IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

MONDAY, THE 4TH DAY OF DECEMBER 2023 / 13TH AGRAHAYANA, 1945

CRL.A NO. 1202 OF 2019

AGAINST CC 411/2016 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE (E&O),ERNAKULAM

Crl.L.P. 416/2019 OF HIGH COURT OF KERALA

APPELLANT/COMPLAINANT:

ASSISTANT COMMISSIONER OF CUSTOMS
PROSECUTION CELL,
CUSTOMS HOUSE, COCHIN

BY ADVS.
P.VIJAYAKUMAR
MANU S. ASG OF INDIA
SRI.SUVIN R.MENON, CGC

RESPONDENTS/ACCUSED/ADDL. 2ND RESPONDENT:

1 **EDWIN ANDREW MINIHAN**
S/O.SHRI. EOIN,
SPRINGS 6, STREET 3, VILLA 67,
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PRESENTLY RESIDING AT BLUE BELL HOME STAY,
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C.R. BUILDINGS, I.S PRESS ROAD,
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***(ADDL.R2 IS IMPLEADED AS PER ORDER DATED 21/06/2022 IN CRL M.A. No.I/2022 IN CRL.A. No.1202/2019)**

BY ADVS.
SRI.SAJEEV KUMAR M.S
SMT.LAKSHMI S KUMAR
SMT.A.N.JYOTHILEKSHMI

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31.10.2023, THE COURT ON 04.12.2023 DELIVERED THE FOLLOWING:

"C.R."

BECHU KURIAN THOMAS, J.

Crl.Appeal No.1202 of 2019

Dated this the 4th day of December, 2023

JUDGMENT

An Irish citizen was found in possession of ten gold bars at the Cochin International Airport on 13.07.2015. He was soon indicted for smuggling gold and prosecuted in C.C. No.411/2016 before the Additional Chief Judicial Magistrate (EO), Ernakulam. By judgment dated 26.03.2019, the learned Additional Chief Judicial Magistrate acquitted the accused. Hence, this appeal.

2. The prosecution was initiated based upon a complaint filed by the Assistant Commissioner of Customs, alleging offences punishable under sections 132 and 135 of the Customs Act, 1962 (for short 'the Act').

3. The prosecution case was that the accused arrived at Cochin International Airport on 13.07.2015 on Emirates Flight EK 534 from Dubai. He had with him two pieces of hand baggage.

At the exit gate of the airport terminal, he was intercepted and found in possession of a customs declaration form duly filled in, with the column for declaration of Gold Jewellery (Over Free Allowance) encircled. Prosecution alleged that when the accused was questioned on whether he carried any dutiable goods, he replied in the negative. However, since the X-ray showed a dark image in his coat pockets, a search was conducted, which revealed that he carried a gold bar in each of his pockets. There were ten gold bars weighing 10 kg in total and worth Rs.2,45,43,500/-. Later, the accused gave a statement under section 108 of the Act, confessing that he had engaged in smuggling the gold to India. He also stated that he had indulged in smuggling on 21 occasions earlier, thus committing the offences alleged.

4. Prosecution examined PW1 to PW10 and marked Ext.P1 to Ext.P12. On behalf of the accused, DW1 was examined. A court exhibit was marked as Ext.D1 produced pursuant to a summons and a warrant issued to the Jail Superintendent. Ext.D2 was also marked on the side of the defence. No material objects were produced or marked in the case.

5. After analysing the evidence, the trial court acquitted

the accused. In coming to such a conclusion, the trial court found that the accused had retracted his statement given under section 108 of the Act and that he had declared that he was carrying gold and also that he had encircled the customs declaration form, though it was mistakenly circled in the column for gold jewellery instead of gold bullion. The trial court also found that the prosecution had suppressed the bill for the purchase of gold despite its seizure from his bag.

6. Sri. Suvin R. Menon, the learned Central Government Counsel, vehemently and with dexterity, contended that the trial court misread the evidence and also erred in acquitting the accused. It was submitted that there was no legal evidence for retraction of the statement under section 108 of the Act and that the statement alone was sufficient to convict the accused. According to Adv. Suvin, though Ext.D1 was marked in evidence, it could not have been relied upon by the court as it had not been proved. Drawing the distinction between proof of contents of a document and marking of a document, it was argued that the Ext.D1 was merely marked without any person being examined. The learned counsel referred to various decisions in support of the above proposition. It was further argued that the

admission of the accused in the statement under section 313 of Cr.P.C that he had brought the gold bars to India itself is sufficient to prove the act of smuggling and, therefore, the burden was entirely upon the accused to prove that he had not committed the offence. Numerous decisions were referred to in support of his contentions.

7. Sri. Sajeev Kumar M.S., the learned counsel for the accused, also, with thorough preparation, argued that the entire prosecution story was fabricated and the acquittal of the accused ought to be sustained. It was also submitted that apart from the statement under section 108 of the Act having been retracted as evident from Ext.D1 and the bail applications that were filed by the accused at the initial stage, there were serious contradictions and inconsistencies in the prosecution case that justified the acquittal of the accused. It was also submitted that the prosecution never questioned the marking or admissibility of Ext.D1 during trial. The learned counsel also submitted that none of the material objects, including the gold allegedly seized, were produced in court. Even the CCTV footage available with the prosecution was not produced, and therefore, the accused is entitled to the benefit of doubt. The learned counsel further

submitted that the Green Channel and the Red Channel in the Customs area were not distinguishable, and even the place where the alleged seizure was effected was doubtful. It was also argued that the statements allegedly given under section 108 of the Act cannot be relied upon, as they were not true or even voluntary.

8. On a consideration of the rival contentions, the following main issues arise for consideration: *(i) Has the accused retracted his statement given under section 108 of the Customs Act as per Ext.D1? (ii) Can the statement given by the accused under section 108 of the Act, produced as Ext.P8, Ext.P8(a) and Ext.P8(b) be relied upon?, (iii) Has the accused admitted the commission of offence? and (iv) Does the judgment of acquittal of the accused warrant any interference?*

9. Before considering the issues mentioned above, it is necessary to advert to the scope of interference in an order of acquittal. It is settled that in an appeal against acquittal, the Appellate Court may reverse the order of acquittal only if the judgement is perverse. Merely because another view is possible, on a re-appreciation of the evidence, the Appellate Court ought not to disturb the order of acquittal and substitute its own

findings to convict the accused. Similarly, if the trial court's view is possible, particularly when evidence on record has been analysed, the Appellate Court should not interfere with the order of acquittal. Reference to the decisions in **Rupesh Manger (Thapa) vs. State of Sikkim** [(2023) 9 SCC 739] and to **Jafarudheen v. State of Kerala** [(2022) 8 SCC 440], would suffice in this context. In the latter decision, it was also observed that an order of acquittal adds up to the presumption of innocence in favour of the accused and gets strengthened. Such a double presumption that enures in favour of the accused ought not to be disturbed unless the conclusion arrived at by the trial court is impossible.

10. Circumstances also compel this court to observe that Ext.D1 is the alleged retraction by the accused of the statements earlier given by him under section 108 of the Act. Ext.D1 was allegedly handed over to the Jail Authorities while the accused was in custody. The said document was produced pursuant to a summons followed by a warrant issued by the court to the Jail Superintendent for the production of the document. Though Ext.D1 was not marked either through the accused or through any Jail Officer, it was produced from the custody of the Jail

Superintendent. It is relevant to observe that Rule 62 of the Criminal Rules of Practice, 1982 deals with the marking of exhibits. Rule 62(ii) and 62(iii) mandate that exhibits admitted in evidence shall be marked in a particular manner. Rule 62(ii) states that "documents if filed by the defence has to be with capital letter 'D' followed by a numeral D1, D2, D3 etc" and Rule 62(iii) states that "if court exhibits, be marked with capital letter 'C' followed by a numeral C1, C2 and C3 etc."

11. In the instant case, Ext.D1 has not been marked through any witness, and therefore, it can only be a court exhibit. It was summoned from the Jail Authorities. The said document should not have been marked as Ext.D1 but as Ext.C1. However, the nomenclature of the marking cannot detract from the evidentiary value of the document.

12. Bearing in mind the above legal principles regarding the scope of interference in an order of acquittal, the issues raised earlier are dealt with as below.

Issue No. (i). *Has the accused retracted his statement given under section 108 of the Customs Act as per Ext.D1?*

13. Ext.P8, Ext.P8(a) and Ext.P8(b) are the three statements given by the accused under section 108 of the Act. The only material available to prove the claim of retraction is Ext.D1. The prosecution had not objected to the marking of Ext.D1 document at the time of trial, though they were aware of its production. Ext.D1 was marked in evidence after it was produced by the Jail Superintendent along with a covering letter, pursuant to a summons issued by the trial Court seeking its production. The objection against its marking and admissibility is raised for the first time before this Court in appeal.

14. As per section 294(3) of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C'), where the genuineness of any document is not disputed, such a document may be read in evidence without proof of the signature of the person to whom it purports to have been signed. Section 294 Cr.P.C reads as under:

> "**294. No formal proof of certain documents.**--
> (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

> (2) The list of documents shall be in such form as may be prescribed by the State Government.
> (3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:
> Provided that the Court may, in its discretion, require such signature to be proved."

15. The purpose behind section 294 Cr.P.C is to dispense with formal proof of certain documents. This can apply only when the circumstances mentioned in the section are satisfied. A reading of section 294 Cr.P.C makes it clear that the provision will apply only after the prosecution or the accused were called upon to admit or deny the genuineness of the document after giving a list of such documents to be denied or admitted. If the genuineness is not disputed after such an opportunity, then the document can be read in evidence without proof of signature. Even then, at its discretion, the Court can require the signature to be proved, as seen from the proviso to Section 294(3). The normal rule is that a document cannot be read in evidence without formal proof. Section 294 is an exception carved out of the normal rule. Therefore, for extending the concept under the provision, the conditions stipulated therein must be satisfied

strictly. The crucial requirement under section 294 Cr.P.C is that an explicit endorsement of admission or denial of the document is taken after calling the opposite side's attention to the document. Reference to the Full Bench judgment of Bombay High Court in **Shaikh Farid Hussainsab v. State of Maharashtra** [1983 Cri LJ 487] and that of the Patna High Court in **Shyam Narayan Singh and Others v. State of Bihar** [1993 Cri LJ 772] are relevant in this context.

16. In the decision in **Shamsher Singh Verma v. State of Haryana** [(2016) 5 SCC 485], it has been observed that the object of S.294 Cr.P.C is to accelerate the pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence. It was further observed that where the genuineness of any document is admitted or its formal proof is dispensed with, the same may be read in evidence. The Court also held that it is not necessary to obtain admission or denial of a document under S.294(1) Cr.P.C personally from the accused or complainant or the witness and that the endorsement of admission or denial made by the counsel for the defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of S.294 Cr.P.C.

Similarly on a document filed by the defence, endorsement of admission or denial by the Public Prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. If in case it is admitted, it need not be formally proved, and can be read in evidence.

17. It is settled that objections to the mode of proof fall within the procedural law; therefore, such objections can be waived. It is also settled that the objections must be raised before a document is marked as an exhibit and admitted in Court, as held in the decisions in **Dayamathi Bai (Smt.) v. K.M.Shaffi,** [(2004) 7 SCC 107], **Lachhmi Narain Singh (Dead) through legal representatives and Others v. Sarjug Singh (Dead) through legal representatives and Others** [AIR 2021 SC 3873] and **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V. P. Temple and Another** [(2003) 8 SCC 752].

18. Thus, for the benefit of section 294 Cr.P.C to apply, the party should have been called upon to admit or deny the genuineness of the document after giving a list of such documents to be denied or admitted. None have a case that such an instance occurred before marking Ext.D1. Therefore, the

accused cannot claim the benefit of section 294 Cr.P.C.

19. In this context, it is appropriate to observe that the mere production and marking of a document as an exhibit is not proof of its contents. The normal principle is that the execution of a document has to be proved by admissible evidence, that is, by the 'evidence of those who can vouchsafe for the truth of the facts in issue'. The decision of this Court in **PRS Hospital represented by its Administrative Officer (General manager) and Another v. P.Anil Kumar** (2021 (1) KLJ 923) has dealt with the mode in which a document can be proved in evidence. Reference to the decision in **Narbada Devi Gupta v. Birendra Kumar Jaiswal and Another** [(2003) 8 SCC 745] and the recent decision in **Harendra Rai v. State of Bihar** (2023 INSC 738) are also relevant. The observation in **Harendra Rai's** case (supra) is apposite and is hence extracted as below;

> "*At the stage of evidence, when any document/paper is formally produced for being treated as a piece of evidence, the Court looks at two basic aspects. Firstly, the existence of the document on the Court's record and, secondly, the proof of its execution or its contents being sufficiently deposed to by a witness having requisite knowledge thereof, whereafter, the document in question is marked as exhibit. At the stage of exhibiting any document as a piece of evidence, the truth of what is stated in the document is not considered. It is left open*

> *to final evaluation at the trial after cross-examination, and the entire testimony of the witness about the existence and contents of the document is weighed in conjunction with various other factors emerging during a trial. At the final evaluation stage, the Trial Court concludes whether the document speaks the truth and decides what weight to give it for final decision. In other words, its evidentiary value is analysed by the Courts at the time of final judgment. In this view of the matter, the marking of a piece of evidence as 'exhibit' at the stage of evidence in a Trial proceeding is only for the purpose of identification of evidence adduced in the trial and for the convenience of the Court and other stakeholders in order to get a clear picture of what is being produced as evidence in a Trial proceeding"*

20. In the instant case, Ext.D1 was produced from the Official custody, pursuant to summons. The contents of Ext.D1 have not been spoken to by anyone. The person who signed the document or, who received the document, or in whose custody it was kept, has not been examined. The only circumstance that stands proved is that a written document was handed over to the prison authorities while the accused was in custody.

21. In the decision in **PRS Hospital's case** (supra), it was held that there are four stages before a Court of law can rely upon a document. They are (i) marking of a document, (ii) admissibility of a document, (iii) proof of contents of the

document and (iv) evaluation of the document. The court can rely upon a document only if all the above four stages are satisfied. It was also observed that a document does not become admissible in evidence by its mere marking. Further, the marking of a document and being admissible in evidence will still not enable the contents of a document to be treated as 'proved'. When a document, admissible in evidence, is marked, for it to be relied upon by the courts, its contents will have to be proved. For the contents of a document to have a probative value, the person who wrote the contents or is aware of the contents and its veracity must be invited to give evidence about it. It is thereafter the last stage, apply i.e., evaluation, which is a judicial exercise. Unless all these stages are carried out, a court of law cannot rely upon any document produced or marked before it. Viewed in the above perspective, the contents of Ext.D1 cannot be said to have been proved. Hence, Ext.D1 cannot be treated as a retraction of the statement given under section 108 of the Act.

Issue No. (ii). *Can the statements given by the accused under section 108 of the Act produced as Ext.P8, Ext.P8(a) and Ext.P8(b) be relied upon?*

22. The initial burden to prove that a statement given under section 108 of the Act was voluntary is on the prosecution. Even if such a statement has not been retracted, the prosecution still has the burden to prove that the accused made the statement voluntarily. The observation of the Bombay High Court in **Union of India v. Kisan Ratan Singh and Others** [2020 SCC OnLine Bom 39] is relevant. It was reiterated that without any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. The following observations are relevant: "*If I have to simply accept the statement recorded under Section 108 as gospel truth and without any corroboration, I ask myself another question, as to why should anyone then go through a trial. The moment the Customs authorities recorded the statement under section 108, in which the accused has confessed about his involvement in carrying contraband gold, the accused could be straightaway sent to jail without the trial court having recorded any evidence or conducting a trial.*"

23. This Court is in complete agreement with the above view. The court has a duty to appreciate whether the statements under section 108 of the Act, relied upon by the prosecution as a confessional statement, meet the standard test of reliability. If the court doubts the truthfulness or its voluntary nature, it is certainly

open for the court not to rely upon such a statement.

24. A statement under Section 108 of the Act is voluntary when the admission of guilt has been made, without any external influence or force that would have compelled the person giving the statement to accept his guilt. The reliability of the evidence of a confession in a criminal proceeding is to be assessed by the court by considering various factors that surround the mode and manner in which such a confession was given. The first step in that process is to assess whether the confession was made voluntarily and the next is to identify whether the confession is true and trustworthy. For a confession to be accepted by a court of law, the prosecution must prove that it is trustworthy to a high degree of certainty. The normal requirements for proof of a confession apply even to a statement under section 108 of the Act. The fact that a Customs Officer is not a Police Officer only makes a statement admissible in evidence in contradistinction to its inadmissibility.

25. As mentioned earlier, Ext.P8, Ext.P8(a) and Ext.P8(b) are the statements allegedly given by the accused in this case under section 108 of the Act. A perusal of the three statements does not inspire this Court to believe that it was made voluntarily. The statements have the trappings of a document written under the dictation of another. Those statements indicate that despite being an

Irish National, the accused refers to specific statutory provisions like section 108 of the Customs Act,1962 and section 193 of the Indian Penal Code, 1860. Even more surprising is the reference to the term 'Mahazar' that too, twice in Ext.P8(b) statement given on 14.07.2015. The term Mahazar is not a universally known word and is generally unknown to laymen, especially nationals of other countries. It is difficult to believe that the accused had voluntarily written the term mahazar unless it was dictated by somebody else. The accused has also, in Ext.P8(a) statement, referred to the passport number of a third person named Tharique and even the mobile numbers of two other persons. The possibility of the statements being given under the dictation of another person cannot be fully ousted. Further, the excel sheets of printouts attached along with the statements are admittedly taken through the computer system available in the office of the Customs Department. The signatures on the printouts are seen affixed in a manner which does not inspire the Court to believe that they were affixed before the papers had any entries on them. The printouts on the various papers are in portrait mode, while the signatures are affixed as if the printouts were taken in landscape mode. The possibility of those signatures obtained without any print on it cannot thus be ignored. The cumulative effect of the above suspicious circumstances is that it creates doubt on the veracity of the

statements allegedly given by the accused under section 108 of the Act.

26. Apart from the above, two specific questions were put to PW9, the Commissioner of Customs, during his evidence. Those questions were: "*While perusing the records, did you see the bail application filed by the accused (Q.) Yes (A.). You must have noted that the accused has retracted his statement in the bail application (Q.) Yes, he has not filed any retracted(sic) and given any statement before the Customs authority (A.)*. It is significant to note that the accused had a case that, at the very first opportunity itself, he had retracted the statement in his bail application and also submitted a letter to the prison authorities to be forwarded to Customs, retracting his statement given under section 108 of the Act. Though the contents of the document produced by the Jail Authorities and marked as Ext. D1 has not been proved in evidence; still, the admission of PW9 in his evidence that the accused had retracted his statement in the Bail application is a significant factor that affects the credibility of the statement under section 108 of the Act, in the light of the suspicious circumstances surrounding those statements.

27. As per section 3 of the Indian Evidence Act, 1872, a fact is proved only when the Court believes its existence so probable that a prudent man ought, under the circumstances of the particular case, act upon the supposition that it exists. In the nature of the circumstances referred to above, this Court does not believe that the statements Ext.P8, Ext.P8(a) and Ext.P8(b) purported to have been made under section 108 of the Act were voluntarily made by the accused. Therefore, no reliance can be placed upon those statements.

Issue No. (iii). *Has the accused admitted to the commission of the offence in the statement under section 313 Cr.P.C?*

28. The accused is alleged to have admitted in his statement under section 313 Cr.P.C to the act of smuggling. This Court could not identify any specific admission of commission of the offence. Even if it is assumed that there is any admission in the statement under section 313 Cr.P.C, the same cannot be relied upon as the sole material to convict the accused. Legally, a statement given under section 313 of Cr.P.C is not given under oath and hence cannot replace evidence. If the evidence of the prosecution leaves out an essential ingredient of the offence, that gap cannot be filled up by the statement under section 313

Cr.P.C. The Court can use the aforesaid statement to the extent it corroborates the case of the prosecution. A conviction *per se* cannot be based upon the statement under section 313 Cr.P.C, as it cannot be regarded as substantive evidence. Reference to the decisions in **Vijendrajit Ayodhya Prasad Goel v. State of Bombay** (AIR 1953 SC 247) and **Ashok Kumar v. State of Haryana** [(2010) 12 SCC 350] are relevant in this context. At the most, the statement can be taken only as an aid to lend assurance to the prosecution evidence as held in **Mohammed Firoz v. State of Madhya Pradesh** [(2022) 7 SCC 443].

Issue No. (iv). *Does the judgment of acquittal of the accused warrant any interference?*

29. The evidence of the prosecution witnesses indicates various inconsistencies and contradictions between them. Though few of the inconsistencies are inconsequential, some are substantial. Smuggling takes place when the Customs area is crossed without paying duty. Reference to section 2(10) and section 2(11) of the Act are relevant. PW1, PW6 and PW7 deposed that the accused was intercepted after he crossed the Green Channel. PW10, however, contradicts the above witnesses

and deposed that the accused was intercepted at the baggage hall. This creates doubt about the place where the accused was intercepted. Failure of the prosecution to produce in evidence the CCTV footage of the airport area to prove the place of interception of the accused has to be treated as withholding of the best evidence available to the prosecution. The existence of separate exit points for the Green Channel and the Red Channel is also not proven by the prosecution witnesses. There are contradictions in the evidence of the prosecution witness in that regard.

30. The fact that the accused had a customs declaration form, in which he had admittedly encircled the column indicating that he was carrying gold in excess of the quantity prescribed, is also significant in this context. Ext.P4 is the customs declaration form which was marked through PW1. Further, despite the seizure of the bill for the purchase of gold from the bag of the accused, the prosecution suppressed it during the stage of evidence. The accused produced a copy of the said invoice as Ext.D2 and the prosecution witnesses admitted the seizure of the said bill.

31. Though the prosecution denied the existence of any

place for storing goods, it is evident from section 42(2) read with section 12(3)(g) of the Airport Authority of India Act, 1994 that there are provisions for setting up warehouses to store goods brought by passengers. Similarly, there is absolutely no evidence regarding any previous smuggling of goods by the accused. The prosecution had not examined any witness or produced any document to show such previous conduct by the accused, and on the other hand, the evidence of DW1 indicates that the accused had been coming down to Kerala for business purposes, which evidence could not be dented by the prosecution during cross-examination. Therefore, the impugned judgment cannot be said to be perverse or impossible.

32. In view of the above discussion, the judgment of acquittal of the accused dated 26.03.2019 in C.C. No.411 of 2016 on the files of the Additional Chief Judicial Magistrate (EO), Ernakulam, needs no interference.

Hence, the appeal is dismissed.

Sd/-
BECHU KURIAN THOMAS
JUDGE

vps