

(2010) 11 MAD CK 0421

In the Madras High Court

Case No : Criminal A. (MD) No. 912 of 2003

Chief Enforcement Officer, Enforcement Directorate,
Government of India

APPELLANT

Vs

D. Uttamchand Jain

RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Customs Act, 1962 — Section 108
Evidence Act, 1872 — Section 25
Foreign Exchange Management Act, 1999 — Section 49(3), 49(4)
Foreign Exchange Regulation Act, 1973 — Section 56(1), 56(2), 9(1)

Citation : (2010) 11 MAD CK 0421

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : C. Ramachandran, for the Appellant; M.S. Peter, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—The criminal appeal has been preferred by the Appellant / complainant against the acquittal recorded by the learned Additional Chief Judicial Magistrate, Madurai in C.C. No. 10 of 2002, dated 25.02.2003.

2. The case was filed against the Respondent / accused for the alleged offence punishable under Sections 9(1)(b) and 9(1)(d) of Foreign Exchange Regulation Act, 1973.

3. Learned Special Public Prosecutor appearing for the Appellant submitted that though the Foreign Exchange Regulation Act, 1973 was subsequently repealed by Foreign Exchange Management Act 1999, as per the subsequent Act u/s 49(3) only, after the expiry of a period of two years from the date of the commencement of the Act, the subsequent Act would be coming in to force. It is seen that Sub-Sections 3 and 4 of Section 49 of the Act reads as follows:

(3) Notwithstanding anything contained in any other law for the time being in

force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

In the aforesaid facts and circumstance, there is no dispute with regard to jurisdiction of the court and the applicability of FERA 1973 for the alleged offence.

4. Learned Counsel for the Respondent/accused submitted that the prosecution has not established the guilt against the Respondent beyond a reasonable doubt and therefore, the case was ended in acquittal.

5. Learned Special Public Prosecutor appearing for the Appellant has not disputed the fact that though the Appellant / complainant filed the complaint stating that the Respondent / accused had committed violation of the Act, to the tune of Rs. 7 crore, there was no supporting material to establish the allegation that the Respondent / accused had committed any violation under the (FERA) Act to the tune of Rs. 7 crore. Admittedly, no amount was seized from the Respondent herein. Learned Special Public Prosecutor appearing for the Appellant submitted that the Respondent had given a confession statement before the Appellant, which is an admissible piece of evidence.

6. Learned Counsel appearing for the Respondent/accused has not disputed that the statement given before the Enforcement Officer is admissible in evidence. It is not in dispute that the statement given before the Enforcement Director is an admissible evidence, though such a statement before a police officer is inadmissible, as per Section 25 of the Indian Evidence Act. However, according to the learned Counsel appearing for the Respondent / accused, under compelling circumstances, the Respondent was made to sign in certain papers and subsequently, he retracted the statement and in support of the same, Ex.D.1, dated 05.07.1997 was marked before the Court below. Hence, based on the retracted statement, the Respondent / accused could not be convicted.

7. As per the charges framed against the Respondent / accused between August 1994 and June 1997, the Respondent / accused had received a sum of Rs. 7 crores from one Farook Abdulla of Dubai. As per the prosecution case, he is an Indian National living in Dubai, U.A.E and disbursed a sum of Rs. 6,72,00,000/- to various persons in India, whereby violated Sections 9(1)(b)(i) and 9(1)(d) of FERA and committed offence punishable under Sections 56(2)(1) and 56(1)(i) of the said Act. As per the prosecution case, without obtaining permission from the Government, the Respondent / accused had received foreign exchange of Rs. 7 crores and disbursed Rs. 6,72,00,000/- to various persons, after deducting Rs. 300/- per one lakh towards his commission. Admittedly, there is no supporting documents or records produced by the Appellant before the Court below, to

establish the guilt against the accused, to show that he had received the alleged amount and disbursed the same to various persons.

8. In Naresh J. Sukhawani Vs. Union of India, , the Hon"ble Supreme Court has held that the statement made before Customs Officer is admissible in evidence, u/s 108 of the Customs Act, with regard to passing off foreign currency out of India and such statement can be used as substantive evidence connecting the accused with contravention of provisions of the Act. The statement recorded by the Custom Officials is admissible, unlike the statement recorded by police u/s 161 of Code of Criminal Procedure The Hon"ble Supreme Court has held in the said decision at page number 523 thus:

4. It must be remembered that the statement made before the Customs officials is not a statement recorded u/s 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs Act. That material incriminates the Petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the Petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the Petitioner. It can, therefore, be used as substantive evidence connecting the Petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty.

The Hon"ble Supreme Court has categorically stated that the statement made before the Customs Officials are valid piece of evidence, which can be taken as prosecution evidence, whereas a statement recorded u/s 161 Cr.P.C, can be used by the accused only for the purpose of contradiction and the prosecution cannot use the same for corroboration and to establish the prosecution case.

9. Learned Counsel appearing for the Respondent/accused relied on the decision in Mohtesham Mohd. Ismail v. Special Director, Enforcement Directorate reported in 2007(220) E.L.T.3 (S.C.) and 1989 (22) ECR 528 and submitted that the confession given by the co-accused cannot be treated as substantive evidence, unless it is corroborated by some other evidence. Learned Counsel for the Respondent / accused submitted that in the instant case, no statement was given by any co-accused and no other witness, except the enforcement officers, P.W.1 and P.W.2 were examined. It is not in dispute that merely based on the alleged retracted statement given by the Appellant / accused, without any recovery or other supporting evidence, the court cannot hold that the charges framed against the Respondent / accused are proved beyond reasonable doubt. As per the adversarial system of criminal jurisprudence, as the prosecution has to establish the guilt against the accused beyond a reasonable doubt and the benefit of doubt should be given to the accused.

10. As per the prosecution case, the Appellant had received a sum of Rs. 7 crores from Farook Abdulla of Dubai and disbursed a sum of Rs. 6,72,00,000/- to various

persons in India on behalf of the said Farook Abdullah. It is an admitted fact that there is no evidence or materials to establish that the Respondent / accused had received the huge amount. Similarly, for the alleged disbursement of Rs. 6,72,00,000/-, no evidence or supporting materials placed before the Court below and no witness was examined to substantiate the charges levelled against the Appellant / accused, except the alleged retracted statement given by the Respondent / accused.

11. On the side of the Appellant/complainant only P.W.1 and 2 were examined before the Court below. P.W.1 and 2 were only Enforcement Officers of the Appellant. Ex.P.1 was a notification and Ex.P.2 was search warrant issued by the Assistant Director of the Appellant and Ex.P.3 was Mahazar, dated 02.07.1997, whereby no incriminating material was recovered, even as per the evidence of P.W.1 and P.W.2. The alleged statement given by the Respondent was marked as Ex.P.4 to Ex.P.9. Copy of the notice issued on the Respondent / accused was marked as Ex.P.10 and the reply notice dated 26.02.2002 sent by the Respondent / accused through his counsel was marked as Ex.P.11. On the side of the Respondent / accused, a copy of the retract confession statement was marked as Ex.D.1. The Appellant / complainant has not produced any register or records or any other materials to show that there were transactions by the Respondent herein to the tune of Rs. 6,72,00,000/-. Similarly violating FERA or Foreign Exchange Management Act or any other Act, no amount was seized from the custody of the Respondent/accused. Without the recovery of any amount from the Respondent / accused and without producing documentary evidence such as Registers and Records, merely based on a retracted statement, allegedly given by the Respondent, the case relating to a very huge amount has been prosecuted.

12. The Hon''ble Supreme Court, in Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate, reported in 2007 (220) E.L.T.3 (S.C.), held as follows:

16. We may, however, notice that recently in Francis Stanly @ Stalin Vs. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram, , this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources.

13. Similarly, in The Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others, , the Hon''ble Apex Court has held as follows:

... The inculpatory statement made by any person u/s 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the

court in the same manner as confession made by an accused person to any no-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.

14. In C.D. George Vs. Assistant Commissioner of Central Excise, Trichur, , the Hon"ble Apex has held as follows:

In Bhagwati and Ors. v. The State of Uttar Pradesh (1976) 3 SC 235, it is held: "Thus if the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record. This has been held to be so because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court therefore should be slow in disturbing the finding of fact of the trial Court, and if two views are reasonably possible of the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different views if the case had been tried by it.

We are convicted that the view taken by the trial court is quite reasonable. Therefore, viewed from any angle, we are firmly of the view that there were no grounds for the High Court to interfere with the findings of the trial court acquitting the accused.

15. The Appellant / complainant has specifically stated that the Respondent/ accused has violated the FERA Act and thereby disbursed a sum of Rs. 6,72,00,000/-on behalf of the Farook Abdullah of Dubai. It is the duty of the prosecution to investigate and establish the alleged guilt against the Respondent / accused by legally acceptable oral and documentary evidence. In the instant case, there is no such evidence available to establish the allegation that the Respondent/accused herein has violated the provision of FERA or any other Act to the tune of Rs. 6,72,00,000/-and no amount was recovered and no document related to the allegation was seized and marked in this case before the Court below.

16. It is well settled that a confession statement purported to have been given by the accused before an authority, requires proper scrutiny, merely based on the retracted confession, without corroborated by any legally acceptable evidence to establish the guilt, the accused cannot be convicted, since the prosecution has to prove the offence against the accused beyond reasonable doubt. Applying the yardstick, I am of the view that the alleged guilt has not been proved against the accused beyond reasonable doubt.

17. On the facts and circumstance of the case, I could find no error in the judgment rendered by the Court below recording acquittal on the ground that the

prosecution has not established the alleged guilt against the Respondent/accused beyond reasonable doubt. I could find no reason to interfere with the judgment of acquittal recorded by the Court below and hence, the appeal is liable to be dismissed.

In the result, confirming the judgment of acquittal recorded by the Court below, the appeal is dismissed.