
(1979) 03 MAD CK 0038

In the Madras High Court

Case No : Criminal Revision Case No. 739 of 1977 and Criminal Revision Petition No. 733 of 1977

Mohammad Hussain

APPELLANT

Vs

Assistant Collector of Central Excise, Customs Division

RESPONDENT

Date of Decision : 05-03-1979

Acts Referred:

Customs Act, 1962 — Section 135(b)(ii)

Citation : (1979) CENCUS 511

Hon'ble Judges : Maheswaran, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Maheswaran, J.—This petition coming on for hearing on this day upon perusing the petition, and the Judgment of the Lower Courts, and the record in the case, and upon bearing the arguments of Mr. A.K. Sridharan, Advocate for the petitioner, and of Mr. P. Mohana Raju for the Central Government Prosecutor on behalf of the respondent the Court made the following Order:

2. The revision petitioner Mohammad Hussain 1st accused in 439/77 on the file of C.J. M. Pudukkottai and one Nizam A2 in that case have been convicted of offences u/s 135(b)(ii) of the Customs Act read with Section 13(1) and Section 67 of the Foreign Exchange (Regulation) Act, 1973 and u/s 135(A) of the Customs Act. The revision petitioner was sentenced to rigorous imprisonment for six months for each offence and Nizam was sentenced to pay a fine of Rs. 200 for each offence. In Appeal, the learned Sessions Judge, Pudukkottai Division confirmed the conviction of the revision petitioner and also the sentence and set aside the conviction and sentence on Nizam. The revision petitioner has filed this revision against the Judgment of the Sessions Judge.

3. On 29-8-1976, P.W. 1 Inspector of Central Excise Customs "preventive party, was on "sea-patrol" at Kattumavadi Sea coast for detecting illicit export of Indian goods to Sri Lanka. It was at about 7.30 P.M. P.W. 1 saw two persons standing at

the coast in suspicious circumstances. He moved towards them. On seeing P.W. 1 both took to their heels and after a hot chase, the revision petitioner was apprehended and on the information furnished by him, the identity of A2 Nizam came to be known to P.W. 1 made a search and seized 5 gunny bags and five Horlicks boxes containing Indian textiles and automobile parts and on examination of the revision petitioner, P.W. 1 came to know that those articles were kept for illicit export to Sri Lanka. On the same night at about 9.00p.m., P.W. 1 seized two gunny bags from a well in a coconut tope belonging to A-2 and those bags contained silver bars weighing 10.10 kgs. smuggled into India from Sri Lanka. The total market value of the goods is Rs. 24,496. The textiles goods and other articles were seized under Ex. P.1 at about 8.30 P.M. and the silver bars were seized under a mahazar Ex. P.2. Both Ex. P.1 and P.2 were attested by one Muthiah and Shankar. On 99.. 1976, A-2 was arrested in his house and he gave a statement Ex. P.6. A-1 gave a statement Ex. P.5. Both statements were voluntarily made to P.W.1. sent a report. The Assistant Collector of Central Excise gave a notice under Ex. P.7 to the revision petitioner and to the other accused. Prosecution was sanctioned and a complaint was laid.

4. The defence of the revision petitioner was that he was taken from his house by P.W. 1 at about 2 00 P.M. on 29-8-1976 to Manamelkudi and that he gave a statement under duress and coercion and that he was induced to sign the statement Ex. P. 5 on the promise that he will be let off. The other accused Nizam contended that he has nothing to do with the crime and that he was forced to give a statement as in by. P.6. The learned trial Magistrate convicted both the revision petitioner and the other accused of the offences with which they were charged and sentenced them as stated above. In appeal, the learned Sessions Judge confirmed the conviction and sentence on the revision petitioner who was A-1 and set aside the conviction and sentence on A-2 on the ground that A-2 cannot be convicted on the confession of the revision petitioner "without further materials".

5. Two points are raised before me by the learned Counsel appearing for the revision petitioner. The first is that a conviction cannot be based on the sole testimony of P.W. 1 who is a detective officer. The other point is that the statement given by the revision petitioner is not voluntary. He has also relied on the defence witness to show that the revision petitioner was taken from his house even at 2.00 P.M., on the date of occurrence. The evidence of P.W.1 shows that the bags and Horlicks boxes containing textile articles and other articles were about 1/4 furlong away from the place where the revision petitioner was arrested. His evidence further shows that these articles were available in one and the same place and there was no need to search for them. The complaint filed by the authorities shows that a thorough search of the shore was made by the officers and the 5 gunny bags and two Horlicks boxes were found on such search. There is therefore discrepancy between what is stated in the complaint and what is stated by P.W.1 before Court. Under those circumstances, it would have been better if the witnesses who attested Exs. P.1 and P.2 had been examined. It is in

evidence that one Shankar and one Muthiah were the attestors to Exs. P.1 and P.2. There is no reason why they were not examined. Unfortunately, not even one of the Mahazar witnesses has been examined. The Court is left only with the evidence of P.W. 1 who stated that he seized the articles. In this case, the mahazars, Exs. P.1 and P.2 have been prepared and attested by Muthiah and Shankar. It is desirable and in this case it is even necessary from the standpoint of the prosecution to examine at least one such witness in addition to the Inspector of Central Excise who actually seized the materials. As has been repeatedly pointed out by this Court, this is not because the evidence of the Inspector of Central Excise concerned is approached with any reservation, but it will be but fair from the standpoint of the accused that the prosecution has placed before the Court the best evidence in respect of the seizure. The prosecution, in my view, could have examined at least one of the mahazar witnesses so that the evidence of P.W.1 could have been made to rest beyond criticism. In the absence of such examination of mahazar witnesses, there is room for doubt whether the evidence of P.W.1 alone can be acted upon. The defence witnesses say that the revision petitioner was taken from his house at about 2.00 P.M. on the date of occurrence. There is also some doubt about the dates regarding recovery of the contraband. The arrest memo shows that the contraband articles were seized on 29-8-1976 and on 30-8-76 at Kattumavadi. The evidence of P.W.1 would show that the goods were seized on 29-8-1976 under Exs. P.1 and P.2 the mahazars. It is therefore all the more necessary that the mahazar witness should have been examined.

6. The next contention is that reliance cannot be placed on the statement Ex. P.5 made by the revision petitioner. This confession is now retracted. In deciding whether a confession is hit by Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how inducement, threat or promise proceeding from a person in authority would operate on his mind (see observations in *Satbir Singh v. State of Punjab* 1977 Crl.L.J.985. It is no doubt true that P.W.1 in his evidence denied having obtained Ex. P.5 by threat, but the evidence shows that the revision petitioner was apprehended on the night of 29-8-1976 on the seashore. He was actually arrested on 31-8-1976. The arrest memo shows that the revision petitioner was arrested on 31-8-1976 at about 11.00 hours. Therefore, he must have been under the custody of P.W.1 from the time of apprehension on the seashore of Manamelkudi at 7.00 P.M. on 29-8-1976 till 11.00 hours on 31-8-1976. This alleged confession was given by the revision petitioner only on 31-8-1976. It should be noted that the revision petitioner has not given the confession immediately after his apprehension, but it was nearly two days after the apprehension that Ex. P.5 was recorded. Under those circumstances, can it be said that there was no inducement, threat or promise from P.W.1? It should be noted that in cross-examination a suggestion was thrown to P.W.1 that Ex. P.5 was recorded under duress and coercion. It should further be noted that the versions of the defence witness have not been carefully considered by the Court.

I cannot persuade myself to believe that Ex.P.5 was a statement voluntarily given by the revision petitioner. Therefore Ex. P.5 has to be excluded from consideration. It should be further noted that A-2 has been acquitted.

7. For the foregoing reasons, the conviction of the revision petitioner is not sustainable and has to be set aside. In the result, the revision is allowed, the conviction and sentence passed on the revision petitioner are set aside and the revision petitioner is acquitted.