(1983) 06 GUJ CK 0003

In the Gujarat High Court

State of Gujarat APPELLANT

Vs

Motilal Himatlal Shah RESPONDENT

Date of Decision : 30-06-1983

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 313
Customs Act, 1962 — Section 135(1), 135A, 135A
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (1984) 1 GLR 504 : (1983) 2 GLR 1404

Hon'ble Judges : A.S. Qureshi, J

Bench : Single Bench

Judgement

A.S. Qureshi, J.—These two appeals are filed by the State of Gujarat and the Customs Department, Original Complainant, against the judgment and order dated March 17,1979 passed by the Additional Chief Judicial Magistrate, Valsad acquitting the accused of the offence alleged to have been committed by him. The accused was charged u/s 135(1). The prosecution case was that the accused had engaged certain persons for carrying silver from Bombay to Daman with the intention to sell it there to some unknown parties who engaged themselves in the export of silver out of India. A total quantity of 287.472 Kg. of silver valued at Rs. 1,60,637/- was seized at Udwada from several persons who were used as carriers of silver to Daman. The accused in his statement to the Investigating Officer of the Customs Department had stated that he was transferring this quantity of silver of a party from Bombay to Daman as he knew that in Daman the silver fetched 20% more price. He also stated that he knew that some fishermen purchased silver at Daman at a higher price with a view to transport it illegally out of India in their fishing boats. He further stated that out of this 20%, higher price he was to get 5% of the price by way of commission. The accused has substantially stood by this story in his statement u/s 313 of the Criminal Procedure Code.

2. Miss V.P. Shah, the learned Standing Counsel for the Union of India concedes that to ban the preparatory activity in furtherance of illegal export and import the

Customs Act, 1962 (Act 52 of 1962) has been amended by the Act 12 of 1969 which came into force on 3-1-1969. Three new Chapters IVA, IVB and IVC are added after Section 11 of the said Act which cover Section 11A to UN which expressly prohibit all the preparatory acts in furtherance of smuggling. These newly created offences are made punishable under the added Section 135A of the Customs Act, 1962. But according to her, these provisions brought in by the amendment were only with a view to clarify and to make the preparatory activity specifically punishable. According to her, even prior to the amendment the activity in furtherance of smuggling was prohibited. This becomes evident according to her by reading the provisions contained in Sections 11 and 135 of the Customs Act read with Section 3 of the Exports and Imports (Control) Act, 1947. According to Miss Shah Section 3 of the Exports and Imports (Control) Act, 1947 empowers the Central Government to make provisions for prohibiting, restricting or otherwise controlling the export, import etc. of such goods as it considers proper. Miss Shah states that under the Export Control Order the export of silver was not banned originally as it was not included in the list of articles in Schedule I to the said order; but by its notification No. E(C), 1962/AM (109) dated October 7, 1966, silver was also included in the said Schedule I to the Export Control Order. Thus, according to her, from the date of the said Notification not only the export of silver was prohibited, but also any act done in furtherance of the illegal export also was punishable, even under the law, as it stood prior to the aforesaid amendment of 1969.

2.1. Mr. K.J. Shethna, the learned Counsel for the accused submits that the learned Magistrate has very rightly acquitted the accused as he arrived at the conclusion that no offence was proved to have been committed by the accused. According to him, prior to the aforesaid amendment of the Customs Act any preparatory act done in furtherance of the object of smuggling of silver out of India was not an offence and there was no question of convicting and punishing the accused. According to Mr. Shethna, Section 3 of the Imports and Exports (Control) Act, 1947 is an enabling section which gives power to the Central Government to declare any article to be prohibited from being exported or imported; but there was no provision in the Customs Act prior to the amendment of 1969 for punishing any activity which may be regarded as preparatory to or in furtherance of the illegal export of silver out of India. Mr. Shethna urges that if such preparatory activity was already punishable there was no need to bring in such an extensive amendment and adding three new Chapters declaring such preparatory activity illegal and provide punishment for them by adding a new punishing Section 135A.

3. The contentions of Mr. Shethna have to be upheld because obviously the legislature does not engage itself in legislating which is not necessary. It must be held that the preparatory activity to illegal export was not punishable prior to the aforesaid amendment of 1969. Moreover, it cannot be said that the learned Magistrate has committed a mistake in acquitting the accused for allegedly illegal, activity of exporting silver out of India. In fact, no silver was recovered

from him. The silver was recovered from some other persons who according to the accused were carrying silver from some Bombay merchants to some unknown buyers at Daman, from the sale of which the accused was to get a commission of 5% on the sale price of silver. The sale of silver within the territories of India is not banned. Therefore, any citizen can carry on legitimately the business of buying and selling of silver. Even the admission on the part of the accused that this silver would be sold to some unknown fishermen at Daman who may export it out of India illegally would not amount to an offence on the part of the accused. It cannot be said that the accused was a link in the chain of illegal trade of smuggling silver out of India. The buyers of silver in Daman may have clear option either to use it in India as for example for making ornaments or to illegally export it. Until there is irrefutable evidence to implicate the accused with the smuggling activity, it would be highly improper to convict a person of some offences which may or may not be committed. The learned Magistrate has in a well considered judgment looked into all aspects of the matter and after proper appreciation of the evidence on record, has quite rightly acquitted the accused. There is no reason to disagree with the finding given by the learned Magistrate. Hence both the appeals by the State and by the Customs Department are dismissed.

