
(1979) 01 GUJ CK 0029
In the Gujarat High Court
Case No : Criminal Appeal No. 118 of 1978

State of Gujarat

APPELLANT

Vs

Hasmukhlal Ambalal Jariwala

RESPONDENT

Date of Decision : 12-01-1979

Acts Referred:

Customs Act, 1962 — Section 11

Citation : (1979) CENCUS 514

Hon'ble Judges : R.C. Mankad, J;M.P. Thakkar, J

Bench : Division Bench

Advocate : K.M. Chayya, P.P, for the Appellant;

Judgement

Mankad, J.—This appeal by the State of Gujarat is directed against the judgment and order dated September 29, 1977, passed by the learned Additional Chief Judicial Magistrate, Bulsar, acquitting the accused Nos. 4 & 5 who are respondents before us.

2. The case of the prosecution is as follows. On May 5, 1970, the Mobile Squad of Customs Department intercepted a pick-up van bearing No. MRD 9101 on the National Highway No. 8 when it was near Chikhli-Billimora-Bulsar, cross roads. The van was found coming from the direction of Surat and it was driven by Balubhai Maganlal Patel, who was accused No. 1 before the learned Magistrate. Accused No. 2 Peshi alias Purshottam Chhaganbhai was accompanying accused No. 1 in the van. The van was registered in the name of one Manohar Pragji Vasani, who was accused No. 6. On search of the van, the Customs officers found silver ingots and pieces weighing 834.650 kilograms valued at Rs. 434,018 in secret compartments below the floor of the van. The van was followed by a Fiat car which was driven by accused No. 6. Accused No. 3 was accompanying accused No. 6 in the Fiat car. The customs officers stopped this car, but as nothing incriminating was found from the car, the accused Nos. 3 and 6 were allowed to go. According to the prosecution, in pursuance of a notification issued by the Government of India vide Sections 11I and 11M of the Customs Act, the

area within 50 kilometers from the sea coast of India has been declared as "specified area" and amongst other articles silver bullion is declared as "specified goods". It is the prosecution case that u/s 11K of the Customs Act, transport of specified goods within the specified area is prohibited, unless the same are accompanied by transport vouchers. When the aforesaid pick-up van was intercepted and silver ingots and pieces worth Rs. 4,34,018 were found and accused Nos. 1 and 2 were asked to produce transport vouchers. They were, however, not able to produce them. According to the prosecution, silver found from the van had become liable to confiscation u/s 113L of the Customs Act.

3. Now, the case of the prosecution further is that accused Nos. 1, 2, 3 and 6 had gone to the factory of accused No. 4. Hasmukhlal Ambaram Jariwala at Surat and obtained silver ingots and silver pieces referred to above from accused No. 4. Accused No. 6 was the agent of accused No. 5. Sukar Naran Tandel, who is resident of Nani Daman. It is the case of the prosecution that accused No. 5 is a notorious smuggler and silver obtained from accused No. 4 was to be delivered to him at Nani Daman. Presumably silver was to be exported illegally. After the silver ingots and pieces were loaded in the pick-up van, accused Nos. 1 and 2 were taking the van to Nani Daman to deliver them to accused No. 6. As stated above, accused No. 1 was driving the van. The van was followed by accused Nos. 3 and 6 in the Fiat car. The van was intercepted and silver was detected as already stated. On the above allegations, it is the prosecution case that the accused had committed offence punishable u/s 135 of the Customs Act.

4. All the accused were tried for the offence u/s 135 of the Customs Act before the learned Additional Chief Judicial Magistrate, Bulsar. Process could not be served on accused No. 6 and, therefore, his case was separated from the case against the other accused. In other words, trial proceeded only so far as accused Nos. 1 to 5 were concerned. All the five accused pleaded not guilty to the charge framed against them. The learned Magistrate, after recording evidence, came to the conclusion that the prosecution had established the guilt against accused Nos. 1, 2 and 3. The learned Magistrate mainly relied on the confessional statements made by accused Nos. 1, 2 and 3 before the Customs Officers in holding them guilty of the offence with which they were charged. He, therefore, convicted them for an offence u/s 135 of the Customs Act and sentenced each of them to rigorous imprisonment for one year and a fine of Rs. 1000 or in default further rigorous imprisonment for three months. However, so far as accused Nos. 4 and 5 were concerned, the learned Magistrate found that except the confessional statements made by accused Nos. 1, 2 and 3, there was no evidence against them. He was of the view that the confessional statements of co-accused can be used only to lend assurance to the guilt if there was other evidence to establish their guilt. As there was no evidence to prove their involvement in the crime the confessional statements made by accused Nos. 1, 2 and 3 could not be used against them. In this view of the matter, he acquitted accused Nos. 4 and 5. It is this order of acquittal which is challenged by the State in this appeal.

5. Now, the prosecution case which is discussed by the learned Magistrate proves beyond doubt that the pick-up van bearing No. MRD 9101 was intercepted by the customs officials on the National Highway No. 8 near Chikhli-Billimora Bulsar cross roads and on search of the van silver ingots and pieces weighing 834.650 kilograms valued at Rs. 4,34,018 were found from the secret chambers under the floor of the van. Accused No. 1 was driving the van, and accused No. 2 had accompanied him. Now, the question which we are called upon to decide is whether accused Nos. 4 and 5 are proved to have been involved in the transport of silver. The prosecution relies solely on the statements made by accused Nos. 1, 2 and 3 to bring home the charge against accused Nos. 4 and 5. Each of the accused Nos. 1, 2 and 3 had made two statements before the customs officials. P.W. 3 M. B. Jani, who was Superintendent of Customs at the relevant time has recorded statements Exhs. 61, 62 and 63 made by accused Nos. 1, 2 and 3 respectively. P.W. 5 D. N. Desai had recorded the statements Exhs. 78, 79 and 80 made by accused Nos. 1, 2 and 3 respectively. Desai had also recorded the statements of accused Nos. 4 and 5 but these statements are exculpatory and they do not in any way help the prosecution in proving the charge against accused Nos. 4 and 5. In statement Exh. 61 recorded by M. R. Jani, accused No. 1 stated that accused No. 3 contacted him at about 8-00 or 8-30 A.M. on May 4, 1970. It may be mentioned that accused Nos. 1, 2 and 3 are residents of village Varkund. Accused No. 1 met accused No. 3 at the house of accused No. 2. Accused No. 3 told accused No. 1 that he and accused No. 2 had to go to collect a motor vehicle and that he would be paid his remuneration which according to accused No. 1 was Rs. 200 per trip. Accused Nos. 1, 2 and 3 left Varkund in a Fiat car. Accused No. 3 was driving the Fiat car. When they reached the High way they met the pick-up van driven by accused No. 6. Accused No. 1 was instructed to drive the pick-up van and take it to Nani Daman. He was instructed to leave the van in a garage adjoining the bungalow of accused No. 5. According to accused No. 1 he and accused No. 2 went by pick-up van, while accused No. 3 and 6 followed them in a Fiat car. Accused No. 1 has then stated about the interception of the van and seizure of silver ingots and pieces accordingly as stated above. In his subsequent statement Exh. 78, accused No. 1 stated that under the instructions of accused No. 6 he and accused No. 2 went with the pick-up van to Surat at about 8-30 A.M. on May 4, 1970. According to accused No. 1 they had to take the van to the house of accused No. 4 from whom on previous occasions he had collected silver. The pick-up van was entrusted to accused No. 4 and accused Nos. 1 and 2 returned to Daman by train. Accused No. 1 further stated that he knew there were secret chambers in the pick-up van and that when he took the van to Surat to deliver it to accused No. 4, metallic yarn was carried in the secret chambers. Accused No. 1 has further stated that on May 5, 1970 he and accused No. 3 went by Fiat car to Surat. Accused No. 6 met them on the way and they all three went to Surat. After reaching Surat, they went to the house of accused No. 4 which was adjoining a theatre which was under construction in Salabatpura. After some time, accused No. 6 brought the pick-up van and accused No. 1 was asked to drive it to Nani Daman. Accused No. 1 has

stated in his earlier statement that accused No. 3 and 6 followed him in a Fiat car. Accused No. 1 has stated that silver was to be delivered to accused No. 5. When his statement Exh. 78 was recorded, accused No. 4 was present in the office of the officer recording the statement. Accused No. 1 identified accused No. 4 as the person to whose house he had gone in Surat.

6. Accused Nos. 2 and 3 have made statements on the lines of statements made by accused No. 1. Therefore it is not necessary to reproduce them in detail. While their statements Exhs. 79 and 80 were recorded accused Nos. 2 and 3 identified accused No. 4 as the person from whom silver seized by the customs officers was collected.

7. It was argued on behalf of the accused that the statements of accused Nos. 1, 2 and 3 recorded by M. R. Jani and D. N. Desai were not voluntary. It was alleged that these statements were obtained under coercion and threat. We, however, do not find any substance in these allegations. We agree with the learned Magistrate that their statements were voluntary. The statements of accused Nos. 1, 2 and 3 disclose that silver seized by the customs officers was collected from accused No. 4 and it was to be delivered to accused No. 5. If the statements could be relied upon and conviction could be based on them, there is no doubt that there is a strong case against accused Nos. 4 and 5. The question, however, is whether we can rely solely on the statements to base conviction of accused Nos. 4 and 5. In *Haroon Haji Abdulla Vs. State of Maharashtra*, the Supreme Court has held that a confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross-examination whilst the former is not. The confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict. Thus, the confessional statements made by accused Nos. 1, 2 and 3 can be used only for a limited purpose as laid down by the Supreme Court. Conviction of accused Nos. 4 and 5 cannot be based solely on these confessional statements. Therefore, though the confessional statements made by accused Nos. 1, 2 and 3 make out a strong case against accused Nos. 4 and 5, accused Nos. 4 and 5 cannot be held guilty on the basis of these statements. We, therefore, agree with the view taken by the learned Magistrate that the prosecution has failed to prove charge against accused Nos. 4 and 5.

8. Mr. K. M. Chhaya, learned Public Prosecutor has sought to rely on one circumstance, which according to him proves the guilt of accused No. 4. The circumstance on which Mr. Chhaya relied was this. The tests disclosed that silver seized from the pick-up van was similar to silver ingots found from the factory of accused No. 4, during search. Mr. Chhaya submitted that similarity of the quality of silver was a strong circumstance which indicated that accused No. 4 was involved in the commission of the crime. It is however, not disputed by him that there were no distinguishing marks on the silver ingots found from the factory of accused No. 4 and the silver seized from the van. Therefore, there is no

satisfactory evidence to show that the silver ingots and pieces seized from the van came from the factory of accused No. 4. In our opinion therefore, the circumstance on which Mr. Chhaya relied does not help the prosecution.

9. In the result, we have no alternative but to dismiss this appeal.