversed. That 20 years has elapsed since the date of the seizure was no ground for not proceeding further with the matter as the offence in question was a serious economic offence which undermines the entire economy of the Nation. But the Sessions Judge had quashed the proceedings not only on this ground but also on the basis of certain factual findings which counsel for the appellant himself found difficult to assail at this juncture. The operative order of the High Court could not, therefore, be disturbed in the peculiar facts and circumstances of the case. The finding of the lower courts and the High Court was reversed on the question of maintainability of the subsequent prosecution but no further

order could be passed in the circumstances. [460A-F]
Maqbool Hussain v. State of Bombay & Ors. etc., [1953] SCR Vol. IV P-730; State of Bombay v. S.L. Apte & Anr., [1961] 3 S.C.R. p. 107, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 169 of 1978.

From the Judgment and order dated 10.11.1975 of the Gujarat High Court in Criminal Revision Application No. 273 of 1975.

V.C. Mahajan, Mrs. Indira Sawhney and Miss. A. Subhashini for the Appellants.

G.A. Shah, Anil K. Naurya, K.L. Hathi Miss Madhu Moolchandani, Vimal Dave and M.N. Shroff for the Respondents.

The Judgment of the Court was delivered by THAKKAR, J. Does the acquittal of an accused charged with having committed an offence punishable under Section 111 read with Section 135 of the Customs Act, 1969 create a legal bar to the said accused subsequently being prosecuted under Section 85 of the Gold (Control) Act, 1968? The High Court having answered this question (in the affirmative) against the prosecution and having directed the dropping of the subsequent proceedings on the premises that the acquittal in the former proceedings operated as a legal bar to the prosecution of the accused in the latter proceedings, the State has approached this Court by way of the present appeal. By certificate under Article 134(i)(c) of the Constitution of India.

Respondents 1 to 3 came to be prosecuted as a result of a raid at their house in which primary gold valued at Rs.84,770 at the material time was found along with some other articles. They were prosecuted for an offence punishable under section 111 read with Section 135 of the Customs Act, 1969. In that case present respondent No. 3 was convicted whereas present respondent Nos. 1 and 2 were acquitted. The same alleged offenders were later on sought to be prosecuted under Section 85 of the Gold (Control) Act, 1968 relying on the find of primary gold from the very same premises at the time and on the occasion of the very same raid which gave rise to the prosecution under the Customs Act which had culminated in the conviction of respondent No. 3 and the acquittal of respondents 1 and 2. A contention was thereupon raised on behalf of respondents 1 to 3 that the new trial was barred. The Chief Judicial Magistrate accepted this plea and ordered that the prosecution be dropped. The learned Sessions Judge confirmed the said order. The appellant challenged the order passed by the learned trial Magistrate as confirmed by the learned Sessions Judge by way of a Revision Application Criminal Revision Application No. 273 of 1975 to the High Court. The High Court affirmed the decision of the Courts below holding that the present trial was barred by virtue of Section 403(1) of the Code of Criminal Procedure, 1898 (Cr. P.C.). Hence this appeal. In order to determine this question it is necessary to identify the ingredients which will have to be established by the prosecution in order to bring home the guilt under the different provisions. These ingredients may be catalogued as under:

Ingredients of the charge Ingredients of the charge for the offence under for the offence under Sec. Section 111 read with Sec. 85 of the Gold (Control) 135 of the Customs Act, 1969 Act, 1968 for which the in respect of which the respondents are sought respondents were acquitted. to be prosecuted.

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i) Inter alia being in posses- The offender owns or has in sion of or being concerned his possession, custody, or in keeping or concealing of control any primary gold of goods which the offender not less than 9 carats in knows or has reason to purity in unfinished or believe are liable to semi-finished from or in confiscation under blocks, bars etc. Section 111.

ii) The goods in question, gold, was imported within the Indian Customs waters contrary to a prohibition contained under the Customs Act.

iii)There was a prohibition in respect of the import of gold at the material time as contemplated by Sec. 111-D of the Customs Act It is therefore evident that the ingredients required to be established in respect of the offence under the Customs Act are altogether different from the ones required to be established for an offence under the Gold (Control) Act. In respect of the former, the prosecution has to establish that there was a prohibition against the import into Indian sea waters of goods which were found to be in the possession of the offender. On the other hand in respect of the offence under the Gold (Control) Act, it is required to be established that the offender was in possession of primary gold meaning thereby gold of a purity of not less than 9 carats in any unfinished or semi-finished form. In regard to the latter offence it is not necessary to establish that there is any prohibition against the import of gold into Indian sea waters. Mere possession of gold of purity not less than 9 carats in any unfinished or semi-finished form would be an offence under the Gold Control Act. It is therefore stating the obvious to say that the ingredients of the two offences are altogether different. Such being the case the question arises whether the acquittal for the offences under the Customs Act which requires the prosecution to establish altogether different ingredients operates as a bar to the prosecution of the same person in connection with the charge of having committed the offence under the Gold (Control) Act.

Reliance has been placed on Section 403(1) of the Code of Criminal Procedure, 1898 (Cr P.C.) in support of the plea that the prosecution under the Gold (Control) Act would be barred on the basis of the undermentioned facts:

i) that the respondents had been tried by a competent Court for the offence of being in possession of gold under the Customs Act and had been acquitted;

ii) they are sought to be prosecuted on the same facts for an offence under the Gold (Control) Act.

It is not in dispute that the respondents were tried and acquitted for the offence under the Customs Act in connection with the possession of a quantity of gold. Their trial would be barred by Section 403(1) provided they are sought to be prosecuted on "same facts" for any offence for which a different charge from the one made against them might have been made under Section 236' and for which they might have been convicted under Section 2372

1. "Section 403(1): A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under section 237".

1. "236. If a single act or series of acts is of such a nature that it is doubtful which of several offences of the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Illustrations

(a) xxxx

(b) xxxx".

2. "237. (1) If in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. "

In order to successfully establish their plea of bar under Section 403(1) the concerned respondents will therefore have to establish that:

i) It was doubtful as to which of the several offences the facts which could be proved by the prosecution would constitute.

ii) And they could have been charged in the alternative with having committed one or other of the said offences.

In other words what they would be required to establish would be that (1) there must have been a 'doubt' as to whether the offence under the 'Customs Act' could be proved or whether the offence under the 'Gold (Control) Act' would be proved and (2) that in the context of this doubt an alternative charge could have been framed under Section 236. Now, on a. true interpretation of Section 236 it would appear that the Section would be attracted where the offence would fall either under one or the other of the two alternative charges. It would not be attracted if an offence could

fall under both of the alternative charges. What is contemplated by Section 236 is framing of an alternative charge where on the facts of the case an offence would fall under one of the two alternative charges, but the act would not constitute an offence under both the charges. This point is made clear by the illustrations to Section 236 viz:

> "(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust of cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.
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> (b) A states on oath before the Magistrate that he saw hit with a club. Before the Sessions Court A states on oath that never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false."

Illustration (a) refers to framing of an alternative charge in respect of theft or receiving of stolen property or criminal breach of trust or cheating. It will be seen that a person cannot be said to have committed the offence both of theft as also of 'receiving of stolen property'. A person who himself commits the theft, cannot be guilty of the charge of 'receiving stolen property' whereas a person who may have nothing to do with commission of theft, but who may be found in possession of the stolen property, would be guilty of the offence of 'receiving stolen property'. Now the prosecution cannot foresee whether the person from whose possession the stolen article was found was himself the thief or as merely a person who had received stolen property from the thief. A person cannot be found guilty of both 'theft' as also for 'receiving stolen property'. And it is in such a case that an alternative charge under Section 236 could be framed. In the present case the concerned respondents could be found guilty of both the offences in the context of the possession of gold. If it was established that there was a prohibition against the import of gold and that he was found in possession of gold which he knew or had reason to believe was liable to confiscation he would be guilty of that offence. He would also be guilty of an offence under the Gold (Control) Act provided the gold is of a purity of atleast 9 carats. He would have violated the provisions of 'both' the Customs Act and the Gold (Control) Act if the aforesaid ingredients were established. It is not as if in case he was found guilty of an offence under the Customs Act, he could not have been found guilty under the Gold (Control) Act or vice versa. Upon being found guilty of both the offences the Court may perhaps impose a concurrent sentence in respect of both the offences but the Court has also the power to direct that the sentence shall run consecutively. There is therefore no question of framing of an alternative charge one, under the Customs Act, and the other, under the Gold (Control) Act. If the ingredients of both the offences are satisfied the same act of possession of the gold would constitute an offence both under the Customs Act as also under the Gold (Control) Act. Such being the position it cannot be said that they could have been tried on the same facts for an alternative charge in the context of Section 236 Cr. P.C. at the time of the former proceedings. The submission urged in the context of Section 403(1) cannot therefore succeed for it cannot be said that the persons who are sought to be tried in the subsequent proceedings could have been tried on the same facts at the former trial under Section 236.

Strong reliance has been placed on behalf of the respondents on Maqbool Hussain v. The State of Bombay & ors. etc. etc., [1953] S.C.R. Vol. IV p. 730 in support of the submission that the second prosecution is barred. In Maqbool's case the central issue arose in the context of the fact that a person who had arrived at an Indian Airport from abroad on being searched was found in possession of gold in contravention of the relevant notification, prohibiting the import of gold. Action was taken against him by the Customs authorities and the gold seized from his possession was confiscated. Later on a prosecution was launched against him in the criminal court at Bombay charging him with having committed the offence under Section 8 of the Foreign Exchange Regulation Act (Act 7 of 1947) read with the relevant notification. In the background of these facts the plea of 'autrefois acquit' was raised seeking protection under Article 20(2) of the Constitution of India. This Court came to the conclusion that the proceedings before the Customs authority did not constitute the 'prosecution' of the appellant. The Court also took the view that the penalty imposed on him did not constitute a 'punishment' by the judicial tribunal. Under the circumstances the trial was not barred. The ratio of the decision is altogether different and has no application in so far as the plea raised by the respondents is concerned. However, reliance is placed on certain observations made in the course of the discussion, at p. 737. To quote:

> " The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown, are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter."

(Vide Halsbury's Laws of England, Hailsham Edition Vol. 9 pages 152 and 153, paragraph 212)."

(Emphasis added) We have already applied the very test indicated in this passage. But we have reached the conclusion that in the present case this test does not support the respondents' submission in asmuch as the ingredients of the two offences are different in scope and content. The facts constituting the offence under Customs Act are different and are not sufficient to justify the conviction under the Gold Control Act. It must also be realized that what is necessary is to analyze the ingredients of the two offences and not the allegations made in the two complaints as declared by this Court in State of Bombay v. S.L. Apte & Another, [1961] 3 S.C.R. p. 107.

We have also concluded that a separate charge could have been framed in respect of the distinct offence under Gold Control Act Under the circumstances the plea raised by the defence cannot succeed. The two conclusions reached by us brings the matter squarely within the parametres of the law settled by this Court decades ago in S. L. Apte's case (Supra). In that case the element of 'dishonesty' was required to be established under section 409 of Indian Penal Code whereas it was not required to be established under Section 105 of the Indian Insurance Act. In this backdrop this Court has enunciated the law in the context of the plea based on Article 20(2) of the Constitution, Section 26 of General Clauses Act and section 403(2) of the Criminal Procedure Code in no uncertain terms:

"If, therefore, the offences were distinct there is no question of the rule as to double-jeopardy as embodied in Art. 20(2) of the Constitution, being applicable.

The next point to be considered is as regards the scope of s. 26 of the General Clauses Act. Though s. 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked. It therefore follows that in the present case as the respondents are not being sought to be punished for "the same offence" twice but for two distinct offences constituted or made up of different ingredients the bar of the provision is inapplicable.

In passing, it may be pointed out that the construction we have placed on Art. 20(2) of the Constitution and s. 26 of the General Clauses Act is precisely in line with the terms of s. 403(2) of the Criminal Procedure Code which runs:

403(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)".

There is no manner of doubt that section 403(1) does not come to rescue of the respondents 1 to 3 whereas section 403(2) of the Code clearly concludes the matter against them.

The High Court was therefore in error in holding that subsequent trial was barred. We accept the appeal on this point and reverse the decision of the Courts below and the High Court. The appellant was understandably seriously aggrieved by the erroneous enunciation of law by the High Court as it would cause prejudice in other matters involving the same point which may have been pending or might arise in future. With the position of law being now settled in the appellant's favour the main objective of the appellant is achieved. Learned counsel for the appellant indicated at the very commencement that the main purpose of the appeal was to have the true position in law settled. That 20 years have elapsed since the date of the seizure (November 15, 1968) is, in our opinion, no ground for not proceeding further with the matter inasmuch as the offence in question is a serious economic offence, which undermines the entire economy of the Nation. The delay occasioned in the working of the judicial system by the ever-increasing workload cannot provide an alibi for upholding such a plea. However in the present case the Sessions Court has quashed the proceedings not only on this ground but also on the basis of certain factual findings as well and the learned Counsel for the appellant himself found it difficult to assail these findings at this juncture. The operative order passed by the High Court cannot therefore be disturbed in view of the facts and circumstances peculiar to this particular case. We accordingly allow the appeal to this extent and reverse the finding of the Lower Courts and High Court on the question of maintainability of the subsequent prosecution but find ourselves unable to pass any further orders under the circumstances.

S.L. Appeal allowed.