

(1985) 12 BOM CK 0004

In the Bombay High Court

Case No : Criminal Writ Petition No. 353 of 1985

T.C. Kanabar and Another

APPELLANT

Vs

Assistant Collector of Customs, Preventive (Prosecution Cell)
and Another

RESPONDENT

Date of Decision : 18-12-1985

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 236, 273, 403, 408
Customs Act, 1962 — Section 135, 138A
Income Tax Act, 1961 — Section 271, 273A, 277, 279
Penal Code, 1860 (IPC) — Section 276C, 482

Citation : (1986) 10 ECC 308

Hon'ble Judges : D.N. Mehta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.N. Mehta, J.—The two petitioners herein T.C. Kanabar and V.V. Nanavathi have filed this criminal writ petition, praying that the order dated 24-4-1985 passed by the learned Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay, under which charges u/s 135(1)(a)(ii) of the Customs Act, 1962 and u/s 7 read with Sections 13 and 20 of the Dangerous Drugs Act, be set aside and the proceedings in Case No. 107/CW/ 1982 be quashed.

2. The facts leading to the prosecution of the two petitioners herein, briefly stated, are that one B.J. Sharma along with his family left India for London via Nairobi on 23-5-1976. Sharma and his family flew by the East African Airlines. Sharma had left certain unaccompanied baggage which was to be flown to London later on. As per the procedure, a departure certificate was obtained from the East African Airlines by petitioner-accused No. 1 on 8-7-1976. The Departure Certificate certified the fact that B. J. Sharma and his family had travelled to London by the East African Airlines. Thereafter a baggage declaration form was filled in by accused No. 1 and signed by accused No. 1 in the name of accused

No. 2. In the baggage declaration form the consignor was shown as accused No. 2.

On 13-7-1976 accused No. 2 accompanied by accused No. 1 went to the office of Air India for the purpose of depositing three suitcases as unaccompanied baggage of B.J. Sharma. Air India acted as the agents for the East African Airlines in Bombay. When accused No. 2 booked the three suitcases as unaccompanied baggage of Sharma, he deposited the departure certificate and the baggage declaration form along with the keys of the three suitcases with the Air India authorities. The three suitcases were to be consigned to "P.D. Sharma, 15, Lanshaw Crescent, Leeds, U.K." and the consignor was V.V. Nanavathi, 50 Babu Genu Road, Kalbadevi, Bombay. On the basis of these documents, Air India prepared an airways bill.

It is the prosecution case that after the three suitcases were deposited with Air India, the officials of that airline opened the baggage in order to examine the contents. During the inspection the Air India Officers suspected that there were false bottoms to all the three suitcases. Thereupon they reported the matter to the customs authorities.

On 14-7-1976, Superintendents of Customs Narayan Singh and Pareira along with other Customs Officers went to the office of Air India and opened the three suitcases in the presence of panchas. Each of the three suitcases was found to have a false bottom which was ripped open by the Customs Officers. It was found that in the false bottoms of two of the suitcases was concealed 61/2 kilos of "charas" each and the third suitcase contained 7 kilos of "charas". In all 20 kilos of "charas" valued at Rs. 20,000 was concealed in the false bottoms of the three suitcases.

3. Thereafter adjudication proceedings were started against the two petitioners herein. Petitioner-accused No. 1 was fined a sum of Rs. 1,000 and petitioner-accused No. 2 was fined a sum of Rs. 2,000.

4. Against the said order of fine, dated 14-6-1978 passed by the Assistant Collector of Customs, an appeal was filed before the Collector of Customs. The Collector of Customs by his order dated 4-9-1980 exonerated both the petitioners and the penalty imposed on them was set aside. The Collector of Customs held that the two petitioners had acted in good faith in the despatch of unaccompanied suitcases and that there was no evidence that they had knowledge regarding the concealment of the contraband.

5. Thereafter sometime in 1982, the Assistant Collector of Customs launched a criminal prosecution by filing a complaint against the two petitioners herein in the court of the learned Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay. The sanction for prosecution was granted by the Additional Collector of Customs, Joglekar.

6. The prosecution examined about five witnesses in the case. On 16-9-1983 an

application was made [before] the learned Additional Chief Metropolitan Magistrate on behalf of the petitioners herein for quashing the criminal proceedings. The learned Additional Chief Metropolitan Magistrate by his order dated 24-4-1985 rejected the application for quashing the proceedings and under the same order proceeded to frame charge against the two petitioners u/s 135(1) (a)(ii) of the Customs Act and u/s 7 read with Sections 13 and 20 of the Dangerous Drugs Act.

7. It is against this order of the learned Additional Chief Metropolitan Magistrate that the two petitioners have approached this Court for invoking its inherent jurisdiction for setting aside the said order of the learned; Additional Chief Metropolitan Magistrate dated 24-4-1985 and for quashing the proceedings pending in that court.

8. Shri Gumaste, learned Counsel appearing on behalf of the petitioners, has made two submissions in support of his prayer to set aside the order of the learned Additional Chief Metropolitan Magistrate and the proceedings. Shri Gumaste, firstly, submitted that there was a legal bar prohibiting the prosecution of the two petitioners. Shri Gumaste submitted that once the adjudication proceedings ended in favour of the petitioners and they stood exonerated, no prosecution could thereafter be launched against, the petitioners on the same set of facts.

9. The second submission made by Shri Gumaste was that there was no credible evidence which could incriminate the two petitioners with the offence u/s 135(1) (a)(ii) of the Customs Act as also u/s 7 read with Sections 13 and 20 of the Dangerous Drugs Act. In these circumstances, Shri Gumaste urged that this Court should invoke its inherent powers u/s 482 of the Indian Penal Code and quash the proceedings against the two petitioners as also the order framing charges against them passed by the learned Additional Chief Metropolitan Magistrate.

10. Shri Gupte, learned Counsel appearing on behalf of respondent No. 1, the Assistant Collector of Customs, has submitted that the mere fact that the two petitioners were exonerated in the adjudication proceedings would not bar their prosecution in a criminal court. Shri Gupte contended that there was no law nor any provision in the Constitution which barred the prosecution of the present petitioners, despite the fact that the adjudication proceedings went in their favour. Shri Gupte also submitted that the evidence led by the prosecution established beyond doubt a nexus between, the petitioners and the contraband found in the unaccompanied baggage. Shri Gupte submitted that there was no ground for any interference with the order passed by the learned Additional Chief Metropolitan Magistrate and the trial Magistrate should be allowed to proceed with the case.

11. It may be pointed out that the inherent jurisdiction of this Court is restricted within a narrow compass and has to be exercised in rare cases in regard to

matters not specifically covered by the provisions of the Criminal Procedure Code. The scope of the inherent powers of the High Court was defined by their Lordships of the Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, , wherein Their Lordships laid down that the inherent jurisdiction of the High Court could be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Their Lordships cautioned that the High Court would be reluctant to interfere with the said proceedings at, an interlocutory stage. Thereafter their Lordships laid down three categories of cases where the inherent jurisdiction to quash proceedings could and should be exercised. The following are the three categories:--

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.

12. Shri Gumaste has submitted that his application for quashing the proceedings would fall within the first and the third categories. I shall now deal with the arguments of Shri Gumaste and the authorities cited by him.

13. Shri Gumaste, firstly, contended that the petitioners herein could not be prosecuted once the adjudication proceedings were decided in their favour. Shri Gumaste argued that there was a legal bar to the prosecution of the two petitioners. In support of his submission Shri Gumaste relied on the observations of the Supreme Court made in an Income Tax appeal in, the case of Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, The judgment of their Lordships is brief and is recited hereunder:--

Heard counsel, special leave granted. In view of the finding recorded by the Income Tax Appellate Tribunal that it was clear on the appraisal of the entire material on the record that Shrimati Janak Rani was a partner of the assessee-firm and that the firm was a genuine firm, we do not see how the assessee can be prosecuted for filing false returns. We accordingly, allow this appeal and quash the prosecution.

14. Shri Gumaste next relied on a judgment of the Punjab and Haryana High Court in the case of Parkash Chand Vs. Income Tax Officer, A-Ward, The learned single Judge observed:--

In Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, the High Court had declined to quash the criminal proceedings on the grounds, inter alia, that the findings of the tribunal were not binding on the criminal courts, but the Supreme Court quashed the proceedings on the basis of the finding of the Tribunal.

In that case also criminal proceedings before the learned Chief Judicial Magistrate were quashed.

15. Now, it may be pointed out that the two authorities cited by Shri Gumaste related to cases under the Income Tax Act, 1961. Under the Income Tax Act there is an express bar u/s 279(1A) against the prosecution of an assessee u/s 276C or Section 277 in relation to the assessment of an assessment year in respect of which the penalty imposed or imposable on the assessee has been reduced or waived by an order u/s 273A. Section 279(1A) provides: --

279. (1A) A person shall not be proceeded against for an offence u/s 276C or Section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under Clause (iii) of Sub-section (1) of Section 271 has been reduced or waived by an order u/s 273A.

It may be pointed but here that there is no such provision barring a criminal prosecution under similar circumstances in the Customs Act, 1962.

16. Shri Gmpte has pointed out that the Supreme Court had occasion to reconsider the observations made in Uttam Chand's case in a recent judgment in the case of P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, . Their Lordships observed:--

It is true that as observed by this Court in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, , the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded .by an authority under the Act subsequently in respect of the relevant assessment proceedings but that decision is no authority for the proposition that no proceedings can be initiated at all u/s 276C and Section 277 as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal

proceedings u/s 276C and Section 277 of the Act. In the criminal case all the ingredients of the offence in question have to be established in order to secure the conviction of the accused. The criminal Court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the criminal Court. The criminal Court has to judge the case independently on the evidence placed before it.

17. The matter, however, is no longer *res Integra* in view of the decision of the Supreme Court in the case of *The Assistant Collector of Customs and Another Vs. L.R. Malwani and Another*, In that case in an enquiry held by the Collector of Customs two persons charged with smuggling contra band were given the benefit of doubt by the Collector, as there was no conclusive evidence against them to hold them as the persons concerned in the act of unauthorised importation. In spite of this finding, the two persons were prosecuted before a Magistrate. A plea was raised on behalf of the two accused that the prosecution was barred under Article 20(2) of the Constitution of India by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act and further that the finding of the Collector of Customs that the two accused were not guilty operated as an issue estoppel in the criminal case against the accused. Dealing with this argument, their Lordships observed:--

This article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this article the rule of *autrefois acquit* embodied in Section 403, Criminal Procedure Code. Assuming we can do that, still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 408, Criminal Procedure Code or Article 20(2), it is necessary for an accused person to establish that he had been tried by a "court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established, it can be contended that he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made, against him might have been made u/s 236 or for which he might have been convicted u/s 273. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "court".

18. The ratio of *Assistant Collector of Customs and Another Vs. L.R. Malwani and Another*, therefore, is that there is no legal bar to the prosecution in a criminal court of a person who has succeeded in the adjudication proceedings before the Collector of Customs or any other Customs Officer. The first submission of *Shri Gumaste* must, therefore, fail.

19. *Shri Gumaste* then submitted that there is no legal evidence adduced by the prosecution which could prove the charge u/s 135(1)(a)(ii) of the Customs Act.

Shri Gumaste argued that the evidence adduced by the prosecution was manifestly and clearly inconsistent with the accusation made by the prosecution. Shri Gumaste contended that the prosecution had failed to establish that the petitioners had the requisite mens rea or knowledge that, the three suitcases which they booked with Air India contained the contraband article in their false bottoms. Shri Gumaste stated that the prosecution had even failed to establish that there was any nexus between the contraband goods and the petitioners. In this view of the matter, there was a total lack of evidence which would incriminate the two petitioners in the offence u/s 135(1)(a)(ii) of the Customs Act. Shri Gumaste took me through the evidence of five witnesses so far examined. I have perused that evidence only with a view to find out whether there was any evidence which incriminated the accused with the crime of smuggling contraband or any nexus between the petitioners and the contraband goods. As pointed out by the Supreme Court in *R.P. Kapur Vs. The State of Punjab*, , in exercising its inherent jurisdiction, the High Court could not embark upon an enquiry as to whether the evidence in question was reliable or not. That was the function of the trial magistrate and ordinarily it would not be open to any party to contend that on a reasonable appreciation of evidence, the accusation made against the accused could not be sustained.

20. Shri Gumaste contended that there was no evidence produced by the prosecution that petitioners Nos. 1 and 2 were aware of the fact that there were false bottoms to all the three suitcases and that "charas" had been concealed in those suitcases. Shri Gurnaste pointed out that the allegation against petitioner No. 1 was that he had obtained the departure certificate from the East African Airways and had filled in the baggage declaration form. The allegations against petitioner No. 2 was that he went with one Ishwarbhai Nayee and delivered the suitcases and the keys along with the departure certificate and the baggage declaration form to the Air India Office. Shri Gumaste contended that the petitioners were charged under Section 135(1)(b) of the Customs Act for being concerned in carrying or removing or depositing or harbouring or keeping or concealing or selling or purchasing or in any other manner dealing with any goods which were liable to confiscation. Shri Gumaste pointed out that there was no evidence that the petitioners were in any way concerned with the contraband goods.

21. Now, with regard to the submission of Shri Gumaste that there was no evidence to establish the fact that the petitioners-accused had knowledge that the three suitcases contained contraband article, it is correct that there is no direct evidence to show that it was the petitioners-accused who had placed the contraband article in the false cavity of the three suitcases. Indeed, in most cases it will be well nigh impossible to obtain such evidence unless there was evidence of an accomplice. Knowledge, therefore, has to be inferred from all the circumstances surrounding a transaction. The two petitioners had prepared certain documents which were necessary for booking unaccompanied baggage. Petitioner No. 2 booked the unaccompanied baggage with Air India and he also

delivered the keys of the suitcases. Since the keys were with both the petitioners, there was opportunity for them to examine the contents of the three suitcases. At this stage it is not necessary to go deeper into the evidence. It is, however, pertinent to point out that u/s 138A of the Customs Act, 1962, there is a presumption of culpable mens rea. Section 138A is in the following terms:--

138A. (1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

22. In view of the provisions of Section 138A of the Customs Act, 1962, the prosecution is not called upon to expressly prove mens rea, but the mental state can be presumed from all the circumstances proved by the prosecution. The section, however, provides that the presumption is rebuttable. Therefore, I do not think I can agree with Shri Gumaste that the prosecution had failed to establish mens rea or knowledge on the part of the two petitioners that the suitcases contained a contraband item.

23. With regard to the second leg of Shri Gumaste's argument that the prosecution had failed to show that the petitioners were in any way concerned with the harbouring, concealing or keeping the contraband article, I am of the view that prima facie from the evidence so far established, it could be stated that the two petitioners were concerned or connected with the contraband item. I, however, hasten to add that this is only a prima facie view and on a more detailed analysis the trial court may come to a different finding. At this stage it can only be stated that it cannot be argued on the facts stated above that the petitioners-accused were in no way concerned with the contraband item. The fact that petitioner-accused No. 1 obtained the departure certificate and prepared the baggage declaration form and even signed for petitioner-accused No. 2, and the fact that petitioner-accused No. 2 handed over both these documents along with the three suitcases containing the contraband article and the keys of the three suitcases to the Air India authorities, would be sufficient to show that there was connection or nexus between the accused and the contraband item. Whether these acts are sufficient to prove the offence u/s 135(1)(a)(ii) of the Customs Act, 1962, is for the learned trial Magistrate to decide. I must, therefore, reject the second submission of Shri Gumaste also.

24. In the result, the rule is discharged and the petition dismissed.