

(1985) 05 MAD CK 0002

In the Madras High Court

Case No : Criminal Appeal No. 319 of 1980

Assistant Collector of Customs, (Prosecution) Preventive
Department, Madras

APPELLANT

Vs

Dharam Pal Jain

RESPONDENT

Date of Decision : 14-05-1985

Acts Referred:

Customs Act, 1962 — Section 11, 111, 135(1)
Evidence Act, 1872 — Section 106
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (1986) 7 ECC 58 : (1987) 29 ELT 853

Hon'ble Judges : Singaravelu, J

Bench : Single Bench

Advocate : P. Rajamanickam, Central Government Public Prosecutor, for the Appellant; K.A. Panchapakesan, for the Respondent

Judgement

1. This is a appeal against acquittal preferred by the Assistant Collector of Customs, Customs House, Madras against the acquittal of the

respondent in respect of a offence u/s 135(1)(b) of the Customs Act.

2. On 6th June, 1978, the officers attached to the Madras Customs House, on information, searched the godown belonging to the accused which

is situated at No. 1, Narayana Mudali Lane Madras-1, in the presence of independent witnesses. The accused is a partner of O. K. Agencies

occupying the godown. During the search, 776 dozens of table-tennis balls of Chinese origin were recovered and when questioned the accused

produced an invoice dated 4th August, 1976 which covered 950 dozens of table-tennis balls purported to have been issued M/s. Allied Supply

Syndicate of Calcutta. The accused merely showed the invoice and refused to handover the same to the Customs Officers. Accordingly, the 776

dozens of table-tennis balls were seized as they were clearly of foreign origin and since the accused was not a position to account for the same.

Therefore, the Customs Officers held that they were smuggled goods worth about Rs. 14,000.

3. Later, the customs department verified at Calcutta whether the Allied Supplies Syndicate of Calcutta had sold the table-tennis balls to the

accused herein at any time, but the Department found that the name was a fictitious firm and non-existent. The sales tax numbers mentioned in the

invoice belonged to some other company. Therefore, the customs department summoned the accused and interrogated him. The accused gave a

statement that in or about July, 1976, a representative of M/s. Allied Supply Syndicate came to him and booked some orders for supplying 1,000

dozens of table-tennis balls. According to the accused, no receipt was given by the representative. One month later, the accused gave a further

statement that he did not know anything about M/s. Allied Supply Syndicate at Calcutta and that he had no knowledge as to how his vendor

acquired the foreign goods which are prohibited.

4. A show cause notice was issued to the accused and after receiving the reply, the Assistant Collector, Customs passed an order of adjudication

on 16th July, 1979 and confiscated the goods and imposed a penalty of Rs. 2,000. Subsequently, the department followed it up with a prosecution

u/s 135(1)(b) of the Customs Act.

5. The prosecution examined four witnesses and all the four of them are Preventive Officers attached to the Customs House, Madras. The accused

admitted before the trial court the search and the seizure and further stated that he had dealings with M/s. Allied Supply Syndicate at Calcutta.

6. After framing of the charges, two more officers were examined as P. Ws. 5 and 6 who spoke to the statement given by the accused. The

accused stated that the statement was obtained by the customs authorities and that he does not know the contents of the same. The accused then

examined one defence witness as D.W. 1 who is none else then his own clerk.

7. Learned Chief Metropolitan Magistrate held that the prosecution has not proved to the hilt that the goods seized were smuggled ones, but he

came to the conclusion that the mere possession of the foreign articles by the accused was not an offence. Consequently, the accused was

acquitted and hence the appeal against the acquittal by the customs department.

8. Now, the question for determination is, whether there is any compelling reason for interfering with the order of acquittal passed by the lower court.

9. The charge against the accused is u/s 135(1)(b) of the Customs Act for acquiring possession of prohibited goods which the respondent knows

or has reason to believe, are liable to confiscation u/s 111(c) of the said Act. Section 111 of the Customs Act deals with goods which are liable for

confiscation. In particular, any dutiable or prohibited goods found in possession of any person unless duly accounted for, are liable to confiscation.

Now, it is common ground that the respondent herein, namely Dharampal Jain had stored in his godown at Madras 776 dozens of table-tennis

balls of Chinese origin and he was admittedly in possession of the same. The said goods were seized by the customs authorities during the search

on 6th June, 1978. Thus, the possession and seizure of the goods are not disputed. On the other hand, the accused tried to give an explanation that

he had purchased the same under an invoice purported to have been issued by one M/s. Allied Supply Syndicate, Calcutta. The customs

authorities verified the name of the seller at the other end and found that it was a fictitious firm and that the sales tax numbers, etc., found in the

invoice were not assigned to the said firm and that it was clearly a manipulation. The prosecution examined six witnesses on its side. All of them are

officers of the customs department. These officers were examined to prove that the goods were of foreign origin and that they were prohibited

items, that the possession of those articles by the respondent/accused was not accounted for and that the alleged voice covering the goods was a

bogus one. The learned Magistrate held that the table-tennis balls sized in the case are not notified goods u/s 123 of the Customs Act and that

there is no direct evidence to show that the goods have been smuggled.

10. I have heard learned counsel for the customs department and the learned counsel for respondent/accused. I am satisfied that the reasoning and

the conclusion of the trial court are clearly unsustainable and that they required interference in the interest of justice.

11. As already stated the possession and seizure are admitted and the invoice was found to be a bogus one. Admittedly, the respondent had no

permit to import such goods from foreign countries. Though the accused put forward a story that he purchased the goods through a broker, he could not even furnish the name of the broker, let alone the address. Section 3 of the Imports and Exports (Control) Act says that the Central Government may, by order publish in the official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases..... the import and export of goods specified therein. Clause 2 of section 3 of the said Act says that all goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited u/s 11 of the Customs Act. Appendix-2 in Schedule 2, Heading No. 97.04 relates to appliances, apparatus, accessories for sports and outdoor games. Heading No. 97.04 includes equipment for games for adults and children including billiard-tables and table-tennis requisites. Thus, the goods in question, namely table-tennis balls is a banned item under Heading No. 97.04 stated above. The lower court has committed a grievous error in holding that table-tennis ball is not a notified item and, therefore, the prosecution had failed. The lower court has lost sight of the fact that it is a banned item, and when a person is in possession of such a banned item, the presumption under the Act applies and the burden shifts on the person to account for possession of the same lawfully and licitly. On account of this fundamental wrong approach, the lower court has acquitted the accused holding that the prosecution must prove the actual smuggling of goods. Virtually, this is asking for an impossibility, and that is why the Legislature, in its wisdom, has shifted the burden on the accused to account for the possession when once a banned item is found in possession of any person. This is precisely where section 106 of the Evidence Act comes into play and the burden of proving the fact especially within the special knowledge of the accused is upon him. It is futile to expect the prosecutor in a customs offence to prove in what manner and wherefrom the goods arrived on the Indian soil. In this case, the prosecution has proved that the goods are of foreign origin and that the accused had no permit to import the same and, therefore, section 106 of the Evidence Act intervenes and shifts the burden on the accused. Section 3 of the Imports and Exports (Control) Act also raises a presumption against the accused unless it is rebutted.

12. On merits, the prosecution has proved the offence beyond all reasonable doubt. P.W. 1 is a Customs Officer at Madras who has spoken to

the search and the seizure of the goods in question. He found five dealwood cases in the godown belonging to the respondent/accused, and when

they were opened, they were found to contain table-tennis balls of foreign origin. The dealwood boxes are M. Os. 1 to 5 and M.O. 6 series are

the table-tennis balls. P.W. 2 is Senior Grade Officer who assisted P.W. 1, and he has spoken to the invoice shown by the accused said to be

covering the goods, but the accused refused to part with it. The witness has stated that the accused gave a voluntary statement Ex. P. 4 after

consulting his own lawyer. P.W. 3 is another officer of the customs department who has stated that the accused later appeared before him and

gave a voluntary statement in English under Exs. P. 8 and P. 9. He says that he wrote to the Department at Calcutta for verification with regard to

the invoice Ex. P. 2 produced by the accused. P.W. 4 is yet another officer of the customs department who has stated that their counterpart at

Calcutta, after verification, intimated them that there was no company as Allied Supply Syndicate at Calcutta and that the sales tax registration

number given in the invoice was given to some other firm.

13. P.W. 5 is the Superintendent of Customs who has stated that the accused made a statement before him under Ex. P. 8 P.W. 6 is a Preventive

Officer from the Customs House, Calcutta, who made enquiries at Calcutta and found that the Allied Supply Syndicate was a bogus firm and

found that no such Syndicate was existing there. He also enquired the sales tax officials and found that the sales tax number mentioned in the

invoice was not assigned to the fictitious firm. On this evidence, there is absolutely no doubt that this is a clear case of an offence u/s 135(1)(b) of

the Customs Act and nothing further remains to be proved. The accused not only did not explain the origin of the goods, but also gave a false

address with a wrong invoice number which loudly proclaims his guilty conscience. Therefore, the presumption that the goods were smuggled ones,

arises in this case. Of course, the accused examined his own clear whose evidence is not worth discussing. He is still in the service of the

respondent and, therefore, he has to protect his master. Further, in cross-examination, it was elicited that there is no correspondence between the

respondent and Allied Supply Syndicate of Calcutta. He does not know personally about the purchase made by the respondent's company. He

merely made entries in the account books what he was asked to enter. The result is, the presumption under law has not been rebutted to by extent.

On the other hand, the prosecution has examined the negative and shown to the court that there was no such firm as M/s. Allied Supply Syndicate

and has thereby clearly demonstrated that the invoice was a bogus one.

14. One other point deserves mention. It is not as if this is a case of some small item of prohibited goods found in the custody of the accused. A

very large quantity of 776 dozens of table-tennis balls were found in the godown duly covered and packed in dealwood boxes. Obviously, it was

for commercial purpose and not for own use. The value of the goods as on that date was Rs. 13,000 and odd and the possession of the goods

was certainly for trade and business purposes. The result of my discussion is that the prosecution has proved to the hilt that it is a banned item

under heading No. 97.06 of Schedule 4 Appendix 2.

15. Learned Counsel for the respondent has placed before me a ruling of a single Judge of this High court reported in K. Hastimal, In re 1970 L

W Crl 234 for the proposition that the prosecution must prove that the goods were smuggled goods imported into the country without payment of

duty. The said decision was for a proposition that the falsity of the defence cannot be a ground for convicting a person. I am wholly unable to

follow this ruling in view of the ruling of the Supreme Court reported in Assistant Collector of Customs (Prevention) Bombay Vs. Babu Miya

Sheikh Imam and Others, wherein the Supreme Court has clearly analysed the provisions of section 135 of the Customs Act. The Supreme Court

has pointed out that section 135(1)(a)(ii) is divisible into three parts and that the ingredients of the offence u/s 135(1)(a)(ii) should clearly be

satisfied if the case falls within any one of these three parts. The Supreme Court has further observed that each of these three parts is distinct and

independent of the other two, and that the ingredients of one part cannot be projected in the other two parts. The result is, the acquittal of the

respondent is palpably wrong, and therefore, the acquittal of the respondent is set aside and the respondent is convicted u/s 135(1)(b) of the

Customs Act.

16. With regard to the sentence, the offence does not call for mandatory imprisonment, and it is noticed that the goods have been confiscated and the respondent was already fined Rs. 2,000 by the adjudicator. Therefore, sentence of imprisonment is not called for, and in my opinion, a fine of Rs. 2,000 would amply meet the ends of justice. According the appeal is allowed, the order of acquittal of the respondent/accused is set aside and the respondent is convicted and sentenced to pay a fine of Rs. 2,000, in default to suffer R.I. for 3 months. Time 1 month from the date of communication.