CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50073 of 2020(SM)

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/PREV./NCH/670/2019-2020 dated 16.10.2019 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s Rajeev Kumar **Appellant**
WT-77, Gali No. 21,
Baljit Nagar
New Delhi-110008

VERSUS

Commissioner, Customs (Preventive), New Delhi **Respondent**
New Customs House,
Near I.G.I. Airport,
New Delhi 110037

WITH
Customs Appeal No. 50116 of 2020(SM)

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/PREV./NCH/671/2019-2020 dated 16.10.2019 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s Amrit Pal **Appellant**
R/O House No. 167, Pocket D-8
Sector VI, Rohini,
New Delhi

VERSUS

Commissioner, Customs (Preventive), New Delhi **Respondent**
New Customs House,
Near I.G.I. Airport,
New Delhi 110037

AND
Customs Appeal No. 51030 of 2020(SM)

(Arising out of Order-in-Appeal No. CC(A) CUS/D-II/Prev./NCH/155/2020-21 dated 15.06.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s Pawan Kumar Arora **Appellant**

C-139, Pushpanjali Enclave
Pitampura
Delhi-110034

VERSUS

Commissioner, Customs (Preventive), New Delhi **Respondent**
New Customs House,
Near I.G.I. Airport,
New Delhi 110037

APPEARANCE:

Mr. Jitendra Singh, Ms. Ekta Kapoor & Ms. Reena Rawat, Advocates for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50459-50461 / 2022

Date of Hearing: 16.12.2021
Date of Decision: 20.05.2022

ANIL CHOUDHARY:

The issue involved in these appeals is whether penalty under Section 112 of Rs. 5 lakhs have been rightly imposed on appellant-Mr. Pawan Kumar Arora and penalty of Rs. 1 lakh each imposed on other appellants namely Rajeev Kumar and Shri Amrit Pal @ Shunti.

2. The brief facts are that Revenue had intelligence that two passengers of Philippines origin would arrive on 18/07/2014 at New Delhi from Manila alongwith smuggled gold and would be staying in 'hotel Delhi pride' in Karol Bagh, New Delhi.

> "3. For assessing the purity and value of the said yellow coloured metal bars suspected to be gold bars, the officers of DRI called upon Shri Ashok Jharwal. Jewellery Appraiser, Jhandewalan Jewellery Complex, New Delhi who examined the

said bars and affirmed the value and purity; Shri Ashok Jharwal examined the above recovered gold bars and submitted his appraisal report which is appended as Annexure 'A' to the panchnama. The said Gold bars totally weighing 4Kg were valued at INR 1,03,19,000/- (tariff value at US$ 425 per 10 Grams) and market value at the time of seizure Rs. 1,11,96,000/- (@ Rs. 27990 per 10 gram for 24 carat gold in Delhi). The appraisal and valuation given by Shri Ashok Jharwal was accepted by both Mr. Samsodin Barauntong Taha and Miss Aisha Jadolan Macud.

4. Since the said gold bars were smuggled into India, the officers of DRI placed the above said gold bars under seizure under the provisions of Section 110 of the Customs Act. 1962 on the reasonable belief that the same were smuggled into India and were liable for confiscation under the provisions of Customs Act, 1962."

3. During the search operation, 2 persons knocked at the said hotel Room No. 201 who identified themselves as Rajeev Kumar and Amrit Pal @ Shunty. On enquiry by the officers they stated that they had come to take delivery of the smuggled gold by producing a ten rupee note to the visiting Filipinos. In the course of enquiry, Mr Rajeev Kumar produced the 10 rupee note bearing No. 89LN44808. He further stated that as per the directions of his employer – Mr. Pawan Kumar Arora, he went to collect the gold from Room No. 201 of hotel Delhi Pride. He also stated that he has taken delivery of gold biscuits earlier also. Accordingly punchnama was drawn and recovered gold was seized valued at Rs. 1,11,96,000/-. Mr. Rajeev Kumar, further stated that he was working in M/s Saffron Diamond and Jewellry Pvt Ltd, a company owned by Mr. Pawan Kumar Arora. Also stated that at around 10 AM on 18 July 2014, Mr. Pawan Kumar Arora had directed him on telephone to collect a 10 rupee note from Mr. Sameer and was further

directed to collect 4Kg of gold from Room No. 201, Delhi pride Hotel, Karol Bagh by presenting the said 10 rupee note. That the gold after collection was to be delivered to Sameer. Further stated that Mr. Pradeep Patil carries on the business in the name of M/s Patil Enterprises having a shop at a Gold Plaza Building, Gururdwara Road, Karol Bagh and was engaged in the business of melting of gold. Further stated that as directed, he met Mr. Sameer who handed him over the 10 rupee note and thereafter, he alongwith Amrit Pal went to Room No. 201 of Hotel Delhi pride for taking delivery from the persons who would be staying there.

4. The other appellant Mr. Amrit Pal Singh also recorded his statement before the officers on 18 July 2014 and *inter alia* stated that he works as the driver for Mr. P.K. Arora. Further stated that in the evening of 17 July 2014. Mr. P.K. Arora called him and informed that he has to go at around 10:30 AM on 18th July, to office where Mr Rajeev would be available and alongwith him he has to go somewhere. AS he reached office as scheduled, thereafter he went to hotel Delhi Pride alongwith Mr Rajeev. On reaching the hotel, they went together to Room No. 201 for taking delivery of gold as directed by Mr. Pawan Kumar Arora that Rajeev Kumar was having the 10 rupee note by showing which delivery of gold was to be taken. That upon reaching the hotel room No. 201, then notice that some other persons were also present there apart from the 2 foreigners. Those persons introduced themselves as officers of the DRI. He also stated that earlier also he has accompanied with Mr. Rajeev for taking delivery of gold in this manner. Further stated that Mr Sameer was working with M/s Patil Enterprises which is engaged in melting of gold.

5. On the basis of disclosures made by Mr. Rajeev Kumar and Mr. Amrit Pal and also by the visiting Filipino nationals Mr S.B. Taha and Miss A.J. Macud, summons were issued by the DRI to Mr. Pradeep Patil and Mr. Samir alias G.S. Mulani.

6. Mr. Pradeep Patil in his statement *inter alia* stated that Mr Pawan Kumar Arora had called him from his mobile phone asking for the serial no. of Indian currency having the denomination of Rs. 10 for further sending the same to his carrier. He gave the same by using Whats App from his Mobile No. That on 18th July 2014, in the morning his employee Mr. Rajeev Kumar alias Raju came to his shop, and his employee Mr. Sameer gave the same note of same serial no. to Mr. Rajeev Kumar, who then went to take the delivery of the gold and was intercepted by the officers of DRI at Hotel Delhi Pride. That the said gold bars were to be delivered to him for melting the same. That by using the this *modus operandi*, they have already sold about 400–500 Kgs gold bars which were of foreign origin, imported into India.

7. Mr Samir alias G.S.Mulani in his statement recorded on 18th July 2014 *inter alia* stated that in the evening of 17th July 2014 at about 6PM Mr. Pradeep Patil came to him and handed him a 10 rupee note bearing a mark of 26 number. At around 10AM on 18th July 2014 he handed over the said 10 rupee note to Mr. Rajeev Kumar. That he was not aware of the further use of the said note, however he was waiting to receive the delivery of gold from Mr Rajeev Kumar. Further stated that he (Sameer) had taken delivery of gold from hotel Delhi pride, 2 times earlier from some foreigners by showing/presenting Indian currency note.

8. That as the name of appellant–Mr. Pawan Kumar Arora appeared

in the statement of Mr. Rajeev Kumar, Mr Amrit Pal, Mr. Pradeep Patil and Mr. Samir, the DRI officers searched the business premises and residence of appellant Pawan Kumar Arora on 19 April 2014 wherein nothing incriminating was found. Thereafter, summons were issued to the appellant Pawan Kumar for appearance on 22nd July 2014. However, he did not appear but filed a Writ Petition No. 146/2014 before Hon'ble Supreme Court, seeking protection. The Court though initially *vide* order dated 5th August 2014 granted *inter alia* protection, however *vide* subsequent order dated 20th November 2014 dismissed the Writ Petition as premature. Thereafter, the appellant approached Hon'ble Delhi High Court for grant of anticipatory bail being bail application no. 2819/2014, which was allowed by order dated 31st December 2014. During the interregnum Mr. Arora appeared before the DRI officers from time to time and tendered his statement, however he did not admit any involvement in the smuggling of the foreign origin gold in question or any other smuggling activity.

9. In the course of investigation, the officers also recorded statement of one Mr. Sanjay Sehgal, Tour operator of Eccess India Hotel Pvt Ltd who had arranged for hotel booking of Mr. S.B. Taha and Ms. A.J. Macud. He further stated that he booked the room on the instructions of Mr. Sameer and that all the payments were made for the rooms booked either by Mr. Rashool a Philippines National or his wife Fatima in cash.

10. Pursuant to the investigations, show cause notice dated 13 July 2015, was issued by the Additional Director, DRI, New Delhi to 7 noticees including these appellants proposing to confiscate the four gold bars totally weighing 4kg having tariff value of Rs. 1,03,19,000/-

and market value of Rs. 1,11,96,000/- seized from Room No. 201 of hotel Delhi Pride, Karol Bagh, New Delhi under Punchnama and seizure memo dated 18th July 2014. Further, penalty was proposed including on these appellants under Section 112 of the Customs Act for the alleged acts of omission and commission.

11. The show cause notice was contested by these appellants wherein they had also prayed for. The cross-examination which was allowed.

12. Mr. Sanjay Sehgal who runs travel agency in the name and style of Eccess India Hotels Pvt Ltd. stated that he had booked the hotel accommodation at the request of Mr. Sameer and had received the payment in cash. He further stated that he had never met Mr. Sameer. Further stated that he has received the payment for room booking from Mr. Rashool in cash, or the person who stayed in the hotel.

12. In his cross-examination. Mr. Rajeev Kumar stated that his statements recorded by the DRI officers on 18th & 19th July 2014 are not true and correct. The said statements were forcefully got signed from him after being physically abused and by use of abusive language by the officers. Actually, on 18th July 2014, he alongwith Mr. Amrit Pal had gone to Delhi Pride Hotel in Karol Bagh, in order to search some part-time job to supplement his income. At the hotel, the DRI officers came across and asked him whether he was a hotel staff to which he denied. Thereafter, they took him in the hotel room and there the officers got certain papers/statements signed from him forcefully. In answer to the question whether he used to make/receive calls with Mr. Pradeep Patil and Mr. Sameer of M/s Patil enterprises. He answered- yes, M/s Patil Enterprises is situated in the same building where he

was working. Due to the reason, that both the companies were engaged in gold jewellery business. He was known to Mr. Sameer alias G.S. Mulani. However, calls made to or receive from Mr. Sameer was for personal reasons only and not relating to other purpose. Further stated that he has never made or received calls to Mr. Pradeep Patil.

13. Cross-examination of Mr. Amrit Pal was conducted on 22nd November 2016 wherein he *inter alia* stated that he was working as driver with Mr. Saffron Diamond Jewellery Pvt Ltd. from 2006 to 2014 owned by Shri Pawan Kumar Arora. After going through his statement recorded by the officers on 18th and 19th July 2014 he stated that the said statement was not his voluntary statement and neither the same was true and correct. In fact, on 18th July 2014, on the basis of request made by Mr. Rajeev Kumar, who used to work in the same company, that he was going for search of some part-time job, I had taken him to Delhi Pride Hotel, Karol Bagh. Mr. Rajeev Kumar went inside the hotel and he was waiting outside in the car. After 10–15 minutes, 3-4 persons came to him and asked whether he knows Mr Rajeev Kumar? On saying yes, they took him inside the hotel. On their asking he informed the reason for coming to the hotel. However, the said persons introduce themselves as DRI officers and stated that Rajeev had come to receive gold. There were two foreign nationals. Thereafter, the DRI officers took him alongwith Mr. Rajeev and the two foreign nationals to their office at Lodhi Road. In the office, the officers took his statement under force and pressure. On being questioned, if after recording of the statement on 18th July 2014, if he was allowed to go home, in reply he stated that no he was detained in the DRI office. Further stated that the statement recorded from him on 19th July 2014

is also not voluntary and has been recorded as per the whims and under the dictation of the officers.

14. In his cross-examination recorded on 22nd November 2016, Mr. Rajeev Kumar in answer to the question–how does he know Shri Pawan Kumar Arora. He answered that he was his employer and he had been working with him during the period 2009 to 2014. In answer to question what he was doing in Hotel Pride on 18th July 2014, he answered that he had gone there in search of a part-time job. In answer to the question, if he knew the Philippines nationals namely Mr. S.B. Taha and Ms. A.J. Macud, he answered that he had never met them earlier. In answer to question where was Mr. Pawan Kumar Arora on 18th July 2014, he answered that Mr. Arora was out of station. In answer to question, if he went to hotel Pride under instructions of Mr. Pawan Kumar Arora, he replied in the negative. Further stated that his statement recorded by the officers on 18th and 19th July 2014 is not voluntary and the same was recorded under force and pressure.

15. In his cross-examination Mr. Amrit Pal alias Shunty which was held on 22nd November 2016 is stated that he was working with Mr. Pawan Kumar Arora in his shop named Saffron Diamond at Karol Bagh as a driver from 2006 to 2014. In answer to question what he was doing at hotel Pride on 18th July 2014, he answered that he was accompanying Mr. Rajeev Kumar who was searching for a job. Mr. Rajeev Kumar had requested him to take him to hotel Pride as he was feeling sick. He did not enter the hotel, only Mr. Rajeev Kumar had gone inside. However, after some time, some people came out and forced him into the hotel. He further stated that he does not know Mr. Mr. S.B. Taha and Ms. A.J. Macud had seen them for the first time on

18th July 2014. He also stated that on 18th July for 2014 his employer Mr. Pawan Kumar Arora was out of station. Further stated that he had gone to hotel Pride on his own volition with Mr. Rajeev Kumar, and had no instructions for going there from his employer Mr. Pawan Kumar Arora. Further stated that his statement recorded by the officers on 18th and 19th July 2014 were not voluntary and were recorded under pressure and threat.

16. Mr. Pradeep Patil appeared for cross-examination on 20 November 2016. He *inter alia* stated that he is a graduate and was engaged in melting of gold at the Gold Plaza Building. In answer to the question–when he is graduate, why he did not write his statement given by him on 18th July 2014. In reply, he stated that the statement was recorded as dictated by the officers on the computer system in the office of the DRI and he had to sign the same under pressure. But he has retracted the statement from jail. Further stated that his statement was not voluntarily. Further in answer to question – is it correct that in your statement dated 18th July 2014, you said that you had given 10 rupee note to Mr. Sameer and made Whats App also through mobile No. 9811597676 on 17th July 2014. In answer he said-No.

17. In his cross examination M. Sameer alias G.S. Mulani, which was conducted on 28th November 2016 *inter alia* stated that he was engaged in melting of gold with Mr. Pradeep Patil. Further stated that the statement recorded by the officers on 18th July 2014 was not voluntary. Further, in reply to question that in his statement recorded on 18th July 2014 he had said that he had given 10 rupee note to Mr. Rajeev Kumar which he had received from Mr. Pradeep Patil. In

answer, he said no, he had not given any such note to Mr. Rajeev Kumar.

18. The adjudicating authority observed that the seized gold bars have foreign marking – 'Kaloti Dubai'. Further it was accepted by Mr. S.B. Taha and Miss A.J. Macud both from whose possession it was recovered and seized, that they have brought the same to India by flight without declaring the same to the Customs. Thus, under provision 123 (2) of the Customs Act, the onus to prove that the seized gold was not smuggled, was on Mr. S.B. Taha & Ms. A.J. Macud, who have failed to discharge the onus. It further appeared that the two Filipino nationals had smuggled the gold into India for delivery and thus Mr. Pawan Kumar Arora and other persons namely Pradeep Patil, Rajeev Kumar, Mr. Sameer and Mr. Amrit Pal have connived and abetted in the smuggling of gold. It was further observed that Mr. Pawan Kumar Arora is the main person who has had hatched a conspiracy in association with the other co-accused for smuggling of foreign origin gold. He further observed that Mr. Pawan Kumar Arora was the intended recipient of the 4kg gold smuggled by the Filipino nationals into India. He further observed that the other persons namely Pradeep Patil, Rajeev Kumar, Amrit Pal and Mr. Sameer have abetted with Mr. Pawan Kumar Arora and the Filipino nationals by their act of omission and commission. Accordingly *vide* Order-in-Original the Additional Commissioner was pleased to confiscate the seized 4kg of gold under Section 111(d) (l) (m) r/w Section 120 of the Customs Act. Penalty was imposed on all the co-noticees including these appellants under Section 112 of the customs act.

19. Being aggrieved the appellants herein preferred the appeals

before the Commissioner (Appeals)

20. The appellant Mr. Pawan Kumar Arora had *inter alia* urged that neither he was present at hotel Pride on 18th July 2014 nor anything incriminating was found in the course of search at his premises, which was conducted by the officers on 18th & 19th July 2014 and 25th August 2014. The order has been passed against him of penalty, relying upon the retracted statements of the co-accused. Further, all such persons whose statements have been relied upon were subject to cross-examination during the adjudication proceedings. All of them stated that their statement recorded during investigation was not their voluntary statement not the same was a true statement. Such statements had been recorded by the officers under pressure and duress and as per the dictation of the officers. Thus, the impugned order is bad on this score alone. It was also urged that in the verification of the record of the appellant, the stock of gold was found as per the stock register. Thus the adjudicating authority have failed to follow principles of natural justice by blindly relying on the statements of the co-accused. All the co-accused on the first available opportunity before the court of Chief Metropolitan Magistrate, had retracted their statements recorded earlier by the officers. It was further urged that the call detail records have been wrongly relied upon. Further this appellant was neither the owner of the gold in question nor had ordered for the same, nor was a recipient of the contraband gold. Thus he had no connection whatsoever with the gold intercepted and seized by the officers. It was further urged that save and except the statements, there is no other evidence relied upon by the court below. It was further evident that on 18th July 2014 this appellant was in

Mumbai to attend the jewellery exhibition. He had never instructed his employee Mr. Rajeev Kumar and Mr. Amrit Pal to go Hotel Delhi Pride on 18th July 2014. Further urged that there is no basis for imposition of penalty on him and the same is fit to be set-aside. In support of his contention that a person cannot be penalised solely on the basis of statement of the co-accused, he relied on the following rulings: –

(i) Birendra Kumar Singh Vs. CC, Lucknow-2006(198) ELT 460(Tri. Del);

(ii) Narayan Das Vs. CC, Patna-2004(178)ELT 554 ITri. Kol)

(iii) Sharad Dugar Vs CC, New Delhi-2003 (151)ELT 321 (Tri. Del.)

(iv) Mahabir Prasad Vs. CC, Patna-2000(126)ELT 803 (Tri.)

21. The other two appellants Mr. Rajeev Kumar & Mr. Amrit Pal had also filed appeal before the Commissioner (Appeals) *inter alia* on the ground that there is no corroborative evidence against them, except their statement which was recorded during investigation and the same has been retracted at the first available opportunity before the learned C.M. Magistrate. Further the outcome of the cross-examination has not been considered. The reliance placed by the Adjudicating Authority on the retracted statements of the co-accused is erroneous, there being no corroborative evidence. These appellants were not found in possession of the gold at any point of time, further these appellants had given cogent explanation why they had gone to hotel Delhi Pride on 18th July 2014, which has not been found to be untrue.

22. Learned AR for Revenue opposing the appeals relies on the impugned order.

23. Having considered rival contentions and on perusal of the records, I find that admittedly the gold in question was recovered from two

Philippines nationals namely S.B. Taha & A.J. Macud, who in their respective statements have admitted the act of smuggling by them, as they have stated that they have brought this gold into India without declaring the same at the Customs check post when they arrived at New Delhi by air. This statement have never been retracted by the two Filipino nationals. Further, they have also not contested the show cause notice. Thus, the two Filipino national have admitted that act of smuggling for gain.

24. So far these appellants are concerned, admittedly, none of them was found to be in possession of the seized gold nor there is any detail of any alleged conspiracy hatched between them with the Filipino nationals in the alleged smuggling. Admittedly, the appellant Mr. P.K. Arora is a dealer/trader in gold jewellery and bullion and the other two appellants were his employees at the relevant time. Admittedly, Mr. P.K. Arora was not in Delhi on 18th July 2014 and had gone to Mumbai to attend a jewellery exhibition. This fact has not been found to be untrue.

25. Further, I find that the case of Revenue against these appellants have made out on the basis of their statements recorded at the time of investigation or the statement of the co-accused. All such statements were retracted soon thereafter. Further, these statements have also not stood the test of cross-examination during the adjudication proceedings.

26. I find that the two Filipino nationals have not taken the name of any of these appellants to the effect that the gold was to be delivered to these persons. Nor there is any exchange of telephone call by these appellants with the visiting Filipino nationals.

27. Further, in the course of search in the shop and residential premises of appellant- P.K. Arora, nothing incriminating was found. It is noteworthy that the gold stock in his shop was found as per the records.

28. It has been held by Hon'ble Supreme Court in its ruling in the case of Vinod Solanki Vs. Union of India, that solely relying on the statement of the co-accused, adverse inference cannot be drawn in absence of corroborative evidence. Further, the mobile no. 8800881412 alleged to be used by Mr. P.K. Arora for interacting with the other co-accused, was found not to belong to him rather it was in the name of one Mr. Dharam Prakash. I also find that there is no admission of the alleged offence by the appellant P.K. Arora at any point of time, although his statement were recorded on five different occasions. The other appellants have also given cogent explanation that they had gone in search of some job to Hotel Delhi Pride, which has not been found to be untrue. I further find that revenue had not discharged the onus, that the statement recorded during investigation from these appellants and others were given freely and voluntarily by them. It is an established principal of law that suspicion, howsoever strong, cannot be treated as proof in absence of corroborative evidence.

29. The only corroborative evidence in the facts of the present case, is the recovery of 10 rupee note bearing serial no. 89L944808, from the appellant-Rajeev Kumar. Further, Mr. S.B. Taha, the Filipino national had also stated that he was to deliver the gold to the person who would have come to him bearing the 10 rupee note having the said serial no. Thus the allegation of abetment stands only against Mr. Rajeev Kumar.

30. So far, Mr. Amrit Pal, is concerned, admittedly he had only

accompanied Mr. Rajeev Kumar and was waiting outside the hotel. Thus, there is no complicity on his part.

30. In view of my findings and discussions hereinabove, I allow the appeal of Mr. Pawan Kumar Arora (50130) & Mr. Amrit Pal (50116) and set aside the impugned order against them.

31. So far, Mr. Rajeev Kumar is concerned, admittedly gold was not recovered from him, however there is strong evidence that he had gone on the said day to hotel Delhi Pride to receive the gold from the Filipino nationals. Accordingly, I uphold the imposing of penalty, imposed under Section 112 of the Act. However, under the facts and circumstances, I think it just and proper to reduce of quantum of penalty from Rs. 1 lakh. to Rs. 25,000/-. Thus, this appeal is allowed in part.

32. In the aforementioned terms all the appeals are allowed.

(pronounced in open Court on 20.05.2022)

Anil Choudhary
Member(Judicial)

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