

(1960) 03 KL CK 0037

In the High Court Of Kerala

Case No : IN THE HIGH COURT OF KERALA

Bernardo Steenholf Ultrich

APPELLANT

Vs

Assistant Collector of Customs, Cochin

RESPONDENT

Date of Decision : 07-03-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 439
Foreign Exchange Regulation Act, 1947 — Section 23A, 8(1)
Sea Customs Act, 1878 — Section 167(81)

Citation : AIR 1960 Ker 335 : (1960) CriLJ 1455

Hon'ble Judges : T.C. Raghavan, J;M.A. Ansari, J

Bench : Division Bench

Advocate : K.P. Abraham, P.P. John and K.K. Poullose, for the Appellant; K.V. Surianarayana Iyer, General for Respondent No. 1 and Public Prosecutor, for the Respondent

Judgement

Ansari, J.—This petition seeks to vacate the conviction and sentence u/s 167 (81) of the Sea Customs Act, which the District Magistrate, Ernakulam, had passed against the accused, and which has with slight modification been sustained by the Sessions Judge. The petitioner and his wife were travelling from Colombo by the Italian Steamer "M. V. Australia," which they had boarded on October 4, 1958, and the tickets show the port of their disembarkation to be Genoa.

A Voiles-Wagon car was also being carried in the same boat as part of the petitioner's luggage, and had been used by him while he and his wife stayed in Ceylon on their honeymoon. It had been booked through the Automobile Agency, Colombo, for disembarkation at Genoa. The ship that started from Colombo on December 4, 1958, called at the Port of Cochin on December 5, 1958 and on its arrival, the Customs Inspector, Pw. 1, who had some information, went on board, and interrogated the petitioner and his wife to ascertain whether they had any gold and currency.

The petitioner declared that he had only 2105 Dollars, 250 Rupees, and

Travelling Cheques worth 80 Dollars. The cabin the couple occupied, the petitioner's "person as well as his wife"s were searched, but nothing beyond the currency notes already known were found. The Customs Inspector wanted to thoroughly search the car, and as the Steamer was to leave Cochin Port at 9-45 on December 5, 1958, he requested the Captain to disembark the petitioner and to offload his car.

The Customs Inspector was evidently anxious to have the petitioner and his wife on land while the car was being searched. Therefore the petitioner was disembarked, but the wife, because of her delicate health and on medical advice was allowed to proceed. Before disembarkation. Pw. 4, a Preventive Officer, gave the petitioner who signed, Ext. P5. This is a printed declaration form for currency and shows only 1605 Dollars and 250 Rupees to be with the petitioner. The car was again searched by Pw. 5, a mechanic, and a secret receptacle was found in the central channel of the chassis, in which channel, the Indian currency as well as the American currency worth about Rs. 5,60,000 were Found concealed.

Thereafter the petitioner was charge-sheeted u/s 23(1)(a) read with Section 8 of the Foreign Exchange Regulation Act as well as the Notification thereunder, and u/s 167 (81) of the Sea Customs Act. The District Magistrate, before whom the petitioner was proceeded against, convicted and sentenced him to six months u/s 167 (81) besides ordering confiscation of the currency and the car. The Sessions Judge has sustained the conviction, but has modified the sentence of six months to four months.

2. The petitioner's learned Advocate has before us raised the following pleas for the conviction and sentence being reversed :

(i) Under International Law, a merchant ship enjoys the right of innocent passage through territorial waters, therefore, laws of the country, in whose territorial waters the right was being enjoyed, would be excluded from the ship, with the result that acts on board the ship would not contravene the territorial laws, and the ship's entrance into a harbour while continuing the voyage would also be covered by the right of innocent passage.

(ii) Where parts of an earlier Act are brought by reference into a subsequent enactment, they thereby become incorporated into the latter with the result that still later amendments of the earlier Act would not extend to the subsequent enactment, so that Section 167 (81) that had been added by Act XXI of 1955 to the Sea Customs Act would not be part of the Foreign Exchange Regulation Act, as Section 23A of the latter, which had incorporated the earlier Act into the latter, was added by the amending Act VIII of 1950.

(iii) The bare fact of the Indian Currency having been found concealed in a secreted receptacle of the car owned by the petitioner, which he had not declared, would be inadequate to convict and sentence him of the offence u/s 167 (81) unless the petitioner's knowledge and intention to evade the restriction under the Act with respect to the currency be also established and that has not

been done.

3. Before dealing seriatim with these arguments, it would be of advantage to summarise the legal position under the several enactments when Indian and American currencies worth Rs. 5,60,000/-were found in the secret receptacle of the petitioner's car and there was no declaration by him concerning these in Ext. P5. We would deal later with the petitioner's plea of not being aware of the notes having been there secreted, which plea has been rejected by the facts-finding courts in these proceedings.

Section 8(1) of the Foreign Exchange Regulation Act, No. VII of 1947, provides that the Central Government may, by notification in the official Gazette, order that subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank on payment of the fee, if any, prescribed, bring or send into India any gold or silver or any currency notes or coin whether Indian or foreign. The explanation to the sub-section is important and reads :

"The bringing or sending into any part or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case may be sending into India of that article for the purpose of this section."

4. Section 23 of the Act provides that a person contravening any provision of the Act or Rule would be on conviction punishable with imprisonment extending to two years or with fine or with both. Section 23-A, which is important, enacts as follows :

"Without prejudice to the provisions of Section 23 or to any other provision contained in this Act, the restrictions imposed by Sub-sections (1) and (2) of Section 8, Sub-section (1) of Section 12, and Clause (a) of Sub-section (1) of Section 13 shall be deemed to have been imposed u/s 19 of the Sea Customs Act, 1878 (VIII of 1878), and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted."

5. At this stage the relevant notification may be given. It is notification No. F. E. R. A. 87/49 R. B. dated September 10, 1949, as subsequently amended. Thereby the Reserve Bank has permitted any person to bring or send into India from any place outside India without limits currency notes provided he makes a declaration on the appropriate form specified by the Reserve Bank at the time of arrival to the Customs authorities of the total amounts of notes brought in.

6. This brings us to the Sea Customs Act, whose Section 19 provides that the Central Government may from time to time by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the

Central Government. The next relevant provision is Section 167 (81) which should be reproduced in extenso :--

"If any person knowingly, and with intent to defraud the Government of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping, or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or which are chargeable with a duty which has not been paid, or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid; or

if any person is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods;

Penalties : such person shall on conviction before a Magistrate be liable to imprisonment for any term not exceeding two years or to fine or to both."

7. It will be observed that the main provision, when analysed, comprises of three ingredients. The first requires a person doing the several acts knowingly and with intention, Again the intention must be to defraud the Government of any duty payable or to evade any prohibition or restriction for the time being in force under or by virtue of the Act. It is therefore clear that the bare act would not suffice and the accused must knowingly intend either to defraud the Government of the duty, etc., or to evade any prohibition or restriction of importation.

The next ingredient of Section 167 (81) covers the acts, of which the accused must be guilty, and are enumerated as his acquiring possession or being in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing, or in any way dealing with any goods. The last requirement of the Section is about the goods which have been unlawfully removed or be chargeable with the duty not paid, or with respect to the importation or exportation of which any prohibition or restriction is in force.

It follows that the petitioner's conviction must rest on his knowingly and with intent to evade the restriction being concerned in carrying, removing, harbouring or keeping the currency notes whose importation is restricted under the notification.

8. His having done the act knowingly was denied, but this plea, which is of fact, has not been believed by the lower courts. It is said that in Ceylon the petitioner and his wife, while staying in the hotel, became familiar with a European, who took on loan the car for a day and gave it back. It is also stated that this friend promised to see the petitioner and his wife at Genoa. The suggestion evidently is that the concealment was by the friend without petitioner's knowledge. Having regard to the skill with which the receptacle has been prepared in the car, the

lower courts have correctly come to the conclusion that it could not have been clone during the period the car was on loan.

Nor do we think such a device could have been got ready during the boat voyage from Colombo to Cochin Harbour, which had lasted only for a day. The wife's participation is out of question as her delicate condition is stated to be the reason for their hurried return journey. In these circumstances the plea by the petitioner of having no knowledge for such a large quantity of the currency notes being in his car cannot be said to have been perversely rejected. In exercise of the revisory powers, High Courts do not interfere with finding of facts unless special grounds are made out, and we have not been convinced of such grounds having been established in this case.

It follows that no satisfactory explanation is offered for such large amounts of currency notes being secreted in the car, and the petitioner's knowledge has been rightly inferred in these circumstances. We would deal with the other question of intention later; for it is necessary to decide first the argument that no act of the petitioner while on the ship would contravene the Customs Act. Voluntary commission on land would be necessary only if we are convinced of the argument that ships in harbour are not subject to the territorial law of the country, in whose harbour they be at anchor, and this brings us to the right of innocent passage on which the petitioner's learned advocate has relied. In support of his argument he has referred to Oppenheim's International Law, Eighth Edition, Vol. I, at p. 290. The passage reads as follows :

"Thus, by customary International Law, every State has a right to demand that its merchantmen may pass through the maritime belt of other States. Navigation on so called international rivers must be open to merchantmen of all States.....Through the right of protection over citizens abroad, which is held by every State according to customary International Law, a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects.....".

The next book he has referred is Smith's Law and Customs of the Sea in which two passages have been relied. One is at p. 45 and runs thus :

"At the same time the very nature of the sea as the common highway of the whole world necessitates in the common interest a practical modification of the general principle of absolute sovereignty. Just as in ordinary law usage may create a public right of way across a man's land, but without thereby destroying his ownership, so the usage of nations from the earliest times has established what may be called general right of way through territorial waters. Like rights of way over land, this right is subject to reasonable regulation on the part of the owner and its enjoyment is conditional upon reasonable use. In the language of the books, it is usually called the right of "innocent passage." So much is generally agreed, but the acceptance of the principle still leaves room for some controversy as to the precise extent of its application, particularly in time of war."

9. The next passage is at page 259 and gives Article 14 of the Convention on the Territorial Sea and Contiguous Zone. For our purposes its relevant parts are its Sections 1, 2, 3 and 4 that read as follows :

"1. Subject to the provisions of these articles, ships of all States whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law."

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10. The learned Advocate has referred us to the following passages of Brierly's Law of Nations (Fifth Edition) pp. 188 and 194 :

(i) "The term "innocent passage" accurately denotes the nature of the right as well as its limitations.. In the first place it is a right of "passage" that is to say, a right to use the waters as a thoroughfare between two points outside them; a ship proceeding through the maritime belt to a port of the coastal State would not be exercising a right of passage. In the second place the passage must be "innocent"; a ship exercising the right must respect the local regulations as to navigation, pilotage, and the like, and, of course, it must not do any act which might disturb the tranquillity of the coastal State. That State therefore must be entitled to exercise some jurisdiction over ships in passage....."

(ii) "A private ship in a foreign port is fully subject to the local jurisdiction in civil matters, but there are the views of its position in criminal matters. That followed by Great Britain asserts the complete subjection of the ship to the local jurisdiction, and regards any derogation from it as a matter of comity in the discretion of the territorial State. We regard the local jurisdiction as complete, but we do not regard it as exclusive; we exercise a concurrent jurisdiction over British ships in foreign ports, and are ready to concede it over foreign ships in British ports."

He further relies on a passage at p. 161 of an Introduction to International Law by J. C. Starke :

"Notwithstanding that the maritime belt is under the absolute sovereignty of the littoral States it is a recognised principle of customary international law that merchant ships in time of peace have the right of "inoffensive" passage through coastal waters. But the essence of the right being that it is innocent, vessels

cannot claim to transport through the maritime belt persons or goods whose presence there would be prejudicial to the safety, good order or revenue of the littoral State."

11. In addition to these, the Advocate has referred us to Savarlien's Introduction to the Law of Nations, where the author at p. 195 states :

"As we have already said, the right of merchant ships of one State to pass through the territorial waters of another known as the right of innocent passage, is now generally recognised by all nations Such vessels. . are, however, subject to the laws..... enacted by the littoral State...."

12. We think the right of innocent passage so strenuously relied by the petitioner's Advocate is but a right of way along the coast and does not exclude the territorial jurisdiction of the littoral State over ships when at anchor in ports of such a State. The British view regarding jurisdiction over such ships is clear from the passage of Brierly's book already quoted above. The same author at p. 196 of the same book summarises the effects of the other view in these words :

"The difference referred to above relates only to the question of jurisdiction over offences committed by members of the crew on board a merchant vessel."

13. Savarlien at p. 196 of his Introduction to the Law of Nations says :

"In view of such conflicting authority, we can only present the tentative conclusion here that ships in foreign ports cannot claim, as a matter of law, any right to immunity from the jurisdiction of local courts. The comity of nations seems to require, however, that acts which pertain strictly to the ship and its crew on board and which do not disturb the peace of the port are within the jurisdiction of the State whose flag the ship flies."

Starke at p. 184 of his book already mentioned states the position to be as follows :

"Where offences or misdemeanours are committed on board vessels berthed in foreign ports, jurisdiction depends on the practice followed by the territorial State of the port concerned."

Smith at page 50 of his book on the Law and Customs of the Sea observes :

"It is now fairly generally agreed, though the point has been one of such controversy in the past, that the criminal law of every State covers its territorial belt, and jurisdiction may, if it is thought fit, be assumed over every violation of the national law which takes place within the three-mile limit."

Schwarzenberger's views in Vol. I of International Law at p. 195 is :

"The sovereignty of the coastal State over the territorial sea "has come to be taken for granted. Thus, when foreign merchant ships enter the territorial sea, they become amenable to the jurisdiction of the coastal State and subject to its law."

14. Apart from the aforesaid consensus of views in favour of the ship being amenable to the jurisdiction, there are two judicial pronouncements against the claim of such ships being immune from the laws of the State in whose territorial waters they be lying. In *Cunard Steamship Co. v. Mellon* (1922) 67 Law Ed. 894 at p. 902, the Supreme Court of America while holding that the National Prohibition Act applied to foreign vessels summarised the position in these words :

"A merchant ship of one country, voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place, and, correlatively, is bound to yield obedience to them. Of course, the local sovereign may, out of considerations of public policy choose to forego the exertion of its jurisdiction, or to exert the same in only a limited way; but this is a matter resting solely in its discretion."

15. Further Lord Macmillan in *Croft v. Dunphy* 1933 AC 156, p. 167: (AIR 1933 PC 16 at p. 17), states the rule in these words :

"It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

16. It is, therefore, clear that the right of innocent passage does not confer any immunity from territorial laws on ships that enter not in distress the ports of a friendly State. On the other hand we think that any foreign ship entering and taking advantages of the facilities afforded in ports of this country becomes amenable to its territorial laws, incur the obligation of observing its customs laws, and that obligation extends to foreign citizens on board the ship. The first argument therefore that the petitioner's acts do not constitute any infraction of the Customs laws, because they were not committed on land, but on a foreign ship at anchor in Cochin Port, fails.

17. The next argument for allowing the revision petition rests on AIR 1931 149 (Privy Council) and *Nathella Sampathu Chetty and Another Vs. Collector of Customs, Madras*, which state the general rule that if any earlier enactment be referred to by later, the earlier becomes walled, and because of such incorporation any subsequent amendments of the earlier enactment are excluded from the referring Act. The question in each case is therefore which Act has been so incorporated. It is also clear that if the reference be by fiction that should be pushed to its logical consequences. Lord Asquith has in *East End Dwellings Co.*

Ltd. v. Finsbury Borough Council 1952 AC 109 insisted on a legal fiction being earned to such an extent, and such insistence has been treated as correct in M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd., and Commissioner of Income Tax, Delhi Vs. S. Teja Singh,

The words of Section 23A of the Foreign Exchange Regulation Act therefore assume importance; for should they create the fiction of the restrictions u/s 8 (1) of the Act being u/s 19 of the Sea Customs Act, the consequences would be that contravening those restrictions would also amount to contraventions of the restrictions under the Sea Customs Act. It further follows that such a contravention would be of the Sea Customs Act as on the date the act be committed and not of what it was when Section 23A of the Foreign Exchange Regulation Act was enacted, Such appears to us to be the intention of the legislature by enacting the fiction and the consequences of the statutory fiction.

We have already quoted Section 23A of the Foreign Exchange Regulation Act and its language clearly creates such a fiction. We further think that because of the fiction the provisions of Section 8 of the Foreign Exchange Regulation Act are brought into the Sea Customs Act rather than any provisions of Sea Customs Act have been drawn in the Foreign Exchange Regulation Act, 1947. For these reasons we differ with respect from *Nathella Sampathu Chetty and Another Vs. Collector of Customs, Madras*, where it has been held that Sea Customs Act had become part of the Foreign Exchange Regulation Act. The result is that notwithstanding Section 167 (81) being later to Section 23A of the Foreign Exchange Regulation Act, it would govern the petitioner's contravention of the notification u/s 8(1) of the Foreign Exchange Regulation Act.

18. This brings us to the third argument of the guilty intent not having been established. The learned Advocate has urged that mere discovery of the currency notes in the secreted receptacle of the petitioner's car would not make his client guilty and punishable u/s 167 (81) unless the intent be also established. In support of this argument he relies on *Frailey v. Charlton*, 1920 1 KB 147 , where the accused had in his cabin soaps but was held not guilty of knowing by harbouring prohibited goods for export. He has also relied on *Atiabari Tea Co. Ltd. and Others Vs. Union of India (UOI) and Others*, where Sinha, J., has observed that in order to amount to export, there must be an animus to export, and no liability to pay export duty would arise because goods have been sent from one part of the country to another part, but been detained in transit in part of the route that lay through a foreign country.

We think these decisions do not circumscribe the rule that guilty intention can be inferred from circumstances arid possession of goods without reasonable explanation. That appears to us to be a well established rule and was followed in *R. v. Cohen* 1951 All ER 203, where the appellant was charged with knowingly harbouring and was found guilty of harbouring 352 watches. He carried the business of a jeweller and when questioned by Customs Officers about his purchases of watches gave the names of two firms from whom he had bought

goods. He produced 30 watches and said there were no others on his premises, but, on making a search at the invitation, the officers found 439.

The jury found him guilty and he was sentenced to twelve months' imprisonment. The ground of appeal was that the deputy chairman had misdirected the jury as to the onus of proof, but Lord Goddard, while dismissing the appeal, observes as follows ;

"First, let us consider the ingredients of the offence and what has to be proved by the prosecution in order to establish a *prima facie* case. Apart from an intent to defraud, with which we will deal separately, the offence consists in knowingly harbouring uncustomed goods and in our opinion, that means that the accused knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused. If they are found, in his house, warehouse or other place under his control, that would establish a *prima facie* case that he knowingly harboured them, though, no doubt he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had "dumped" them there without his knowledge or privity...-....."

19. The learned Judge then states as to what would constitute the intent to defraud :

"Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If it jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue."

20. In *Sayce v. Coupe* (1952) All ER 715, the aforesaid observation concerning the intent was again referred to by the same learned Chief Justice. It follows that in this case the possession of the currency notes, whose bringing is prohibited except under declaration, would require explanation and on the explanation being rejected the petitioner would be knowingly harbouring them. It further follows that the intention may be inferred from surrounding circumstances of the case. Those circumstances are that the car is owned and was being carried as part of the petitioner's luggage.

Next is that it has the secret receptacle, which according to evidence could not have been prepared in a day, and therefore the possibility of its having been prepared during the voyage is excluded. Then there are the currency notes, which because they were found in the secret receptacle of the car owned by the petitioner, could have been put in only by the petitioner. It was open to him to explain, and that he has done by suggesting, that the friend in Ceylon had put

them, but that has been not accepted. The friend's preparing the receptacle is rejected, and there is also no possibility of the friend being aware of the receptacle, with the result that without knowledge putting the notes therein is impossible.

It follows that on the petitioner's possession of the currency notes being proved, his knowingly harbouring them becomes established. Also his intention to evade the restriction for the time being in force with respect to the currency notes is proved from the aforesaid circumstances in the case, and from his failure to make the declaration. That restriction under the notification requires declaration for bringing in the currency notes, and "bringing" under the Explanation to Section 8(1) of the Foreign Exchange Regulation Act means bringing in port without being removed from a ship. This restriction u/s 23A of the Foreign Exchange Regulation Act is deemed to be u/s 19 of the Sea Customs Act, and therefore the intention to evade the restriction must be of bringing into an Indian port from any place outside currency notes without a declaration.

This we think to be established; for the notes were in petitioner's car that was being carried for him and no declaration was made concerning them, while the ship remained in the Cochin Port. But it is argued that the petitioner's intention was of remaining on board the ship and then he had no intention of evading the restriction, We think the word "bring" having been given the special meaning by the explanation to Section 8(1), the intention to bring must also carry the same meaning. Therefore remaining on board the ship would not affect the liability, nor the intention would be inadequate. In these circumstances we agree with the lower courts that the intention as well as the act of breaking the restriction are established in the case.

21. It is pleaded on behalf of the petitioner that he has been detained for a period of over a year in Cochin and in the circumstances he should not be put in jail. We think there is force in the argument, because not only has the petitioner been in Cochin for some time, but he has been kept under close observation, which has affected his movements. In these circumstances we think punishing him with imprisonment would now cause considerable hardship.

We would therefore direct that the part of the sentence ordering four months' imprisonment should be set aside; the petitioner must instead pay a fine of Rs. 2,000 and in default of the fine undergo a simple imprisonment of two months. The other parts of the sentence of the lower courts will stand, i. e., confiscation of the currency notes and car. Accordingly the sentence is modified, and the petitioner is allowed a week to pay the fine. Until this order takes effect on Monday, March 14, 1960, the earlier restrictions will continue.