
(1959) 09 KAR CK 0003

In the Karnataka High Court

Case No : Criminal Revision Petition No. 266 of 1958

Issa Yacub Bichara and Others

APPELLANT

Vs

State of Mysore and Another

RESPONDENT

Date of Decision : 25-09-1959

Acts Referred:

Foreign Exchange Regulation Act, 1947 (FEMA) — Section 23 (1), 8 (1)

Citation : AIR 1961 Kar 7 : (1961) CriLJ 106

Hon'ble Judges : H. Hombe Gowda, J

Bench : Single Bench

Advocate : S.C. Javali, for the Appellant; A.G., for the Respondent

Judgement

1. This revision petition is directed against the judgment dated 30-6-1958 passed by the Sessions Judge, South Kanara in Criminal Appeal No. 16 of 1958. By the aforesaid judgment the learned Sessions Judge confirmed the conviction of the petitioners for an offence u/s 8(1) of the Foreign Exchange Regulation Act of 1947 read with Notification No. 12 (11)(f) 1-48 dated 25-8-1948 (as amended), but acquitted them of the offence u/s 167(81) of the Sea Customs Act but confirmed the composite sentence of one year's rigorous imprisonment and a fine of Rs. 1,111/- in respect of the first petitioner and a fine of Rs. 111/- in respect of the other petitioners, passed on each of them by the District Magistrate, South Kanara, in Criminal Case No. 87 of 1957.

2. A foreign vessel M. L. Anwar captained by the first petitioner Issa Yakub Bichara entered the Mangalore Port on 13-10-1957 from Muskat with the cargo of 341 bundles of wet dates. The first petitioner filed the entry and other papers on 14-10-1957 and declared that the vessel contained only 341 bundles of wet dates and no other dutiable articles in it. After verification the cargo of 341 bundles of wet dates was discharged by the Customs Authority on 16-10-1957.

The fact that only a small cargo of 341 bundles of wet dates had been brought all the way from Muskat to India roused the suspicion of the Customs Authorities

and they subjected the vessel to a thorough rummaging for some days from 18th October 1957 but nothing was found in it. But the Authorities had some credible information that the members of the crew had brought gold concealed in the vessel and therefore, they kept a keen and continuous watch over the vessel. On 31-10-1957 one of the Customs Officials, who was inspecting the vessel once again observed certain cavities underneath the ridge of the hatchway on the port side of the vessel covered with thin deal-wood planks. He suspected that they may be cavities in which gold had been concealed.

He, therefore, secured some respectable persons to the place and in the presence of all the petitioners and another member of the crew got the deal-wood planks covered at four places removed. On removing the planks the cavities were searched and they were found to contain gold bars in cotton cloth belts and they were taken out. There were in all 33 belts in the four cavities. On counting the 33 belts they were found to contain 1,390 pieces of gold bearing foreign marks weighing 13,894 1/8 tolas. None of the petitioners had with them any permit to import gold into India. The first petitioner, who was the Captain of the vessel had not declared that he had brought gold into India in the declaration filed by him on 14th of October 1957. These gold bars valued at Rs. 12,50,471/25nP. were seized by the Customs Authorities under a mahazar drawn up at the place in the presence of these petitioners.

Necessary proceedings under the Sea Customs Act and the Foreign Exchange Regulation Act were then started against these petitioners and another person. The Collector of Central Excise of Madras and Mysore who held an enquiry under the Sea Customs Act confiscated the gold which had been brought in contravention of the Foreign Exchange Regulation Act without paying the import duty. He further levied heavy fines on the petitioners. After the proceedings were concluded, the Collector of Central Excise of Madras and Mysore under the Sea Customs Act directed Sri A, Para-meshwara, the Assistant Collector of Central Excise, Customs Preventive Kozhikode to file a complaint against the petitioners and another member of the crew for offences punishable u/s 167(81) of the Sea Customs Act and u/s 8(1) of the Foreign Exchange Regulation Act after investigation.

Accordingly a complaint against the petitioners-and another was lodged in the Court of the District Magistrate of South Kanara, Mangalore for the above said offences. All the petitioners pleaded not guilty to the charges and denied that the gold belonged to them and that they had brought the same into India. The petitioners examined one witness to prove their innocence. On the evidence adduced in the case the learned District Magistrate held that the petitioners were guilty of both the charges and convicted them but passed a composite sentence against each of the petitioners for both the offences. He sentenced the first petitioner to rigorous imprisonment for one year and to pay a fine of Rs. 1,111/- and sentenced each of the remaining petitioners and another person (who was acquitted by the appellate Court) to pay a fine of Rs. 111/- each.

Being aggrieved by the judgment of the learned District Magistrate, the petitioners and the pilot of the vessel, who had also been convicted filed an appeal to the Sessions Judge, South Kanara Division in Criminal Appeal No. 16 of 1958 challenging the correctness and legality of their convictions. Several contentions were raised by the petitioners. The learned Sessions Judge held (i) that none of the petitioners was guilty of an offence punishable under the provisions of Section 167(81) of the Sea Customs Act since the prosecution had failed to establish mens rea and he, therefore set aside the conviction of all the petitioners on the said charge and (ii) that the third accused, who was the pilot of the vessel was not guilty of any of the two charges and acquitted him.

In so far as the charge for contravention of the provisions of Section 8(1) read with Section 23(1) of the Foreign Exchange Regulation Act of 1947 is concerned, the learned Sessions Judge held that the finding of the District Magistrate that the petitioners were all guilty was based on proper appreciation of the evidence on record and confirmed the same. As already stated, the learned Sessions Judge confirmed the composite sentences passed against the petitioners. It is the legality of this judgment that is now challenged before me by the petitioners in this revision petition.

3. It is no longer in dispute that the vessel M. L. Anwar which was captained by the first petitioner Issa Yacub Bichara arrived at Mangalore Port from Muskat on 13-10-1957; that the first petitioner filed the necessary papers including the entry papers and customs declaration on 14-10-1957 and that the declared cargo of 341 bundles of wet dates was discharged by the Customs Authorities on 16-10-1957. It cannot also be disputed that the vessel was being subjected to continuous search from 18-10-1957 by the Customs Authorities on suspicion that gold had been concealed in it till 31-10-1957.

The fact that a large quantity of gold valued at Rs. 12,50,471/25nP. was recovered from the cavities which had been made underneath the ridge of the hatchway on the port side of the vessel on 31-10-1957 and those gold pieces which were 1,390 in all, bore foreign marks on them has been satisfactorily established and is not disputed before me. The Courts below have reached the conclusion that the gold seized by the Customs Authorities is foreign gold and had been brought by the petitioners concealed in the cavities made in the vessel without obtaining any permit from the Government of India or Reserve Bank of India and in contravention of the Foreign Exchange Regulation Act with a view to evade payment of duty which would amount to over two lakhs of rupees.

On this finding the learned District Magistrate held that all the petitioners were liable both u/s 167(81) of the Sea Customs Act and also u/s 8(1) read with Section 23(1) of the Foreign Exchange Regulation Act. As already stated, the learned Sessions Judge acquitted the petitioners of the charge u/s 167(81) of the Sea Customs Act on the ground that the prosecution had failed to establish mens rea or knowledge and in the absence of a clear finding to that effect none of the petitioners can be held liable under the above said section. But the learned

Sessions Judge was of the opinion that mens rea was not a necessary element in so far as the offence u/s 8(1) of the Foreign Exchange Regulation Act 1947 read with Section 23(1) of the said Act is concerned and that proof of the fact that the petitioners had brought gold into India without obtaining necessary permit from the Reserve Bank of India was sufficient to make them liable to answer the said charge and confirmed the convictions of the petitioners of the said charge.

4. It was contended by Sri Javali, learned counsel for the petitioners, that the learned Sessions Judge on the evidence on record having reached the conclusion that no offence was made out against any of the petitioners for an offence u/s 167(81) of the Sea Customs Act was not justified in finding the petitioners guilty for an offence u/s 8(1) of the Foreign Exchange Regulation Act of 1947 on the very same evidence. Sri Santosh, the learned Government Pleader, contended that the conclusion of the learned Sessions Judge that mens rea was a necessary element for an offence u/s 167(81) of the Sea Customs Act and that there was no evidence or material on record to point out that the petitioners had knowledge that the gold was being smuggled or had intention to bring the same into India is not based on proper appreciation of the facts established in the case and therefore, there is no substance in the contention of the petitioners that they should have been acquitted for an offence u/s 8(1) of the Foreign Exchange Regulation Act.

There is considerable force in the contention of the learned Government Pleader. The learned Sessions Judge held that the statements made by the petitioners before the Customs Authorities, viz., Exs. P-18 to P-26 were inadmissible in evidence and that if that evidence is excluded there was no other evidence to prove the knowledge or intention of the petitioners. It is urged by the learned Government Pleader that the finding of the learned Sessions Judge that Exs. P-18 to P-26 are inadmissible in evidence is erroneous and I am inclined to agree with him. I will advert to this contention, later on. I am unable to accept the contention of the learned counsel for the petitioners that because the learned Sessions Judge acquitted the petitioners on a charge u/s 167(81) of the Sea Customs Act, the petitioners are entitled for an acquittal on a charge u/s 8(1) of the Foreign Exchange Regulation Act.

The learned Sessions Judge considered as to whether the evidence on record was sufficient to hold all the petitioners liable for an offence u/s 8(1) of the Foreign Exchange Regulation Act and held that the first petitioner brought the gold into India without the necessary permit secreted in the cavities of the vessel with a view to evade payment of the customs duty and that the other petitioners had abetted him to do so. He has assessed the evidence separately in respect of this charge. There is, therefore, no substance in this contention of the petitioners.

5. It is further urged by Sri Javali, the learned counsel for the petitioners, that P. W. 1 Sri A. Parameshwara, the Assistant Collector of Central Excise, Customs Preventive, who lodged the complaint, had not been authorised by a competent authority to file the complaint and therefore, the complaint itself is incompetent.

This argument is based on the fact that no notification has been issued by the Government of India or the Reserve Bank of India after Sub-sections (2) and (3) of Section 23 of the Foreign Exchange Regulation Act were amended. Section 3 of the Act enables the Government of India to appoint a Director of Enforcement for purposes of enforcing the provisions of the Foreign Exchange Regulation Act.

It is not disputed that the amendment in question had come into operation before the prosecution in this case was lodged. The procedure to be followed in taking cognizance of an offence for contravention of Section 8(1) of the Foreign Exchange Regulation Act is governed by Section 23(3)(b) of the Foreign Exchange Regulation Act. This section as it stands lays down that no Court should take cognizance of any such offence except upon any complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by general or special order.

It is contended that since the Government of India or the Reserve Bank had not issued any general or special order empowering P. W. 1 Sri Parameshwara to file such a complaint and since no Director of Enforcement has been appointed by the Central Government, P. W. 1 Sri Parameshwara was not competent to file a complaint. There is a fallacy in this argument. The only change made in Sub-section (3) by the amendment is that the Director of Enforcement was added as one of the officers entitled to lodge a complaint. The section as it stood originally provided that a complaint may be made in writing by any person authorised in this behalf by the Central Government or the Reserve Bank by a general or special order.

The mere fact that the Director of Enforcement has not been appointed as contemplated by the amending Act and no fresh notification is issued does not mean that the notification that had already been issued before the amendment which empowered the several officers named therein to file complaints has become invalid and ceased to operate. This will be abundantly clear if we bear in mind that Act 39 of 1957 was merely an unending Act and has not repealed the previous Act. Section 23(3)(b) of the amended Act as it now stands empowers two authorities to lodge a complaint in writing in regard to the enforcement of the provisions of the Act one of them being the Director of Enforcement and the other authority is any officer authorised in that behalf by the Central Government or the Reserve Bank by general or special order.

It is not disputed that before this amendment, a notification dated 12-1-1932 had been issued by the Ministry of Finance, Central Government empowering the Collector and the Assistant Collector of Central excise in charge of customs preventive to file such complaints. It is not also disputed that P. W. 1 Sri Parameshwara was competent under the said notification to lodge the complaint in question by virtue of the notification dated 18th January 1952. It is undisputed that the Central Government has appointed the Collector of Central Excise, Madras as the Chief Executive officer of Sea Customs for all the ports in the State of Madras including Mangalore Port. It is the Collector of Central Excise, Madras

as the Chief Executive officer of Sea Customs who had jurisdiction over the port of Mangalore that empowered P. W. 1 Sri Parameshwara to lodge the complaint. It cannot therefore, reasonably be urged that P. W. 1 Sri Parameshwara was not duly authorised by general or special order to lodge the complaint for enforcement of the provisions of the Foreign Exchange Regulation Act.

I am unable to accept the contention of Sri Javali, the learned counsel for the petitioners, that in the absence of a notification issued subsequent to the amendment of the Act by Act 39 of 1957 the old notification which empowered P. W. 1 Sri Parameshwara and the other customs officers to lodge complaints became inoperative and that P. W. 1 Sri Parameshwara was not competent to file the complaint. Section 24 of the General Clauses Act provides that where any Central Act or Regulation is repealed and re-enacted with or without modification then unless it is otherwise expressly provided any appointment, notification, order etc., issued under the repealed Act or Regulation shall so far as they are not inconsistent with the provisions re-enacted continue in force and be deemed to have been made or issued under the provisions of the new Act unless and until it is superseded by any appointment, notification etc., issued under the provisions of the new Act.

It is, therefore, clear that the general notification issued by the Ministry of Finance, Government of India dated 12-1-1952 empowering all the Collectors and the Assistant Collectors of Customs to lodge complaints continued to be in force even after the section of the Regulation was amended. There is, therefore, no substance in the second contention of the petitioners and it must fail.

6. The next contention urged by Sri Javali, the learned counsel for the petitioners, is that the complaint lodged against the petitioners without affording an opportunity as contemplated in proviso under Sub-section (1) of Section 23 of the Foreign Exchange Regulation Act to show cause whether they had a permit is invalid. Relying upon the proviso to Section 23 of the Foreign Exchange Regulation Act he contended that in the absence of anything to indicate that the mandatory requirements of the proviso to Section 23 of the Foreign Exchange Regulation Act were complied with by the prosecution, no prosecution could be launched against the petitioners.

In support of this contention he relied upon an unreported decision of the Bombay High Court in Criminal Appeal No. 59 of 1952 D/- 17-6-1952. The argument of Sri Javali the learned counsel for the petitioners, ran in this way. In accordance with the provision referred to above the Customs Authorities should give a notice in writing to the petitioners and afford an opportunity to the petitioners by giving due notice of the fact to show that they had permission to bring gold into India. It may at once be stated that there is no substance in this contention. It is not at all the case of the petitioners that they had any permit to bring the gold into India.

Their defence from the beginning is one of denial. They denied the ownership of

the gold and have been throughout contending that the gold seized by the Customs officers must have been planted after they arrived at Mangalore Port by some one at the instance of the Customs Authorities. They never took the stand that they had brought the gold with any authority or permission obtained from the Central Government or the Reserve Bank or they kept the gold with a view to take it to any other country. Proviso to section 23 of the Foreign Exchange Regulation Act reads thus :

"Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

The evidence of P. W. 1 Sri Parameshwara makes it abundantly clear that such an opportunity was given to the petitioners by the Customs authorities. Exhibit P-2 is the copy of the notice served on each of the petitioners. Exhibits F-3 to P-11 are the replies given by the petitioners. It is clear from a perusal of these Exhibits that the petitioners were given an opportunity of showing cause whether they had any permit or authority to bring the gold into India and all of them have uniformly stated that they had no permits with them. The petitioners cannot now be allowed to contend that they had not been given an opportunity. The decision of the Bombay High Court cited by the learned counsel for the petitioners does not in any way help the Petitioners in any manner.

7. It was next urged by the learned counsel appearing for the petitioners that there was absolutely no reliable and sufficient evidence placed on record by the prosecution to reach the conclusion that the petitioners intentionally brought the gold into India without any necessary permit in that behalf. It was strenuously urged that the evidence on records is not sufficient even if accepted on its face value to lead one to the conclusion that the petitioners had brought the gold into India and that the gold in question had foreign marks on it and had been actually smuggled into India so as to make the petitioners liable u/s 8(1) of the Foreign Exchange Regulation Act. There appears to be no substance in this contention.

It is clear from a perusal of the judgment of the learned Sessions Judge that the petitioners did not seriously challenge before him that the gold seized by the Customs Authorities was actually found concealed in the cavities of the vessel brought into Mangalore Port by the petitioners. In Exts. P-18 to P-26 which are the statements purported to have been made by the petitioners before the Customs authorities, the petitioners had unequivocally admitted that they brought the gold without any permit from the Government of India or the Reserve Bank of India. The learned Sessions Judge held that these statements of the petitioners are inadmissible in evidence since they amounted to confessions and had been made before officers who are considered to be police officers.

It is now argued that the other evidence on record is not sufficient to reach the

conclusion that the petitioners brought the gold into India in the vessel. Sri Santosh, the learned Government Pleader, on the other hand contended that the conclusions reached by the learned Sessions Judge that Exts. P-18 to P-26 which are the statements made by the several petitioners before the Customs authorities during the enquiry under the Customs Regulation are hit by Section 25 of the Evidence Act line they amounted to statements made before the Police is not sound in law. The learned Sessions Judge appears to have relied upon a decision of the Calcutta High Court reported in *Fernandez v. State*. AIR 1956 Cal 219, and a Sind decision reported in *Bachoo Kadero v. Emperor* AIR 1938 Sind 1 (FB), in preference, to the decisions of the Madras High Court in *In Re: Mayilvahanam and Others*, . *In Re: K. Venkata Reddi*, , *Crown Prosecutor v. Ramanjulu Naidu* 1944 MWN 31: (AIR 1914 Mad 169), in coming to the conclusion that the above statements are inadmissible in evidence.

It is urged that the view taken by the Calcutta and Sind High Courts that an Assistant Inspector of Customs is a Police Officer and any statement made before him is hit by Section 25 of the Evidence Act is untenable. After carefully examining the decisions, I am inclined to agree with the consistent view taken by the Madras High Court. Dealing with this question somewhat elaborately in *Richard v. Forest Range Officer* AIR 1958 Mad 31, *Somasundaram J.*, held that so long as the forest officers are not invested with powers of an officer in charge of a police station they cannot be considered to be police officers under the Code of Criminal Procedure and therefore, any statement made by an accused to the said forest officer is admissible in evidence and is not hit by Section 25 of the Evidence Act.

This view consistently taken by the Madras High Court has been accepted as correct by the Andhra Pradesh High Court in *The Public Prosecutor Vs. M. Rangareddy and Others*, . The learned Sessions Judge has not given reasons as to why he found it difficult to follow the reasoning adopted by the Madras and the Andhra Pradesh High Courts. I am of the opinion that the view taken by the Madras and the Andhra Pradesh High Courts that the Customs Authorities are not police officers as they are not invested with powers of an officer in charge of a police station and powers of investigation is sound and is acceptable. I am unable to accept the view of the Calcutta High Court that statement made to Customs Authorities by a person, who may later on be accused of an offence under the Foreign Exchange Regulation Act is hit by Section 25 of the Evidence Act and is therefore, inadmissible in evidence.

It is conceded by the learned counsel for the petitioners that if Exts. P-18 to P-26 are held to be admissible in evidence there is sufficient evidence to indicate that the petitioners had knowledge of the fact that the gold was being smuggled from, Muskat to India and that their convictions are perfectly justified. As already indicated, I have no doubt in my mind that Exts. P-18 to P-26 are admissible in evidence and any statements made by the petitioners before the Customs Authorities can be taken into consideration against the petitioners.

8. It was faintly urged by Sri. Javali, the learned counsel for the petitioners, that there is intrinsic evidence in the case to prove that those statements were not actually recorded in the very words of the petitioners and that the petitioners did not understand the implications of the statements made by them in these statements before they affixed their signatures and there are, no value, should be attached to them. I am unable to accept this argument. The Courts below have concurrently held that these statements were duly recorded by the Customs Authorities after taking the necessary precautions of securing persons who knew the language of the petitioners and that the questions put to them were translated to them and answers given by them are duly, recorded. This contention of the petitioners should, therefore, fail.

9. It was finally urged by Sri Javali, the learned counsel for the petitioners, that since the prosecution had failed to examine some independent witnesses to establish that the gold was actually found in the ship secreted in the cavities in the ship and that there was no possibility of other persons gaining entrance to the said vessel during that period that the vessel was in the Port before the gold was seized by the Customs Authorities, the charge against the petitioners had not been satisfactorily established. I am unable to accept this argument. The trial Court which had the opportunity to watch the demeanour of the witnesses examined by the prosecution has believed those witnesses and accented their version and based a conviction against the petitioners.

It is seen from the records that none of the witnesses were seriously cross-examined by the petitioners on the material facts deposed by them. For very good reasons the learned Trial Judge did not accept the version given by the only defence witness examined in the case that these petitioners were throughout in the hotel. In these circumstances. I cannot, sitting as a revision Judge, dislodge the findings of fact. This contention of the learned counsel for the petitioner should, therefore, fail.

10. The last contention urged by Sri Javali, the learned counsel for the petitioners, was that the learned Sessions Judge was not justified in ton-firming the composite sentence awarded by the learned trial judge in spite of the fact that he acquitted the petitioners of the offence u/s 167(81) of the Sea Customs Act. According to the learned counsel for the petitioners the sentences awarded to the petitioners should have been proportionately reduced. There is no substance in this contention. It cannot reasonably be urged that the sentences awarded to the petitioners are in any way severe. I am of the opinion that the sentences awarded to any of the petitioners do not call for any interference.

11. In the result, therefore, this revision petition fails and the same is dismissed. The first petitioner is on bail and should surrender to his bail and undergo the imprisonment and also pay the fine. The sentences of fine awarded to the other petitioners shall be enforced if they have not already paid the fine amounts.

12. Revision dismissed.