(1994) 02 MAD CK 0076

In the Madras High Court

Case No : Criminal Appeal No. 632 of 1988

Assistant Collector of Customs, Madras — APPELLANT

Vs

A. Narayana Pillai — RESPONDENT

Date of Decision : 18-02-1994

Acts Referred:
Customs Act, 1962 — Section 123, 135(1), 138A

Citation : (1994) 71 ELT 673

Hon'ble Judges : Bellie, J

Bench : Single Bench

Advocate : Mr. P. Rajamanickam, Central Govt. Public Prosecutor, for the Appellant; Mr. A. Abdul Ghani, for the Respondent

Judgement

1. This Criminal appeal against acquittal is filed by the Assistant Collector of Customs. Three persons were prosecuted for an offence u/s 135(1)(a)(i) of the Customs Act before the Additional Chief Metropolitan Magistrate, Madras by filing a private complaint. Of them Accused 2 and 3 were discharged and the case was proceeded as against the first accused alone. The trial court viz., Additional Chief Metropolitan Magistrate, Madras convicted the first accused and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000/-. Against this the first accused filed an appeal. The Principal Sessions Judge, Madras who heard the appeal found him not guilty and therefore he set aside the Judgment of the trial court and acquitted him. As against this order of acquittal the Assistant Collector of Customs has filed this appeal.

2. The case of the prosecution is that the appellant - first accused arrived at Madras Air Port from Singapore on 25-2-1986 by an Air India flight. He brought two brief cases - M.Os. 1 and 3. P.W. 1 Air Customs Officer found the handles of the two brief cases heavy, and on examining them he saw one of them containing six gold bits (M.O. 2 series) and the other containing four gold bits (M.O. 4 series). The gold bits totally weighed 510 grams and most of them were having foreign marks. P.W. 1 seized them under a mahazar Ex. P1.

3. A statement Ex. P3 was obtained from the first accused in which he has stated inter alia that the two brief cases and a suit case belonged to one Kumar who was the younger brother of one Janarthana Iyer, both of Sreekandeswaram, Trivandrum, and on an earlier occasion the first accused had gone to Singapore along with Janarthana Iyer and having stayed there for 7 - 8 days returned to India; then in 1986 he happened to meet the brother of Janarthana Iyer viz. Mr. Kumar who invited the first accused to Singapore telling him that he (Kumar) would meet the to and for expenses and it would be enough if the first accused handed over the cloths and other things that would be given to him there to Kumar''s friend in India. Then when the first accused met Kumar at J.K. Travels, Kumar told him that he had taken a ticket for him and handed over it to his brother Janarthana Iyer; upon that the first accused went to Trivandrum and got the ticket from Janarthana Iyer : with the money given by Janarthana Iyer he obtained 500 American Dollars from bank; at Madras he purchased another 20 American Dollars with the money given by Janarthana Iyer, and then he went to Singapore; at Singapore he met Kumar who had already gone there; first accused gave Kumar 520 Dollars given by Janarthana Iyer; Kumar told on 24th that he had purchased all items of things and he must get ready to go to Madras; Kumar gave two brief cases, one suit case and a plastic bag to be taken to Madras. Kumar told him that there was one Funai Video Cassette Player and other items valued at 400 Singapore Dollars and he should inform the Customs authorities accordingly and his friend to whom the first accused had been already introduced at Madras would meet him at the Air Port and he would pay the amount for paying Duty; he came to Madras with the said brief cases and other things; at the Air port he declared one V.C.P. and the other things worth about 350 Singapore Dollars; for that the Customs Officer gave a Customs Duty Bill for Rs. 4,600/-; then the first accused met Kumar''s friend there and from him he got Rs. 4,600/-, and paid the duty; but the Customs Officer removed the handles of the brief cases and broke them and ten gold bars were taken from the hallow spaces in the handles of the two brief cases. He was not aware of the gold bits inside the handles of the brief cases.

4. After further investigation of the case and after obtaining sanction for prosecution the Assistant Collector of Customs filed a complaint against the appellant - first accused, and Janarthana Iyer and Kumar as accused 2 and 3.

5. On consideration of the evidence adduced by the prosecution the learned Magistrate has found that no prima facie case has been made out against accused 2 and 3 and therefore he discharged them and the Magistrate framed a charge only against the first accused. Then after the trial was over the learned Magistrate found the first accused guilty of the charge and therefore he convicted and sentenced him as aforesaid, but the Appellate Court acquitted him.

6. Now in this appeal it is contended that the finding of the Appellate Court that the first accused is not guilty is against the evidence and the probabilities of the case, and it is erroneous and therefore the order of acquittal of the Appellate

Court has to be set aside and the first accused be convicted and sentenced.

7. The appellate Court has found that the prosecution has not proved M. Os. 2 and 4 series are gold bits, and further that even if they are gold bits the prosecution failed to prove that the first accused knew or had knowledge that the handles of the brief cases contained gold bits, and thus the prosecution failed to prove that the accused is guilty of the offence with which he is charged.

8. The first finding of the Appellate Court that the prosecution has not proved that M. Os. 2 and 4 series are gold bits is manifestly erroneous. The accused in his statement Ex. P. 3 has clearly stated that the handles of the brief cases were broken by P.W. 1 Air Customs Officer, and he found it to contain gold bits. The evidence of P.W. 1 that the handles contained gold bits has not been challenged. In view of this, the answer given by the accused during his questioning u/s 313 Cr.P.C. that he did not know that M.Os. 2 and 4 series were gold is of no significance and cannot carry any weight. The observation of the Appellate Court that the prosecution has not proved that M.Os. 2 and 4 series are gold by adducing expert evidence is unwarranted in view of the abovesaid admission of the accused himself that they are gold. In fact before me it is not seriously argued on behalf of the accused that M.Os. 2 and 4 series are not gold.

9. But the next finding of the Appellate Court that the prosecution has not proved that the first accused knew or had knowledge that the handles of the brief cases contained gold bits is absolutely correct and that has to be sustained. Even in Ex. P. 3 statement of the first accused he has stated that he did not know that the handles contained gold bits and that if he had known it he would not have brought the brief cases from Singapore to Madras. It is his definite case that the brief cases belonged to Kumar and it was at his behest he (first accused) only carried the brief cases without any knowledge that the handles thereof contained golds bits. As seen above the case has been filed not only against the first accused but it has been filed against accused 2 and 3 also viz. Janarthana Iyer and Kumar.

10. A reading of the complaint given by P.W. 1 clearly shows that Kumar had given a statement to the Central Excise Officials in which he has stated that at the instance of his brother Janarthana Iyer he and the first accused went to Singapore and there he as instructed by his brother Janarthana Iyer met one Saleem and they both purchased gold biscuits, and in Saleem''s house they cut them into ten pieces out of which Saleem concealed six bits in one brief case and the remaining four pieces in the other brief case, and handed over the brief cases to him; this happened on 23-2-1986 and on the same day they purchased some other goods; his brother Janarthana Iyer told him to come to Madras at the earliest but he could get confirmation of only one ticket and he handed over the brief cases to the first accused and sent him to Madras telling him to hand over the gold concealed in the brief cases and the V.C.P. and other goods to one Hussain who would receive him at the Madras Air Port.

11. As per this statement given by Kumar to the Customs Officials it is seen clearly that the brief cases and all the contents thereof belonged to him and not to the first accused. It was because of the statement given by the first accused and Kumar, the said Kumar and his brother Janarthana Iyer also have been impleaded as accused. But somehow Kumar and Janarthana Iyer were discharged. In these circumstances we have to consider whether the first accused knew or had knowledge that the handles of the brief cases contained the gold bits.

12. For an offence under Sec. 135(1)(a) of the Customs Act, as it is clear from the Section, the prosecution must prove that the accused was in relation to the goods in question knowingly concerned in the commission of the offence stated in the section. As for Kumar, it would appear that from the statement given by himself he has committed an offence, but it cannot be said so with regard to the first accused from the statement given by him. As aforesaid he has stated that he did not know that the handles contained gold bits. The statement of Kumar has not been filed and even otherwise it cannot be used against the first accused. As per his (Kumar''s) statement he himself was to come to Madras with the brief cases but since only one ticket could be confirmed he handed over the brief cases to the first accused. Considering all these circumstances, only from the fact that the brief cases were brought by the first accused from Singapore and they were seized from him it cannot be said that he was aware or had knowledge that the handles thereof contained gold bits.

13. It is however argued that u/s 138A of the Customs Act, in any prosecution for an offence under the Customs Act which requires a culpable mental state on the part of the accused, the court shall presume such existence of mental state, and it is for the accused to prove the fact that he had no such mental state, and in this case the Ist accused has not let in any evidence to rebut the presumption. But to rebut the presumption of existence of mental state u/s 138A there need not be direct evidence, and the rebuttal can be gathered from the circumstances in the case. The accused even in his statement Ex. P3 itself has denied the knowledge of the handles containing gold bits, and from the other circumstances in the case there is possibility of his innocently carrying the brief cases at the behest of Kumar without knowing the contents in the handles thereof.

14. The learned counsel appearing for the appellant-Assistant Collector of Customs, would rely on a decision of the Supreme Court in Assistant Collector of Central Excise, Calicut Vs. V.P. Sayed Mohammed, . But on a careful reading of that decision I do not find that that decision would help the appellant in any way. In that case the scope of Section 123 was considered, but that section is not relevant to our case because it relates to the question whether the seized goods were smuggled goods or not, and in our case that the goods seized were smuggled goods is in no doubt, and the question that arises as said above is whether the first accused had knowledge that the handles of the brief cases contained the gold bits. In that case there was evidence showing that the

accused, who pleaded that he was carrying the packet which was found to contain gold bars for another person without knowing the contents of the pocket, secreted the packet, which circumstance implied his guilty mind.

14A. It must be remembered that this appeal is against an order of acquittal, and only because a view different from the view taken by the Court below is possible the appeal cannot be allowed. I find that one of the two grounds on which the Appellate Court found the first accused not guilty is quite reasonable. In this view of the matter the appeal is dismissed.