

2019-TIOL-2001-HC-DEL-CUS

IN THE HIGH COURT OF DELHI

CRL MC No. 2408/2016

**CUSTOMS PREVENTIVE NEW CUSTOMS HOUSE
THR NARESH KUMAR, INSPECTOR**

Vs

AJAY KUMAR BANSAL

R K Gauba, J

Dated: January 24, 2019

Appellant Rep by: Mr Satish Aggarwala, Sr. Standing Counsel with Mr Vineet Sharma, Adv.

Respondent Rep by: Mr Sonam Nagrath, Adv.

Cus - The complaint was presented by petitioner through its representative officer - For prosecuting the complaint, the petitioner has engaged a Special Public Prosecutor who has been in-charge of the case since beginning, i.e., 30.06.1993, now for over 25 years - The manner in which the proceedings have been held and the manner in which the petitioner has conducted the prosecution gives the impression it is more of persecution than prosecution - A total casual and callous approach instead seems to have been adopted by the petitioner, and its representatives, and indeed the counsel representing the department - PW-1 was never called upon by prosecutor to prove the sanction, his attention not being drawn to it - The sanctioning authority was never called upon to appear and prove the sanction - It is the duty of the prosecutor to ensure that all such evidence is properly and formally adduced - He could not assume that the witness would himself offer all the necessary facts - After all, the witness was a public servant holding the rank of an inspector - The failure to bring formal evidence in respect of sanction for prosecution, in these circumstances, is wholly and squarely that of the public prosecutor in-charge - The omission to adduce proof of sanction was an issue being raised by respondent anterior to the order dated 27.01.2010 of the ACMM - The least that the prosecutor could have done at that stage was to move appropriate application under Section 311 Cr.P.C. and either examine PW-1 further or to summon any other witness so that the proof of sanction had been tendered - No such steps were taken - Instead, the prosecutor continued to harp on the plea that he had discharged his burden, as if standing on some ego - The direction of the revisional court for fresh sanction to be obtained was wholly uncalled for inasmuch as the sanction granted prior to the launching of the complaint is already there and it is that sanction which is relevant - The criminal prosecution of such nature cannot be allowed to be reduced to a mockery, not the least, at the whims of individuals - After all, public interest involved in such prosecution also has to be taken care of - The petition is allowed with costs of Rs.50,000/- - In turn, the petitioner would have the liberty to recover the said costs from the person responsible for the said lapse - Subject to proof of deposit of costs by petitioner being shown to the satisfaction of CMM, the liberty to examine additional

witness to prove the sanction for prosecution is granted - The parties are directed to appear before the said court accordingly: HC

Petition disposed of

JUDGEMENT

Per: R K Gauba:

1. On the criminal complaint (CC No.282/1/1993) of the petitioner, the respondent stood summoned as accused by order dated 06.07.1993 of Additional Chief Metropolitan Magistrate (ACMM), the accusations levelled constituting the offence under Section 135 of the Customs Act, 1962. It may be mentioned that besides the respondent, one another (Jitender Nath) had also been summoned by the said order, the said other accused having since died and the proceedings against him having abated.

2. The complaint dated 30.06.1992 was presented by Mr. Satish Aggarwala, Senior Special Public Prosecutor engaged by the petitioner, he having continued to be the counsel till date and representing the petitioner in these proceedings as well. The complaint was accompanied by sanction and authorization for prosecution granted by Collector of Customs on 26.11.1992 in exercise of the power vested in him by Section 137(1) of the Customs Act, 1962.

3. In view of the fact that the complaint was filed by a public servant in official capacity, no preliminary inquiry was held, cognizance being taken on the complaint, the documents and the material filed therewith, it being inclusive of the above mentioned sanction, satisfaction about its sufficiency having been recorded by the ACMM in the order dated 06.07.1993, and procedure of trial of warrant cases instituted otherwise than on a police report (i.e., the complaint cases) was applied. After securing the presence of the accused, the ACMM took the matter to the stage of recording of pre-charge evidence.

4. The case was listed before the ACMM for such purposes on 09.11.1994 when the following order was recorded:-

"Present: Sh. Satish Aggrwal P.P. for the Customs. Accused No.2 on bail with counsel Sh. Akshay Anand.

Accused No.1 is not present. The presence of accused No.1 is exempted for today on an application made on his behalf by Sh. Akshay Anand Adv. However, Sh. Akshay Anand Adv. has got no objection if the evidence of the witness present is recorded. As such statement of PW 1 Sh. S.K.Verma partly recorded. His further statement is to be recorded at Nangloi where the case property is lying and the permission from the Hon'ble High Court has been received to hold the court there. To come up for evidence at Nangloi on 8.12.94.

ACMM/9.11.94"

5. It may be mentioned here that S.K. Verma (PW-1), referred to in the aforementioned proceedings, was Inspector Customs (Preventive) by whom the complaint had been filed

on behalf of the petitioner. The deposition recorded on 09.11.1994 was his part examination-in-chief, which would read thus:-

"PW1. Sh. S.K.Verma ACO, IGI Airport, New Delhi.

On S.A.

In September, 1992 I was posted as Inspector Customs at Customs Collectorate, Delhi. On 26.9.92 acting on specific information I alongwith the officers of Customs preventive searched the godown located at Nilothi Mode near G.R. Public School Sri Ram Park, Nangloi in the presence of two independent witnesses and Sh.Vikaram Singh Watchman. Sh. Vikaram Singh opened the godown with the keys available with him and as a result of search ball bearing of foreign origin valued at Rs.14,57,500/- (MV) were recovered and during the course of the search the documents, packing list having No.1094 of M/s Ameeco Marketing, Dubai, U.A.E. pasted on one of the wooden crates containing details regarding quantity etc and sticker of Ameeco Marketing telephone numbers, destination, C.C.U./KT etc and one debit voucher of M/s. Great India Chemicals, 251 Kamla Market were also seized. On demand Sh. Vikaramjit could not produce any evidence for the lawful import/acquisition/possession for the purchase and storage of the recovered ball bearing and as such the same were seized vide panchnama Ex.PW1/C which is in my own hand and is signed by me, two panch witnesses at points A to D and thumb marked by S. Vikaram Singh Watchman at point D on all the pages. Certain documents were also seized which are Ex.PW1/D1 to D3. (To be continued)

RO & AC

ACMM/9.11.94."

6. As can be noted from the above, only four documents were formally referred in the chief-examination by PW-1 they being Ex.PW-1/C, (punchnama) and Ex.PW1/D1 to D3 (collectively referred to as certain documents which had been seized). The deposition sheet is conspicuously silent about any document having been proved or referred or labeled as Ex.PW-1/A or Ex.PW-1/B. Yet, on the sanction and authorization for prosecution dated 26.11.1992 (pages 151-163 of the trial court record) an endorsement appears to have been made in coloured pen, it reading – "Ex.PW-1/B", meant to be authenticated by the ACMM on 09.11.1994, it bearing signatures of no one. It may be added that the first sheet of the complaint bears similar endorsement "Ex.PW-1/A", it also expected to be authenticated by the ACMM on 09.11.1994, but it also bearing signatures of no one.

7. The witness (PW-1) was further examined on 30.11.2000 and 05.09.2002 and, thereafter, tendered for cross-examination, no effort having been made by the prosecutor to make up for the omissions with regard to proof as to sanction.

8. The petitioner, as the complainant, took its own time in prosecuting the complaint, it having lingered on over the years, the prosecution evidence eventually being closed by the ACMM on 23.01.2006. On CrI.M.C.770/2006 this court by order dated 22.01.2008, permitted additional witness to be adduced and for cross-examination of the witness to be facilitated. Taking note of this, the proceedings were revived by ACMM, for pre-

charge evidence, by his order dated 04.02.2008. The matter was again closed for pre-charge evidence, by order dated 18.02.2008, and taken to the stage of consideration of the question of charge.

9. On 27.04.2010, the ACMM held that the complainant had failed to bring on record any evidence, which if left unrebutted, could warrant conviction of the respondent, and thus, directed he to be discharged.

10. The petitioner challenged the said order dated 27.04.2010 before this court by criminal revision petition No.344/2010. A learned Single Judge of this court observing that next hierarchical court being the court of sessions, the revision petition was made over to the District & Sessions Judge (New Delhi). The revision petition of the petitioner came to be allocated to an Additional Sessions Judge (ASJ) in which court it was listed as criminal revision petition No.159/2014. It was eventually decided by order dated 29.10.2015. The ASJ noted some of the above-mentioned proceedings and the fact that no formal proof had been adduced about the sanction for prosecution dated 26.11.1992. He was of the view that the ACMM could have dropped the proceedings but could not have discharged the respondent. On the basis of these conclusions, the impugned order dated 27.04.2010 of ACMM was set aside. It was added by ASJ that if the petitioner wanted to proceed against the respondent, it would have to "obtain fresh sanction" or "get authenticated the sanction from the competent authority" and thereafter argue afresh on the question of charge.

11. By virtue of the said order of the revisional court dated 29.10.2015, the proceedings before the trial court again stood revived where the parties were directed to appear on 23.11.2015. The parties did appear before the Chief Metropolitan Magistrate (CMM) in terms of the above directions. But the petitioner (the complainant), at the same time, also preferred the petition at hand invoking the inherent power and jurisdiction of this court under Section 482 Cr.P.C. primarily submitting that direction for fresh sanction to be obtained was uncalled for.

12. The petition has been pending now for over two years and a half in this court, the proceedings before the CMM where the criminal complaint is pending having again come to a halt. Even the respondent has added to the delay to an extent for which reason costs of Rs.10,000/- were imposed by order dated 14.01.2019. But, it is submitted by the counsel for the respondent today that she could not appear on the last date since she was unwell. Keeping in view this explanation, costs imposed against the respondent on 14.01.2019 are waived.

13. The complaint was presented by the petitioner through its representative officer. For prosecuting the complaint, the petitioner has engaged a Special Public Prosecutor who has been in-charge of the case since beginning, i.e., 30.06.1993, now for over 25 years. The manner in which the proceedings have been held and the manner in which the petitioner has conducted the prosecution gives the impression it is more of persecution than prosecution. The prosecution of a criminal case is a serious business. A total casual and callous approach instead seems to have been adopted by the petitioner, and its representatives, and indeed the counsel representing the department. The part deposition of PW-1, as was recorded on 09.11.1994, itself is a good illustration to record the above observations. It is a sad commentary on the control of the proceedings by the

ACMM, such that no care was taken to ensure that the documents were properly exhibited. PW-1 was never called upon by the prosecutor to prove the sanction, his attention not being drawn to it. The sanctioning authority (or anyone else in its lieu) was never called upon to appear and prove the sanction.

14. It is the duty of the prosecutor to ensure that all such evidence is properly and formally adduced. It is not a private prosecution but prosecution in the name of an entity of the State. The prosecutor had a duty of trust to discharge. He could not assume that the witness would himself offer all the necessary facts. After all, the witness was a public servant holding the rank of an inspector. He required assistance and, for his chief-examination, proper questions had to be put to him by the prosecutor. The failure to bring formal evidence in respect of sanction for prosecution, in these circumstances, is wholly and squarely that of the public prosecutor in-charge. He should have fully awakened to the neglect or omission on his part at least at the time of arguments on charge. The omission to adduce proof of sanction was an issue being raised by the respondent anterior to the order dated 27.01.2010 of the ACMM. The least that the prosecutor could have done at that stage was to move appropriate application under Section 311 Cr.P.C. and either examine PW-1 further or to summon any other witness so that the proof of sanction had been tendered. No such steps were taken. Instead, the prosecutor continued to harp on the plea that he had discharged his burden, as if standing on some ego.

15. The fact remains, as is now conceded by the counsel appearing for the petitioner, that no formal proof of sanction document in which regard was already there on record with the complaint has been adduced through any witness. He also concedes that without formal proof such document cannot be looked into. His prayer now is for one more opportunity to be given for such purposes, he invoking the inherent power of this court under Section 482 Cr.P.C. and the general power of the court to summon any other witness under Section 311 Cr.P.C. for just decision of the case.

16. The direction of the revisional court for fresh sanction to be obtained was wholly uncalled for inasmuch as the sanction granted prior to the launching of the complaint is already there and it is that sanction which is relevant. The criminal prosecution of such nature cannot be allowed to be reduced to a mockery, not the least, at the whims of individuals. After all, public interest involved in such prosecution also has to be taken care of.

17. In these circumstances, the petition is allowed with costs of Rs.50,000/- to be deposited by the petitioner with Delhi High Court Legal Services Committee within two weeks hereof. In turn, the petitioner would have the liberty to recover the said costs from the person responsible for the above mentioned lapse.

18. Subject to proof of deposit of costs by the petitioner being shown to the satisfaction of the CMM, the liberty to examine additional witness to prove the sanction for prosecution is granted. This liberty, however, shall be availed by the petitioner of its own responsibility on one date of hearing, to be fixed by the CMM for such purposes. After such additional evidence has been taken on board, the CMM shall proceed to consider the case for deciding the question of charge.

19. It is noted that the criminal case is listed before the CMM, New Delhi on 22nd April, 2019. The parties are directed to appear before the said court accordingly.