2026:DHC:1110

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

% ***Judgment Reserved on: 09.02.2026***
Judgment pronounced on: 11.02.2026

\+ CRL.A. 872/2016

AIR CUSTOMS .....Appellant

Through: Ms. Anushree Narain Sr. Standing Counsel with Mr. Yamit Jetly and Mr. Naman Chawla, Advocate.

versus

ISLAM AHMAD .....Respondent

Through: Ms. Sagita Bhayana, Advocate.

CORAM:
HON'BLE MS. JUSTICE CHANDRASEKHARAN SUDHA

JUDGMENT

CHANDRASEKHARAN SUDHA, J.

1. In this appeal under Section 378 (4) of the Code of Criminal Procedure, 1973, (the Cr.P.C.), the complainant in CC No. 97/1999 on the file of the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi, assails the judgment dated 05.11.2012 as per which the accused no. 2 (A2), the respondent herein, has been acquitted under Section 248(1) Cr.P.C.

of the offence punishable under Section 135 (1)(a) of the Customs Act, 1962 (the Act).

2. The prosecution case is that on the intervening night of 16.4.1999 and 17.4.1999, accused no. 1 (A1), holder of Indian passport No. A/4242102 was intercepted by the Preventive Officers, Customs and a search was conducted whereby his bag was found to contain foreign currencies valued at ₹27,77,263/-.No explanation was given by A2 for the foreign currency in his possession, and hence the same was seized under Section 110 of the Act.

2.1. According to the complainant, A1 in his voluntary statement given under Section 108 of the Act on 17.4.1999, admitted seizure of the foreign currency and further stated that during the period from 1985 to 1993 he used to sell clothes, cosmetics on the footpath in Karol Bagh and from the year 1994 onwards he had been bringing foreign goods from Hong Kong,

Dubai, Bangkok and then selling them for a profit in Delhi. In January 1999, he met accused no. 2(A2) who told him that the latter was working in the Immigration Department at Indira Gandhi International (IGI) Airport and told him that if he was ready to carry foreign currency from India to Hong Kong, he would be given a ticket as well as an amount ranging from ₹15,000/- to ₹20,000/-per trip. On 12.04.1999, when A1 arrived at the IGI airport from Hong Kong, he met A2 outside the airport and it was decided that on 16.04.1999 he would carry foreign currency worth ₹25,00,000/- to ₹30,00,000/- to Hong Kong for which A2 would pay him ₹20,000/- besides the return ticket. It was also decided that the foreign currency would be handed over by A2 to A1 at the IGI Airport.

2.2. Pursuant to the aforesaid plan, an air ticket from Delhi to Hong Kong and a return ticket was purchased from Karol Bagh and when A1 reached the departure hall of IGI Airport with a

handbag, A2 met him near the counter of Air India. A2 instructed him to get his checking done at the counter of Air India and also complete the immigration clearance formalities and to reach the transit lounge area where A2 would meet him. At about 10.15 pm, he met A2 at the transit lounge, from where he was taken to the "*Nescafé*" counter, where A2 introduced him to A3, a boy of about 20 years working as a salesman in the counter. A2 directed him to complete his security checking and to wait inside the gents toilet in the security hall area, where A3 would hand over a paper packet containing foreign currency worth around ₹27,00,000/- to ₹28,00,000/-. As instructed by A2, he completed his security checking and waited in the gents toilet where A3 handed over a packet containing foreign currency. He put the packet inside his blue-coloured handbag, and when he was proceeding for boarding the flight, he was intercepted by the officers of the Customs. On search, foreign currency worth ₹27,77,263/- was recovered from

him A1 admitted that the foreign currency had been handed over to him by A3 as per the instructions of A2.

2.3. A3 in his voluntary statement under Section 108 of the Act dated 17.04.1999 admitted that he was working as an attendant at the '*Nescafé*' counter for a monthly salary of ₹1,800/- and that A2, working in the Immigration Department, had approached him and told him that the latter's friend was going to Hong Kong and requested him to hand over a packet to his friend. A3 further stated that the packet containing the foreign currency was handed over to him by A2, who promised to give him ₹ 2,500/- for doing the job.

2.4. A2, in his statement under Section 108 of the Act, admitted that he was working in the Delhi police for 16 years and had been working in the Immigration Department, IGI airport, where he had met A1. A3 confessed that he came into possession of the foreign currency through one Ishwar Singh, who had met him at the departure hall of the airport at 8.30 pm. The said Ishwar

Singh had introduced him to A1 and asked him if he could somehow deliver the packet to A1 in the security area. He was also promised a good amount by the said Ishwar Singh.

2.5. It was thus alleged in the complaint that all three accused had colluded together and, as part of the pre-arranged plan, brought the packet containing the foreign currency to the airport, knowing that there was a prohibition for exporting the same. Thus, they were alleged to have committed the offence punishable under Section 135(1)(a) of the Act. The complaint was filed by PW3, Preventive Officer, New Custom House, Mumbai, before the jurisdictional magistrate. Being a warrant case instituted otherwise than on a police report, the learned Magistrate proceeded to take evidence produced in support of the complaint under Section 244(1) Cr.P.C. and examined PW1 to PW3. Based on the testimony of PW1, 2 and 3, the trial court found grounds for presuming that the accused persons had committed the offence

punishable under Section 135(1)(a) of the Act and hence proceeded to frame a charge against the accused persons under the aforementioned Section, which was read over and explained to the accused persons to which A1 and A3 pleaded guilty and hence they were convicted and sentenced accordingly. A2 pleaded not guilty. He exercised his option under Section 246(4) Cr.P.C. to recall and cross-examine the prosecution witnesses, namely, PW1, 2 and 3. PW2 and 3, on being recalled, appeared and offered themselves for cross-examination after the Charge was framed. A2 exercised his option under 246(5) Cr.P.C. and cross-examined PW2 and 3. However, the trial court records reveal that PW1 never appeared for the post-charge evidence contemplated under Section 246(4) and (5) Cr.P.C.

3. After the close of the complainant's evidence, A2 was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence

of the prosecution. A2 denied all those circumstances and maintained his innocence. He submitted that he had been falsely implicated in the case. Though an opportunity was given under Section 247 Cr.P.C for the defence to adduce evidence, no oral and documentary evidence was adduced by him.

4. On consideration of the oral and documentary evidence on record and after hearing both sides, the trial court, by the impugned judgment dated 05.11.2012, acquitted A2, the respondent herein, under Section 248(1) Cr.P.C., of the offence punishable under Section 135(1)(a) of the Act. Aggrieved, the complainant has preferred the present appeal.

5. It was submitted by the learned counsel for the appellant/complainant that the trial court has erred in acquitting A2/ the respondent, despite sufficient materials being available on record. The trial court went wrong in rejecting the testimony of PW1, though it was pointed out that when a witness is not cross-

examined due to his non-availability or death, the same would not be fatal to the prosecution case.In support of the argument, reference was made to the dictum in **Nagarjit Ahir vs State of Bihar** 2005(1) JCC 171 (SC) as well as **Food Inspector Thodupuzha Circle vs James N.T. &Anr.** 1998 Cr.L.J. 3494 (Kerala). It was also submitted that trial court went wrong in holding that the statement of the co-accused under Section 108 cannot be relied to form the basis of convicting A2. Reference was made to the dictums in **Naresh J. Sukhwani Vs. UOI** 1996 (83) ELT 258 (SC) as well as **Yudhister Kumar vs State &Anr.**2 (1992) CCR 1122 (DHC). The statement given by A2/respondent has been duly proved through the testimony of PW1 and the said statement has been corroborated by the confession statements of the co-accused and therefore, the trial court ought not to have rejected the materials on record and proceeded to acquit A2, goes the argument.

5.1. *Per contra,* it was submitted by the learned counsel for A2/respondent, that the latter has been falsely implicated in the case based solely on his retracted confession and the retracted confessions of his co-accused, which have not been corroborated by any other independent evidence. The Hon'ble Supreme Court in **Union of India vs Balmukund** JT 2009(5) SC 45, has held that a person cannot be convicted solely on the basis of his retracted confession and the retracted confession of his co-accused without any corroboration. The *panch* witnesses to the *panchnama* of the alleged recovery of foreign currency from A1, was never examined by the complainant. In fact A2/respondent had moved an application for summoning the *panch* witnesses and he had also taken dasti summons for serving notice on them. However, A2/respondent was unable to serve the summons on them as they were unavailable at the given address. Further, PW1, who is alleged to have recorded the statement of A2 under Section 108 of

the Act, was never produced by the complainant during the post-charge evidence, and hence A2 never got an opportunity to cross-examine him. Therefore, the testimony of PW1 cannot be read either in favour of the prosecution or against A2. The trial court was right in rejecting the testimony of PW1 and the alleged confession of the co-accused. There is no infirmity in the impugned judgment calling for an interference by this Court, argued the learned defence counsel.

6. Heard both sides.

7. The only point that arises for consideration in this case is whether there is any infirmity in the impugned judgment by which the trial court acquitted A2, discarding the testimony of PW1 and the statements of the co-accused under Section 108 of the Act.

8. Before I go into the questions of law involved in the case on hand, it would be appropriate to make a brief reference to the oral and documentary evidence relied on by the

complainant/appellant in the case. PW1, the then ACP(P), IGI Airport, deposed that he was on duty at the airport on the intervening night of 16.04.1999/17.04.1999, on which day he had recorded the statement of A1 and A2 under Section 108 of the Act, which have been marked as Exhibits PW1/A and PW1/B. According to PW1, the summons issued to A2 is exhibit PW1/C. The statements of A2 were marked as Exhibits PW1/D, E and F. Exhibit PW1/G is the Xerox copy of the identity card of A2. PW1 was cross-examined during the 244(1) Cr.P.C stage by A1 as well as by A2.

8.1 In the cross-examination on behalf of A2, PW1 deposed that independent witnesses were not present when he recorded the statements of the accused persons. He had recorded the statement of A1 at about 01:00 AM. He denied the suggestion that the statement of A1 never mentioned the name of A2 and that he, in connivance with the officials of the police department, had

dragged A2 into the litigation only for completing the process of the case and making out a case of conspiracy. According to PW1, the statement of A2 was recorded at about 02:15 AM after the statement of A1 had been recorded. He explained to the accused persons that they were required to make a true and correct statement under Section 108 of the Act. He also explained to them that the said statement could be used against them or any other person. He was unable to recall the person who had brought A2 before him. PW1 also deposed that A1 had identified A2 and thereafter A2 had also produced his identity card. He denied the suggestion that the statement of A2 was not voluntarily made and that after releasing the actual culprit, the signature of A2 was taken in blank papers under pressure and coercion.PW1 also denied the suggestion that the copy of the statement of A2 had never been supplied to the latter.

8.2. PW2, Superintendent Customs, New Custom House,

Mumbai deposed that he had issued Exhibit PW2A summons dated 17.04.1999 to A1 and in pursuance of the same A1 had tendered his statement, that is, Exhibit PW2/B. He also deposed that on the said day, A1 had given two supplementary statements which have been marked as Exhibit PW2/C and D.

8.3. PW3 deposed that he had been posted from June 1998 till July 2000 as ACO, IGI Airport, New Delhi. Exhibit PW3/A complaint, was filed by him before the jurisdictional magistrate on the basis of Exhibit PW3/B Sanction and authorisation.

8.4. PW3 deposed that on the intervening night of 16.04.1999 and 17.04.1999, while he was on duty at the airport, A1, who arrived at the airport for going to Hong Kong by flight No. A1318 was intercepted at gate no. 5 and was asked whether he was having any foreign/Indian currency or any other incriminating articles with him, to which he answered in the negative. A1 was brought to the Departure Counter of the Customs along with the blue-

coloured handbag in his possession. Notice, that is, Exhibit PW3/notice under Section 102 of the Act was served on A1 to which A1gave a reply in writing that a search of his person/baggage could be conducted by an officer of the Customs.

8.5. The search of his handbag resulted in the recovery of a packet which was duly sealed with adhesive tape, which on opening, was found to contain assorted foreign currencies worth ₹27,77,263/-. The foreign currencies were seized as per Exhibit PW3/ D panchnama. A2 was taken to the preventive room for his personal search, which resulted in recovery of an amount of ₹2,500/-. A1, on demand, failed to produce any documentary evidence for the lawful possession/export of the seizedforeign currency. The travel documents, boarding pass and air ticket of A1 were seized as per Exhibit PW3/F and G memo. A2 was arrested and Exhibit PW3/H is the arrest memo.

9. Now, the question is whether the aforesaid evidence is

sufficient to convict A2. As noticed earlier, A1 and A3 pleaded guilty and hence the trial court convicted and sentenced them. However, the records do not reveal what sentence was awarded to them. The trial court rejected the testimony of PW1 as far as A2 was concerned on the ground that the complainant had not made PW1 available for cross-examination, which is a right available to A2 under Section 246 (4) and 246 (5) Cr.P.C. According to the learned trial judge, as A2 was unable to exercise his valuable right of cross-examination of PW1, no value could be attached to the testimony of PW1 given under Section 244(1) Cr.P.C. The trial court also held that A2 could not be convicted based on the inculpatory statements made by the co-accused under Section 108 incriminating PW1 and hence proceeded to acquit A2. On behalf of the complainant/appellant, reference was made to the dictum in **Naresh J. Sukwani v. Union of India, 1995 KHC 722:1996 SCC Criminal 76**, in which it has been held that the statement made

before the Customs officials is not a statement recorded under Section 161 Cr.P.C. It is a material piece of evidence collected by the customs officials under Section 108 of the Act. That material would incriminate the person making inculpatory statement regarding the contravention of the provisions of the Customs Act. Such a statement made by one accused can certainly be used to connect the co-accused if the statement of the former clearly inculpates not only himself but also the latter. It can, therefore, be used as substantive evidence for proving the offence.

10. However, the learned counsel for the respondent relies on the dictum of a three-judge bench decision of the Apex court in **Union of India v. Balmukund, 2009 KHC 4414**. In the said case, the Apex court did not agree to the proposition laid down in **Naresh J. Sukwani** (*supra*). It was held that no legal principle had been laid down in the said decision and that no reason had been assigned in support of the conclusions arrived at. If a statement

made by an accused while responding to a summons issued to him for obtaining information can be applied against a co-accused, Section 30 of the Indian Evidence Act, 1872 (the Evidence Act) being not applicable, there are no other provisions under which such a confession would be admissible for making the statement of a co-accused relevant against another co-accused. If an accused makes a confession in terms of the provisions of Cr.P.C. or otherwise, his confession can be held to be admissible in evidence only in terms of Section 30 of the Evidence Act and not otherwise. If it is merely a statement before any authority, the maker may be bound thereby but not those who had been implicated therein. If such a legal principle is culled out, the logical corollary thereof would be that the co-accused would be entitled to cross-examine the accused who made such statement, as such a statement made by him would be prejudicial to his interest. It was further held that a confession can only be used to "lend assurance to other evidence

against a co-accused". The proper way to approach a case of such a kind, is first to marshal the evidence against the accused, excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing that without the aid of the confession, he would not be prepared to accept. The crucial expression used in Section 30 is "the Court may take into consideration such confession" these words imply that the confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the

co-accused. The Court may take the confession into consideration and thereby, no doubt, make it evidence on which the Court may act; but Section 30 does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.

11. In light of the dictum in **Bal Mukund** (*supra*), the argument that the statement of the co- accused under Section 108 of the Act is substantive evidence cannot be accepted. Therefore, as held by the Apex Court in **Bal Mukund**(*supra*),I shall first keep aside the confession/inculpatory statements of the co-accused under Section 108 of the Act and see whether there is other admissible evidence available against A2.

12. PW1, while examined under Section 244(1) Cr.P.C., deposed that he served summons to A2 pursuant to which A2

voluntarily gave a statement under Section 108 admitting that he had received the foreign currency from one Ishwar Singh and had then handed over the same to A3, who in turn gave it to A1. It was submitted by the learned counsel for A2/respondent that the latter had retracted his confession. However, the records do not reveal the same. No letter or other document has been produced to show that A2 had retracted from the statement given by him under Section 108 to PW1. Therefore, the argument that A2/respondent had retracted his statement does not appear to be correct.

13. Coming to the question whether Section 108 of the Act statement of A2 stands proved. The complainant relies on the testimony of PW1 who, while examined under Section 241(1) Cr.P.C., deposed that Exhibit PW1/C is the summons issued to A2 and that Exhibit PW1/B is the 108 statement of A2. As noticed earlier, A2 did exercise his right of cross-examining PW1 at the stage under section 244(1) Cr.P.C. also. What is the evidentiary

value of this testimony of PW1? Here, it would be apposite to refer to Section 33 of the Evidence Act, which reads thus:-

> *"33.* ***Relevancy of certain evidence for proving, in subsequent proceeding, the truth of factstherein stated.—*** *Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a laterstage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead orcannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or ifhis presence cannot be obtained without an amount of delay or expense which, under the circumstances ofthe case, the Court considers unreasonable:*
>
> *Provided —*
>
> *that the proceeding was between the same parties or their representatives in interest;*
>
> *that the adverse party in the first proceeding had the right and opportunity to cross-examine;*
>
> *that the questions in issue were substantially the same in the first as in the second proceeding.*
>
> *Explanation.—A criminal trial or inquiry shall be deemed to bea proceeding between the prosecutor and the accused within the meaning of this section."*

14. The ingredients of Section 33 are - (i) that the earlier proceeding was between the same parties or their representatives-in-interest; (ii) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and (iii) that the questions in issue were substantially the same in the first as in the second proceeding. The testimony of PW1 recorded under Section 244(1) Cr.P.C. is certainly evidence given by a witness in a judicial proceeding. The stage under Section 246(4) and 246(5) can be stated to be a later stage of the same judicial proceeding. A2 did cross examine PW1 at the Section 244(1) Cr.P.C. stage. But there is yet another aspect that needs to be satisfied for the Section to apply that is, the evidence becomes relevant only when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable. This

aspect of the Section has not been satisfied by the complainant because it has not been shown that PW1 was unavailable or incapable of giving evidence or that had been kept out of the way by the adverse party or that his presence could not be obtained without an amount of delay or expense which the trial court, under the circumstances of the case considered unreasonable. Therefore, the testimony of PW1 cannot be made admissible under Section 33 of the Evidence Act.

15. I also refer to Section 32(2) of the Evidence Act, which reads thus:

> *"**32. Cases in which statement of relevant fact byperson who is dead or cannot be found, etc., is relevant-** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: —*

(1). XXXX

(2). ***or is made in course of business****-When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him. ……"*

Sub-sections (3) to (8) are not referred to as they are not relevant here.

16. If PW1 was not available for any of the reasons stated in Section 32, the complainant had still the option of proving the 108 statement of A2 recorded by the former by resorting to Section 32(2) read with Sections 47 and 67 of the Evidence Act (**Prithichand v. State of H.P., 1989 KHC 1160: (1989) 1 SCC 432**; **Kochu v. State 1978 KHC 321: ILR 1978(2) Ker. 593 and**

Kurien v State 2019 KHC 741: 2019(4) KLJ 903). However, the complainant has not chosen to establish the case either by resort to Section 33 or Section 32(2) read with Section 47 and 67 of the Evidence Act. That being the position, the trial court cannot be faulted for rejecting the materials on record as against A2.

17. In the result, the appeal, *sans* merit, is dismissed. Application(s), if any, pending, shall stand closed.

CHANDRASEKHARAN SUDHA
(JUDGE)

FEBRUARY 11, 2026/MJ/KR