(1990) 11 BOM CK 0029

In the Bombay High Court

Case No : Criminal Appeal No. 221 of 1983

Assistant Collector of Customs APPELLANT

Vs

Srikant Vinayak Harsha RESPONDENT

Date of Decision : 22-11-1990

Acts Referred:
Customs Act, 1962 — Section 107, 108, 135, 138A, 138B

Citation : (1991) 53 ELT 229

Hon'ble Judges : R.G. Sindhakar, J

Bench : Single Bench

Advocate : Shri A.R. Gupta, Mr. K.H. Chopda, Addl. P.P, for the Appellant;

Judgement

1. This is an appeal filed by the Assistant Collector of Customs, Rummaging and Intelligence, Bombay, against an order of acquittal passed by the Additional Chief Metropolitan Magistrate, 8th Courts, Esplanade Bombay, on 12th July 1982, in Case No. 35/CW of 1980. The accused, four in number, were charged with offence u/s 5 of the Import and Exports (Control) Act and Section 135(1)(a)(ii) of the Customs Act. The charge was that on 15th March 1977, the Respondents along with accused No. 1 Bhatia (who has been absconding since the date of the offence) attempted to export out of India, 17 reels of a feature film "Geeta Mera Naam" valued at Rs. 13,000/- without an export licence and thereby committed breach of Export (Control) Order. They were also concerned in a fraudulent evasion of the prohibition imposed under the Imports and Exports (Control) Act which is also punishable u/s 135(i)(ii) of the Customs Act. The prosecution case has been stated in detail by the learned Additional Chief Metropolitan Magistrate in his judgment and it is not necessary to report the same. It could be briefly stated thus :

On the date in question, Customs Officer Shri Reedy noticed P.W. 12 Merchande, a loader of Air India, putting a blue-colour suitcase on the conveyer belt and the suitcase did not bear any chalk mark of the customs showing that it was checked by the customs. He, therefore, contacted Merchande who told him that he was loader and accused No. 4 had directed him to do so. Further enquiries led to the off loading passenger Abdul Aziz, but on enquiry he was allowed to go and continue his journey to Dubai. Accused Nos. 2 and 3 were traced at the instance of accused No. 4 and they led to the residence of accused No. 1 where some empty tins of film were recovered. It so happened that the suitcase on being opened, was found to contain 17 reels of Hindi feature film ''Geeta Mera Naam'' without the tin, wrapped in brown colour paper. The usual enquiry by the Department of customs was made and ultimately the Respondents came to be prosecuted on the charge stated above. The learned Additional Chief Metropolitan Magistrate recorded the evidence adduced on behalf of the prosecution since the accused pleaded not guilty to the charge. He found ultimately that the case against none of the accused was satisfactory proved and, therefore, acquitted them.

2. Aggrieved by this order, the present appeal has been filed. Though served, the Respondents have not appeared and I have heard the learned Counsel Shri Gupta appearing on behalf of the applicant.

3. The appeal had been filed and leave had been granted by this Court on 26th April 1983. The learned counsel for the appellant urged that the learned Magistrate did not approach the evidence properly and that had led to the acquittal as a result of which there has been a miscarriage of justice. Short point, therefore, arises is whether the order of acquittal calls for interference in the appeal.

4. It has to be noted that this is an appeal against the order of acquittal and normally this Court does not interfere with the order of acquittal passed in an appeal unless it is found that the judgment is perverse and no court could have taken the view which the trial Magistrate has taken.

5. In this case what is not disputed is the recovery of the suitcase containing 17 reels of the film "Geeta Mera Naam" and does not appear to be a dispute that it is the accused persons who have conspired to smuggle them out of this country without the permission.

6. The evidence consisted mainly of the statements of accused Nos. 2, 3 and 4 recorded by the Customs Officers. It may be stated at this stage that accused No. 1 was never traced since the inception and, therefore, could not be tried and has been shown as absconder. The evidence of Reddy and Somdatta coupled with that of Superintendent Kamble did go to show that suitcase was recovered and had contained film reels "Geeta Mera Naam". The evidence of Reddy goes to show that he saw Merchande putting the suitcase on the conveyor belt in the customs and that it could be seen from the suitcase that it was not cleared by the customs authorities. It is evident from the evidence of Merchande that he knew fully well that it was a suitcase of an additional passenger who had checked in at a last minute and whose baggage required clearance of the customs. In spite of this, he was admitting that he was loading it on the conveyor belt for

being carried to the Aircraft. He, therefore, in my view, was a party to the conspiracy if at all it was so hatched by accused Nos. 1 to 4. His evidence is, therefore, that of an accomplice at any rate and could itself be tainted evidence requiring obviously corroboration. The learned counsel for the appellant tried to seek support to the statement recorded by the Customs Officers from this evidence of Merchande. In my opinion, it could not be done because Merchande''s evidence itself would require support and the statements recorded by the Customs Officers cannot stand on their own because they were retracted by the makers. It is not necessary to state that the retracted statements themselves require corroboration before they are acted upon. Not much, therefore, would turn upon the evidence of Merchande. The prosecution case so far as accused No. 4 was concerned was that he told Merchande to load it and on that point, as stated earlier, there is a confessional statement of accused No. 4 which has been retracted and the evidence of Merchande, therefore, on that point cannot be said to have been satisfactorily established. The suitcase was collected from the Left Luggage Counter with a tag and that evidence could be accepted. The statement of accused No. 4 was that it was Abdul Aziz who asked him to collect it and bring it to the checking counter and accordingly he did it for the payment of Rs. 5/-. On this point all that is against him is his own statement before the Customs Officer which as has been stated earlier was retracted. There is evidence to show that Miss Bindu, the Traffic Assistant, has checked in the baggage and she was shown the baggage card. It is she who had issued that card. Considering the evidence of this witness, it is clear that the suitcase was brought to the customs checking room after it was received by Miss Bindu. The learned Counsel for the appellant submitted that there were only two baggages and the suitcase was not checked in by Miss Bindu. However, it is difficult to accept it in view of the fact that the baggage card was there on the suitcase.

7. It is pertinent to note that Abdul Aziz has not been examined and the reasons assigned by the learned Counsel for the appellant was that it was not necessary to do so in view of the provisions of Section 138B of the Customs Act. It is true that the statement made and signed by the person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains when the person who made the statement is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be contained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable. "It is was argued that he is in Dubai and to call him all the way from Dubai to give evidence would entail a delay and/or expense which under the circumstances of the case would be unnecessary. The learned Magistrate has also criticised the prosecution for not examining Abdul Aziz and keeping him in back from the Court and asking the Court to rely upon his statement recorded by the customs authorities. In fact accused No. 4 pointed out by finger this Abdul Aziz in whose name the baggage was checked in and he

was also offloaded and his statement that he was not concerned with the baggage was found to be accepted by the Customs authorities. In the circumstances, in my opinion, and that was also the view of the learned Magistrate, it was incumbent upon the prosecution to examine him. It has not been shown that he was in fact in Dubai at the time when the trial was proceeding. Even assuming it was so, the expenses that would have been incurred for citing him as a witness could not be considered to be unreasonable in the circumstances of the case where the prosecution case depended upon his evidence. In my view, therefore, the leaned Magistrate was right in blaming the prosecution for not examining Abdul Aziz.

8. It has to be noted that Abdul Aziz was a passenger who had come in at the last minute and succeeded in getting the ticket with the assistance of, and that is the case of the prosecution, accused Nos. 2 and 3. It is they who wanted this suitcase to go to Dubai because of the request made by the accused No. 1 to that effect. It is, therefore, very likely that Abdul Aziz who could travel by the flight with the assistance of these two persons, would have in turn agreed to carry the suitcase with him. On learning that it contained some contraband, he was bound to disclaim that particular suitcase.

9. It is again worth noting that the suitcase had to be claimed by someone at Dubai and it could not have been claimed by any one other than the passenger Abdul Aziz in whose name it was checked in. Therefore, it became extremely difficult to see how the prosecution could dispense with the evidence of Abdul Aziz. In the circumstances, the prosecution could not have taken resort to the provisions of Section 138B. Probably the case with regard to Raju might be slightly different, but his evidence was not that material in the circumstances of this case.

10. The learned Counsel for the appellant submitted that the approach of the learned Magistrate was not in accordance with law. I am unable to see where the learned Magistrate has gone wrong. He has dealt with the direct evidence. He has also dealt with the statements recorded by the Customs authorities of accused Nos. 2, 3 and 4. He was rightly of the view that before they are acted upon as confessions, they should be found to be true and voluntary. Once he found that they were retracted by the makers, he was of the view, and again in my view rightly, that they should be corroborated before they are acted upon. He took the correct view that the retracted confessions of co-accused cannot be made use of against another accused. In the circumstances he was also of the view that the confession of co-accused is not made relevant u/s 138B of the Act, so that it could be made use of and relied upon. After bearing in mind this principle he approached the evidence and dealt with it. He was not inclined to accept the statements containing confession of accused persons even after considering the other evidence led and, therefore, did not hold the Respondents guilty. The said judgment of acquittal therefore, cannot be said to be perverse. It cannot be said that no court could have taken the view which the learned

Magistrate took.

11. It is true that the prosecution evidence shows that 17 empty tins, 14 of them bearing name of the film ''Geeta Mera Naam'' were recovered from the house of accused No. 1. The contention was that accused Nos. 2 and 3 themselves pointed out the residence of accused No. 1 from where this recovery was made. The argument advanced was that this lent corroboration to the statements of accused Nos. 2 and 3 and also corroborated the prosecution version. It was, therefore, argued that the failure on the part of the learned Magistrate to refer to this evidence and deal with it was not correct. It is not that he was not aware of this piece of evidence. In para 13 of his judgment at the end, the learned Magistrate has made a reference to it. It is true that while dealing with the evidence, he says that the only evidence against these two persons is the statements made by them to the Customs authorities. However, I do not think that this has affected the ultimate conclusion reached by the learned Magistrate. In this connection, a decision of the Supreme Court in the case of Hem Raj Vs. The State of Ajmer, was relied upon. The observations of the Supreme Court to the following effect were referred to :-

"The contention that a confession can only be corroborated by evidence discovered by the police after a confession has been made and any material that is already in their possession, cannot be put in evidence in support of it, is not valid. A confession can be made even during a trial and the evidence already recorded may well be used to corroborate it. It may be made in the court of the committing magistrate and material already in possession of the police may well be used for purposes of corroboration."

It was, therefore, urged that the discovery of 17 empty tins though prior to the recording of their statements would be made use of. As already stated above, this solitary circumstance could not have lent assurance to the confession statement making that confession statement true as well as voluntary and on which conviction should have been based.

12. Another decision in the case of Percy Rustomji Basta Vs. State of Maharashtra, was also referred to. It re-emphasises the proposition that the "Customs Officer making inquiry u/s 107 or Section 108 of Customs Act is not a police officer and person against whom inquiry is made is not an accused person. Statement made by such person in that inquiry is not a statement made by a person accused of any offence."There is no dispute raised in this behalf. A third decision of the Gujarat High Court in the case of Union of India v. Kanchanlal Trikamlal & Ors. reported in 1977 GLR 289 was referred to. It has explained the implication of Section 138A of the Customs Act.

13. Considering, therefore, the facts and circumstances of the case, it cannot be said that the learned Magistrate has taken a view which could be styled as perverse. He has taken one of the views which could have been taken on the basis of the material on record in the light of the provisions of law and, therefore,

I do not think, sitting in appeal against the order of acquittal, I should interfere with that order of acquittal. The appeal, therefore, fails and is dismissed and the order of the learned Addl. Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay, dated 12th July 1982 is confirmed.

