

(2009) 11 GUJ CK 0039
In the Gujarat High Court

Case No : Criminal Revision Application No. 59 of 2001

Amrutlal Vasubhai Patel

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Customs Act, 1962 — Section 108, 111, 123, 135
Evidence Act, 1872 — Section 10, 30
Penal Code, 1860 (IPC) — Section 120B

Citation : (2009) 11 GUJ CK 0039

Hon'ble Judges : A.L. Dave, J

Bench : Single Bench

Advocate : Y.F. Mehta, for the Appellant; Maulik G. Nanavati, APP for Respondent 1 and Devang Nanavati, for Respondent 2, for the Respondent

Judgement

A.L. Dave, J.—The revisionist, along with one Adam Noormohmed (accused No. 2), came to be charged for the offences punishable u/s 135 of the Customs Act and Section 120B of the Indian Penal Code, and convicted by the learned Additional Chief Metropolitan Magistrate, Ahmedabad by judgment and order dated 10th January, 1994. The revisionist came to be sentenced to undergo R.I for one year and was imposed with a fine of Rs. 25,000/-, in default to undergo S.I for three months; whereas accused No. 2- Adam Noormohmed was sentenced to undergo R.I for three years, with fine of Rs. 25,000/-, in default to undergo S.I for nine months.

1.1 The revisionist challenged the order of the learned Additional Metropolitan Magistrate before the City Sessions Court, Ahmedabad; whereas accused No. 2- Adam Noormohmed did not prefer any appeal at all. The City Sessions Court by judgment in Criminal Appeal No. 8/1994, dated 19th January, 2000, dismissed the appeal and confirmed the conviction and sentence of the revisionist. Hence, the present revision application.

2. As per the case against the revisionist, accused No. 2- Adam Noormohmed

was engaged in the activity of smuggling of gold biscuits, and the revisionist facilitated the activity conspired between them by providing shelter in his home, permitting use of telephone for the activity conspired between them by providing shelter in his home, permitting use of telephone for the purpose and attending calls in respect of such activity in absence of accused No. 2.

2.1 The statements of both the convicts were recorded u/s 108 of the Customs Act, which came to be retracted by the revisionist immediately on production before the Magisterial Court stating that the statement was obtained from him under coercion and duress by using physical force. The revisionist was sent for medical examination where injuries in the form of tenderness on shoulder were noticed by the Doctor.

3. The trial Court found that though the statement was retracted, injuries found were of the nature which could be either self-inflicted or being caused for any other reason being in the form of tenderness and were not relatable to any beating by the interrogating officer of the Customs Department. This finding of fact by the trial Court came to be confirmed by the appellate Court while confirming the conviction and sentence.

4. Heard learned advocate Mr. Y.F. Mehta for the revisionist and learned A.P.P. Mr. Nanavati for the State.

5. Learned advocate Mr. Mehta for the revisionist submitted that the statement of the revisionist recorded u/s 108 of the Customs Act came to be retracted immediately on his production before the Magisterial Court. The injuries were found on the person of the revisionist. The custom authorities have not gone any further into the direction of the so-called smuggling of 200 to 250 gold biscuits allegedly committed by accused No. 2. There is no evidence to show that the phone was, in fact, used for the purpose either by accused No. 2 or by the revisionist. There is total lack of independent evidence. Both the Courts below, therefore, committed an error in convicting the revisionist. The reliance placed on the diary of accused No. 2 is also improper and, therefore, this Court may exercise its revisional jurisdiction and set aside the conviction.

6. Learned A.P.P. Mr. Nanavati submitted that assuming for a moment that the statement of the revisionist was retracted, the statement of accused No. 2 came to be used by the trial Court for recording conviction and that part is not challenged by accused No. 2 by preferring any appeal. Mr. Nanavati, while referring to the provisions contained in Sections 10 & 30 of the Evidence Act, submitted that the statement u/s 108 of the Customs Act of accused No. 2 could very well be used against the revisionist by the trial Court as being relevant and having been accepted, by not challenging the conviction founded on accused No. 2, as the same is the confessional statement duly proved and not challenged. He, therefore, submitted that the revision may be dismissed.

7. In the decision in the case of Union of India v. Abdulkadar (supra), this Court took a view that the provisions of Sections 111, 123 & 135 of the Customs Act

need to be read together and for recording conviction u/s 135 of the Customs Act, the prosecution has to prove that the goods were liable to be confiscated. In the instant case, upon screening the evidence, no material is found which would go to show that gold biscuits, which were allegedly smuggled by accused No. 2 and the revisionist permitted him to do so by giving shelter in his home and permitting use of his telephone, were smuggled biscuits and that they were liable to be confiscated. This aspect seems to have been lost sight of by the trial Court while recording conviction. The conviction of the revisionist recorded u/s 135 of the Customs Act deserves to be set aside.

8. Now, the question remains about conviction u/s 120B of the Indian Penal Code. It has been vehemently contended by the learned A.P.P that conviction u/s 120B IPC has to be upheld in view of the fact that the co-accused is convicted and that conviction has attained the finality. In the opinion of this Court, it is not possible to accept this contention for the reason that once this Court finds that there is no material to show that the gold biscuits, allegedly smuggled by original accused No. 2, were smuggled biscuits liable to be confiscated, then their overtact itself is not accepted as having been proved and if the overtact is not accepted as having been proved, there is no question of convicting the person for conspiracy of the same.

9. It is true that out of the same transaction and from the same judgment, one of the accused person remained convicted, but that is because of non-challenge on his part. Once the order is challenged, its legality has to be examined and if it is found that there is an error of law, that order has to be set aside. The Court considered that the benefit of findings of this judgment can also be extended to the original accused No. 2. However, in view of the fact that he has already served the sentence by choosing not to challenge the said order, the same is not extended to him.

10. In the light of the foregoing discussion, this Court is inclined to accept this revision application. The judgment and order dated 10th January, 1994 passed by the learned Additional Chief Metropolitan Magistrate, Ahmedabad, in Criminal Case No. 407/1990 and also the judgment and order dated 19th January, 2000, passed by the learned Additional City Sessions Judge, Court No. 19, Ahmedabad, in Criminal Appeal No. 8/1994, are hereby set aside, and the revisionist-accused is acquitted of the charges levelled against him. Rule is made absolute. Bail bond stands cancelled.