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Court : Mumbai

Decided On : Jun-10-1992

Reported in : 1992CriLJ4014; 1993(1)MhLj1020

Judge : S.M. Daud, J.

Appeal No. : Criminal Appln. No. 720 of 1987

Appellant : Haji Oomer

Respondent : B.S. Hobbar, Assistant Collector of Customs, Rummaging and Intelligence (Preventive) and Another

Advocate for Def. : M.K. Patwardhan, Adv. and;M.R. Suryavanshi, P.P.

Advocate for Pet/Ap. : K.M. Desai and;S.J. Thaker, Advs., i/b;M/s. Haresh Methta & Co.

Judgement :

1. This is a quashing petition under section 482 of the Code of Criminal Procedure, 1973.

2. This petitioner has been arraigned along with 14 others to a prosecution under various sections of the Customs Act the Imports and Exports (Control) Act, 1974

read with Section 120-B of the Indian Penal Code lodged by the first respondent in the Court of the Chief Metropolitan Magistrate, Esplanade. Shortly stated, the case against accused persons is that accused No. 15 is the kingpin of a smuggling gang. His assistants in the operation were accused Nos. 13 and 14. Accused No. 15 with the assistance of accused No. 13 loaded an Arab dhow known as 'A1 - Kawthar' with contraband. The goods in this dhow were to be off loaded into a fishing craft on the high-seas. The Arab dhow was crewed by accused Nos. 1 to 6. The fishing craft had for its crew accused Nos. 7 to 12. The smuggling operation was detected red-handed and statements of accused Nos. 1 to 12 were recorded. From these statements the Customs staff learnt of the operation being master minded by accused Nos. 13 to 15. Accused No. 13 who is the petitioner was not present for quite some time and as soon as he appeared before the Director of Revenue Intelligence, his statement was recorded under Section 108 of the Customs Act, 1962. Accused No. 13 denied having any connection with the contraband seized from 5th to 7th of February 1985. He was arrested on 2-4-1985, remanded to judicial custody and later on released on bail.

3. When the matter came up before the Magistrate for a consideration as to whether an issue-process order could be passed against accused No. 13, it was argued that except for the self-serving statements of accused Nos. 5 and 6 there was no material to warrant the taking of cognizance of any offence whatsoever in so far as accused No. 13 was concerned. The learned Magistrate negatived this contention and his reasons for so doing are to be found at para 9 of the order passed by him on 28-1-1987. This paragraph and a sentence appearing in the 10th paragraph read as under :-

'Against accused No. 13 it can be seen that his statements are exculpatory for the obvious reason that he was not arrested immediately and he was in Dubai and he must have come very well prepared with the knowledge that he is going to be arrested. He was in remand in other case which was under investigation. He is implicated by other accused as stated above and it is also shown that the statements of other accused are supported by the fact that accused No. 13 was in Dubai at that time when this trip was fixed at Dubai. I feel that this material is sufficient to issue process against accused No. 13. His photograph is also

identified by accused Nos. 5 and 6 as the same person ..... The case of the prosecution is that accused No. 15 is the main kingpin and accused Nos. 13 and 14 along with others had arranged to smuggle into India the large quantity of contraband.'

Mr. Desai argues that the learned Magistrate was in error and the order taking cognizance vis-a-vis accused No. 13 has to be quashed. Mr. Patwardhan for the first respondent disputes this submission and argues that good reasons have been given by the Magistrate for taking cognizance against accused No. 13 though it may well be that at a later stage the 13th accused may be in a position to apply for a discharge or acquittal as the case may be. Mr. Desai's contention has to be and is hereby sustained for the reasons given below.

4. The person speaking to the part played by accused No. 13 are accused Nos. 5 and 6. These are persons who are being jointly tried along with the 13th accused and in so far as the statement made by such persons are concerned we have to turn to Section 30 of the Indian Evidence Act. This section, to the extent relevant reads as follows :-

'When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration confession as against such other person as well as against the person who makes such confession.'

By a series of decisions it has been laid down that the confession spoken of by Section 30 has the limited value of being an addition to pre-existing evidence indicating the guilt of the person being tried along with the maker of the confession. By itself the confession vis-a-vis the person not making it is not of much assistance. Bearing this principle in mind what we have in the present case is firstly accused Nos. 5 and 6 alleging that accused No. 15 was assisted in the smuggling operation at the Dubai and by accused No. 13, secondly the identification of a photograph of accused No. 13 by accused Nos. 5 and 6 as the photograph of a person who had assisted accused No. 15 in the loading of smuggled goods in the Arab dhow and thirdly the fact that at the relevant time i.e. when the Arab dhow was or could have been loaded accused No. 13 was in Dubai

from which place the goods had come. None of these circumstances add anything of consequence to the guilt of the 13th accused. The mere fact that accused No. 13 was at Dubai when the dhow was or could have been loaded is inconsequential for several others were at Dubai at about the same time. In so far as the first and second circumstances are concerned, we will have to go back to the statements of accused Nos. 5 and 6. To those statements there is no independent corroboration and the result is that accused No. 13 will be facing a prosecution in which he is bound to be acquitted if not discharged. The law does not favour pointless prosecutions. The issue process order vis-a-vis the 13th accused i.e. the petitioner is hereby quashed and the rule made absolute.

5. Rule made absolute.

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