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In the Bombay High Court

The State of Maharashtra — APPELLANT

Vs

Laxmichand Varhomal Chugani — RESPONDENT

Date of Decision : 31-08-1977

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 390, 83
Customs Act, 1962 — Section 135A

Citation : (1978) CriLJ 845

Hon'ble Judges : Deshmukh, J;Aggarwal, J

Bench : Division Bench

Judgement

Deshmukh, J.—This is an appeal by the State for enhancement of sentence, The accused has been convicted u/s 135 (ii) read with Section 135-A of the Customs Act.

2. The room of the accused was raided on 14-12-1970 when he was found in possession of 173 bars of silver weighing 146.765 Kgs. valued at Rs. 81,455. He was therefore charged for having offended the provisions of Sections 11 (2) (j), (k) and (1) of the Customs Act 1962 thereby committing an offence punishable u/s 135 (ii) read with Section 135-A of the said Act. At the trial the accused pleaded guilty to the charge and the learned Magistrate acted upon the plea and convicted him. However, it was pleaded before the Magistrate that the accused was a poor broker and had no proprietary interest in the silver and therefore mercy should be shown to him. For the brokerage which was a pretence, he had the temptation to act in the manner in which he did and by the very fact that he is prosecuted, this poor man is ruined. It was also argued on behalf of the prosecution before the Magistrate that the silver was meant for being exported to Bul-sar from which it could be inferred that the intention was obviously to illegally export outside India. It was also pointed out to the Magistrate that smuggler exports silver and import gold and other luxury articles and therefore serious view should be taken.

3. The learned Magistrate, however, observed that on consideration of the

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submissions on either side, it was not possible for him to think that silver bars in question were meant for being illegally exported or that the accused had any connection with any such export. In the circumstances he sentenced he accused to pay a fine of Rupees 3000/- or in default to undergo R.I. for three months. We are told that the fine has already been paid by the accused.

4. After this appeal was admitted when the notice was served upon him the accused was not traced for quite sometime. A notification was issued u/s 83 of Cr. P. C and he was detained in jail for 2| months as he could not afford the security as demanded by the Magistrate. When the learned Judge of the High Court realised that Section 390 of the present Code could not be applied, the accused was directed to be released. In the meantime he was in custody between 29-9-1976 to 15-12-1976.

5. Two points are raised before us for our consideration. The first point is common not only to this appeal but to three other appeals, which we have heard to-day along with this appeal. The reasoning in this order will also dispose of the same point raised in the other three appeals. The first point raised is whether the appeal, filed by the Public Prosecutor at the instance of the State Government is a validly filed appeal u/s 377 (3) of Cr.PC and the second point raised is whether the sentence requires to be enhanced.

6. So far as the first point is concerned the argument is that Section 377 of the present Cr.PC is a new provision permitting the State and the Central Government to file appeals against the sentence on the ground of its inadequacy. Sub-section (1) of that section which is in general terms permits the State Government to direct the Public Prosecutor to present an appeal in the High Court in "any case of conviction on a trial held by any court other than a High Court", Having made such general and sweeping provision of filing appeals through a Public Prosecutor by the State Government in case of any conviction by any court other than the High Court, an exception is carved out under Sub-section (2). In that Sub-section it is mentioned that where investigation has been carried out in an offence by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may direct the Public Prosecutor to present an appeal to the High Court against the inadequacy of the sentence.

7. What is therefore argued is that the Customs Act is an independent and complete Code by itself. The provisions starting from S 100 in Chapter XIII as well as Chapter XIV provide a complete machinery for the purpose of detection of offence as well as investigation thereof including the recording of statements of witnesses etc. It is only the Customs Officer who is authorised under the Act to conduct those investigations and under the provisions of Section 137 a complaint is to be filed with the previous sanction of the Collector of Customs. All those offences are made punishable u/s 135 of that Act. This being so, this is a case where another agency is created which is empowered to make investigation into

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an offence under the Central Act, viz. the Customs Act 1962, and that investigation is other- wise than under the Code. It is therefore argued that this and the other appeals ought to have been filed by the Public Prosecutor at the instance of and on the instructions from the Central Government. Since all these four appeals are admittedly filed on the instructions of the State Government they are improperly filed and the Court should not entertain these appeals in view of the provisions of Section 377 (2), Cr.PC

8. A learned single Judge of this Court had previously taken the view that in the case of Central Acts where the investigation is carried by certain officers appointed under the Act, it would be for the Central Government alone to direct the Public Prosecutor to file an appeal under Sub-section (2) of Section 377. That view was taken so far as the provisions of the Forests Act were concerned. However, that view is no more good law, since the Supreme Court in deciding the appeal against that very matter has reversed the decision. That judgment appears as the State of Maharashtra Vs. Mahipati Krishna Ingavale etc. etc., While disposing of the appeal by short judgment they referred to their reasoned judgment given earlier in the case of Eknath Shankarrao Mukkawar Vs. State of Maharashtra, While dealing with the principles incorporated in Sub-section (2) of Section 377 they referred to Section 3 of the Delhi Special Police Establishment Act 1947 and pointed out that unless such specific provision is made, the State Government can always file an appeal by directing the Public Prosecutor under Sub-section (1) of Section 377.

9. After examining the provisions of the Food Adulteration Act where the Investigation is practically completed in a day''s time by the Inspector who files a complaint with the sanction of the appropriate authority in case the Public Anaylst''s report supports that the sample is adulterated. Their Lordships pointed out that this does not mean that this kind of investigation and filing of the prosecution by the Food Inspector does not amount to (amounts to?Ed.) a creation of an agency empowered to make investigation into the offence under any Central Act other than this Code, as required by Section 377 (2) of the Code.

10. Bearing in mind this approach of interpreting the provisions of Section 377 (2), we have gone through the provisions of Chapters XIV & XV as also the provisions of Chapter XVI of the Customs Act, 1962, According to us, the proper view of these provisions will be that the Customs Act has been enacted primarily for the enforcement of the provisions of the Customs Act and to prevent the evasion of duty in the matter of imports and exports. That is the primary function of the Customs Department and all the officers appointed under the Act are meant for that purpose. When they detect that duty has been evaded in a certain manner by a certain person they have a right to commence adjudication proceedings and levy penalty as well as confiscate the goods. Unless the Customs Department is satisfied that prosecution is necessary and to that effect a certificate is issued and prior consent is given by the Collector of Customs, no prosecution is filed in the Court. No Criminal Court is entitled to take cognizance

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of the offence Under Sections 132, 1S3, 134 or 135 of the Customs Act, except with the previous sanction of the Collector of Customs.

11. In our view, therefore, the scheme of the Act is to enforce the provisions of the Customs Act and to prevent the evasion of Customs Duty, The machinery created under this Act is not one for the purpose of investigation into crimes. It is only the side effect resulting from the enforcement of the Customs Act that certain offences are detected. Certain imports or exports without licence are also detected. Since they also constitute offences on the basis of the material collected, a prosecution can be launched as provided in Chap. XVI. The machinery is however not created for the purpose of investigation of crime under any Central Act. It cannot be said that that is a separate machinery for the purpose of investigation of crimes bypassing the provisions of the Cr.PC There is, therefore, no warrant in thinking that the investigation of the Customs crime falls under Sub-section (2) of S, 377, Cr.PC so as to render the State Government incompetent to instruct the Public Prosecutor to file an appeal. The two appeals out of the group of four, which are under the Customs Act and which are in relation to offence of Customs Act, are therefore properly filed.

12. The remaining two appeals relate to offences under the Drugs and Cosmetics Act 1940. There also we find that it is the Drug Inspectors who have to perform several duties enumerated under the various provisions of the Act. The entire Act has been again prepared for the purpose of proper enforcement of the Drugs and Cosmetics Act. The primary idea is that no sub-standard drug shall be sold in the market and no one will sell even a genuine drug without a licence. This is the essence of the provisions of the Drugs and Cosmetics Act. To enforce this central idea the various provisions of the Act have been made and officers are appointed primarily for the purpose of enforcement of this Act. While doing so they discover that certain irregularities have been committed or there are acts or omissions which are in breach of the Act and Rules framed thereunder. Such breaches also amount to offence.

13. Here again where an offence appears to have been committed, it is not permissible for the Court to take cognizance of the offence unless upon a complaint in writing of an Inspector. These provisions are very much similar to the provisions of the Customs Act. We do not think that an Inspector who carries on his duties under the Drugs and Cosmetics Act 1940 for the purpose of enforcement of that Act could be deemed to be a creation of a separate agency empowered to make investigation into offences under the Central Act, viz. the Drugs and Cosmetics Act 1940. The appeals at the instance of the State Government by the Public Prosecutor in those matters are also in order.

14. This brings us to the second point which arises in the present appeal. The conviction of the accused is u/s 135 (ii) read with Section 135-A of the Customs Act. This is an offence where the property discovered is less than Rs. 1,00,000/-. No minimum sentence has been prescribed though the offence is punishable with imprisonment for a term which may extend to three years or with fine or with

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both. These provisions leave discretion in the Court to either impose substantive sentence alone, or fine alone or both. What is done in the present case is- to impose a fine of Rs. 3000/- only. So far as the reasons given by the learned Magistrate are concerned, we are not very much impressed with what the learned Magistrate says. A person in whose room fairly large quantity of silver is detected in respect of which he has not observed the provisions of Sections 11 (j), 11 (k) and 11 (1) would normally lead to the inference that he wants to do something clandestinely about this huge haul of silver. It does not appeal to us that a person who is mere carrier is much less involved in this nefarious trade of smuggling than the person at whose instance the goods are carried. In fact, unless there are carriers available the smuggling itself would be difficult.

15. Ordinarily we would have allowed this appeal and impose a sentence of six months imprisonment upon the respondent-accused. However, we are apprised of the fact that he was already in custody for 2 1/2 months, Even though technically that may not be done which would fall u/s 428, Cr.PC and of which the respondent-accused could not get the benefit under that section, we are inclined to think that we cannot afford to lose sight of that fact. If he has already been in jail custody over 2 1/2 months in those peculiar circumstances, we think that this is a case in which no enhancement of sentence be awarded.

16. For these reasons we do not accept the State appeal and dismiss it.

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