(1997) 07 MAD CK 0108

In the Madras High Court

Case No : Criminal O.P. No. 8280 of 1997

Abdul Hakim APPELLANT

Vs

State, by Superintendent of Customs (Prosecution) Customs House, Chennai RESPONDENT

Date of Decision : 08-07-1997

Acts Referred:

Citation : (1997) 07 MAD CK 0108

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : T. Sudanthiram, for the Appellant; P. Rajanianickam, Spl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—The petitioner is seeking anticipatory'' bail in this Court, by filing an application u/s 438 Cr. P.C. on the ground that he is implicated in a case registered by the respondent in R.R. No. 6 of 1997, for the offence u/s 135(1) of the Customs Act.

2. It is stated in the petition that he is innocent and has not committed any offence, that he has no involvement in the alleged offence, and that merely on the basis of the confession, alleged to have been recorded on 144-1997, from one Jayachandran, a passenger bound for Sharjah, at Anna International Airport, Chennai, resulting in the seizure of his baggage, containing various foreign currency notes to the Indian value of Rs.57 lakhs and odd, the petitioner has been implicated in this case.

3. On the strength of these averments in the petition, Mr. Sudanthiram, learned counsel for the petitioner would vehemently argue, that there is no material against the petitioner for hi! alleged involvement, except the alleged confession statement of the said Jayachandran, the co-accused.

4. Counsel for the petitioner would also cite an authority rendered by this Court

re-ported in 1990 (2) M.W.N. (Crl.) 60 (P. Pulla Rao v. State), in which it is held that "confession of a co-accused can never form the foundation of the prosecution case as against the other accused, unless there is evidence aliunde implicating the other accused in the offence." In the said decision, as pointed out by learned counsel for the petitioner, this Court granted bail to the accused, holding that the confession of the co-accused implicating the other accused is not sufficient to hold that there are enough materials, in view of Section 30 of the Evidence Act, in which it does use the phraseology "may take into consideration", in consideration of the confession of the accused in this case, but the said Section does not at all use the phraseology "read as evidence."

5. Learned counsel for the petitioner would also place reliance of the authority reported in 1980 S.C.C. (Crl.) 465 (Gurbaksh Singh Sibbia and Others v. State of Punjab), wherein it has been held that "even if any property is recovered on the statement of the accused, who was not in custody, that would be admissible.".

6. Per contra, Mr. P. Rajamanickam, learned Special Public Prosecutor, appearing for the Central Government, would cite a decision reported in 1992 (1) Crimes 1115 (Baji Abdulla Haji Ibrahim Mandhra and Another v. Superintendent of Customs, Bhuj and Others), in which the Gujarat High Court held that "conviction can be based by the Court, even on the sole retracted statement of the co-accused recorded u/s 108 of the Act, provided that the Court is satisfied that the said retracted statement of the co-accused is otherwise reliable and trustworthy, after considering the attendant circumstance of the case, and that at the most, it can be said that it would be risky to base conviction on the sole retracted statement of the co-accused, but it can never be said that no conviction can be based on the retracted statement of the co-accused.

7. In yet another decision cited by learned Special Public Prosecutor, reported K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, , the Apex Court held that "in a criminal trial, it is now well settled legal position that confession can form the sole basis for conviction, and if it is retracted, it must first be tested whether confession is voluntary and truthful inculpating the accused in the commission of the crime, and if a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property."

8. On the basis of these authorities, learned Special Public Prosecutor, would submit that the petitioner is not entitled to anticipatory bail, especially when the investigation discloses that the petitioner is the main person at whose instance the co-accused Jayachandran, attempted to export the foreign currency notes concealed in the lungies and bedsheets.

9. Before considering the merits of respective submission let me at the outset refer about the facts as projected by the prosecution:

(i) On 14-2-1997 at about 7.00 A.M., at Anna International Airport, Chennai, the

Customs Intelligence Officers, attached to Air Intelligence Unit, interrogated Mr. Govindaraj Jayachandran, a holder of Indian Passport and a passenger bound for Sharjah, via Muscat by Gulf Air flight No. GF 069 - vide ticket No. 072 4409 774 216. When he as questioned, whether he was carrying any foreign currencies either in his baggage or in his person, the said passenger replied in negative. When his cardboard carton was searched in the presence of the witnesses and the said passenger, the said baggage was found to contain four bedsheets and four lungies.

(ii) On further examination, the said four bedsheets and two, out of four lungies were found to be heavy. On unfolding the same, the said four bedsheets were found to contain four paper packets, wrapped with adhesive tapes. All the said four paper packets were removed from the folding of the said bedsheets, and on further examination, the packets were found to contain various foreign currencies. The lungies were also searched It was also found to contain various foreign currency notes.

(iii) As the passenger was not in a possession of any valid permit issued by the Reserve Bank of India to export the said foreign currency notes, out of India, and since the said passenger attempted to smuggle out from India, without declaring to the Customs, the Customs Intelligence Officer seized all the foreign currencies, to the Indian value of Rs. 57,21,401/- under a mahazar.

(iv) The personal search of the passenger resulted in recovery of one receipt bearing No. 906, dated 30-1-1997, of Yasmeen Travels, 98, Main Road, Labbaikudi Kadu, Trichy District, and one entry permit No. 40028/301/96-Employment, dated 31-12-1996 issued by Sharjah, kept in his shirt pocket.

(v) Immediately after the seizure, the passenger Jayachandran, came out with a voluntary statement, that he being a resident of Alakkudi village, Seergazhi Taluk, was being sent by one Abdul Hakim of Labbaikudi Kadu, to Sharjah, and that he was handed over this cardboard carton containing various foreign currency notes, kept concealed in the lungies and bedsheets, by the said Abdul Hakim, for the purpose of handing over the same to his brother at Sharjah, and that if he handed over the same to his brother at Sharjah, he would be given thousand Dirhams by his brother.

(vi) Then the said passenger was arrested on the basis of confession and recovery, and he was sent for judicial remand. Since the investigating agency felt that Abdul Hakim, the petitioner herein is mainly responsible for the export of these foreign currencies, through the passenger Jayachandran, immediately a summon was sent by registered post on 1-3-1997, to his address asking him to appear before the Superintendent of Customs, Madras on 12-3-1997. The said registered post was returned undelivered by the Postal department, with remarks "gone out and not found".

(vii) A second summon dated 26-3-1997 was also sent to Abdul Hakim, the petitioner herein, through the Assistant Commissioner of Customs and Central

Excise, Trichy, and the same was also returned by the Assistant Commissioner, stating that the "subject person is not available and hence the summons could not be served". Again on 24-5-1997, a reminding letter was sent to the Assistant Commissioner of Customs and Central Excise, Trichy requesting him to cause discreet enquiry and surveillance to locate the whereabouts of the petitioner.

10. At this stage, the petitioner has filed this petition dated 27-6- 1997, before this Court, seeking anticipatory bail.

11. The main point that\\has been urged by learned counsel for the petitioner, as pointed out earlier is that the only material available against the petitioner is the confession of the co-accused, alleged to have been recorded on 14-2-1997, implicating the petitioner, and that the said material cannot be acted upon, as it was not sufficient to hold that the petitioner has any involvement in the said offence.

12. Learned Special Public Prosecutor, on the basis of Pavunny''s case {stated supra), would submit that the confession, even if when retracted is entitled to high degree of value, if it is of a voluntary nature. But, I am afraid that this decision would not be applicable to this case, because the Supreme Court would deal with the confession of the maker and not with reference to the co-accused confession.

13. In the decision reported in 1992(1) Crimes 1115 (supra), the Gujarat High Court held that "it would be risky to base conviction on the sole basis of retracted statement of the ''co-accused.'' But in this case, this Court need not go into that question, because it is seen from the case-diary that there is not only material available in the form of confession of the co-accused, but also other materials collected in the form of statements from five more witnesses.

14. I have gone through the statements of (1) Sulaiman (2) Navaneethan (3) Muthukrishnan (4) Ethirajan and (5) Safiudeen. The statements of these persons would disclose that the petitioner alone arranged to buy the flight tickets for the journey of the passenger Jayachandran, through Sulaiman, to go to Sharjah on 14-2-1997. The statements of Muthukrishnan and Navaneethan would also indicate that the petitioner handed over a cardboard carton to the co-accused Jayachandran alongwith the flight ticket for being taken to Sharjah and to hand over the same to his brother. Furthermore, it is also revealed that the petitioner arranged a taxi belonging to one Safiudeen, for taking the said Jayachandran from Labbaikudi Kadu to Anna International airport at Chennai. The witness Ethirajan was the driver of the said taxi. His statement to this effect has also been recorded. Therefore, in this case, apart from the material, in the form of statement of co-accused, the other materials collected subsequent to the seizure of the foreign currencies, would clearly show the prima facie case against the petitioner.

15. Learned Special Public Prosecutor would vehemently contend that the petitioner has got to be apprehended and custodial interrogation is an absolute

necessity to trace the source of these foreign currencies, and to find out how the petitioner came to acquire such huge quantities of currencies of various countries. He would further contend that the investigation is at the crucial stage, and if the petitioner is released on anticipatory bail, he would definitely hamper further investigation, and as such, the petitioner having been involved in the serious and social crime, and having committed economic offence, he cannot claim the benefit of anticipatory bail.

16. In this context, it is quite relevant to refer about some of the portions of the report, of the Law Commission, as referred in Gurbaksh Singh Sibbia''s case (1980 S.C.C.(Cri.) 465) (stated supra):-

The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

17. So, in the light of the above observation, as contained in the report of the Law Commission, could it be said in this case, that the accusation leveled against the petitioner appears to stem not from motives of furthering the ends of justice but from some ulterior motive? And could it be said that the object being to injure and humiliate the accused by having him arrested? My answer to these questions is emphatic ''no''.

18. In this context, the observation of the Supreme Court made in the case of Pokar Ram Vs. State of Rajasthan and Others, , is quite relevant-

Let it be made distinctly clear that status in life, affluence or otherwise, are hardly relevant considerations while examining the request for granting anticipatory bail. Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the Court must be cautious and circumspect in exercising such power of a discretionary nature.

19. Therefore, when the prosecution agency apprehends mat the investigation

would be hampered with by exercising the discretion u/s 438 Cr. P.C, this Court feels that it is not proper to grant anticipatory bail to the petitioner, in view of the enormous materials collected by the investigating agency, against the petitioner. As rightly pointed out by learned Special Public Prosecutor, that if the petitioner comes under custodial interrogation, the investigating agency may likely to unearth the sources from which the petitioner alleged to have collected the foreign currencies from various countries, which would highly affect the economy of our country.

20. In that view of the matter, the petitioner is not entitled to anticipatory bail, and hence this petition is dismissed.

