Assistant Collector Of Customs & Anr vs U.L.R. Malwani And Anr on 16 October, 1968

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Author: K.S. Hegde

Bench: K.S. Hegde, J.C. Shah, V. Ramaswami, G.K. Mitter, A.N. Grover

PETITIONER:
ASSISTANT COLLECTOR OF CUSTOMS & ANR

Vs.

RESPONDENT:
U.L.R. MALWANI AND ANR.

DATE OF JUDGMENT:
16/10/1968

BENCH:
HEGDE, K.S.
BENCH:
HEGDE, K.S.
SHAH, J.C.
RAMASWAMI, V.
MITTER, G.K.
GROVER, A.N.

CITATION:
1970 AIR 962 1969 SCR (2) 438
CITATOR INFO :
R 1971 SC 458 (99)

ACT:
Constitution of India, Art. 20(2)--Accused given benefit of doubt by customs authority in respect of alleged offence under Sea Customs Act, 1878--Subsequent prosecution before Magistrate in respect of same offence whether barred by Article--Principle of issue estoppel whether applies--Delay in filing complaint, effect--Code of Criminal Procedure, ss. 173(4)--Section whether applicable in a trial on complaint by customs authorities--S. 94(1) whether can be used to secure supply of documents mentioned in s. 173(4) to the accused.

HEADNOTE:

The accused persons were charged with having entered into a conspiracy at Bombay and other places in the beginning of October 1959 or there about for the purposes of smuggling foreign goods into India and having, in pursuance of that conspiracy, smuggled several items of foreign goods in the years 1959 and 1960. In that connection an enquiry was held by the Customs authorities. In the course of the enquiry some of the goods said to have been smuggled were seized. After the close of the enquiry those. goods were ordered to be confiscated. In addition penalty was imposed on some of the accused. Accused No. 1 and 2 were given by the Collector benefit of doubt on the ground that there was no conclusive evidence against them. Thereafter the Assistant Collector of Customs 'after obtaining the required sanction of the Government filed a complaint against five persons including Accused 1 and 2 under s. 120-B I.P.C. read with s. 167 of the Sea Customs Act, 1878 as well as under s.'5 of the Imports and Exports (Control) Act, 1947. Before the commencement of the enquiry the 1st accused filed an application before the Magistrate raising therein various questions of law namely (i) whether the prosecution of Accused 1 and 2 was barred by Art. 20(2) of the Constitution by reason of the decision of the Collector of Customs (ii) whether the finding of the Collector of Customs operated as an issue estoppel in the criminal case against Accused 1 and 2, (iii) whether the prosecution amounted to 'an abuse of the process of the Court in view of the inordinate, delay in launching the same, and (iv) whether s. 273(4) Cr. P.C. was applicable to the facts of the case, and (v) whether the documents mentioned in the petition of Accused No. 1 to the Magistrate could be summoned under s. 94 Cr. P.C. The Magistrate dismissed the application of Accused No. 1. In revision the High Court, while agreeing with the Magistrate on other issues, did not agree with him that there was no need at the stage to summon the statements of the witness recorded by the customs authorities in the enquiry under the Sea Customs Act. It directed the Magistrate to'summon those statements and to see that the prosecution made available copies of these statements to the accused before the commencement of the ennquiry in the case. Against the orders of the High Court the customs authorities as well as the accused appealed to this Court.

HELD: (i) In order to get the benefit of s. 403 Criminal Procedure Code or Art. 20(2) it is necessary for an 'accused person to establish

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that he had been tried by a "court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said acquittal is in

force. If that much is established. it can be contended that he is not liable to be tried again for any other offence for which a different charge from the one made against hun might have been made under s. 236 or for which he might have been convicted' under s. 237. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "Court". Therefore in the present case the plea of the accused based on Art. 20(2) could not be accepted. [442 E--G] .

Maqbool Hussain v. State o/Bombay, [1953] S.C.R. 730 and Thomas Dana v. State o/Punjab, [1959] S.C.R. 274, applied.

(ii) Before the accused can call into aid the rule of issue estoppel he must establish that in a previous lawful trial before a competent court he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case since the proceeding before the' Collector was not a criminal trial it follows that the decision of the Collector did not amount to a verdict of acquittal in favour of accused Nos. 1 and 2.[444 A--B]

Sambasivan v. Public Prosecutor, Federation of Malaya, [1950] A.C. 458 at p. 479, Pritam Singh v. State of Punjab, Aj.I.R. [1956] S.C. 415 and N.R. Ghose @ Nikhil Ranjan Ghose v.-State of west Bengal,[1960] 2 S.C.R. 58, applied.

(iii) The question of delay in filing the complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint. [444 D]

(iv) Section 173 Criminal Procedure is attracted only in a case in, vestigated by a police officer under Ch. XIV of the Code followed by a final report. Section 173(4) was incorporated into the Code by Central Act 25 of 1955 because of the changes effected in the mode of trials in cases instituted on police reports. Under the new procedure prescribed in s. 251(A) of the Code, but for the facility provided to him under s. 173(4) an accuse person would have been greatly handicapped in his defence. But in a .case instituted on complaint like the present, and governed by ss. 252 to 259 of the Code no such difficulty. arises and the position is as it was before the amendment of the Code. in 1955. [444 H; 445 G]

The High Court was wrong in holding that the Legislature did not make available the benefit of s. 173(4) Criminal Procedure Code in cases instituted otherwise than on police reports by oversight. It is not proper to assume except on very good grounds that there is any lacuna in any statute or that the legislature has not done its duty properly.[445 H]

(v) Section 94 (1) does not empower a Magistrate to direct the prosecution to give copies of any documents to an accused person. It was impermissible for the High Court to read into s. 94 Criminal ProcedUre COde the requirements of

s. 173(4) of the, Code. The High Court was wrong in indirectly applying to cases instituted on private complaints the requirements of s. 173(4). [446 E-F]

Further the High Court was not justified in interfering with the discretion of the learned Magistrate. Whether a particular document should be summoned or not is essentially in the discretion of the-trial court. In the present case the reasons given by 'the Magistrate.:for his 440
order were good reasons. Unnecessary interference with the orders of the ,trial court results in waste of public money and time as had happened in the present case. [447 D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 15 and 35 of 1967.

Appeals from the judgment and order dated October 12, 1966 of the Bombay High Court in Criminal Revision Application No. 289 of 1966.

N.S.Bindra,R.M.Parikh and S.P. Nayar, for the appellants (in Cr. A. No. 15 of 1967) and the respondents (in Cr. A. No. 35 of 1967).

N.N. Keswani, for the appellants (in Cr. A. No. 35 of 1967) and the respondents (in Cr. A. No. 15 of 1967). K.R. Chaudhuri, for the intervener (in Cr. A. No. 15 of 1967).

The Judgment of the Court was delivered by Hegde, J. These appeals by certificate arise from the decision of the High Court of Bombay in Criminal Revision Application No. 238 of 1966 wherein the following questions of law arise for decision:

(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Art. 20 (2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act ?

(ii) Whether under any circumstance the finding of the Collector of Customs that the Ist and 2nd accused are not proved to be guilty operated as an issue estoppel in the criminal case against those accused ?

(iii) Whether the present prosecution amounts to an abuse of the process of the Court in view of inordinate delay in launching the same and consequently whether it is liable to be quashed ?

(iv) Whether s. 173(4), Criminal Procedure Code is applicable to the facts of this case and (v) Whether the documents mentioned in the petition filed by the 1st accused on

August 3, 1965 are required tO be summoned under s. 94, Criminal Procedure Code ?

The aforementioned questions were raised before the trial Magistrate by the 1st accused by means of an application but the learned-Magistrate' found ,no substance in the pleas advanced in that application and accordingly he dismissed the same as per his order dated-25,1-1966. In revision, a .Division Bench of the Bombay High Court agreeing with the trial Magistrate negatived all but one of the contentions advanced on behalf of accused Nos. 1 and 2. It did not agree with the learned Magistrate that there was no need, at that stage to summon the statements of witnesses recorded Customs Act. It directed the learned Magistrate to summon hose statements and curiously enough, it went further and directed him to see that the prosecution made available the copies of those statements to the accused before the commencement of the enquiry in the case. In so far as. the Other documents called for are concerned, the High Court after indicating, what according to it, is the law on the subject left the matter to the discretion of the learned Magistrate.

Criminal Appeal No. 15 of 1967 is filed by the Assistant Collector of Customs, Bombay and the State of Maharashtra and Criminal Appeal No. 35 of 1967 is the appeal filed by accused Nos. 1 and 2 in the case (Case No. 98 of 1965 in the Court of the Chief Presidency Magistrate, Bombay). The appellants in Criminal Appeal No. 15 of 1967 challenge the correctness of the decision of the Bombay High Court in so far as it went against them and the appellants in Criminal Appeal No. 35 of 1967 challenge that decision in other respects.

The prosecution case is that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places in the beginning Of October, 1959 or India and in pursuance of that conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960. In that connection an enquiry was held by the Customs authorities. In the course of the enquiry some of the goods said to have been smuggled were seized. After the close of the enquiry those goods were ordered to be confiscated. In addition penalty was imposed on some of the accused. Thereafter on February 19, 1965, the Assistant Collector of Customs, Bombay after obtaining the required sanction of the Government flied a complaint against five persons including the appellants in Criminal Appeal No. 35 of 1967 (accused Nos. 1 and 2 in the case) under s. 120-B,I.P.C. read with cls. (37), (75), (76) and (81) of s. 167 of the Sea Customs Act, 1878 (Act VIII of 1878) as well as under s. 5 of the Imports and Exports (Control) Act, 1947. Before the commencement of the enquiry in that complaint, the 1st accused filed on August 3, 1965, the application mentioned above.

3Sup.C.I./69-11 Now we shall proceed to examine the contentions set out earlier.

Reliance on Art. 20(2) is placed under the following circumstances. In the enquiry held by the Collector of Customs, he gave the benefit of doubt to accused Nos. 1 and

2. This is what he stated therein:

> "As regards M/s. Lamel Enterprises (of which accused No. 1 is the proprietor and accused No. 2 is the Manager) although it is apparent that they have directly assisted

> the importers in their illegal activities and are morally guilty. Since there is no conclusive evidence against them to hold them as persons concerned in the act of unauthorised importation, they escape on a benefit of doubt."

Despite this finding the Assistant Collector in his complaint referred to earlier seeks to prosecute these accused persons. Hence the question is whether that prosecution is barred under Art. 20(2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Art. has no direct bearing on the question at issue. Evedently those accused persons want to spell out from this Art. the rule of autrefois acquit embodied in s. 403, Criminal Procedure Code. Assuming we can do that still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of s. 403, Criminal Procedure Code or Art. 20(2), it is necessary for an accused person to establish that he had been tried by a "court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established, it can be contended that he is not 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 s. 236 or for which he' might have been convicted under-s. 237. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "Court". In Maqbool Hussain v. The State of Bombay(1), this Court held that the wording of Art. 20 of the Constitution and the words used therein show that the proceedings therein contemplated are proceedings of the nature of criminal proceedings before a court of law or a judicial tribunal and "prosecution" in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute (1) [1953] S.C,R. 730.

which creates the offence and regulates the procedure. This Court further held that where a person against whom proceedings had been taken by the Sea Customs authorities under s. 167 of the Sea Customs Act and an order for confiscation of goods had been passed, was subsequently prosecuted before a criminal court for an offence under s. 23 of the Foreign Exchange Regulation Act in respect of the same act, the proceeding before the Sea Customs authorities was not a "prosecution" and the order for confiscation was not a "punishment" inflicted by a Court or judicial tribunal within the meaning of Art. 20(2) of the Constitution and hence his subsequent prosecution was not barred. The said rule was reiterated in Thomas Dana v. State of Punjab(1) and in several other cases.

We shall not take up the contention that the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution. The issue estoppel rule is but a facet of the doctrine of autrefois acquit. In Sambasivan v. Public Prosecutor, Federation of Malaya(a), Lord MacDermott enunciated the said rule thus:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less

> appliCable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

The rule laid down in that decision was adopted' by this Court in Pritam Singh v. State of Punjab(a) and again in N.R. Ghose alias Nikhil Ranjan Ghose v. State of West Bengal(4).

(1) [1959] S.C.R. 274. (2) [1950] A.C. 458 at p. 479. (3) AI.R. 1956 S.C, 415. (4) [1960] 2 S.C.R. 58.

But before an accused can call into aid the above rule, he 'must establish that in a previous lawful trial before a competent court,he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2.

This takes us to the contention whether the prosecution must be quashed because of the delay in instituting the same. It is urged on behalf of the accused that because of the delay in launching the same, the present prosecution amounts to an abuse of the process of the Court. The High Court has repelled that contention. It has come to the conclusion that the delay in filing the complaint is satisfactorily explained. That apart, it is not the case. of the accused that any period of limitation is prescribed for filing. the complaint. Hence the court before which the complaint was filed could not have thrown out the same on the sole ground that there has been delay in filing it. The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint. Hence we see no substance in the contention that the prosecution should be quashed on the ground that there, was delay in instituting the complaint.

We also see no merit in the contention that the accused in this case are entitled to the benefit of s. 173(4), Criminal Procedure Code which provides that before the commencement of the enquiry or trial the officer-in-charge of the police station who forwards a report under s. 173, Criminal Procedure Code, should furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under s. 173(1), Criminal Procedure Code of the first information report recorded under s. 154, Criminal Procedure Code and all other documents or relevant extracts thereof on which the prosecution proposes to rely, including the-statements and confessions, if any, recorded under s. 164, Criminal Procedure Code and the statements recorded under s. 161, Criminal Procedure Code of all the persons whom the prosecution proposes to examine as its witnesses. On a plain reading of s. 173, Criminal Procedure Code, it is clear that the same is wholly inapplicable to

the facts of the present case. In the instant case no report had been sent under s. 173, Criminal Procedure Code. Therefore that provision is not attracted. That provision is attracted only in a case investigated by a police officer under Chapter XIV of the Criminal Procedure Code, followed up by a final report under s. 173, Criminal Procedure Code. It may be remembered that sub-s. (4) of 173, was incorporated into the Criminal Procedure Code for the first time by Central Act 26 of 1955, presumably because of the changes effected in the mode of trials in cases instituted on police reports. Before the Criminal Procedure Code was amended by Act 26 of 1955, there was no difference in the procedure to be adopted in the cases instituted on police reports and in other cases. Till then in all. cases irrespective of the fact whether they were instituted on police reports or on private complaints, the procedure regarding enquiries or trials was identical. In both type of cases, there were two distinct stages i.e. the enquiry stage and the trial stage. When the prosecution witnesses were examined in a case before a charge is framed, it was open to the accused to cross-examine them. Hence there was no need for making available to the accused the documents mentioned in subs.(4) of s. 173, Criminal Procedure Code. The right given to him under s. 162, Criminal Procedure Code was thought to be sufficient to safeguard his interest. But Act 26 of 1955 as mentioned earlier made substantial changes in the procedure to be adopted in the matter of enquiry in cases instituted on police reports. That procedure is now set out in s. 251(A), Criminal Procedure Code. This new procedure truncated the enquiry stage. Section 251 (A), Criminal Procedure Code says that the Magistrate, if upon consideration of all the documents referred to in s. 173 and making such examination if any, of the accused as he thinks necessary and after giving the prosecution and the accused an opportunity of being heard considers the charge against the accused to be groundless he shall discharge him but if he is of opinion that there is ground for presuming that the accused has committed an offence triable as a warrant case which he is competent to try. and which in his opinion could be adequately punished by him, he shall frame in writing a charge against him. Under the procedure prescribed in s. 251 (A), Criminal Procedure Code but for the facility provided to him under s.173(4)of that Code an accused person would have been greatly handicapped in his defence. But in a case instituted on a complaint, like the one before us and governed by ss. 252 to 259 of the Criminal Procedure Code, no such difficulty arises. Therein the position is as it was before the amendment of the Criminal Procedure Code in 1955. We are unable to agree with the learned fudges of the High Court that the legislature did not make available the benefit of s.173(4), Criminal Procedure Code in cases instituted otherwise than on police reports by oversight. The observations of the learned Judges in the course of their judgment that "Even the great Homer occasionally nods. There is nothing to show that the,legislature has applied its mind to the question of the amendment of the procedure so far as the investigation of an offence under the Sea Customs Act is concerned at the time when it was considering amendments to the Criminal Procedure Code"

> is without any basis. In the first place, it is not proper to assume except on very good grounds that there is any lacuna in any statute or that the legislature has not done its duty properly. Secondly from the history of the legislation to which reference has been made earlier, the reason for introducing s. 173(4) is clear. The learned judges of the High Court were constrained to hold that s, 173(4), Criminal Procedure Code in terms does not apply to the present case. But strangely enough that even after coming to the conclusion that provision is inapplicable to the facts of the present case, they have directed the learned Magistrate to require the prosecution to make available to

> the accused, the copies, of the statements recorded from the prosecution witnesses during the enquiry under the Customs Act. They have purported to make that order under s. 94(1), Criminal Procedure Code which to the extent material for our present purpose reads:
>
> "Whenever any Court ..... considers that production of any document or other thing is necessary or desirable for the purposes of any ..... enquiry, trial or other proceeding under this Code by or before such Court ... such Court may issue a summons ..... to the person in whose possession and power such document or thing is believed to be, requiring him to attend and produce it. or to produce it, at the time and place stated in the summons or order."

This section does not empower a Magistrate to direct the prosecution to give copies of any documents to an accused person That much appears to be plain from the language of that section it was impermissible for the High Court to read into s. 94, Criminal Procedure Code the requirements of s. 173(4), Criminal Procedure Code. The High Court was not justified, in indirectly applying to cases instituted on private complaints the requirements of s. 173(4), Criminal Procedure Code.

That apart we do not think that the High Court was justified in interfering with the discretion of the learned Magistrate Whether a particular document should be summoned or not is essentially in the discretion of the trial court. In the instant case the Special Public Prosecutor had assured the learned trial Magistrate that he would keep in readiness the statements of witnesses recorded by the Customs authorities and shall make avail able to the defence Counsel the statement of the concerned witness as and when he is examined. In view of that assurance, the learned Magistrate observed in his order:

> "The recording of the prosecution evidence is yet commence in this case and at present there are no male-
>
> before me to decide whether or not the production of any of the statements and documents named by the accused in his application is desirable or necessary for the purpose of the enquiry or trial. As stated at the outset, the learned Special Prosecutor has given an undertaking that he would produce all the relevant statements and documents at the proper time in the course of the heating of the case. The request made for the issue of the summons under s. 94, Criminal Procedure Code is also omnibus."

The reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in court are likely to be destroyed or tampered with or the same are not likely to be made available when required. It has proceeded on the erroneous basis that the accused will not have a fair trial unless they are supplied with the copies of those statements even before the enquiry commences. Except for very good reasons, the High Court should not interfere with the discretion conferred on the trial courts in the matter of summoning documents. Such interferences would unnecessarily impede the

progress of eases and result in waste of public money and time as has happened in this case.

For the reasons mentioned above, we allow Criminal Appeal No. 15 of 1967 and dismiss Criminal Appeal No. 35 of 1967. In other words, we restore the order of the learned Magistrate.

G.C. Criminal Appeal No. 15 of 1967 allowed.

Criminal Appeal No. 35 of 1967 dismissed.