(1992) 08 MAD CK 0044

In the Madras High Court

Case No : Criminal R.C. No. 478 of 1988

S. Kaliappan APPELLANT

Vs

The Addl. Collector of Customs, Madurai RESPONDENT

Date of Decision : 07-08-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Customs Act, 1962 — Section 123, 135(1)(b)(i)

Citation : (1992) LW(Cri) 493

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : S. Pichai, for the Appellant; P. Rajamanickam, for the Respondent

Final Decision : Allowed

Judgement

Arunachalam, J.—Petitioner Kaliappan was A-2 in C.C. No. 53 of 1987 on the file of the Additional Chief Judicial Magistrate, Madurai. Subbiah who was arrayed as A-1 in the same calendar case died during pendency of trial and naturally the charge against him abated. The petitioner was convicted under S. 135(1)(b)(i) of the Customs Act and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1000/-. in default to undergo simple imprisonment for six months. Aggrieved petitioner challenged the correctness of his conviction and sentence, by preferring Criminal Appeal No.278 of 1987 before the Principal Sessions Judge, Madurai. The appellate court concurred with the findings recorded by the trial Magistrate and confirmed the conviction. However, the substantive sentence of imprisonment was reduced to one year rigorous imprisonment. Hence, this revision.

2. The prosecution case in brief will have to be narrated. P.W.1, Nallasivam, Inspector of Customs at Thondi, on information, searched the house of the petitioner situate in Theerthandthanam village at or about 3:00 p.m. on 11.2.1984. The petitioner was not present at his residence. His wife Sundariammal witnessed the search and seizure. Twenty-two gunny bags were

discovered in the kitchen of the house. The gunny bags were found wet. On opening, the gunny bags were found to contain polyster cloth of Korean origin. Certain labels were fixed on them. Sundari Ammal informed P.W.1 that the petitioner and Subbiah had brought those goods at or about 4:00 a.m. on 11-2-1984 and had kept them in the kitchen portion of the house. No document was available to indicate licit import of polyster cloth. All the twenty-two gunny bags were seized under mahazar. Ex.P-2. The market value of the seized goods was fixed at Rs. 1,83,040/-. Subbiah (since deceased) was examined on 12-2-1984 and his confession is Ex.P-4. The petitioner who was on anticipatory bail was questioned on 8-3-1984 and his confession, Ex.P-5, was recorded on the same day. It was the case of the prosecution that the polyster cloth seized was notified cloth u/s 123 of the Customs Act, for import of which licence is to be obtained. Adjudication proceedings were initiated and the Additional Collector ordered confiscation of the cloth seized by his order, Ex.P-7, dated 15-10-1985. Ex.P-8 is the sanction accorded to prosecute the petitioner and another. It was P.W.2, Balakrishnan, Superintendent of Customs, Ramanathapuram, who was present when Ex.P-5 was recorded by P.W.1.

3. The defence of the petitioner was that he was not available during alleged seizure and that he had nothing to do with the polyster cloth stated to be smuggled. His confession was not voluntary, but was the outcome of coercion.

4. Both the Courts below accepted the prosecution case, rejected the defence and dealt with the petitioner as stated earlier.

5. Mr. S. Pichai, learned counsel appearing on behalf of the petitioner contended that the petitioner by preferring Ex.C-3 before the trial Magistrate pleaded for production of the case property. The prosecuting authority sent a reply. Ex.C-4, stating that the case property had already been sold in pursuance of the adjudication order even on 29-10-1985. He also pointed out that Exs.C-1 and C-2 were respectively the petition and telegram dated 2-3-1984 and 9-3-1984 sent by the petitioner to the trial Magistrate. Ex.C-2 in effect retracts the confession alleged to have been made by the petitioner on the earlier day (8-3-1984). The argument was that Ex.P-5, the confession which had been retracted even on the next day should not be relied upon as the sole foundation to base a conviction. Non-production of property before Court had prejudiced the petitioner from discharging the onus cast on him. On these contentions, I have heard Mr. P. Rajamanickam, learned counsel appearing on behalf of the respondent. He vehemently contended, that on the basis of Ex.P-5, the conviction and the sentence imposed on the petitioner can be sustained. He would add that if the petitioner was desirous of challenging the voluntary nature of the confession, the onus was cast on him to establish, that Ex.P-5 was tainted.

6. I have carefully considered the divergent contentions placed before me. There are several infirmities which ensure in favour of the petitioner. Section 123 of the Customs Act reads as follows:

123. BURDEN OF PROOF IN CERTAIN CASES.-(1) Where any goods to which his section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be-

(a) in a case where such seizure is made from the possession of any person,-

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner hereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazelle specify.

A reading of this section makes it clear that when any goods to which this section would apply happened to be seized under the Act, with the reasonable belief, that they were smuggled goods, the burden of proving, that they were not smuggled goods, shall stand shifted to the person placed the position of the petitioner. It is also seen, that S. 123 of the Act would apply to gold, diamonds, manufactures of gold or diamonds, watches and any other class of goods which the Central Government may by notification in the Official Gazette specify. The prosecution has not chosen to place before the trial Court any notification in the Official Gazette specifying that polyster cloth seized in this case, would fall within the contemplation of such notification. However, Mr. Rajamanickam pointed out that under S. 123 of the Act, a notification was issued on 27th March 1968 and amended by another notification dated 10-10-1974 bringing within the net of S. 123 of the Act cigarettes, transistors and diodes, synthetic yarn and metallic yarn, fabrics made wholly or mainly of synthetic yarn, cassette tape recorders, electronic calculators and whisky. A careful perusal of the evidence of P.W.1 does not show that he had sought to connect the polyster cloth seized as fabrics made wholly or mainly of synthetic yarn, falling within the scope of this notification. Therefore, initial duty cast on the prosecution docs not appear to have been performed. Assuming for a moment that the prosecution had discharged its onus that the seizure was of smuggled goods, it owed a duty to produce the goods which were seized under the reasonable belief that they were smuggled goods, before Court, to facilitate the petitioner discharge his burden, of establishing that they were not smuggled goods. Without production of property, it may not be possible for the petitioner to discharge this burden. Laches on the part of the prosecution has deprived the petitioner, of a valuable opportunity. Mere presence of labels or marks over the polyster cloth will not be prima facie sufficient to bring it under S. 123 of the Customs Act. This grave lacuna alone, will be sufficient, to exonerate the petitioner.

7. Now that I have arrived at the conclusion that the basic foundation of the prosecution case has cease to exist, a peep into the acceptability of the confession of the petitioner marked as Ex.P-5, would be necessary to test the argument of the respondent''s counsel, if on Ex.P-5 alone a conviction could be safely recorded. In Ex.P-5 the petitioner, of course, has admitted that the seizure was of smuggled goods. Even so something more would be required on the instant facts, to find the petitioner guilty of the offence charged. Admittedly, the seizure was in the absence of the petitioner. Soon after thus statement of the petitioner was recorded on 8-3-1984, he had taken immediate steps to retract it by forwarding a telegram lo the trial Court. The trial Court had received Ex.C-2 on 9-3-1984, the day after Ex.P-5 was recorded. The petitioner has sufficiently challenged the evidence of P.Ws.1 and 2, that Ex.P-5 was not voluntarily made. When the petitioner was examined under S. 313 Cr.P.C. he has persisted in his case, that Ex.P-5 was not the outcome of voluntariness. On the peculiar facts and circumstances of this case, it will be very difficult to hold, that the confession statement, Ex.P.-5, was voluntarily made and that alone would suffice, without any other material, to convict the petitioner.

8. Mr. Rajamanickam brought to my notice the decision of the Supreme Court in K.T.M.S. Mohd. v. Union of India 1992 SCC (Crl.) 572 : 1992 L.W. (Crl.) 452 to impress upon me that when the maker alleges that the statement retracted was obtained by inducement, coercion, threat, promise or any other improper means, it was for him to establish that it was involuntary and extracted by such illegal means. The Supreme Court while observing this has added a corollary which needs extraction:

However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc. against the officer who recorded the statement, the court intending to act upon the inculpatory statement as a voluntary one, should apply its mind to the retraction accepting or rejecting it.

On the totality of facts, I am not inclined to base a conviction on the petitioner, merely on Ex.P.5. It cannot be safely held as voluntary. It is unfortunate that the goods had been sold, even two years prior to initiation of this prosecution. Vital infirmities, pointed out, have escaped the attention of both the Courts, and miscarriage of justice is the consequence.

9. As stated earlier, there are too many laches in this prosecution and hence it would be totally unjustified to sustain the verdict of the court below. In future, the Customs authorities would do well to retain the case property and produce it as material object during trial, for otherwise the contemplation under S. 123 of the Customs Act would become a dead letter.

10. The conviction and sentence imposed on the petitioner are set aside. Fine, if paid, shall be refunded. This revision is allowed.