(1971) 07 BOM CK 0012

In the Bombay High Court

Case No : Criminal Appeal No. 925 of 1970

State APPELLANT

Vs

Yakub Ahmed RESPONDENT

Date of Decision : 20-07-1971

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

Citation : (1971) 07 BOM CK 0012

Hon'ble Judges : Deshmukh, J;Apte, J

Bench : Division Bench

Judgement

1. This is an appeal by the State against the order of acquittal passed by the Presidency Magistrate, 23rd Court, Esplanade Bombay. Though the appeal is filed against all the nine accused, who were prosecuted, it appears that notices have not been served except upon accused Nos. 4, 5, 8 and 9. By an earlier order passed by this Court it was directed that after 21st June 1971 the appeal in respect of those accused who are served should be separated from the appeal of the others who are yet to be served and the appeal should be heard and disposed of in case of those accused who have been served. In these circumstances we are hearing this appeal only in respect of original accused Nos. 4, 5, 8 and 9. The observations which we may make about the facts are, therefore, confined to these four accused only and nothing is intended to be said which would affect the State''s appeal in any manner in respect of the remaining accused.

2. The prosecution case is that A. C. Deputy Superintendent of Police Shri Besadia instructed Sub-Inspector Lagali of the Anti-Corruption Bureau to go and keep a watch for a mechanised Arab Dhow, which was expected to arrive in the Indian waters with a view to smuggle goods. The instruction was that in the night between the 9th December and 10th December 1969 the Dhow might be seen near about the Manori Island. Having received these instructions Sub-Inspector Lagali of the A.C.B. started from Reti Bunder at about 7.30 p.m. in a

police launch along with his staff. He arrived near Manori Island at about 10.30 p.m. and anchored his launch in the sea about a mile away from the shore. He was then on a look-out for any mechanised vessel that may be seen round about.

3. It is stated that at about 12.15 a.m. he noticed through a binocular a mechanised vessel approaching the Manori Island. He alerted his staff and directed the launch towards the vessel. Seeing the police launch, the vessel changed its direction and tried to proceed to the high seas. However, Lagali chased the mechanised vessel and overtook it within a distance of a mile or a mile and half. He forced the inmates of the vessel to stop it at the point of his pistol. He then boarded the vessel and forced accused No. 1 who was at the wheel to stop the engine. He searched the persons of all the nine accused who were on board the vessel. He also inspected the vessel and found that there were 24 packages wrapped in gunny bags in the hold. On the personal search he found an envelope with some currency notes in the right side pyjama pocket of accused No. 1 and some currency notes in the shirt pocket of accused No. 6. The envelope found on the person of accused. No. 1 was covered with celopene tape and it had three papers in it showing the list of packages and the merchandised price list of the articles in the packages. According to Lagali, he waited till about 2.30 a.m. for the arrival of the mechanised fishing vessel, which was to take away the articles from the Dhow for the purpose of smuggling them within the Indian territory. As none arrived, both the vessels were brought to Reti Bunder by about 7.15 a.m. on 10th December 1969. Information was conveyed to A.C.B. Office whereupon Besadia along with other members of the staff and panchas arrived at 8 a.m. A panchanama was made at the Reti Bunder and the articles were thereafter transferred to the A.C. Office. A second panchanama was made there after opening the packages. Twenty packages out of the 24 contained wrist watches totalling 20,033 valued at Rs. 5,73,630 on import and at Rs. 17,20,890 at the local market rate. One package contained watch straps 1010 in number valued at Rs. 3,030 on import and at Rs. 9090 at market value. One package contained some textiles collectively valued at Rs. 680 on import and Rs. 2040 at the local market rate. Two packages contained jackets containing 500 gold slabs valued Rs. 4,93,920 at international market value and Rs. 10,00,000 at the local market rate. After completing the panchanama, information was conveyed to the Custom Officers. The Customs Department then took charge of the accused as well as the goods and after interrogating the nine accused persons, statements came to be recorded. Thereafter, after completing the investigation all the accused persons were charged, firstly u/s 135(a) of the Customs Act and secondly u/s 135(b) of the same Act. They were also charged u/s 8(1) read With Section 23(1-A) of the Foreign Exchange Regulations Act, 1947. All of them were further charged u/s 5 of the Imports and Exports (Control) Act, 1947 read with Imports (Control) Order, 1955. Besides these common charges against all the nine accused, accused No. 1 who was the Tandel or the captain of the vessel was further charged u/s 135(a) of the Customs Act, 1962 for possessing two transistors. He was also charged u/s 111 read with Section 135(b) of the

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Customs Act, 1962. Since he was found in possession of certain Dubai currency he was also charged independently u/s 8(1) read with Section 23(1-A) of the Foreign Exchange Regulations Act. In the same manner as accused No. 6 was found in possession of Dubai currency and Indian currency he was charged u/s 135(a) of the Customs Act as also u/s 111 read with Section 135(a) of the Customs Act. He was further charged u/s 8(1) read with Section 23(1-A) of the Foreign Exchange Regulation Act, 1947.

4. The defence of all the accused persons at the trial was that they were undoubtedly forcibly brought to Reti Bunder by Sub-Inspector Lagali and that they were not into the Indian Customs'' water till when their vessel was overtaken by Lagali by firing several shots at them with the help of a pistol. They were 35 miles away from the Indian shore and were normally proceeding from Dubai to Ceylon. Their alternative defence is that none of the articles for which they are charged was with them at all. The Customs people have crores of worth property unclaimed. Out of the goods in their godown, they have foisted a few of them on the present accused and have concocted a story.

5. The learned Magistrate after hearing the evidence came to the conclusion that the prosecution has not satisfactorily proved that the Arab Dhow in which the accused were travelling was really within the Indian customs waters at the time when was accosted by S. I. Lagali. On the contrary the evidence appears to be more consistent with the fact that the vessel was 35 miles away from the Indian shore and not very close to Manori Island. The learned Magistrate has criticised severely the investigation as well as the conducting of the case. The other points raised, viz. that the sanction to prosecute was not proper and legal and that the vessel was required to come to Indian shore due to force, had not appealed to him. He has rejected them altogether. However, in view of his conclusion that the accused persons were not within the prohibited area of the Indian Customs'' waters, he acquitted all of them. Aggrieved with this order the State has preferred the appeal.

6. As already suggested earlier, we are hearing the appeal in respect of accused Nos. 4, 5, 8 and 9 only. Several points have been raised before us by the learned Counsel appearing for the accused person. Though it is Sub-Inspector Lagali who detected the Arab Dhow and brought it to Reti Bunder, the peculiar feature of the complaint is that there is no reference at all to Lagali in the body of the complaint. Even in the list of witnesses which is a long one, the name of Lagali does not appear at all. Some capital is sought to be made by the learned Counsel appearing for the accused before us of this fact. However, we find that though it is possible to blame the drafts man for a very bad draft, it is difficult to assume that Lagali was not there or that he was not the officer who brought the vessel to Reti Bunder. Apart from what the accused persons have stated in Court u/s 342 of the Code of Criminal Procedure, where they clearly admit that it was Sub-Inspector Lagali who brought them forcibly to Reti Bunder by showing pistol, at an occasion when Panchanama Ex. N, was made at 8 a.m. at Reti Bunder on

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10th December 1969, mention was made that Lagali and his staff detected the Dhow and brought it to Reti Bunder. There is, therefore, no ground to think that the entire story is concocted and Lagali has been subsequently shown as a person who detected the Arab Dhow whether Lagali brought the vessel from a distance of 35 miles and whether he did so by firing several bullets from his pistol is another disputed question of fact. We will express no opinion on the question for the purpose of disposing of this appeal against accused Nos. 4, 5, 8 and 9 as it is not necessary to do so. Yet another point raised is that Sub-Inspector Lagali went to Manori Island with prior information that an Arab Dhow was expected. When a raid is conducted with prior information of this type, ordinarily the Investigating Officer ought to carry with him panchas so that independent evidence is available from the very inception. Admittedly this was not done in the present case. Whether not doing so has any serious consequence upon this case is again a point of which we shall not express our opinion. In the same manner, some minor points which were argued before us need not detain us for the simple reason that no one important point of this appeal could be disposed of so far as respondents accused Nos. 4, 5, 8 and 9, are concerned.

7. The evidence shows that accused No. 1 was the Tandel or captain of the ship and he possessed documents relating to the goods that were stored in the hold. Accused Nos. 4, 5, 8 and 9 who are the respondents against whom the appeal is being heard, appear to be mere manual servants on the ship. In order to bring home several charges against them, an important ingredient of the crime appears to be that the accused persons must know that they are in possession of articles which could not be taken to Indian territory without a specific permit, licence or appropriate order from the Reserve Bank of India in that behalf. Since knowledge is an important ingredient, it is necessary for the prosecution to allege and prove that these respondents also knew that the articles were of a particular type and that they were being attempted to be smuggled into India. The only evidence in that behalf which the prosecution could lead was the statements made by these accused persons before the Customs Officer u/s 108 of the Custom Act, 1962. In this case statements purporting to be of these accused have been produced. Exhs. A to I are the statements of the nine accused person. The learned Trial Magistrate has held these statements inadmissible in evidence. The ground on which he held them inadmissible was that the statements ought to be recorded by any Gazetted Officer of the Customs and not by others. Inspector Divekar of the Customs has signed below all the nine statements, but his evidence shows that he recorded none of them. He admits that each of the accused persons was interrogated by some other officer. The prints in the paper book relating to Exhs. A to I do not clearly indicate as to who recorded the statement or who interrogated the accused persons. We, therefore, looked into the original statements and found that each statement bears some signature which is not decipherable. There is endorsement above the signature ''by me''. By way of specimen we may point out that accused No. 1 appears to be Hindi knowing persons and there is an endorsement signed by one

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Tiwari that he read over this statement and explained the same to Yakub Ahmed in Hindustani and it was accepted by him as correctly recorded. Inspector Divekar in examination-in-chief tries to assert that the accused persons were summoned u/s 108 of the Customs Act and he interrogated them and recorded their statements. However, in the cross-examination he admits that different officers were interrogating different accused at the same time. After the statements of the accused were recorded, they were produced before him for his perusal. He then signed below them. It is therefore obvious that he had not recorded any of these statements at all but he allowed some other officers to record the statements. He merely perused them and signed them after the record was complete. This is not a record of the statements by Divekar. We do not say that Divekar alone should have recorded the statements. Section 108 of the Customs Act permits any Gazetted Officer of the Customs to do so. Even after this fact was brought on record, no effort has been made by the prosecution to disclose who those officers were nor have they been examined to show that they were also Gazetted Officer who were eligible to record the statements u/s 108. It is thus clear that the prosecution has not shown to the satisfaction of the Court that the statements, Exhibits A to I, have been recorded by Gazetted Officer as required by Section 108 of the Customs Act. These statements are therefore not admitted in evidence. We are therefore eliminating them from our consideration.

8. The moment these statements go out of consideration, so far as these accused persons are concerned there is no evidence to show that they were aware of the contents of the various packages which were in the hold vessel. Unless a person has any conscious possession as required by the various sections with which he is charged, it is not possible to hold that the offence is brought home to him. On this ground alone, viz. requisite knowledge is not being brought home to the accused persons, the appeal against accused Nos. 4, 5, 8 and 9 must fail and must be dismissed. In this view we dismiss the State appeal against respondents Nos. 4, 5, 8 and 9, viz Abdul Wahab Abdul Karim, Ibrahim Haji Yusuf, Abdul Latif Mohamed and Haji Yusuf respectively. These respondents are directed to be set at liberty. The rest of the appeal is kept pending and will be heard in due course.

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