

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Rev.P. No. 516/2008**

% Reserved on: 15th February, 2012
Decided on: 24th April, 2012

KRISHAN

..... Petitioner

Through: Mr. Naveen Malhotra, Mr. Nitendra
Kumar, Advs.

versus

R.K. VIRMANI, AIR CUSTOMS OFFICER

..... Respondent

Through: Mr. Satish Aggarwala, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition the Petitioner seeks setting aside of order dated 20th June, 2008 whereby the Learned ACMM, New-Delhi ordered framing of charges against the Petitioner under Section 135 A of the Customs Act, 1962 and the consequential order dated 18th August, 2008 framing charge in case No. 507/1 titled as R.K. Virmani Vs. Shri. Krishan.

2. Learned counsel for the Petitioner contends that the statement of the Petitioner recorded under Section 108 of the Customs Act is exculpatory in nature and the statement of Virender Singh Batra, recorded under Section 108 of the Customs Act, 1962 cannot be relied upon for the purpose of framing charges as he was not examined as a witness in terms of Section 244 Cr.P.C in the complaint case. Reliance is placed on *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate & Anr. 2007 (11) SCALE 741*. Relying on *Ripen Kumar Vs. Department of Customs, 2001 Cr.LJ 1288* and *Anand Kumar Vs. Naresh Arora, 2006 (3) JCC 1491* it is further

contended that the testimony of Subhash Narain (PW1) recorded during the pre-trial stage cannot be relied upon as his testimony is not complete. Further since Virender Singh Batra is not being tried jointly, his statement is not admissible under Section 30 of the Evidence Act.

3. Learned Counsel for the Respondent contends that only a prima facie case needs to be made out against the Petitioner at the stage of framing of charge. He further contends that the statement of Virender Singh Batra recorded under Section 108 of the Customs Act, 1962 can be read as evidence against the Petitioner for prima facie making out a case against him and thus, there is sufficient evidence at this stage for framing charge against the Petitioner.

4. I have heard the learned counsels for the parties. Briefly the facts giving rise to the present petition are that on 15th October, 1992, on the basis of a secret information, one Virender Singh Batra was apprehended by the Respondent, R.K. Virmani while he was in flight no. BA 035 on seat no.33G. He was found in possession of foreign currency equivalent to Rs.18,01,236.35, which he had not declared before the customs officials. His statement was recorded under Section 108 Customs Act, 1962 by one Shri Subhash Narain wherein, he admitted the recovery and further stated that he was helped in carrying this foreign currency out of India by Shri Krishan, the Petitioner herein, who was working as Aero Bridge Operator at IGI Airport for a consideration of Rs. 5000/-. Statement of the Petitioner was also recorded under Section 108 of the Customs Act, 1962 wherein he denied delivery of the said currency to Virender Singh Batra. Thereafter, on 5th November, 1993, a complaint was filed by the Respondent before the Ld.

ACMM, New-Delhi against the Petitioner for offences punishable under Sections 135 (1) (a) and 135 A Customs Act, 1962. In the said complaint, statements of two witnesses namely PW1 Subhash Narain and PW2 R.K. Virmani were recorded during pre-charge evidence under Section 244 CrPC. Subsequently, on 20th June, 2008 the Learned ACMM, New-Delhi ordered the framing of charge under Section 135 A Customs Act, 1962 and as a consequence of which, charges against the Petitioner under Section 135 A Customs Act, 1962 was framed vide order dated 18th August, 2008.

5. Before dealing with the first contention of the Petitioner that the statement of Virender Singh Batra, recorded under Section 108 Customs Act, cannot be looked at for the purpose of framing charges as he was not examined under Section 244 Cr.P.C., it would be necessary to reproduce Section 108 of the Customs Act:

“SECTION 108. Power to summon persons to give evidence and produce documents. – (1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make

statements and produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

6. From the perusal of the section, it is evident that the inquiry under Section 108 Customs Act is deemed to be a judicial proceeding by virtue of sub-section 4 and the person who is summoned under this section is bound to appear and state the truth while giving evidence. If he does not do so he makes himself liable for prosecution under Sections 193 and 228 IPC. Their Lordships in *Percy Rustomji Basta v. State of Maharashtra, 1971 (1) SCC 847* held:

“22. We are not inclined to accept the contention of Mr Chari that in the circumstances mentioned above any threat has proceeded from a person in authority to the appellant, in consequence of which the statement Ex. T was given. Section 108 of the Act gives power to a Customs Officer of a gazetted rank to summon any person to give evidence in any inquiry in connection with the smuggling of any goods. The inquiry made under this section is by virtue of sub-section (4) deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. A person summoned under Section 108 of the Act is bound to appear and state the truth when giving the evidence. If he does not answer he would render himself liable to be prosecuted under Section 228 IPC. If, on the other hand, he answers and gives false evidence, he would be liable to be prosecuted under Section 193 IPC for giving false evidence in a judicial proceeding. In short, a person summoned

under Section 108 of the Act is told by the statute itself that under threat of criminal prosecution he is bound to speak what he knows and state it truthfully. But it must be noted that a compulsion to speak the truth, even though it may amount to a threat, emanates in this case not from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under Section 24 of the Evidence Act is that it must emanate from the person in authority. In the case before us there was no such threat emanating from PW 5, who recorded the statement of PW 19, who was guiding the proceedings. On the contrary the officers recording the statement were only doing their duty in bringing to the notice of the appellant the provisions of the statute. Even if PW 5 had not drawn the attention of the appellant to the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which Section 193 IPC applies, the appellant was bound to speak the truth when summoned under Section 108 of the Act with the added risk of being prosecuted, if he gave false evidence.”

7. In *Ramesh Chandra Mehta v. the State of West Bengal*, AIR 1970 SC 940, the Constitution Bench while examining the admissibility of a statement recorded under Section 171A of the Sea Customs Act, 1878 (now repealed) corresponding to Section 108 of the Customs Act, 1962 held:

“24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could not be made by a Customs Officer of his own accord: he had to apply for and obtain a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the

Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any person on bail or otherwise. The expression “or otherwise” does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in *Badku Joti Savant case*, 1966-3SCR698= (AIR 1966 SC 1746) we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act.”

8. Thus, it is evident that a statement made by a person, who is subsequently made an accused, before a Customs Officer under Section 108 of the Customs Act is a confession made to a person other than a police officer and thus not hit by the bar of admissibility under Section 25 of the Evidence Act.

9. The next issue that arises for consideration is whether it is essential to examine the maker of the confession or the person before whom this confession by co-accused has been made can prove the confession. The law

on the point is well settled. An accomplice is a competent witness against the co-accused. In case the accomplice is cited as a witness then it is essential to examine him under Section 244 Cr.P.C. However if the confession of the co-accused made to any person has to be proved, then the confession so recorded has to be exhibited like any other document under Section 244 Cr.P.C. At this stage it would also be relevant to reproduce Section 244 Cr.P.C.:-

“ Sec. 244 Evidence for prosecution. (1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing”.

10. Sub-Section (1) of Section 244 Cr.P.C. employs the words ‘shall’ and ‘may’. So when these two words are used together in Sub-Section (1) of Section 244 Cr.P.C., in the sense that they are generally used, denote that words “the Magistrate shall proceed to hear” would mean that the Magistrate is under a duty to hear the witnesses at the pre-charge stage. However, these witnesses are the ones that ‘may’ be produced by the prosecution in support of their case thus, the prosecution is under no duty to produce all its witnesses at this stage. Further under Sub-Section 2 of Section 244 Cr.P.C. the Magistrate is under no obligation to summon any witness on his own. It is only on the application of the prosecution that the witnesses are produced at this stage. Thus, it is clear that at the pre-charge stage the discretion to

produce a witness lies with the prosecution and not the court or the accused. Further the prosecution at this stage needs to satisfy the court of the existence of a 'prima facie; case for the purpose of framing charges.

11 Their Lordships in *R.S. Nayak vs. A.R. Antulay*, AIR 1986 SC 2045 observed:

“44.The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is no sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if

the trial Court is satisfied that a prima facie case is made out, charge has to be framed”.

12. It was further observed by this Court in *Mathura Dass & Ors. vs. State 2003(2) JCC 639* as:-

“7. After considering the submissions made by learned counsel for the parties and examining the material on record, this Court is of the considered view that a Judge, at the time of framing of charge, is not to act merely as a post-office or mouth-piece of the prosecution, but has powers to sift and weigh the evidence but for a limited purpose only. This exercise has to be undertaken by him only with a view to find out as to whether a prima facie case is made out or not. The existence of a prima facie case may be found even on the basis of strong suspicion against an accused. The assessment, evaluation and weighing of the prosecution evidence in a criminal case at the final stage is on entirely different footing than it is at the stage of framing a charge. At the final stage if two views are possible, one of which suggests that the accused may be innocent, then the view favorable to the accused has to be accepted whereas at the stage of framing of the charge, the view which is favorable to the prosecution, has to be accepted for the purpose of framing charge so that in the course of the trial, the prosecution may come out with its Explanations in regard to the draw-backs and weaknesses, if any, being pointed but by an accused.”

13. Thus, if the prosecution is able to prove the existence of a prima facie case on production of ‘a few’ and not ‘all’ witnesses, charge has to be framed against the accused. Further, from perusal of *Mathura Dass & Ors.(supra)* it can be seen that at the stage of framing charges, if two views are possible, one that favours the prosecution has to be taken. In the present case though the accomplice Virender Singh Batra has been cited as a witness, however he has not been examined under Section 244 Cr.P.C. Thus, there is no evidence in the form of accomplice evidence

before the Court to form a prima facie opinion that charge can be formed against the Petitioner.

14. In *Naresh J. Shukawani Vs. Union of India 1996 (83) ELT 258 (SC)* it was observed that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the Hon'ble Court that if such a statement incriminates the accused, inculcating him in the contravention of the provisions of the Customs Act, it can be considered as a substantive evidence to connect the accused with the contravention of the provisions of this Act. Para 4 of the said judgment is thus reproduced as:-

“4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.”

15. The learned Counsel for the Petitioner has placed reliance on *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate & Anr.* (2007) 8 SCC 254 in support of his contention that the statement recorded u/s 108 Customs Act cannot be looked at the stage of framing charge as the same was not recorded under Section 244 Cr.P.C at the pre-trial stage. However, on perusal of the said judgment especially para 20, it is evident that the Hon'ble Supreme Court has stated that such statements are, although, not inadmissible, they should be scrutinized by the Court in the same manner as confessions made by an accused person to any non-police personnel. Thus, according to the Hon'ble Supreme Court it should also pass the test of Section 24 of the Evidence Act. It was held:-

“20. In *The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd.* 2000 CriLJ 4035, this Court held:

...The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.”

16. This Court in *Paramjit Singh vs. Commissioner of Customs & Others* 2002 (2) JCC 916 further observed that the statement of any person called for enquiry by the customs officer under the Customs Act can be recorded by

such officer and such a statement is admissible in evidence by virtue of Section 30 of the Evidence Act and the protection under Article 20 (3) of Constitution of India is not available at the stage of recording of such statement the person giving the statement is not an accused. Their Lordships thus observed:-

“5. As per settled law, statement of any person called for enquiries during investigation by the authorities under the Customs Act, can be recorded by the customs officer. Such statement is admissible in evidence. Protection under Article 20(3) of the Constitution of India is not available at that stage (see *Poolpandi etc.etc. v. Superintendent, Central Excise and others etc.etc.*, 1992 CriLJ 2761). The confession of the co-accused in the case would also be admissible by virtue of Section 30 of the Evidence Act. As per statement of witnesses, the petitioner absconded after the seizure. His conduct would be relevant.”

17. The contention of learned counsel for the Petitioner at this stage is that the statement was not recorded under Section 244 Cr. P. C at the pre-trial stage and hence, inadmissible as evidence for framing charges. The reliability of the statement will have to be examined during trial. At this stage, it is sufficient to hold that the statement is admissible without examining the co-accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.PC. As can be observed from the conjoint reading of the judgments in *Percy Rustomji Basta (supra)*, *Ramesh Chandra v. the State of West Bengal (supra)*, *Naresh J. Shukawani(Supra.)* and *Paramjit Singh(Supra.)*, a statement recorded by Customs officer under section 108 of the Customs Act,1962 is admissible in

evidence and not hit by provisions of Article 20(3) of the Constitution or Section 25 of the Evidence Act. Further, such statement is presumed to be truthful as it is recorded under a proceeding which is judicial in nature and if upon such statement a prima facie case can be made out for framing the charge, by virtue of *R.S. Nayak (Supra) and Mathura Das (supra)*, the Magistrate is well within his powers to order framing of charges.

18. Thus, though Virender Singh Batra was not called as a witness, his statement, recorded under Section 108 Customs Act, can definitely be looked at the stage of framing charges by virtue of the judgments aforementioned. Further the said statement of Virender Singh Batra stands proved by the testimony of PW1 Subhash Narayan who in his statement under Section 244 Cr.P.C., stated that he recorded the statement of Virender Singh Batra and exhibited the same. Also PW2 in his testimony under Section 244 Cr.P.C. stated that Virender Singh Batra, during his interrogation, stated that the packets containing the foreign exchange apprehended from him were handed over to him by the Petitioner.

19. However, the moot question is whether the statement of Virender Singh Batra recorded under Section 108 Customs Act duly proved by PW1 Subhash Narayan is admissible for the further reason that he is not jointly tried with the Petitioner. I find force in the contention of learned counsel for the Petitioner. A confession of the co-accused is admissible only under Section 30 of the Evidence Act. One of the essential requirements of the said provision is that the two accused should be tried jointly. Since the confession of the co-accused is not admissible as he is not being jointly tried with the Petitioner and besides this piece of evidence there is no other

evidence, no charge can be framed against the Petitioner for offence under Section 135A of the Customs Act.

20. Hence the order dated 20th June, 2008 directing framing charge and the consequent order dated 18th August, 2008 framing charge against the Petitioner for offence under Section 135A Customs Act are set aside. Petition is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

APRIL 24, 2012
'ag'