

(1987) 06 BOM CK 0015

In the Bombay High Court

Case No : Criminal Writ Petition No. 1165 of 1986

Smt. Paru Mrugesh Jaikrishna

APPELLANT

Vs

Assistant Collector of Customs, Preventive Deptt., Bombay
and another

RESPONDENT

Date of Decision : 11-06-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 306, 321, 482
Evidence Act, 1872 — Section 3, 30
Penal Code, 1860 (IPC) — Section 120B

Citation : (1987) 89 BOMLR 318 : (1988) 15 ECC 172 : (1989) 40 ELT 23 :
(1987) MhLj 683

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Judgement

1. This is an application filed by the original accused 4 u/s 482 of the Cr.P.C. for quashing of process issued by the Chief Metropolitan Magistrate, Bombay in Case No. 28/CW of 1986 whereunder the petitioner along with six others are sought to be prosecuted u/s 120-B of the Penal Code read with S. 135 of the Customs Act.

2. The facts leading to the filing of the present application can be enumerated as under :-

On the 19th March, 1985 the original accused 2 and 3 were apprehended at the Sahar Air-port by the Customs Intelligence Officer when they were found to be carrying foreign exchange. On their statements being recorded by the Customs Intelligence Officer, the original accused 1 who is the husband of the petitioner was apprehended at the domestic air-port and his statement was recorded separately. During the course of investigation the statements of accused 5 and 6 were recorded whereby it was revealed that the petitioner/original accused 4 was also concerned with the foreign exchange seized from the accused 2 and 3. Thereafter departmental show cause notices were issued and adjudication proceedings were initiated against the petitioner and others. After the departmental investigation was complete, the present complaint came to be filed

in the Court of the Chief Metropolitan Magistrate, Esplanade, Bombay on the 22nd January, 1986.

3. The allegations of the prosecution as against the petitioner are set out in paras 12, 13, 14, 16 and 18 of the said complaint. In substance it was alleged, as against the petitioner, that on the accused 5 and 6 being apprehended at Ahmedabad they admitted in their statements that they were working for accused No. 1 in Skyjet Aviation Pvt. Ltd. at Ahmedabad of which the accused 1 as also the petitioner were the owners. Accused 1 had called accused 5 and 6 his residence on the 24th February, 1985 where accused 1 and 4 were present and accused 1 asked them to purchase U.S. Dollars and gave them an amount of Rs. 20,00,000/- to be carried to Bombay for the purpose of acquiring foreign exchange from one Noor Mohamed and Mahesh Marwari of Bombay. An amount of Rs. 20,00,000/- was placed in two V.I.P. suitcases and the accused 1 and the petitioner told them that Indian currency given to them was to be utilised by them in Bombay for the purpose of acquiring U.S. Dollars. The accused 5 and 6 were given Indian Airlines tickets for their travel from Ahmedabad to Bombay on the 25th of February, 1985 in false names. Investigations further revealed that the accused 3 who was to carry the foreign exchange to Hongkong was supplied his air-ticket by the petitioner through M/s. Marcopia Travel P. Ltd., Bombay. In the statement of the accused 4 she admitted having a major share in M/s. Skyjet Aviation Pvt. Ltd. She knew accused 2, 3, 5, 6 and 7. She, however, denied that she had any connection with the acquisition and attempt to have foreign exchange. She admitted having arranged for the ticket for accused 3 through Marcopia Travel Pvt. Ltd. but explained that she did so as accused 3 was the customer of Skyjet Aviation Pvt. Ltd. of which she was a major shareholder. On the aforesaid allegations, the petitioner was sought to be prosecuted for being a party to a conspiracy to attempt to export foreign exchange outside the limits of India.

4. By the judgment and order dt. 30th January, 1986 the learned Chief Metropolitan Magistrate was pleased to issue process against all the seven accused. Aggrieved by the said order of issue of process the original accused 7 filed in this Court Criminal Writ Petn. No. 702 of 1986 seeking to challenge the issue of process as against him and my brother Justice Kotwal by his judgment and order dt. 19th January, 1987 : (reported in Rajnikant Maganghai Patel Vs. Asstt. Collector of Customs, Bombay,) was pleased to quash the said process issued against the accused 7. The application of the original accused 4 for a similar relief seeking to challenge the issue of process as against her has come up before me for hearing and final disposal.

5. Mr. Desai, the learned Counsel appearing in support of the application has submitted that in the exhaustive complaint lodged by the Assistant Collector of Customs the only material placed against the petitioner were the statements of the accused 5 and 6 and of the petitioner having booked the passage for accused 3 from Bombay to Hongkong. According to him the aforesaid material is no

material in law for bringing out any offence under the Customs Act. The said allegation at best could make out an offence under the Foreign Exchange Regulation Act for which, as stated in the complaint itself, separate proceedings were being initiated under that charges. The issue of process as against the petitioner original accused 4 is an abuse of the process of Court and the petitioner who is a lady was likely to be unnecessarily dragged into a protracted criminal trail. Reliance was placed on the abovementioned judgment of my brother Justice Kotwal in Criminal Writ Petn. No. 702 of 1986 decided on 19th January, 1987 (reported in Rajnikant Maganghai Patel Vs. Asstt. Collector of Customs, Bombay,) wherein while disposing of the case of the accused 7 and quashing the process issued against him, it has been held that confessional statements of co-accused and its evidentiary value could be taken into account at the stage of the issue of process. On placing reliance upon the decision in the case of Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar, , it was found that those confessional statements of the co-accused were relevant u/s 30 of the Evidence Act, they were not evidence in the strict sense of the term u/s 3 of the Evidence Act. Such statements could be used only to lend assurance to the prosecution case after the same is established by other independent evidence.

6. The aforesaid decision of my brother Justice Kotwal was followed by my brother Justice Couto in Criminal Misc. Appln. No. 141 of 1986 decided on 20th March, 1987.

7. Having considered the material placed on record as against the petitioner, I am inclined to hold that the submissions of Shri Desai, the learned Counsel for the petitioner must be accepted. Once it is held that the statements of accused 5 and 6 are not evidence in their strict sense u/s 3 of the Evidence Act and the same can be relied upon only to lend assurance to the case of the prosecution as has been held in the aforesaid decision of the Supreme Court in the case of Haricharan Kurmi, (1964 (2) Cri LJ 344) (supra), one must necessarily look for some other independent evidence which can connect the petitioner with the offence under the Customs Act i.e. for attempting to export foreign exchange. The only material placed on record is the fact of the petitioner having arranged for the air-passage of the accused 3 from Bombay to Hongkong through M/s. Marcopia Travels Pvt. Ltd., Bombay. It has come on record in the recitals of the complaint itself that the petitioner is a major shareholder in M/s. Skyjet Aviation Pvt. Ltd. at Ahmedabad and if the petitioner in her capacity of being connected with her M/s. Skyjet Aviation Pvt. Ltd. arranged for an air-ticket for accused 3 who is known to her, through M/s. Marcopia Travels Pvt. Ltd., Bombay the same can hardly be said to connect the petitioner with the attempt on the part of the accused 1 to 3 to export foreign exchange out of India. Even if one were to accept the confessional statements of the accused 5 and 6 at their face value even as substantive evidence that would only show that she had directed the accused 5 and 6 to procure foreign exchange at Bombay. That Act, if established, can at best make out an offence under the Foreign Exchange Regulations Act but cannot make out an offence under the Customs Act for exporting foreign

exchange.

8. Shri Gupte, the learned Counsel appearing on behalf of the complainant, however, strenuously urged that it would not be open to go into the details of the evidence and into the evidentiary value the pieces of evidence at the stage of the issue of process. All that the Court was concerned at that stage was whether there was a prima facie case made out for the purpose of issue of process. The trial Magistrate had on a proper application of mind found in para 3 of the impugned order that there was sufficient material on record for issue of process and no fault could be found in that order. In any case this was not a case which warranted interference in my extraordinary inherent jurisdiction u/s 482 of the Code of Criminal Procedure. Shri Gupte relied upon a decision in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , wherein it has been held that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he has only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. The scope of the inquiry u/s 202 is extremely limited - only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complaint without at all advert to any defence that the accused may have. It is only in few cases where the order of Magistrate issuing process can be quashed, such as :

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

9. Reliance was also placed on a decision of this Court in the case of Jacob Harold Aranha and Another Vs. Mrs. Vera Aranha and Another, wherein similar propositions of law were laid down as in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, .

10. When I found that the entire material that had been collected by the complainant during the investigation had been placed in the complaint and when I felt that on a consideration of that material a conviction of the petitioner under the Customs Act was not at all possible. I enquired with Shri Gupte as to whether he had any additional material even at this stage to advance the case of the prosecution as against the petitioner. He relied upon the provisions of Ss. 306 and 321 of the Cr.P.C. and submitted that it was likely, though he had no material in that behalf, that one or the other accused may be tendered pardon and his evidence be recorded as an accomplice witness and that could possibly further the case of the prosecution against the petitioner. Alternatively, the prosecution could be withdrawn as against one or the other accused and their evidence be tendered as against the petitioner. He also relied upon the provisions of S. 138-A of the Customs Act and submitted that there was a presumption of culpable mental state against the petitioner. According to him, accused 1 was none else than her husband. Both of them had hired the services of accused 5 and 6 for procuring foreign exchange. They had handed over an amount of Rs. 20 lakhs to them for that purpose and booked their passage to Bombay for acquiring the said foreign exchange. The accused 2 and 3 were found red handed in their attempt to export the foreign exchange procured by accused 5 and 6 at the instance of accused 1 and 2 and the fact that the accused 4 had helped the accused 1 in procuring his passage from Bombay to Hongkong was sufficient material to connect the petitioner with the offence of export of foreign exchange under the Customs Act.

11. Shri Gupte, further submitted that the decision of my learned brother Justice Kotwal in Criminal Writ Petn. No. 702 of 1986 (reported in Rajnikant Maganghai Patel Vs. Asstt. Collector of Customs, Bombay, as also the decision of my brother Justice Couto in Criminal Misc. Appln. No. 141 of 1986 had not been correctly decided and that I should take a contrary view or in any even refer this matter to a larger Bench inasmuch as, according to him, the said decision did not properly construe the decision of the Supreme Court as also this Court in the cases of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, and Jacob Harold Aranha and Another Vs. Mrs. Vera Aranha and Another, .

12. Having given my anxious consideration to the submissions of Shri Gupte, I have been unable to persuade myself to accept the said contentions. At the cost of the petition it may be stated that the only material as against the petitioner is the confessional statements of accused 5 and 6 which, though relevant u/s 30 of the Evidence Act, is no evidence as contemplated u/s 3 of the Evidence Act and the only use to which they can be put to is to lend assurance to the case of the prosecution. Even assuming that one were to consider the said statements as evidence at the stage of the issue of process, those statements can at best be said to be material contravening the provisions of the Foreign Exchange Regulations Act and cannot make out any offence under the Customs Act. The only other material is about the petitioner having arranged for the air-ticket for the accused 3's air passage from Bombay to Hongkong. Unless there is a

connection link between the said procurement of the air passage and the attempt to export the foreign exchange at the hands of accused 2 and 3 the petitioner cannot even remotely be connected with an offence under the Customs Act and that vital link is conspicuously missing in this case. Regarding the submissions of Shri Gupte that at the stage of the issue of process only a prima facie case is to be looked into only to find out the truth or otherwise of the allegations which make out an offence, in my judgment a distinction will have to be drawn between a private complaint lodged by an individual and a private complaint lodged by the Customs Authorities after due investigation and collecting all material in support of its case. In complaint filed by private individual he has necessarily to depend upon the evidence of witnesses for making out a prima facie case for the purpose of framing of a charge. In such a case it would undoubtedly be unjust to go into the details of the evidence that may be with the complainant. However, as far as the Customs Authorities are concerned, the complaints are filed after recording of various statements which are made admissible in evidence and after conducting full investigations and it is hardly likely that after such detailed investigation more material is likely to come forth in support of the prosecution after the filing of the complaint. The possibility of one of the accused being granted pardon u/s 306 or the prosecution being withdrawn as against an accused u/s 321 of the Cr.P.C. whose accomplice evidence may come in aid of the prosecution, in my view, is nothing but conjectures. The view expressed by my brother Justice Kotwal and followed by my brother Justice Couto in the above decisions, in my view are binding upon me and I see no reason to defer from the views expressed in the said well considered judgments. If the evidentiary value of the confessional statements of accused 5 and 6 can be taken into account at the stage of the issue of process as held in the aforesaid cases, I do not see any useful purpose can be served by directing the trial to proceed as against the present petitioner as the petitioner who is a lady, may be the wife of the accused No. 1, cannot be held even remotely to be connected with the offence under the Customs Act. In my judgment the allegations made in the complaint taken at their face value make out absolutely no case against the petitioner and the same does not disclose the essential ingredients of an offence against the petitioner under the Customs Act and hence, the case of the petitioner falls in the first category of cases as mentioned in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, which would justify an interference at my hands u/s 482 of the Cr.P.C. for quashing the process issued against her.

13. In the result, this application is allowed. The order issuing process dt. 30th January, 1986 of the Court of the learned Chief Metropolitan Magistrate, Bombay in Case No. 28/CW of 1986 as against the petitioner is quashed. Bail bond cancelled.

Prayer of the petitioner for the return of her passport may be considered by the trial Magistrate only after a period of two months from today. Rule absolute.

Prayer of Shri Gupte for leave to appeal to the Supreme Court rejected.

14. Application allowed.