

PETITIONER:
COSTAO FERNANDES

Vs.

RESPONDENT:
STATE AT THE INSTANCE OFD.S.P., CBI, BOMBAY

DATE OF JUDGMENT: 20/02/1996

BENCH:
RAY, G.N. (J)
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HANSARIA B.L. (J)

CITATION:
1996 AIR 1383 JT 1996 (2) 519
1996 SCALE (2)298

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

G.N.RAY.J.

While respectfully agreeing with the judgment of my learned brother, I intend to add as follows :-

Mr. Altaf Ahmed, learned Additional Solicitor General appearing for the respondent has very strongly contended that even if in the facts of the case, it becomes apparent that the appellant, a Preventive Officer of the Customs Department, on the basis of source information, was keeping a vigil on the apprehended smuggling activities and having located the deceased speeding away with. smuggled goods in a contessa car had chased him in his motor cycle and attempted to stop the vehicle but he was resisted by the deceased driving the said car, the appellant is not entitled to claim protection against initiation of a criminal trail for causing death of the driver of the vehicle under Section 155 of the Customs Act because under Section 106 of the Customs Act, he was authorised to take such course of action as was confined to stopping the vehicle and not beyond that. The learned Additional Solicitor General has submitted that if a custom officer while attempting to stop a vehicle involved in smuggling activities had faced resistance from the driver or occupant of the vehicle which had necessitated to take action by way of right to private defence and by that process, the driver or the occupant had suffered bodily injuries which had caused death, the concerned officer cannot claim protection at the threshold in stopping the criminal trial under Section 155 of the Customs Act. He has to face the criminal trial where the question of the right of private defence, if raised, is to be considered in the light of the evidences to be adduced in the case.

In my view, such contention should not be

accepted. The very purpose of Section 106 of the Customs Act in stopping the conveyance and searching the same when it was reasonably believed by a Customs Officer that such conveyance was or going to be involved in carrying out smuggling activities, will be frustrated if the Customs Officer, in the bona fide exercise of his powers and consequential duties as enjoined under Section 106 of the Customs Act is not permitted to take all consequential actions necessary for stopping the conveyance and conducting the search of such conveyance. If in course of a consequential action, it becomes necessary to immobilize the driver or occupant of a vehicle when without recourse of such action it was not possible to stop the vehicle, I fail to see any reason why the Customs Officer will not possess power and authority under Section 106 of the Customs Act to take recourse to such action for giving full effect to Section 106 of the Act. It will not be correct to contend that the Customs Officer's power under Section 106 of the Act is confined only to immobilization of the conveyance and not of the driver or occupant of the conveyance even when without which immobilization, stopping of the conveyance cannot be effected. Sub Section (2) of Section 106 of the Customs Act authorises a competent Officer to fire upon animal, vehicle or aircraft for forcibly stopping the same. It will be only hypertechnical to contend that although in an attempt to mobilise an aircraft or a vehicle, the same may be fired upon and by such process serious damage to the aircraft or the vehicle may be caused which may lead to loss of life of the pilot or driver together with occupants of the concerned conveyance, an action in injuring the driver or the occupant of the vehicle in an attempt to immobilize the vehicle is beyond the scope and ambit of Section 106.

It is, however, necessary to indicate a note of caution in the matter of consideration of protection against criminal liability if sought for under Section 155 of the Customs Act at the threshold of the Criminal trial. Since such immunity is claimed at the threshold, the Court should carefully scrutinize the relevant facts and materials placed before it for the purpose of finding (a) that the concerned Officer was authorised to act for prevention of smuggling activity and in fact had bona fide acted in exercise of his duties and functions in preventing the smuggling activities being carried or about to be carried (b) there are prima facie materials to indicate that such officer had honestly attempted to stop the conveyance for effecting search of the same (c) that such an attempt to stop the vehicle was sought to be frustrated either by not stopping the vehicle or by attempting to forcibly taking away the vehicle despite attempt by the concerned officer to stop the vehicle and (d) that recourse to use of force on the driver or occupant of the vehicle was apparently necessary to immobilize the vehicle or to save himself from imminent danger of personal risk. If on consideration of the materials placed before the Court, a possible view can be objectively taken that in discharge of the duties and functions under Section 106 of the Customs Act that a competent Officer had bona fide used force and such use of force is not just a ruse for high handed action on his part which was not at all necessary in the facts of

the case but prima facie there is justification for the course of action pleaded by the officer, the Court would give effect to the protection under Section 155 of the Customs act by dropping the criminal case initiated against the concerned Officer. The facts already on record, some of which have been indicated in the judgment of my learned brother, indicate that the appellant was on official duty as preventive Officer to look out for smuggling activities at the relevant time and in discharge of his official duties he had chased a speeding contessa car driven by the deceased in an attempt to stop the car for searching the same. As a matter of fact, he overlooked the car and having disclosed his identity asked the deceased to stop the car but when the driver had attempted to flee with the car, he jumped into the same and tried to take out the ignition key in order to stop the vehicle. It has also been revealed that appellant had received various injuries including incised wounds which on the basis of medical report are likely to have been caused at the time when attempt to stop car was made. Such facts prima facie support the appellant's claim for the protection under Section 155 to the Customs Act. In the facts of the case, it will not be proper to disallow such protection under Section 155 of the Customs Act to the appellant but to subject him to a full fledged trial on a charge of murder by pointing out that it would be open to the appellant to plead for right to private defence in such trial, like any other accused.

It may be indicated here that in the case of Bhappa Singh Vs. Ram Pal Singh and others (1981 (Supp.) SCC 12) the officials of the Customs and Excise Department raided a jewellery shop of the complainant and being attacked, the said raiding party fired shots. The complainant lodged a complaint that the members of the raiding party had come to commit dacoity in the jewellery shop. Indicating the circumstances, this Court held that the raiding party had not gone to commit the dacoity but they had to open fire thereby injuring some person in the shop when they were resisted in the carrying of the raid peacefully and men of the raiding party were manhandled. The impugned order quashing the complaint against the raiding party was upheld by this Court on the basis of general prima facie impression even by noticing that perhaps the matter may have required further evidence before quashing. It will be appropriate to refer paragraph 7 hereunder :

"Even though what we have just stated is a general prima facie impression that we have forced at this stage on the materials available to us at present, it may not be possible to come to a conclusive finding about the falsity or otherwise of the complaint. But then we think that it would amount to giving a go-by to Section 108 of the Gold (Control) Act, if cases of this type are allowed to be pursued to their logical conclusion, i.e., to that of conviction or acquittal. In this view of the matter we do not

feel inclined the upset the impugned order, even though perhaps the matter may have required further evidence before quashing of the complaint could be held to be fully justified. The appeal is accordingly dismissed."

JUDIS