
(1991) 04 BOM CK 0083
In the Bombay High Court
Case No : Criminal Appeal No. 870 of 1980

State of Maharashtra

APPELLANT

Vs

Akhtar Hussain Rehaman Moson

RESPONDENT

Date of Decision : 10-04-1991

Acts Referred:

Customs Act, 1962 — Section 108, 110, 111, 123, 135

Citation : (1993) 49 ECR 207 : (1991) 55 ELT 327

Hon'ble Judges : R.G. Sindhakar, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Smt. K.D. Randive, Addl. P.P, for the Appellant; Shri M. Janardhan, Shri G.S. Hedge and Shri B.M. Purandare, for the Respondent

Judgement

Chaudhari, J.—The learned Judicial Magistrate, First Class, vasi, by his order dated 27th May 1980 acquitted the Respondents (Accused Nos. 1 to 5 hereinafter referred to as "the accused") of the offences u/s 135(a)(b) read with with Section 135(i) of the Customs Act, 1962 and Section 3 and 4A read with Section 5 of the Imports and Exports (Control) Act, 1947. The said order is challenged in this appeal by the State. The few relevant facts leading to the prosecution of the accused may be stated thus :

Dattatraya Mugave P.W. 1 who was then working as Assistant Collector of Customs in the Directorate of Revenue Intelligence at Bombay, on the basis of information received by him on 4-2-1971 that smuggled goods are likely to be landed at Kalamb, went along with his raiding party consisting of six officers to Nirmal where they kept themselves in hiding at a place and awaiting further information about the time of actual landing of the goods. On 5-2-1971 at about 3 a.m. upon information having been received that the goods were landed at Kalamb and were being loaded in a truck, the raiding party proceeded to Kalamb. While approaching Kalamb, they saw a truck standing on the road with its lights on. They saw one person standing near the truck and another sitting in the driver's cabin. The person who was standing outside escaped and according to

the prosecution, the person sitting inside driver's cabin was present accused No. 1. The raiding party took charge of the truck which was loaded with packages covered with gunny cloth and packed and proceeded to the Customs House, vasi. As they proceeded in the direction of vasi while the truck was being driven by one of the officials, they saw an Ambassador Car coming from opposite direction near Satpala. The time was about 3.30 a.m. The officers stopped that Car and interrogated the persons who were sitting in that Car. Those persons were accused Nos. 2 to 5. At that place itself, panchas were called and the truck as well as accused Nos. 1 to 5 were shown to them. Thereafter the truck was taken to the vasi Customs House along with the said Car and all the accused i.e. 1 to 5 were taken to the Customs House. It may be mentioned that the raiding party was traveling in a Car along with the truck.

2. At vasi Customs House, the packages loaded in the truck were unloaded and opened and inventory of the contents was taken in the presence of panchas and a panchanama was drawn. The inspection of the goods revealed that they consisted textiles with foreign making, sewing machine needles, metallic yarn and packets of sewing needles and razor blades. There were in all 91 packages. Their value was estimated over Rs. 13 lakhs and the amount of duty that was payable thereon which was allegedly sought to be evaded, was more than Rs. 4 lakhs. Thereafter summons were issued to the accused u/s 108 of the Customs Act and their statements were recorded. After completing these formalities, sanction to prosecute the accused was obtained u/s 137(1) on 18th December, 1976 (nearly 5 years after the commission of the alleged offences). As complaint was instituted in the Court of the Judicial Magistrate, First Class, vasi on 22nd December, 1976 against the accused for committing the offences under sections mentioned earlier.

3. The prosecution examined six witnesses and relied upon the statements of the accused recorded u/s 108 of the Customs Act. Reliance was also sought to be placed on the panchanama of seizure.

4. All the accused in their statements u/s 313 of the Code of Criminal Procedure, denied having committed the alleged offences. They contended that their statements recorded u/s 108 were not voluntarily made and were recorded under threat given at the point of gun. Each of the accused had his own explanation to be given about his presence in the Car which is not material to be noted here. They did not, however, dispute that they were travelling in the Ambassador Car which was intercepted by the Customs Officers. It may be mentioned that even according to accused No. 1, he was also travelling in that Car and was not travelling in the truck as alleged by the prosecution.

5. The learned Judicial Magistrate did not believe the prosecution evidence and held that the offences were not proved against the accused. Consequently he acquitted them.

6. The learned Additional "Public Prosecutor Smt. Randive vehemently argued

that the learned Magistrate was in error in discarding the statements of the accused recorded u/s 108 of the Customs Act even though the accused purported to retract the statements as the evidence of the concerned officers showed that they were voluntary statements made by the respective accused. She argued that having regard to the nature of the offences committed and the activities in which the accused were found indulging, it would be difficult to expect independent evidence to be available. Moreover, viz., Mugave P.W. 1, Nagarkar P.W. 2 and the supporting witness P.W. 3, could be believed and their evidence provided corroboration to the statements made by the accused so that they could be safely relied upon.

7. The learned Advocates representing the respective accused on the other hand submitted that the evidence of the Customs Officers was contradictory in nature and no reliance could be placed on that evidence. Likewise, no reliance could be placed upon the statements of the accused recorded under Sec. 108 of the Customs Act as the statements recorded were not voluntarily made and were also retracted by the accused.

8. After going through the evidence we find a fatal lacuna in the prosecution, which goes to the root of the matter and having regard to the same, the prosecution deserves to be dismissed.

9. The charge framed against the accused persons was on two counts viz., for offences u/s 135(a)(b) read with Section 135(1) of the Customs Act and u/s 3 and 4A read with Section 5 of the Imports and Exports (Control) Act, 1947. Section 135 of the Customs Act, in so far as material, reads thus :

"135(1) without prejudice to any action that may be taken under this Act, if any person -

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Sec. 111,

he shall be punishable -

(i) in the case of an offence relating to any of the goods to which Sec. 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years, and with fine;

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for less than three years;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both".

It is thus clear that the ingredient of the offence is that the accused must be knowingly concerned with the alleged fraudulent evasion of the duty and should acquire possession or be concerned in carrying or removing the goods or dealing with them with the knowledge or having reason to believe that the goods are liable to confiscation u/s 111. When we turn to Section 111, it will be noticed that it relates to confiscation of improperly imported goods etc. That section, where dutiable and prohibited goods are concerned, requires it to be shown that the goods found are of this category. In order to understand the scope of these two sections, it will be necessary to have a look at the definition of the expression "smuggling" in clause (39) of Section 2 of the Act which means any act or omission which will render such goods liable to confiscation u/s 111. The definition of the expression "goods" contained in clause (22) of Section 2 of the Act is an inclusive definition and includes any kind of moveable property amongst other. The impact of these definitions is that any goods would not accord to the definition of being smuggled goods unless there is a reasonable belief that the goods are either liable for duty or their import into India or dealing with such goods is prohibited by the law. The character of the goods being prohibited goods or smuggled goods or dutiable goods thus is foundation for attracting penal provision of the Customs Act as well as Imports and Exports (Control) Act. When the prosecution is launched on the basis of the complaint, it must be shown by the prosecution in the first instance that the seized goods were liable to confiscation and that under such reasonable belief they were seized. The onus will shift only thereafter to the accused u/s 123 of the Customs Act to show to the contrary. Moreover, Section 123 would require that it must be shown before the burden can shift upon the accused that the goods were from the category of goods specified under sub-section (2) of the said section by the Central Government by notification in the official Gazette.

10. In the instant case, the basic ingredient is lacking P.W. 1 Mugave who had carried out the raid and who was present at vashi Customs House when the seizure of the goods was in process and who was the person who had gathered the information about likelihood of smuggling of goods and had arranged the raid, has not uttered a single word in his evidence to assert that he had reason to believe that the goods in question were likely to be of the description covered by Section 111 of the Customs Act or Section 5 of the Imports and Exports (Control) Act. Besides his own evidence, a reference can be made to the complaint, the sanction and the panchanama of the seizure of find out whether Mugave had acted in effecting the raid on any basis which afforded him reason to believe that an offence was likely to be committed under the provisions of the two Acts and that on seeing the goods when they were seized at the instance of the Customs whether they were of the description which rendered them liable for confiscation. In the complaint it is stated that the truck was found fully loaded with the packages and was suspected to contain smuggled goods. The basis,

therefore, for carrying out the raid was suspicion but it is not shown that in the mind of Mugave that suspicion was based upon any reason to believe that the goods would be such as fell within the ambit of Section 111 of the Customs Act. There is only one sentence in the complaint wherein it is stated that the goods were seized u/s 110 of the Customs Act by the officers in the reasonable belief that the said goods were smuggled goods liable to confiscation under the Act and that likewise the truck and the Car in which the accused were travelling were also seized by the officers in the reasonable belief that the same were used for the carriage/transport of the smuggled goods which were liable to confiscation under the Customs Act. No credence can be given to these statements appearing in the complaint because they clearly appear to be mentioned mechanically in the complaint since nothing of that nature was stated by Mugave in his evidence nor Mugave could corroborate the statements made in the complaint and take advantage thereof for the simple reason that the complaint was lodged nearly about 5 years after the incident under the signature of S.C. Chaudhary Assistant Collector of Customs and Central Excise, vasi. The said officer has not been examined by the prosecution to prove the contents of the complaint. The prosecution endeavoured to prove the signature of Mr. Chaudhary by examining Chandran Bunker, Assistant Collector of Customs and Central Excise, P.W. 5. His evidence does not improve the matter and fact remains that the contents of the complaint have not been proved. There is nothing in the evidence of Mugave himself from which the contents of the complaint about the mention of the reasonable belief stand proved. In the sanction it is not asserted that Mugave had acted after he had reason to believe that an offence was about to be committed in respect of goods seized. Turning next to the panchanama of the seizure, the contents of the panchanama are not proved because the pancha Nicholas P.W. 6 did not support the prosecution. He was declared hostile and was cross-examined on behalf of the complainant. During his cross-examination, he stated that the contents of the panchanama are not correct and that he had signed the panchanama at the instance of the Customs Officers. He also stated that only the metallic yarn was shown to him, but the rest of the property mentioned in the panchanama was not shown to him. Although the panchanama recites that the goods were seized by the Customs and Central Excise Officers under a reasonable belief that the same were smuggled goods and liable for confiscation that fact cannot be expected to be proved by the panchanama, but there has to be an assertion coming from the officer who had proceeded to seize the goods that he had formed reasonable belief in his mind. That evidence is lacking, as Mugave has not so stated in his evidence. The position, therefore, that emerges is that even though 91 packets were found loaded in the truck and they were inspected and seized at the vasi Customs House, there is no evidence to establish that those goods were liable to confiscation under the provisions of the Customs Act and Imports and Exports (Control) Act.

11. It was sought to be argued by the learned Prosecutor that the evidence shows that the goods had a foreign marking on them which showed that they

were smuggled goods. Suffice it to say, in this connection, that the mere fact that the goods apparently appeared to be of a foreign origin that by itself would not cloth the authorities with any jurisdiction under the Act to effect seizure of them; since the seizure of the goods in the instant case is not shown to have preceded by formation of a reasonable belief in the mind of the seizing authority that they were smuggled goods. That being the position, in our opinion, the entire prosecution of the accused for the offences with which they were charged was unsustainable and cannot be treated to be legal.

12. That apart, another serious difficulty in the way of the prosecution is that the charge was brought against all the five accused jointly for committing the offence under the Customs Act as well as under the Imports and Exports (Control) Act without charging them under any appropriate provisions of the Indian Penal Code so as to establish any conspiracy between them to smuggle the goods or deal with them illegally or for abetting each other in the commission of the offences or for having acted with a common object shared by all of them to commit the offences. When the loaded truck was taken charge of by the Customs Officers, none of the accused Nos. 2 to 5 was present. Hence they could not be said to be in possession of the goods that were ultimately seized from the truck. They could, therefore, be roped in only by the process of proving that they had either formed a conspiracy for committing the offence with respect to the goods and loading of the goods in the truck was a part of their conspiracy so that they could be held constructively in possession of the said goods or for having abetted some one in smuggling and loading the goods in the truck for the purposes of further transportation. There is absolutely no evidence to establish these ingredients. It was submitted by the learned Prosecutor that even if in the charge no section of Indian Penal Code has been mentioned, that could be treated merely an irregularity and should not vitiate the trial. Assuming, therefore, for the sake of argument that section with reference to its number may not be mentioned in the charge yet the ingredients of the appropriate section constituting either conspiracy or abetment should find place in the charge so that the accused could be expected to answer that charge. The charge as framed does not contain any such particulars. The accused, therefore, could not be said to have been given an opportunity to meet such a charge. In the absence of this circumstances since accused Nos. 2 to 5 were not found in actual possession of the goods nor their connection with the goods can be said to have been established, their prosecution for the offences under the respective Acts was bad in law.

13. The learned Prosecutor referred to Section 5 of the Imports and Exports (Control) Act which uses the words "abets" and submitted that one Section 5 has been mentioned in the charge, it automatically means that the accused were charged for having abetted others in the commission of the offences. It is difficult to agree with the submission. When section itself mentions abetment, it is necessary that the charge should set out the accusation that there has been an abetment committed by the accused. Such an accusation must find place in the complaint.

14. Turning to the evidence on record, it has been strenuously urged by the learned Prosecutor that the statements of the accused which are inculpatory statements and amount to confession of the guilt should have been accepted by the learned Magistrate as providing sufficient evidence to hold the offences proved. These statements were retracted by the accused. Even though a statement recorded u/s 108 of the Customs Act is admissible in evidence and would be relevant, yet it is a salutary rule that unless some amount of corroboration is available to it from some other independent evidence, it would not be safe to rely on it particularly when it is retracted by the person making it. The learned Advocates for the accused submitted that the statements were not made by the accused much less voluntarily and they were already kept ready by the Customs Officers and the accused person were simply made to sign over them which they did under pressure and threats from the officers. The submissions is not totally unfounded because evidence of witness Dube P.W. 3 shows that he was called to explain the statement of accused No. 2 to the said accused at 10 a.m. whereas according to Nagarkar P.W. 2 who recorded the statement, the accused himself had read the statement and had signed the same. It is difficult to understand as to why the statement was required to be once again explained to accused No. 2 by Dube P.W. 3. However, on going through the statement, the language does not appear to be the language coming from a lay-man, but which is more familiar to the officers. For instance, in the statement of Akhtar Hussain Rehaman Moson, accused No. 1, it is found stated by him that "at Satpala the Car MR 8140 occupied by Ziauddin, Shaffi, Anna Patil and Gavari came, the officers promptly stopped that car...." The word "promptly" relating to the reaction of the officer was unnatural to have come forward from this accused. Likewise, the statements at the top originally stated that they were being recorded before Mugave. That part was struck out by Nagarkar who came to vasi from Bombay at about 12.30 p.m. and after he was briefed by Mugave, proceeded to serve the summonses and record the statements of the accused. The evidence of Nagarkar P.W. 2 shows that he had proceeded to record the statements immediately after serving the summons u/s 108 without giving sufficient time to the accused to reflect. These circumstances go to show that absolute reliance cannot be placed on the statements to hold the accused guilty on the basis of their confession contained in these statements without independent corroboration forthcoming.

15. The value of the statements and the panchanama is further reduced by the fact that Mugave P.W. 1 has stated that when their car intercepted the car of the accused, he had called the panchas/and showed the truck as well as accused Nos. 1 to 5 to the said panchas. That happened at Satpala. However, none of the panchas has been examined. Indeed from the statement of the pancha Nicholas P.W. 6; it appears that he was one of those panchas, but according to him, he was called from his house at 7.30 a.m. to the vasi Customs House and denied that the truck was shown to him at Satpala, but asserted that it was shown to him at vasi. That means the evidence of Mugave that panchas were called at

Satpala and he had taken these panchas along with him to the Customs House where the goods were unpacked and shown to the panchas cannot be believed. Likewise, Mugave in his cross-examination has stated that some 2-3 days before 4-2-1971 an informant and already showed him the place of hiding. That completely knocks out his story that on information received on 4-2-1971 he had proceeded with the raiding party to Nirmal, suspecting that some goods would be smuggled on that night about which he had received information on that day. This answer of Mugave shows that he may not have necessarily gone in pursuance of any information about the present consignment but he had gone in connection with some other information and has ultimately tried to connect the seizure of the goods in question as seized in pursuance of the information received by him on 4-2-1971. There is a clue to this possibility in his own statement in the cross-examination that earlier to 4-2-1971 he had been to the area of Nirmal and Kallam 3-4 times. Moreover, the conduct of Mugave has been peculiar. After taking the truck and the accused to the Customs House at vasi, he does not proceed to issue summonses to the accused or to record their statements or to complete the panchanama of seizure. His evidence shows that he was very much in a hurry to go back to Bombay and was anxiously waiting for some officer to relieve him. Accordingly Nagarkar arrived at about 12.30 p.m. from Bombay. He simply gave him instructions and left the place. If Mugave had acted in pursuance of some information on the basis of which he had reason to believe that an offence was going to be committed and had happened to seize the truck and bring it to the Customs House, it was his duty to see the goods after unpacking them and ascertain as to whether they were goods of the type which were liable to confiscation and, therefore, any offence was in fact committed in respect thereof and to have completed at least the panchanama of the seizure. Apart from the above infirmity, the learned Advocates for the accused have pointed out to us contradictions on several points arising in the evidence of Mugave P.W. 1 and Kanade P.W. 4 who was another Customs Officer in the raiding party. These contradictions are on the point of lights of the truck being on when it was on the shore, about lights of the Customs' Car being switched off while travelling, two gun shots allegedly fired at that time, presence of accused No. 1 in the cabin of the truck, about the car of the Customs Officers being ahead or behind the truck on their way to Satpala and the road being wide enough to allow tow cars to pass and few other minor points. These contradictions would not have assumed much significance had the evidence of Mugave been otherwise satisfactory.

16. Considering the above nature of the evidence, we find it difficult to treat it as affording corroboration to the statements recorded u/s 108 of the Customs Act and vice versa.

17. The case in respect of accused No. 1 stands on slightly different footing than the case against accused Nos. 2 to 5. The accused Nos. 2 to 5 were never found in possession of the goods. For the reasons already discussed, they cannot be held guilty. So far as accused No. 1 is concerned, the evidence of Mugave shows

that on seeing their car approaching one of the persons who was standing by the side of the truck had escaped as one of the officers in fact tried to chase him, but he could not be caught. According to Mugave, the other person who was sitting at that time in driver's cabin was accused No. 1.

As stated earlier, according to accused No. 1, he was not in the truck at all, but he was in fact travelling along with other accused in the Car which was intercepted by the Customs Officers near Satpala. There is room to give benefit of doubt on this circumstances to accused No. 1 because the panchas who were supposedly called by Mugave at the spot where the car was intercepted and where all the accused were shown to them including accused No. 1, have not been examined and if witness Nicholas is to be treated one of these panchas he has not supported the story of the prosecution.

18. In the light of the above discussion, we find that although the reasons given by the learned Magistrate in support of his order are not very happily worded, his ultimate conclusion was right. It is really unfortunate that the proceedings have remained pending for nearly 20 years from the date of alleged offences. The sanction itself was obtained by the Customs Department for filing the complaint after the lapse of about 5 years after the seizure of the goods and no satisfactory explanation was given by the Customs Officers in their evidence about this delay. No explanation was given as to why the complaint was not signed by Mugave before he retired and why he was not confronted with the complaint while he was in the box. The case lingered on for four years in the trial Court when according to the scheme of the Act, the trial Court is expected to try the case speedily by applying summary procedure. Much of the blame will have also to be shared by the cross-examiner as the cross-examination of the witnesses has been prolix and unnecessarily lengthy. We have no words except to express regret that this appeal itself has come up for hearing after a period of nearly 11 years in this Court.

19. In the result, we hold that none of the offences with which the accused were charged stands proved from the evidence and the accused have been rightly acquitted of the offences with which they were charged. Consequently the order of acquittal is confirmed and the appeal is dismissed. Bail bonds stand cancelled.