

(1985) 06 KL CK 0010
In the High Court Of Kerala
Case No : Order

Assistant Collector of Central Excise

APPELLANT

Vs

Kallatra Abdul Khader Haji and Others

RESPONDENT

Date of Decision : 13-06-1985

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 162, 313, 452, 517
Customs Act, 1962 — Section 108, 111, 123(2), 126, 135
Essential Commodities Act, 1955 — Section 7(1)
Evidence Act, 1872 — Section 24, 25

Citation : (1985) 6 ECC 10 : (1986) 6 ECR 267 : (1987) 32 ELT 479

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : M.N. Sukumaran Nayar, N.A. Muraleedharan, B. Raman Pillai, K.K. Dinesan and Sunny Varghese, for the Appellant; T.P.K. Nambiar, P.G. Rajagopalan, P. Devakikutty, Johnson Mathes and Babu Varghese, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—The Assistant Collector of Central Excise, Special Customs Preventive Division, Kozhikode, the complainant in C.C. 386 of 1978 on the file of the Judicial Magistrate of the I Class, is the appellant. That complaint was filed against 9 accused for an offence punishable u/s 135 of the Customs Act, 1962 hereinafter referred to as "the Act". By judgment dated 27th February, 1981 the Magistrate acquitted all the accused and in the judgment the Magistrate also made provision for release of the material objects u/s 452 of the Code of Criminal Procedure, hereinafter referred to as "the Code". Accused 1 to 3 and 6 to 8 are respondents 1 to 6 in the appeal and the State is the 7th respondent. After filing of the appeal, the first respondent, who was the first accused before the trial Court, expired. So also during the pendency of the proceedings before the trial Court, 5th accused expired. Accused 4 and 9 are absconding and the trial as against them has been split up and included in the register of long

pending cases. Therefore, in this appeal, I am concerned only regarding the case against accused 2, 3 and 6 to 8.

2. The allegations as disclosed from the complaint are briefly as follows : On 21st March, 1974, the Customs Preventive Staff at Kasaragod was having patrol duty in the night, on getting information that silver was being attempted to be exported illegally out of India. The Preventive Staff was patrolling in a hired fishing boat near the Nileswar coast. While they were about 4 kilometres away from the coast, at about 2 a.m. in the night between 21 and 22nd March, 1974 they saw two mechanised boats docked side by side within the territorial waters of India. They were found transacting some business. On seeing the patrol party, one of the boats moved towards the outer sea and the other towards the coast. The boat that moved towards the outer sea was an Arab vessel and the prosecution case is that it was there for the purpose of collecting silver taken in the other boat.

3. The preventive staff chased the Boat which was moving to the coast. Even after revealing identity of the Preventive Staff and even after repeated requests, the boat did not stop but moved with high speed. Finally they were able to stop the boat only after successive firing. On inspection, 86 silver ingots were found in the boat. The boat is known by the name "Ayisha" and accused 3 to 7 were the persons who were inside the boat and who manned the same. On questioning them they said that the silver ingots were being carried by them in the boat at the instance of accused 1 and 2 for being handed over to the Arab boat. The total weight of the silver ingots was found to be 249 kilograms and 100 grams worth Rs. 30,96,448. The silver was got assayed and found to be 96 percent pure. It was the 8th accused who arranged the crew for transporting silver in the boat. Jeep and driver were provided by the 2nd accused for the illicit transport to the boat. Accused 3 to 7 were members of the crew in the boat which carried the silver for export at the instance of accused 1 and 2. 9th accused was the driver of the jeep.

4. The Magistrate found that the prosecution was not able to prove the guilt of the accused who were tried before him. Hence they were acquitted. The Magistrate found that the Jeep MHY 3288 was not at all involved in the commission of offence and on the further finding that its confiscation was illegal, he, purporting to act u/s 452 of the Code, ordered release of the jeep to its registered owner or the person who, proves himself to be entitled to possession. The acquittal of the accused and the order for release of the jeep were the subject-matter of serious challenge by the appellant. Many of the reasonings, observations, conclusions and findings in the judgment were also subjected to very serious criticism. After hearing both sides and perusing the evidence and the judgment, I feel myself hesitant to say that the attack is not justified.

5. There are certain facts not disputed. On the particular night PW3 along with other Preventive Staff were patrolling in a boat. They chased and stopped the boat "Ayisha". Accused 3 to 7 were the members of the crew in the boat. The

boat contained 86 silver ingots. They were carried in the boat for illegal export. The entire silver and the boat were seized by the Customs party. These facts were proved by PW3 and to a certain extent PW1 also. The above facts are not disputed and they were found by the Magistrate also.

6. Though the prosecution case is that the 1st accused was the owner of the silver and the entire illegal transaction as arranged for him and at his instance, his involvement and the evidence relating to it need not be considered since the case against him has abated with his death. That is the case with the 5th accused also. Since accused 4 and 9 are absconding, we are concerned in this appeal only with the following points.

(a) Whether the 2nd accused is involved in the offence by arranging transport of the silver in his boat and by making further arrangements for transport into the Arab vessel?

(b) Whether the 8th accused is involved in the crime by arranging crew for the boat.

(c) Whether accused 3, 6 and 7 are involved in the offence by acting as crew of the boat "Ayisha" and knowingly transporting the illicit silver for export? and

(d) Is the order passed by the Magistrate purporting to be u/s 452 of the Code for release of the jeep sustainable?

7. These points are noted not for the purpose of dealing with them in the order in which they are arrayed above. I shall first deal with the general attack against the judgment with particular stress to the order for disposal of the jeep. The points regarding the involvement of accused 2, 3, 6, 7 and 8 will be dealt with thereafter. I am doing so because very serious criticism not conducive to the image of the judiciary came up while dealing with the way in which the Magistrate dealt with the various points and I was in a position to discard those criticisms as totally baseless.

8. As earlier stated by me the prosecution case relating to the jeep MHY 3288 and the involvement of the 2nd accused is this. 2nd accused is the brother-in-law of the 1st accused, who owned the silver and arranged to export it illegally by evading duty. 2nd accused connived for that transaction by making arrangements including transport of the silver in the above jeep belonging to him for being carried to boat "Ayisha". Actually the silver was transported into the said boat in the jeep.

9. Whatever be the purpose or motive, whether it be to disown liability for the crime or otherwise, none of the accused including the 2nd accused owned the jeep. All of them denied having anything to do with the jeep including ownership, possession or right to possession. The jeep was seized from the workshop of PW4 and it was ordered to be confiscated. It is within the competence of the Customs Authorities to order confiscation. Section 126 of the Act provides that the confiscated goods shall thereupon vest with the Central Government. Thus

this is a case in which the jeep MHY 3288, by the order of confiscation, vested with the Central Government. The Act provides remedy for the persons affected by the order of confiscation to file an appeal. So far nobody including any of the accused or strangers laid claim to the jeep before the Magistrate. Nobody filed appeal under the provisions of the Act against the confiscation order also. Thus the jeep remains as a no man's property which has legally vested in the Central Government and the confiscation has become final.

10. The judgment does not show that any accused or any stranger claimed disposal of the jeep u/s 452 of the Code or otherwise.. If such a claim was made and argued it would have been so stated in the judgment and the complainant would have objected also. If so, the contentions and arguments would have found a place in the judgment. It is clear from the judgment that the order for disposal of property was made in the judgment suo moto without any motion for that purpose made in Court from any source. So also the order was made with full consciousness of the confiscation. The impugned portion of the judgment containing the order for disposal of the jeep reads thus :

"Coming to jeep number MHY 3288 it is to be noted that there is no evidence in the case to show that it was concerned in any way in the clandestine (transaction). It was seized from the workshop of PW4. It has got registration. It has been confiscated by the Customs Authorities. As there is nothing to connect it with any illegal transaction I think the confiscation is illegal. This Court is competent to order regarding disposal of the properties involved in the case u/s 452 of the Cr.P.C. even after the same has been confiscated by the Customs authorities. In the circumstances the jeep number MHY 3288 will be given to its registered owner or to the person who proved to be entitled to be in possession."

11. Involvement of the jeep was a matter covered by statements recorded u/s 108 of the Act produced in the case including Exts. P16 and P17. When that matter was not argued before him and when the legality of the confiscation or claim for custody were not matters raised before him there was no reason or occasion for the Magistrate to find that the confiscation is illegal. Section 452 of the Code provides for disposal by destruction, confiscation or delivery. If disposal is by delivery, it must- be "to any person claiming to be entitled to possession thereof or otherwise". Here there is no such person, who claimed the jeep. That is clear from the order of the Magistrate itself. The Magistrate himself was not sure to whom custody was to be given. He was not aware as to who is the registered owner or who is the person otherwise entitled to possession because no such claim was there before him. But still the magistrate provided for disposal to some person whose identity is to be decided later by saying that it may be given to the registered owner or the person who proves to be entitled to possession. This is not a case where even without a request the Magistrate was compelled to dispose of the property in order to avoid the contingency of it being kept in the custody of the Court and get destroyed. The jeep was with the Government in which it vested. If the bona fides of such a disposal is disputed it

cannot be said to be baseless.

12. Section 452 of the Code contains a general provision relating to disposal of property at the conclusion of a trial. It is the general rule of construction that a special provision in a special statute will override the general provision when the Court is dealing with a matter concerning the special statute. Otherwise the special provisions will be rendered superfluous and meaningless. Legislature makes such special provisions in its wisdom to be followed in cases relating to the special statutes. In such cases it is not for the Courts to ignore the special provisions and resort to the general provisions. This question came up for consideration in Abdul v. State of Kerala 1979 KLT 189. Though that case related to the provisions of the Essential Commodities Act, the principles stated is a general one applicable in cases of other similar statutes also. If so it must be applicable to the case in hand which deals with an offence under an Act which contains special provisions. In Abdul's case 1979 KLT 189, Subramonian Poti, J., as he then was, observed :

"The provisions of Section 452 of the Code corresponding to Section 517 of the repealed Code of 1898 is a general provision concerning disposal of property. Section 7(1) of the Essential Commodities Act is the provision made with reference to that Act and therefore evidently in regard to prosecution under the Act it is the said provision that should govern in the matter of forfeiture. To import the provision in Section 452 despite Section 7(1)(b) would not be justified as the provision in Section 7(1)(b) would then be rendered a superfluity. Even otherwise it is a general rule of construction of statutes that a special provision will override the general provision and the provision in special enactments must have overriding application unless it be that the circumstances point to the need for application of the provisions of the general enactment in the particular case."

13. The provision for disposal of the jeep in the judgment is, therefore, out of place, uncalled for, unwarranted and illegal. It requires to be set aside and I do so. If so, the order for confiscation will stand.

14. Smuggling is an activity which affects the nation as a whole and jeopardises the economy of the country at the expense of enriching those who are engaged in the activity. Smugglers, just like Abkari contractors or even more than them, are rich and influential. It is not an easy task to face them especially in the sea. The Customs Officers were roaming about in the sea during late hours in the night, even risking their lives, for safeguarding the economy of the country. I do not mean to say that even if it is proved that the committed irregularities or illegalities in the discharge of their official duties, the Courts should shut eyes and keep silent. But while expressing opinions about their actions the Courts are expected to be within the limits of sobriety and propriety, having due regard to the evidence. Remarks by Courts will have the effect of exposing them to various actions including departmental proceedings. In such proceedings due weight will be given to remarks and opinions expressed by Courts. It will be unfair and uncharitable to expose them to such risks by making light-hearted remarks

especially when such remarks are not fully justified by the evidence and circumstances. I said so because certain remarks of the Magistrate against them are, in my opinion, wholly unsupported by the evidence and beyond the limits of propriety. I am citing only one instance. Exts. P11 series to P14 series are bills and receipts seized from a petrol bunk as if they relate to jeep MHY 3288. These records were proved through PW6. Some of the bill and receipts contained number of the jeep and name of the owner also. It has to be remembered that PW6 admitted Ext. P17 statement given by him to the Customs Officers u/s 108 of the Act. But he denied the contents in the box, evidently to help the accused. To a leading question in cross examination, he gave an answer in the affirmative when he was asked whether some of the entries in Exts. P11 to P14 were made by him at the instance of the Customs Officers. Normally nobody would swallow what PW6 said. But the Magistrate accepted his versions and remarked "Exts. P11 to P14 are suspicious". "They are the purposeful manipulations of the Customs Officers as has been admitted by PW6". According to me, this is an unwarranted remark.

15. Accused 3, 6, 7 and 8 respectively gave Exts. P2, P5, P6 and P7 statements u/s 108 of the Act to the Customs Officers. There is nothing on record to show that these statements were retracted, But the Magistrate proceeded on the assumption that these statements were retracted and the record evidencing this fact are missing in the case records. If so he ought to have enquired into the matter and traced out the records. He over-looked the fact that even if they were retracted, belated retractions will not be of much value because it could only be taken as the result of afterthought or advice. In fact there was no retraction and if at all there was retraction it 313 of the Code.

16. Accused 3, 6 and 7 were among the crew in the boat "Ayisha" which carried the illicit silver worth lakhs of rupees for being carried to the Arab vessels and this fact was not seriously disputed also. PW3 saw this boat and the Arab vessel docked side by side in the sea and some attempts being made to transport something. From his evidence it is further seen that on seeing them the Arab vessel moved fast into the outer sea and the boat "Ayisha" to the coast. When they chased "Ayisha", it moved faster. Requests for stopping the vessel after revealing their identity only resulted in the boat "Ayisha" increasing the speed in an attempt to escape. First rounds of firing also did not help in getting the speed reduced. Repeated firing alone could persuade stopping of the vessel fearing dire consequences. If the crew was not conscious of the illegal activity, it was not at all necessary to speed up the vessel in order to escape from the customs party. Finally when the vessel was inspected and seized, it was found to contain 86 silver ingots worth lakhs of rupees. The mahazar was prepared in the presence of PWs 1 and 3. These facts are not disputed and they are clearly indicative of the fact that accused 3, 6 and 7 consciously committed the crime. They gave Exts. P2, P5 and P6 statements u/s 108 of the Act admitting these and other facts. There is nothing to show that these statements were given under inducement, threat or promise from any person in authority. These statements were not

retracted also. But when questioned on the evidence u/s 313 of the Code they said that at the instance of somebody not known to them they transported the goods believing them to be lead ingots and they became aware of the smuggling activity and the identity of silver only after seizure. Any reasonable man of ordinary commonsense and prudence, much less an experienced Magistrate, will only consider this to be a cock and bull story which came at a belated stage as a result of advice. But the Magistrate coolly accepted this as a possible version in order to accept the explanation for the purpose of exonerating them on the ground that they consciously did not commit any offence. The Magistrate in this respect ignored the presumption available under the Act also. Suffice to say that the disposal of the case is far from convincing.

17. I do not think it necessary for me to consider points (a) and (b) raised in Para 6 above, in view of the submission made by the counsel for the appellants at the time of arguments that the complainant was not able to make out a case for conviction against accused 2 and 8 in spite of the scanty evidence on record. I think the counsel is correct in his concession which is justified by the evidence. There is no oral evidence implicating the 2nd accused. PWs 1 and 3 have no direct knowledge regarding his involvement. The statement u/s 108 of the Act alleged to have been recorded from him was not produced and proved. The only documentary evidence implicating him are Exts. P16 and P17 statements u/s 108 of the Act given by PWs 4 and 6. PWs 1 and 3 have not spoken to these statements and PWs 4 and 6 disowned the contents in the box, but they were not declared hostile and cross-examined.

18. PWs 1 and 3 have no direct knowledge regarding the complicity of the 8th accused also. The only evidence against him are Exts. P2, P5, P6 and P7. Exts. P2, P5 and P6 are only statements of co-accused which cannot be taken as substantive evidence. They could be used only for corroborating substantive evidence, if any. Barring these items, there is only Ext. P7, the statement given by the 8th accused himself u/s 108 of the Act. Without any other evidence, it may be unsafe to rest conviction solely on Ext. P7. The presumption under the Act also, therefore, cannot be availed of against the 8th accused.

19. Then remains only the question of accused 3, 6 and 7. As against them, there is ample evidence. I have already discussed the evidence of PW3 based on his direct knowledge. Even though PW1 has come to the scene only after the seizure, there is his evidence also supported by the mahazar and the evidence of PW2 who assayed the silver. Then there are Exts. P2, P5 and P6 statements of accused 3, 6 and 7 respectively u/s 108 of the Act supported by the evidence of PWs 1 and 3. I have also stated that these statements were not retracted and the belated explanations in the statement given u/s 313 of the Code are not acceptable.

20. The complaint is for an offence punishable u/s 135 of the Act. So far as accused 3, 6 and 7 are concerned the offence will come u/s 135(1)(b). It is enough if they acquired possession of or were in any way concerned in carrying,

removing, harbouring, keeping etc., or in any other manner dealing with any goods which they knew or had reason to believe are liable to confiscation u/s 111. The evidence amply shows that they had not only reason to believe, but they actually knew that the silver which they carried was for illicit export out of India and was liable to confiscation u/s 111.

21. The statements given u/s 108 are relevant u/s 138B of the Act. The objection that the statements given u/s 108 of the Act are hit by Section 162 of the Code or Sections 24 and 25 of the Evidence Act cannot stand. They are not hit by the provisions of Article 20(3) of the Constitution also. There is no acceptable evidence to show that there was any inducement, threat or promise from any person in authority. This is clear from the evidence of PWs 1 and 3 and the further fact that Exts. P2, P5 and P6 were not retracted at any point of time in the near future or otherwise. Customs Officers are not Police Officers within the meaning of Section 25 of the Evidence Act. Statements were given in the course of enquiry under the Act by the Officers, who cannot be treated as Police Officers. Even a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. The proceedings taken by the Customs Officers are for the purpose of holding an enquiry into the suspected cases of smuggling. For all practical purposes, they are only Revenue Officers. They can only file complaints before the Magistrate. Until a complaint is filed by them, the person or persons against whom they hold the enquiry will not stand in the position of persons accused of offences. These propositions are well established by ever so many decisions and it is unnecessary to quote authorities for that purpose;.

22. Further the prosecution is entitled to rely on the presumption available u/s 138A of the Act. Section 138A of the Act reads as follows :-

"138A. Presumption of culpable mental state. -

(1) In any prosecution for an offence under this Act which requires a culpable mental state on part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the Act charged as an offence in that prosecution.

Explanation. - In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe a fact.

(2) For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

For the purpose of any prosecution under the Act if a culpable mental state on the part of the accused is required, the section authorises the Court to draw the presumption regarding such existence. The burden of proof is cast on the accused to disprove the same. This is against the normal presumption available in a criminal case. But the Court is entitled to give the prosecution the advantage

of that presumption. It is true that the presumption is a rebuttable one. When the presumption of culpable mental state is drawn under that provision that presumption includes intention, motive, knowledge, belief as well as reason to believe. The presumption could be deemed as rebutted only if the proof is beyond reasonable doubt. Going by these provisions, it cannot be said that the accused were able to discharge the burden cast on them. On a consideration of the entire evidence and circumstances, I am of opinion that the evidence established beyond doubt that accused 3, 6 and 7 committed the offence punishable u/s 135 of the Act for which the complaint was filed against them. The acquittal of these accused by the Magistrate will have to be set aside and to that extent the appeal is allowed and the acquittal of accused 3, 6 and 7 are set aside.

23. Accused 3, 6 and 7 (respondents 3, 4 and 5) were heard on the question of sentence. It was argued that they were only labourers employed by the main culprits for the purpose of transporting smuggled goods. I was also told that they are the only earning members of their family. It is true that accused 3, 6 and 7, even according to the prosecution, had no ownership in the goods and they were acting only as labourers of the main culprits. The main culprits have escaped conviction. Evidently, this is not a case to which Sub-section (2) of Section 123 applies. No. notification was brought to my notice by which Sub-section (2) of Section 123 was made applicable to silver which is the subject-matter of this case. Therefore the provisions of Sub-section (1)(i) of Section 135 of the Act are not applicable. They are liable to be sentenced only u/s 135(1)(ii). The sentence provided is imprisonment which may extend to three years or fine or both. Taking the entire facts and circumstances into consideration, I think that simple imprisonment for a period of three months each will meet the ends of justice. Therefore, accused 3, 6 and 7 (respondents 3, 4 and 5) are each convicted u/s 135 and sentenced to undergo simple imprisonment for a period of three months each. The trial Court will take steps for executing the sentence.

For the reasons stated above in the body of the judgment, the order for disposal of jeep MHY 3288 made by the Magistrate is set aside. The customs authorities will be free to proceed against the jeep on the basis of the confiscation ordered by them.