(1990) 12 BOM CK 0027

In the Bombay High Court

Case No : Criminal Appeal No. 811 of 1977

Marcelin Sabestian Carvello APPELLANT

Vs

State of Maharashtra RESPONDENT

Date of Decision : 04-12-1990

Acts Referred:
Customs Act, 1962 — Section 108, 111, 123, 135

Citation : (1991) 52 ELT 484

Hon'ble Judges : S.M. Daud, J;D.J. Moharir, J

Bench : Division Bench

Advocate : Shri S. Venkateswaran, Mr. D.C. Gomes and V.K. Ramabhadran, for the Appellant; Shri C.M. Kothari, Public Prosecutor, for the Respondent

Judgement

Daud J.

1. This appeal by persons arraigned as accused No. 5, 17, and 20 takes exception to the conviction and sentence recorded against them for their allegedly committing offences punishable under Sections 120-B of the Indian Penal Code and 135(b)(i) of the Customs Act, 1962.

2. The case against the appellants, shortly stated is that being aware of smuggling operations being carried on by various persons, they permitted the use of their godown for the purposes of storage of contraband consisting of metallic yarn, synthetic yarn and synthetic fabrics etc. Appellants are full brothers and were doing business in the name and style of ''Cyril Wilson & Co.'' at Belgaum in the State of Karnataka. Pursuant to the discovery of the smuggling activities being carried on by the three brothers and their co-conspirators, the Customs Authorities apprehended the culprits. In the course of the investigation carried on by the Customs Authorities, statements of the appellants were recorded u/s 108 of the Customs Act, 1962. In these statements, written by the appellants in their own handwritings, they made a clean breast of their participation in smuggling activities. Along with their co-conspirators appellants were put up for trial and at the trial the appellants retracted the statements

made u/s 108 of the Customs Act. Their contention was that the Customs Authorities had virtually dictated what they had to write down with their own hands. Having been coerced, there was no alternative open to them but to heed the directions given to them. They were not guilty and deserved to be acquitted.

3. At the trial almost the entire evidence adduced against the appellants consisted of the Section 108 Customs Act statements made by them before a Custom Officer known as Mr. Amarnani. The learned Magistrate held that the statements were voluntary and unerringly pointed to the participation of the appellants in a criminal conspiracy to aid and abet smuggling. He negatived the defence that appellants had been forced into giving confessional statements. The appellants were convicted u/s 120-B of the Indian Penal Code and Section 135(b)(i) of the Customs Act, 1962. The sentence imposed on accused Nos. 17 and 20 was R.I. for one year and a fine of Rs. 300/- on each count. Failure to pay the fine was to entail additional R.I. for two months per default. The substantive sentences were to run concurrently. The conviction and sentence recorded against accused No. 5 need not detain us, for after availing of bail pending appeal, the said accused has expired, with the result, that the appeal in so far as he is concerned, stands abated.

4. Learned counsel representing accused Nos. 17 and 20 submits that the learned Magistrate was in error in holding that the Section 108 Customs Act statements were voluntary. In any case, he was in error in holding that these statements made out the guilt of the accused Nos. 17 and 20. With the first submission we are not inclined to agree. The statements were written down by accused Nos. 17 and 20 respectively in their own handwriting. This is not the only reason for inferring that the statements were voluntarily made. The learned Magistrate has commented about the differences and dissimilarities in the statements of the two accused as amongst themselves as also when compared with that given by their deceased brother accused No. 5. Agreeing with the learned Magistrate we hold that there is no substance in the charge of accused Nos. 17 and 20 having been forced to take down a confession foisted upon them by the Customs Authorities.

5. As to whether or not the statements make out to culpability of the 17th and 20th accused, we cannot do better than go to the original statements. Accused No. 17 gives his age as 20 years and then comes a detailed description about where he lives, what work he does and the state of his brothers, sisters and parents, etc. Accused No. 17 speaks of being a partner of Marcelin (accused No. 5) and Peter (accused No. 20). The partnership carries on fish business and the Margaon customers used to send their fish for sale through the Commission agency of Cyril Wilson & Co. Accused No. 17 makes no secret of the fact that he was aware of his brother Marcelin being engaged in concealing of smuggled goods for the benefit of Margaon and Belgaum smugglers. The mere fact of the brother being engaged in smuggling would not make accused No. 17 guilty of any crime. There is however the admission that on one occasion about five

packages of contraband were allowed to be concealed by him at the instance of one of the smugglers. This was done by accused No. 17 despite the negative advice received from Marcelin conveyed to him by his brother accused No. 20 who had spoken to Marcelin then at Bombay on phone. The reason for this violation of brotherly counsel was that the person seeking the favour had plied him with food and drinks and had further given him a sum of Rs. 100/-. Accused No. 17 knowingly permitted the goods to be stored in the family godown. What would this solitary act make him guilty of ? Knowing that several people were engaged in smuggling and that one of these persons was his own brother Marcelin, would not make the accused No. 17 privy to any criminal conspiracy. Accused No. 17 would be guilty of no more than one occasion allowing his godown to be used for the depositing and concealing of smuggled goods. This would render him guilty of the offence punishable u/s 135(b)(i) of the Customs Act, 1962. At the time the offence was committed, i.e. on or about 26-4-1969, the penalty provision read thus :-

"Without prejudice to any action that may be taken under this Act, if any person..... acquires possession of or is in any way concerned in ..... depositing.... keeping... concealing... or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111, he shall be punishable in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to five years and with fine :

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than six months."

Counsel submits that at the time of commission of the offence accused No. 17 was a stripling of 20 summers, completely under the domination of his two elder brothers and it was this which led him astray. Having regard to the long passage of time and nothing adverse being known against accused No. 17 we are inclined to agree with the submission advanced by Counsel. Justice will be done by substituting the sentence awarded by the learned Magistrate into a fine of Rs. 5,000/-. While awarding the fine we are not unaware of the 15 days spent in detention by the 17th accused before being released on bail preparatory to the commencement of the trial. In case the fine is not paid accused No. 17 shall undergo two years S.I. Accused No. 17 granted six weeks time as from today to pay the fine.

6. Turning now to the case of accused No. 20, a careful scrutiny of the statement made by him reveals nothing which can be said to be incriminating. In fact, it can be seen from accused No. 17''s statement that this accused i.e. accused No. 20, had beaten accused No. 17 when the latter inspite of his advice on the contrary had permitted contraband to be stored in the godown of Cyril Wilson & Co. That apart, accused No. 20 speaks of his going to Margaon quite often and there learning that Baba and his Brothers Hussain, Ismail and Abbas being well

known as smugglers at Margaon. Next, he speaks of learning that Marcelin had got a truck of contraband unloaded in the house of Sherkhan which house was infact the family''s godown. Thirdly, the statement makes a reference to accused No. 17 flouting the advice given Marcelin and the maker of the statement himself i.e. accused No. 20, in allowing contraband to be stored in the godown and being rewarded with slaps for the flouting of instructions. In one of the last paragraphs accused No. 20 speaks of the partnership business and he himself being totally unconnected with the activities of Marcelin who was allowing the partnership''s godown to be used for depositing, keeping or concealing of smuggled goods. Therefore it is not possible to see how the learned Magistrate had read into the statement anything which can be said to be an incriminating nature. The conviction and sentence recorded against accused No. 20 cannot be sustained and hence the order.

ORDER

The Magistrate''s verdict in relation to accused Nos. 17 and 20 varied as under :-

Accused No. 17''s conviction restricted to the falling u/s 135(b)(i) of the Customs Act, 1962 - the sentence being a fine of Rs. 5,000/-. In case the fine is not paid, accused No. 17 shall undergo two years S.I. Accused No. 17 granted six weeks as from today to pay the fine amount.

The conviction and sentence recorded against accused No. 20 set aside in its entirety. Fine, if any paid by him, be refunded.

7. Appeal in so far as it relates to accused No. 5 stands abated.

