

(1989) 11 DEL CK 0020
In the Delhi High Court
Case No : Criminal Revn. No. 87 of 1979

Vishwa Nath Khanna

APPELLANT

Vs

The State and another

RESPONDENT

Date of Decision : 06-11-1989

Acts Referred:

Citation : (1989) 11 DEL CK 0020

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Judgement

1. This criminal revision has been brought against the order dated May 10, 1979, of an Additional Chief Metropolitan Magistrate, New Delhi, by which he had directed the farming of charges against the petitioner for offences punishable under Ss. 132 and 135(1)(a) of the Customs Act and S. 5 of the Imports and Exports (Control) Act, 1947.

2. The facts, in brief, are that the petitioner had returned to India by Lufthansa Flight No. 645 on January 3, 1974. On arrival at the airport, the petitioner presented himself for Customs clearance and declared that his unaccompanied baggage from Hongkong contained one tape-recorder with two speakers which is yet to arrive and he obtained a landing certificate from the Customs officials. Two packages had arrived at Palam Airport by the same flight in which the petitioner had come and those packages were stated to contain the personal effects of the petitioner.

3. On January 4, 1974, two more packages of the petitioner, which were unaccompanied baggage declared by the petitioner earlier, had arrived by Pan-American Air Lines Flight 001. The airway bill in respect of the said two packages showed that the same were unaccompanied baggage containing personal effects of the petitioner. The petitioner himself was shown as consignor as well as consignee in the said airway bill. The petitioner obtained the delivery orders in respect of the said two packages from the Pan-American Airlines, New Delhi. However, the petitioner did not choose to come to the customs office for

obtaining the delivery of the said two packages and he was, thus, summoned by the Customs officials u/s 108 of the Customs Act for recording his statement and on a few dates he did not appear but ultimately he appeared on March 15, 1974 and made a statement u/s 108 of the Customs Act and mentioned therein that he had handed over the tape recorder and two speakers and his personal effects contained in four packages to the travel agent in Hongkong for booking the same in his name. The petitioner went on to disown the said two packages without even bothering to examine the contents of the said packages. The said packages were, thus, opened in presence of independent witnesses and the representatives of the Airlines and each one of the packages was found to contain a speaker of AKAI made in Japan and further examination of the speakers led to the recovery of contraband goods from the said speakers. It was also revealed in inquiry that the accused had contacted the Pan-American Airlines on January 5, 1974 and had obtained the delivery order in respect of the said two packages from the said Airlines. One of the packages contained a shirt having the washerman's mark which tallied with the washerman's mark on the clothes seized from the petitioner at his residence. The goods so recovered being of foreign origin were seized u/s 110 of the Customs Act, the import of the said goods being prohibited. So, the petitioner is stated to have committed the offences punishable under S. 135(1)(a) of the Customs Act and S. 5 of the Imports and Exports (Control) Act, 1947 and S. 132 of the Customs Act as well.

4. The learned counsel for the petitioner has, however, argued that no charges could have been framed against the petitioner inasmuch as the petitioner had not actually attempted to take delivery of the said goods from the Customs authorities. He has also argued that offence under S. 132 of the Customs Act is also not made out. He has placed reliance on *Union of India and Others Vs. Khalil Kacherim, and Malkiat Singh Vs. The State of Punjab*, of the Customs Act reads as follows :

"False declaration, false documents, etc. whoever makes, signs or uses, or causes to be made, signed or used any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

5. Counsel for the petitioner has argued that the petitioner has not at any time made any declaration or statement in the transaction of any business relating to the Customs knowing or having reason to believe that such declaration statement or document is false in any material particular. The learned counsel for the petitioner has pointed out that the declaration referred to in S. 132 of the Customs Act has a special meaning and such a declaration has to be made by a person at the time of getting the goods released from the Customs Office. He has pointed out to the testimony of PW 1 Sardar Jit Singh, Assistant Collector, AIR Cargo, Palam Airport, New Delhi, wherein in cross-examination he stated that the

petitioner had not made any declaration of the baggage as mentioned in para 24 of the complaint but had made only a statement. However, S. 132 of the Customs Acts also lays down that if any statement is made, which is false, pertaining to any business relating to Customs the person making such a statement is liable to be punished. So, it cannot be said that the petitioner, prima facie, has not committed any offence punishable under S. 132 of the Customs Act in view of the fact that there is preliminary evidence led by the complainant to prove that the petitioner had made such a false statement at the time he arrived in India on January 3, 1974 and also at the time he was summoned to give the statement under S. 108 of the Customs Act.

6. Now coming to the provisions of S. 135 of the Customs Act which are to the following effect :

"Evasion of duty of prohibitions (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 in force with respect to such goods; or

(b) he shall be punishable -

(i) in the case of an offence relating to any of the goods to which Section 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 the contrary to be recorded in the judgment of the court, such imprisonment shall not be less than one year :

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

(2)-(3)"

It is evident that an attempt is also made punishable under this Section. Counsel for the petitioner has argued that the petitioner had only made preparation to commit such an offence at the most but it cannot be said that he had made any attempt and counsel for the petitioner has pointed out that unless and until the petitioner has come to the customs office for getting the goods cleared, he could not be stated to have made any attempt. There is no merit in this contention. The petitioner has made all preparations to get the contraband goods dispatched from Hongkong to India and had made a statement at the time he arrived in India with his unaccompanied baggage consisting of two packages which were to arrive later on would contain only his personal effects and one tape-recorder (AKAI make) with two speakers. He had also obtained delivery orders from the Airlines. So, it cannot be said that he had only made preparations for committing the offence and had not actually attempted to commit the offence. He has made

reference to the two cases mentioned above. In the case of Malkiat Singh Vs. The State of Punjab, , the Supreme Court has laid down that as a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. It was held that in order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence and secondly, to have done an act which constitutes the acts ruse of a criminal attempt. It was observed in this judgment that if a man buys a box of matches, he cannot be convicted of attempted arson, however, clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it. It was laid down that the test for determining whether the act of accused person constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. This judgment is not applicable to the facts of the present case. Here, the acts already done by the petitioner cannot be treated as harmless inasmuch as he had taken concrete steps to get the contraband transported from Hongkong to India and he had also taken the delivery orders which is clearly indicative of the factum of his attempt to get those goods released from the Customs authorities and he perhaps changed his mind later on due to some apprehension that he might be caught at the spot while taking delivery of the said two packages.

7. In the case of Union of India and Others Vs. Khalil Kacherim, , it was observed that there is no import within the meaning of Customs Act in a case where goods are entrusted under S. 80 and are not carried by passenger beyond customs barrier. This judgment is also of no help to the petitioner inasmuch as what this Court is to examine in the present case is whether the offence under S. 135(1) (a) is made out ? The offence would be made out if it is shown prima facie that the petitioner had attempted evasion of any duty chargeable on the aforesaid goods. It is already clear from the discussion above that the petitioner had attempted for getting those goods transported from abroad and had not declared those goods in his statement and thus, he prima facie committed the offence punishable under S. 135(1)(a) of the Customs Act. I may refer to State of Maharashtra Vs. Mohd. Yakub and Others, , where the word "attempt" appearing in S. 135(1)(a) of the Customs Act came up for consideration. In the said case also the accused had brought certain silver ingots in truck near seashore but before those goods could be loaded on in sea-craft for taking them outside India, the accused were apprehended and silver ingots were seized. The question which arose for consideration before the Supreme Court was whether the accused could

be deemed to have attempted to export the said silver in contravention of the law. It was held as follows :

"What constitutes an attempt is a mixed question of law and fact, depending largely on the circumstances of the particular case. Attempt defies a precise and exact definition. There is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. Such act must be an act during the course of committing that offence."

It was observed that :

"The penal provisions in the present case have been enacted to suppress the evil of smuggling precious metal out of India. Therefore, these provisions should be construed in a manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. A narrow interpretation of the word "attempt" Therefore, in these penal provisions, which will impair their efficacy as instruments for combating this baneful activity, has to be eschewed."

It was laid down by the Supreme Court :

"Thus construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold an one or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export. In the present case, beyond the stage of preparation, most of the steps necessary in the course of export by sea, had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea-craft for moving out of the territorial waters of India. But for the intervention of the officers of law, the unlawful export of silver would have been consummated. The clandestine disappearance of the sea-craft when the officers intercepted and rounded up the vehicles and the accused at the creek, reinforces the inference that the accused had deliberately attempted to export silver by sea in contravention of law."

8. It was held by the Supreme Court in the said case that accused had attempted to export the said silver against the provisions of law even though no ultimate act had been committed by the accused for loading those silver ingots in the sea-craft. Similarly in the present case the mere fact that the petitioner had not

actually approached the Customs office for getting cleared the said packages does not mean that the petitioner had not attempted to commit the offence.

9. I, hence, find no merit in this petition which I, hereby, dismiss. The trial has remained stayed for all these years due to pendency of this criminal revision. The trial court shall now take urgent steps to complete the trial at an early date. The file of the trial court be immediately sent to the trial court where the petitioner should appear for further proceedings on November 20, 1989.

9. Petition dismissed.