

2014 (3) ECS (90) (HC - All.)

In The High Court Of Judicature  
At Allahabad

**SHRI GOPI CHAND SONI & ANR.**

*Vs.*

**CESTAT & ORS.**

**Date of Decision: 25.08.2011**

Civil Misc. Customs Appeal No. 162 of 2006

Appearance:

Shri M. Manglik &  
Shri Shailesh Verma

For the Appellant.

A. S. G. I, Ajay Singh  
Dr. A. K. Nigam & K. C. Sinha

For the Respondent.

**CORAM:**

**Hon'ble Sunil Ambwani, J.**

**Hon'ble Pankaj Mithal, J.**

**"The gold was seized on the reasonable belief that the same has been imported into India from Nepal in contravention of notification No.9/96 dated 22.1.1996, issued under Section 11 of the Act and as such, the same is liable to be confiscated under Section 112 (d) and 121 of the Act (ibid) and as such, the same was seized.(Para 3)**

**We also find that the customs authorities as well as the Tribunal did not consider the mandatory requirement of Section 125 of the Act, which requires the officer adjudging, in the case of any goods to importation or exportation thereof is prohibited under the Act, or under any other law for the time being enforced, to give to the appellants, apparently the owner of the goods (gold) from whose possession the gold was seized, and option to pay fine, which shall not exceed the market price of the goods confiscated, in lieu of confiscation. Such market price has to relate to the date, when the goods (gold) was confiscated. (Para 23)**

**In the facts and circumstances, we find that the custom authorities did not decide the case on the settled principles of law, relating to the burden of proof, and the reliance upon the statements under Section 108 of the Act. They also did not give an opportunity, if they found that the gold was imported against the prohibition in law under Section 123 (2) of the**

**Act to the appellants, pay fine in lieu of confiscation of gold.”(Para 24)**

1. This appeal under Section 130 of the Customs act, 1962 (the Act, in short) is directed against the order of the Member, Technical, Customs, Excise and Service Tax Appellate Tribunal dated 10.10.2005 by which he has partly allowed the appeal against the order of the Commissioner, Customs and Central Excise dated 4.11.1999, dismissing the appeal against the order of the Joint Commissioner, Customs Lucknow for absolute confiscation of 559.700 grams of 9 pieces of gold valued at Rs.2,23,880/- seized on 16.6.1999, in exercise of his powers under Section 122 of the Act. By the same order the Joint Commissioner, Customs also ordered confiscation of Maruti Van No.UP 53D 2052 under Section 115 (2) of the Act, at the same time giving option to redeem the Maruti Van on payment of fine amount to Rs.15,000/-. The Commissioner also imposed penalty on the appellants of Rs.15,000/- and Rs.10,000/- respectively under Section 112 of the Act. The Tribunal in its order dated 10.10.2005 under appeal has partly allowed the appeal only to the extent of reducing the penalty of Shri Sanjay Soni from Rs.10,000/- to Rs.5000/-.
2. We have heard Shri R.R. Agarwal assisted by Shri Suyash Agarwal for the appellants. Shri Sambhu Chopra appears for the department.
3. Brief facts giving rise to the appeal are:-
 

"That on 16.6.1999, at about 1850 hours, officials of Customs of Gorakhpur Division, on the basis of the alleged specific information, intercepted Maruti Van No.UP-53D-2052 near Munshi Prem Chandra Park. In the car, there were two occupant i.e. the appellant and Shri Sanjay Soni. It is alleged that the appellant was searched and seven big size and two small size pieces of gold were recovered from the front pocket of the appellant's pant and the same were of 559.700 grams and totally valued at Rs.2,23,000/-. It is further alleged that the pieces of hammered to erase the foreign origin marking and one piece showed explicit Chinese origin marking on it and the appellant and his driver, Sanjay Soni, failed to produce any documentary evidence for lawful importation, acquisition and possession of the said gold and he was interrogated and in his statement, it is alleged that he has stated that he had purchased the said gold pieces through a broker of Urdu Bazar, Gorakhpur for selling the same at Balaharganj and as per the instructions of the broker, they erased the marking by hammering and Sanjay Soni, his nephew. It is further alleged that Sanjay Soni in his statement stated that he has no concern with the purchase of the said gold biscuits.

The gold was seized on the reasonable belief that the same has been imported into India from Nepal in contravention of notification No.9/96 dated 22.1.1996, issued under Section 11 of the Act and as such, the same is liable to be confiscated under Section 112 (d) and 121 of the Act (ibid) and as such, the same was seized. The car was also seized as the same has been used for transportation of the said gold, as the same was also liable to confiscation under Section 115 of the Act ibid. Statement recorded under Section 107 of the Act on 16.6.1999 was confirmed by the appellant under Section 108 of the Customs Act, 1962 on 17.6.1999. The appellant in his bail application has specifically stated before Special CJM on 3.7.1999 that he had purchased the said gold from Dhan Cholia Sons, Chandni Chowk, Delhi, on 14.6.1999 and produce the photocopy of Bill. Statement of Shri Badri Narain Shara, the owner of Dhan Cholia Sons was also recorded and he has confirmed that he had sold the said gold to the appellant vide Bill No.4 and 11 pieces were sold to him and only one bill was issued on the said date. A copy of the receipt is enclosed. Different findings were given and the gold was seized.

A show cause notice was issued to the appellant, calling upon as to why the seized gold should not be confiscated under Section 111 (d) and 120 of the customs Act and why the Maruti Van should not be confiscated under Section 115 (2) of the Customs Act, 1962, and why the penalty should not be imposed under section 112 (b) of the Customs Act. Panchnama, statement of the applicant and Sanjay Soni and other documents were relied upon.

The show cause notice was adjudicated by the Jt. Commissioner of Customs and Shri Davender Singh, Jt. Commissioner of Customs, Lucknow, after hearing the matter, ignored the contentions of the appellant and confiscated absolutely the 9 pieces of gold under Section 120 and 111 (d) of the Act and imposed the penalty of Rs.15,000/- under Section 112. Maruti Van UP-53D-2052 was also confiscated under Section 115 (2) of the Act and option was redeemed the same was given on payment of fine of Rs.15,000/-. Against the order of respondent no.2, bearing No.220 (181) / 99 JC-GKP/ 99 dated 4.11.1999, the appeal was filed before the respondent No.2. The appeal was adjudicated by respondent No.2, and the findings given by respondent No.3 were upheld by the respondent No.2."

4. Shri R.R. Agrawal, learned counsel for the appellants submits that on the date of seizure on 16.6.1999, a panchnama was prepared and on the same day statement of Shri Gopi Chand Sonar @ Gopi Chand

- Soni son of Shri Sekhar Chand Soni, resident of Chowk Badhalganj-appellant No.1 and Shri Sanjay Kumar Soni-appellant No.2 were recorded under Section 108 of the Act. The appellant no.1 did not make any confession of smuggling the gold from Nepal; he admitted to have purchased the gold from Urdu Bazar in Distt. Gorakhpur through a commission agent. He stated that he has purchased 560 grams of gold from the Commission Agent for Rs.2,24,000/-. The Commission agent had told him that the gold is absolutely pure and was brought from Nepal, where it is sold at cheaper rates. He stated that after the gold is brought to India, it is melted and hammered to give different shape. He purchased the gold, which was hammered to give it a different shape. The foreign markings were not clear except on one piece of gold. He had not admitted any receipt from the Commission agent and stated that he had purchased such gold for the first time. Shri Sanjay Soni-appellant No.2 stated that Shri Gopi Chand Soni is his maternal uncle, and that he was only driving the vehicle. After coming to Gorakhpur they had gone to Urdu Bazar from where they had purchased the gold from the commission agent and that he does not know the details of the transactions.
5. On 3.7.1999 both the appellants were granted bail by the Sessions Judge, Varanasi, the designated court for Customs cases, in Bail Application No.1843 of 1999 and 1845 of 1999. The Court granting bail referred to the grounds for bail namely that the gold was not pure to the extent of 99.99%. It had purity to the extent of 98.75%. The applicants had stated before him that they had receipts of the purchase of gold, which belongs to them and had requested for its release. Both the applicants were granted bail on executing the bond and sureties of Rs.50,000/- to the satisfaction of the concerned Magistrate.
  6. Both the appellants were again called to make their statements under Section 108 of the Act before the Superintendent, Customs, Gorakhpur. Shri Gopi Chand Soni, the appellant No.1 in his statement recorded on 3.8.1999 in pursuance to the summons issued to him on 20.7.1999 stated that he had purchased the gold on 18.8.1999 from Dhancholia and Sons, Delhi. He arrived from Delhi in Vaishali Express at Gorakhpur in the morning and gave 10 grams of gold to goldsmith for making 'kan ka taras'. He was caught by the Customs Officers near Naglia Hospital. He had produced the receipts of purchase of gold but that the customs authorities recorded his statement in the manner they wanted and seized the gold and vehicle. He has not committed any illegality. He had given 90 grams of gold to Santosh Sonar, son of Radhey Shyam Sonar, Apurna Bazar, Gorakhpur. He had purchased the gold for the first time from Delhi and gave the details of the purchase of gold from Delhi. Shri Sanjay Soni

was also examined under Section 108 of the Act on 5.8.1999. The customs authorities also examined Shri Sada Narain Sharma, Proprietor of M/s Dhancholia & Sons, 395, Chandani Chowk, Delhi, who stated that he is engaged in the business of gold and silver in wholesale. On 14.6.1999 by Bill Voucher No.4 he had sold 11 pieces of gold to Shri Gopi Soni weighing 570.05 grams for total amount including tax for Rs.2,36,323/-. On that day only one bill was issued. The stamp on the photocopy of the bill shows to him by the Inspector, Customs was not clear. He put rubber stamp and signed on the receipt. He could not describe Shri Gopi Soni.

7. The Joint Commissioner, Customs proceeded on the basis that Shri Gopi Chand Soni has confessed to have received the gold illicitly imported from Nepal through an unidentified broker at Urdu Bazar. The Chinese marking on the gold pieces were flattered by hammer except for one piece. Shri Sanjay Soni stated that he was aware of the dubious transactions and he was present, when the gold was purchased from broker. During his visit to and fro Gorakhpur he was driving the Maruti Van. Despite the hammering, one of the gold pieces were found to bear explicit Chinese origin markings. In their bail applications they gave a totally different story. In the statements recorded after grant of bail, under Section 108 of the Act Shri Gopi Chand Soni pleaded that he had purchased the gold pieces at Delhi from M/s Dhancholia and Sons and returned to Gorakhpur in the morning of 16.6.1999. He had given 10 gram of gold to local jeweller for making earrings. His father along with Shri Sanjay Soni had come to Gorakhpur to receive him. He handed over his bag, which also contained purchased receipt of the gold. They departed for Badhalganj for some urgent matter and got his Maruti Van repaired before proceedings towards Badhalganj, when he was intercepted in the route. Shri Sanjay Soni also changed his statement and stated on 5.8.1999 under Section 108 that he actually accompanied the father of Shri Gopi Chand to Gorakhpur and had picked up Shri Gopi Chand Soni from railway station. The Joint Commissioner did not believe the subsequent statement on the grounds:-

- (a) The different in the number of pieces of gold shown to have been purchased and actually seized has not been explained and accounted for, and thus it is difficult to believe that the same two full pieces corresponded to such a small quantity of gold as 10 gms.; (b) there was no conclusive evidence on record to establish the irrefutable correlation between the quantity claimed to have been transacted and actually seized; (c) if the transaction was bonafide and the said gold was lawfully acquired there was no need to change the shape and erase the markings

on the gold pieces. One of the pieces bear the explicit Chinese origin markings and thus there was no evidence, direct or corroborative to arrive at the conclusion that the said cash memo is not being used as a cover to legitimize an otherwise dubious transactions; (d) Gold is a notified item under Section 123 of the Act and the onus of proving that the same is not smuggled lies on the accused; (e) There are contradictions in the statements tendered by Shri Gopi Chand Soni and Shri Sanjay Soni at different stages. The retractions are on selective basis and therefore in the absence of any independent corroboration that the changed stand cannot be believed.

8. The appellate court confirmed the findings of confiscation and penalty order of the Joint Commissioner and observed that the bail order passed by the C.J.M. Varanasi has no bearing on the adjudication order passed under the Customs Act.
9. The Tribunal found that there was no dispute that 9 pieces of gold with foreign markings on one of the pieces were recovered from possession of Shri Gopi Chand. The attempt to erase the foreign markings was made by hammering on the other pieces. Shri Gopi Chand Soni had pointed out that the gold was of foreign origin and was purchased by him through a 'dalal' (broker) from Urdu Bazar, Gorakhpur and it was intended to be sold at Badhalganj, Distt. Gorakhpur. The invoice of sale of gold by M/s Dhancholia & Sons, New Delhi dated 14.6.1999 was for 11 pieces weighing 570.050 grams. If this gold was sold by 14.6.1999, there was no reason to bring it to Gorakhpur on 16.6.1999, when Shri Gopi Chand resided at Badhalganj. The weight and number of pieces of the gold shows in the bill issued by the Delhi dealer, is different than the gold seized from Shri Gopi Chand Soni. If the gold was purchased under genuine invoices, then there was no need to hammer the gold to remove the foreign markings, hence the seized gold cannot be said to be covered by the invoices issued by the Delhi dealer. The onus was on Shri Gopi Chand Soni to prove that the gold was not smuggled. He failed to establish the fact as bill no.4 for 11 pieces of gold weighing 570.50 grams would not be for the same gold, which was seized.
10. The orders passed by all custom authorities, and the Tribunal are based on the statements given by the appellants, and the evidence led by them, namely the oral evidence of the whole-seller of gold from Delhi and the receipts of purchase. The customs authorities have heavily relied upon the alleged confession, which they found was not successfully retracted. They found the earlier statement

under Section 108 to be incriminating to establish contravention of the Act, confiscation and penalty.

11. Sections 107, 108 and 125 of the Customs Act, 1962 relevant for the purposes of this case are quoted as below:-

"SECTION 107. Power to examine persons. - Any officer of customs empowered in this behalf by general or special order of the Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods, -

- (a) require any person to produce or deliver any document or thing relevant to the enquiry; (b) examine any person acquainted with the facts and circumstances of the case.

SECTION 108. Power to summon persons to give evidence and produce documents. - (1) Any Gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

- (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.
- (3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required:

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

- (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

SECTION 125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized,

an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

- (2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods."

12. The Supreme Court, while interpreting Sections 107 and 108 of the Customs Act, held in *Romesh Chandra Mehta Vs. State of West Bengal*, (1969) 2 SCR 461 that any statement made by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence, but he being an officer concerned or the person in authority, Section 24 of the Indian Evidence Act would be attracted and which provides that a confession made by an accused is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against accused persons, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

13. In *Collector of Customs, Madras & Ors. Vs. D. Bhoormall*, (1974) 2 SCC 544, while examining the provisions of Sections 167 (8) and 178A of the Sea Customs Act, the Supreme Court held:-

"33. Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of Clause (8) of Section 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima



facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling." (Emphasis supplied)

14. In *K.T.M.S. Mohd. & Anr. Vs. Union of India*, (1992) 3 SCC 178, the Court made a distinction between the provisions of the FERA and the Income Tax Act held in para 31 as follows:-

"31. Leave apart, even if the officers of the Enforcement intend to take action against the deponent of a statement on the basis of his inculpatory statement which has been subsequently repudiated, the officer concerned must take both the statements together, give a finding about the nature of the repudiation and then act upon the earlier inculpatory one. If on the other hand, the officer concerned bisects the two statements and make use of the inculpatory statement alone conveniently bypassing the other, such a stand cannot be a legally permissible because admissibility, reliability and the evidentiary value of the statement of the inculpatory statement depend on the bench mark of the provisions of the Evidence Act and the general criminal law."

15. Holding in categorical terms that Section 24 of the Indian Evidence Act shall apply, it was held:

"But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected *brevi manu*. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its

mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated." (emphasis supplied)

16. The Court then held in para 25 that the initial burden to prove that the confession was voluntary in nature, would be on the department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue.
17. In *Vinod Solanki Vs. Union of India*, 2009 (233) ELT 157 (SC) the Supreme Court considered the effect of retraction of the statement in proceedings of penalty under Foreign Exchange Regulation Act, 1973. The Supreme Court held that indisputably a confession made by an accused would come within the purview of Section 24 of the Indian Evidence Act, 1872. The proceedings under the Act are quasi criminal in nature. Section 50 of the Act is penal provision. It prescribes that in the event of contravention of any of the provisions of the Act or the Rules, directions or order penalty in exceeding 5 times of the amount of value involved in any such contravention may be imposed. Section 71 of the Act provides for burden of proof in certain cases. Sub-section (2) of Section 71 provides for burden of proof that foreign exchange acquired by such person, has been used for the purpose for which permission to acquire was granted, shall be on such person. The Act as Special Act confers various powers under the authorities. Even if salutary principle 'mens rea' and 'actus reus' in the proceedings under the Act may not be held to be applicable, it is now a settled principle that presumption of innocence as contained in Art.14 (2) of the International Covenant on civil and political rights is a human right, although per se it may not be treated to be a fundamental right within the meaning of Art. 21 of the Constitution of India. Sub-section (2) of Section 71 places burden of proof upon an accused or proceedee only when the foreign exchange acquired has been used for the purpose for which permission to acquire it was granted and not for mere possession thereof. The Parliament advisedly did not make any provision placing the burden of proof on the accused/ proceedee.
18. In para 22 the Supreme Court said:-

" 22. It is a trite law that evidence brought on record by way

of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. {See *Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras* [(1999) 6 SCC 1]}"

19. The Supreme Court in *Vinod Solanki's case* (Supra) found that in the circumstances in which the confessional statement was obtained in the case in which the appellant was detained in the office of Enforcement Department for two days and two nights, no attempt was made to controvert the statement made by the appellant before the Chief Metropolitan Magistrate. The Tribunal misdirected themselves in law in so far as they failed to pose unto themselves a correct question. The Tribunal proceeded on the basis that the issuance and service of show cause notice subserves the requirement of law only because by reason thereof an opportunity was afforded to the proceedee to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law. The statement made by the appellant before the Chief Metropolitan Magistrate was not a barred statement. The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal did not arrive at any finding that confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act. The appeal was thus allowed by the Supreme Court.
20. In *K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin*, (1997) 3 SCC 721 it was held that a person suspected by a Customs Officer is not an accused at that stage. He becomes an accused only when summons are issued by a competent Court/ Magistrate pursuant to a complaint lodged by the competent Customs Officer. His statement recorded under Section 108 or during confiscation proceedings is not that of an accused within the meaning of Section 24 of the Evidence Act. The Customs Officer in such case although not police officer, is an authority within the meaning of Section 24 of the Evidence Act. The evidence is admissible under Section 135 of the Customs Act, although subsequently retracted, if

on facts found voluntary and truthful. Only in such case it can form exclusive basis for conviction. It is, however, a rule of prudence and practice that the Court seeks assurance from other facts and circumstances to corroborate retraction of confession. The Supreme Court held that object of the Act in empowering the Customs Officer to record evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband, to avoid or avoidance of the duty of excise so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act for initiating proceedings for further action of confiscation of the contraband or imposition of penalty. By virtue of authority of law the officer exercises the power under the Act is an authority, within the meaning of Section 24 of the Evidence Act.

21. There is no prohibition under the Evidence Act to rely upon retracted confession to prove the prosecution case and to make the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there were any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained on the confessional statement. The Court is required to examine whether the confessional statement was voluntary; in other words whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that the Court would seek assurance getting corroboration from other evidence adduced by the prosecution.
22. Coming to the present case we find that the appellant Shri Gopi Chandra Soni had in his statement under Section 108 on 16.6.1999 did not say that he had smuggled, or that the commission agent smuggled the gold on his behalf from Nepal, gold being a notified item under Section 123 (2) of the Act. All that he had stated was that he had purchased the gold from the commission agent (dalal), who had assured him that the gold is pure as it was brought from Nepal. The petitioner did not make any such confession that he had hammered the gold by removing the foreign markings. The possession of the gold, even if it was smuggled, was not by itself an offence under the Customs act, 1962, on which it could be confiscated under Section 111, unless it was established by evidence that the gold was smuggled and brought by the appellant, or it was

smuggled and brought by him through the commission agent. The appellants thus cannot be said to have made any such confession, which may have incriminated them, and which they subsequently retracted on 3.8.1999 on 5.8.1999 respectively, in their statements under Section 108 in pursuance to summons issued to them. The appellant no.1 had changed his statement, in which, instead of purchasing it from commission agent in Urdu Bazar, Gorakhpur, he stated to seized gold, to be from Delhi by producing the receipt and Shri Sada Narain Sharma, the proprietor of M/s Dhancholia & Sons, Chandani Chowk, Delhi. The custom authorities and the Tribunal instead of relying upon any evidence of smuggling the gold, or any corroborative evidence, tried to match the first statement recorded under Section 108, with the subsequent statement recorded under Section 108, after notice was issued to the appellants, and relied upon the retracted statement, by finding out discrepancies in the statements.

23. In our opinion the discrepancies pointed out in the subsequent statement of the appellants and the evidence led by them under Section 108, to discharge the burden of proof by itself were not sufficient, to discard the explanation, and then to rely upon the earlier statement, treating it to be inculpatory, unless there was any corroborative evidence, to record findings that the appellants were in possession of improperly smuggled gold. We also find that the customs authorities as well as the Tribunal did not consider the mandatory requirement of Section 125 of the Act, which requires the officer adjudging, in the case of any goods to importation or exportation thereof is prohibited under the Act, or under any other law for the time being enforced, to give to the appellants, apparently the owner of the goods (gold) from whose possession the gold was seized, and option to pay fine, which shall not exceed the market price of the goods confiscated, in lieu of confiscation. Such market price has to relate to the date, when the goods (gold) was confiscated.
24. In the facts and circumstances, we find that the custom authorities did not decide the case on the settled principles of law, relating to the burden of proof, and the reliance upon the statements under Section 108 of the Act. They also did not give an opportunity, if they found that the gold was imported against the prohibition in law under Section 123 (2) of the Act to the appellants, pay fine in lieu of confiscation of gold.
25. We consequently allow the appeal, set aside the order of the Member Technical, Customs, Excise and Service Tax Appellate Tribunal dated 10.10.2005, and remand the matter back to him to decide it in accordance with law and the observations made by us in the judgment.