

(1990) 07 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No. 260 of 1983

State of Maharashtra

APPELLANT

Vs

Sayed Mohamed Hashim Al Musavi

RESPONDENT

Date of Decision : 07-07-1990

Acts Referred:

Customs Act, 1962 — Section 108, 135, 135(1)

Citation : (1991) 51 ELT 41

Hon'ble Judges : K.N. Patil, J

Bench : Single Bench

Advocate : Shri P.M. Vyas, P.P, for the Appellant; Smt. S.D. Kolhe, for the Respondent

Judgement

1. This appeal is filed by the State against the judgment of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay in Case No. 29/CW/82 acquitting Sayed Mohamed Hashim Al Musavi respondent (original accused No. 1) of the offences punishable u/s 135(1)(a)(ii) of the Customs Act, 1962 and Section 5 of the Imports and Exports (Control) Act, 1947. The prosecution case in brief is as follows :

The respondent is a national of Bahrain and in the year 1978 he had brought with him a car under a carnet procedure. The car was to be sent back within a specified time. On 28-2-1980 the respondent brought the car from Pune to Bombay for exporting it to Dubai. On the same day the car was checked for carnet procedure by Nivrutti Sakharam Kardak (P.W. 5) Customs Officer but nothing incriminating was found. After the car was checked, the key was handed over to the cargo supervisor. It was then located on the ship M. V. Noorjehan of Moghul Lines on 1-3-1980. Gaonkar (P.W. 1) Preventive Officer of Customs Bombay along with officers went to the ship and on search they found 162 pieces of silver weighing about 51 Kg. valued at Rs. 1,63,710/- concealed in the petrol tank of the car. The key of the car was given to them by cargo supervisor of the ship. The ship was to sail for gulf countries within few days. From the shipping

documents, the Customs officers traced the respondent at Pune and brought him to Bombay in the evening of 2-3-1980 and interrogated him on 3-3-1980 and 5-3-1980 and recorded his statement. Ex. P3 to P6 wherein he had disclosed that Mansoor (original accused No. 2) was to export the silver bars by concealing them in the car and for which a sum of Rs. 5,000/- was paid if him. His statement disclosed that he had allowed Mansoor to use his car for exporting silver for consideration. When produced before the Magistrate on the next day for remand, respondent retracted the confessional statement. After investigation, the complaint was filed against the respondent and Mansoor u/s 135 of the Customs Act and Section 5 of the Import & Export (Control) Act, 1947.

2. The respondent pleaded not guilty and denied that he attempted to export the silver in the manner suggested by the prosecution. He denied that he made statements Ex. P3 to P6 before the Customs Officers. He also denied involvement of Mansoor. Mansoor also denied that he was exporting the silver.

3. The prosecution examined Gaonkar (P.W. 1) Preventive Officer of Customs, S. R. Vichare, Preventive Officer of Customs (P.W. 2), Kazi Kamar Sadrudin, Superintendent of Customs (P.W. 3), V. V. Vakatkhar, Preventive Officer of Customs (P.W. 4) and N. S. Kardak, Selection Grade Preventive Officer (P.W. 5) Mahalingam Ramkrishnan (P.W. 6) employee of the Carting Agent. The learned Additional Chief Metropolitan Magistrate held that the retracted confessional statements of the respondents accused are not corroborated by an independent evidence and it would not be safe to base conviction on retracted confessional alone without independent corroboration. The prosecution failed to prove that the respondent had canceled silver bars in the petrol tank of the car and attempted to export silver. He also held that there was no evidence except the retracted confessional statements against accused No. 2. Consequently, both the accused were acquitted. However, in this appeal the acquittal of respondent is challenged.

4. There is no serious dispute that the respondent had imported car in the year 1978 and he was staying with his brothers at Pune. The car was imported under carnet procedure and therefore was to be reshifted within a specified time. On 28-2-1990, the respondent brought his car to Bombay for reshipping it to Dubai. The car was checked by the Preventive Officer, Mr. Kardak (P.W. 5) but nothing incriminating was found in it. Mr. Kardak says that he did not search the petrol tank of the car. However, I am not inclined to attach much significance to that statement because in all probability he must have checked the car thoroughly. However, his evidence shows that no incriminating article was found during the search of the car. Thereafter, the Carting Agent loaded the car on the ship. After the car was cleared by Kardak, the respondent No. 1 handed over the case of the car and thereafter he had no concern with it. The car was in possession of the Shipping Company. Evidence of Gaonkar (P.W. 1) Preventive Officer, shows that on information he along with other officers went to the ship on 1-3-1980 at about 2.00 p.m. He informed the mate who came with the key of the car. The noticed that something was concealed in the petrol tank of the car. The tank was

broken and 162 pieces of silver were recovered and attached under panchanama. Prosecution did not examine panchas but there is no good reason to disbelieve the evidence of Gaonkar about the seizure of silver bars from the petrol tank of the car. In the cross examination of Mr. Gaonkar he admitted that they have come across many cases wherein crew members of the ship are involved in the smuggling of silver. They had detected many smuggling cases in which M. V. Noorjehan ship of Moghul Lines was involved. This evidence does not rule out the probability of silver bars being planted after the car was loaded on the ship. It is not the prosecution case that the respondent had access to the car after it was loaded on the ship and was in custody of the offices of the ship. Admittedly at that point of time, respondent had no concern with the car.

5. There is no direct evidence to show that the appellant had kept silver bars in the petrol tank of his car with an object to export it. The evidence is circumstantial mainly in the form of the statements. Ex. P3 to P6 recorded u/s 108 of the Customs Act by the Officers of the Customs. In these statements, which are lengthy, the respondent disclosed how he came in contract with respondent No. 2, who agreed to purchase the car and told him that he would put silver bars in the petrol tank to export them to Dubai because accused No. 2 paid him Rs. 5,000/-. The car brought to Bombay after the bars were concealed in the petrol tank, thereafter respondent No. 1 gave the shipping documents, the car was checked by the Customs Officer, he handed over the key and went back to Pune. The respondent was detained and kept in Mule Police Station and when he was produced for remand, he retracted the statements made by him. Although as a matter of law, the conviction can be based on retracted confessional, yet as a settled rule of practice it has been held in numerous cases that it is unsafe to convict the accused person on his retracted confessional statements standing by itself without independent and full corroboration. There is no independent corroboration to the confessional statements made by the respondent. The learned Judge, therefore, rightly did not rely on these statements. If these statements are excluded for want of corroboration then there is nothing which would reasonably connect the respondent with the offence. In my view, the learned Judge was right in acquitting the respondent of the offences with which he was charged as the prosecution failed to prove the case. There is no merits in the appeal. In the result, the appeal fails and is dismissed.