Kashmiri Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-19-1991

Reported in : (1991)LC382Tri(Delhi)

Appellant : Kashmiri

Respondent : Collector of Customs

Judgement :
1.1 In pursuance of an information officers of the Directorate of Revenue Intelligence searched the residential premises under the control of Shri Louis Thomas on 19-1-1986. As a result thereof heroin weighing 2.000 Kgs. valued at Rs. 6 lakhs alongwith certain incriminating documents was recovered and seized under the Customs Act, 1962 and Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The search of the above said residential premises was carried out in the presence of Louis Thomas as also of S/Shri Raj Kumar Karwal and K.B. Nandwani - the latter two persons were being two of the appellants herein.

1.2 In the follow-up action, room no. 1517 of Hotel Ashok Yatri Niwas under the occupation of Raj Kumar Karwal was also searched by the officers of DRI on the same date 19-1-1986. Nothing incriminating, however, was recovered from there. Search of room No. 7 of Hotel Little Star, Pahar Ganj, New Delhi on the same day, under the occupation of K.B. Nandwani and Kashmiri (another appellant herein) resulted in the recovery and seizure of documents including two confirmed PANAM air tickets from New Delhi to New York for 20-1-1986 in the names of Raj

Kumar and Kashmiri for PANAM flight PA-73 and their passports.

1.3 Raj Kumar Karwal in his statement dated 19-1-1986 under Section 108 of the Customs Act, 1962 admitted the recovery of 2.000 Kgs. of heroin from the aforesaid premises of Louis Thomas in his and K.B. Nandwani's presence. He stated that heroin was given to him by K.B. Nandwani on 17-1-1986 in the aforesaid room at Hotel Ashok Yatri Niwas, New Delhi. He carried the said heroin on 18-1-1986 from the Hotel room to the House under the control of Louis Thomas from where the recovery thereof was effected on 19-1-1986. He also admitted that he was to carry that heroin to U.S.A. on 20-1-1986 by PANAM Flight PA-73. The purpose of carrying the heroin to Louis Thomas house was to get it properly packed in polythene bags with the help of K.B. Nandwani. He also admitted that his passport and ticket from New Delhi to New York were lying with Kashmiri staying in room No. 7, Hotel Little Star, Pahar Ganj, New Delhi. He further stated that finance for the purpose of heroin was provided by Kashmiri and that Kashmiri and other person Rana were to accompany him to New York, who was to make arrangement for sale of the heroin in the U.S.A. He further stated that he was to be paid Rs. 2 lakhs for carrying the heroin to New York and that Shri Louis Thomas was to help him in carrying the goods directly to the aircraft without Customs examination. He has also submitted some of the activities in connection with smuggling of Narcotic drugs out of this country. He also stated that Nandwani was his partner in these clandestine transactions and that Nandwani was a person who procured the heroin from him.

1.4 Shri Louis Thomas in his statement dated 19-1-1986 under Section 108 of the Customs Act, while admitting his detention under the COFEPOSA Act for three months in 1980 and his involvement in the smuggling of watches stated that he came in contact with Nandwani 7-8 days before through one Ashok Pahuja @ Doctor who asked him to help in sending some white skin (heroin) and carrying the same to the aircraft with the help of a loader without going through the Customs area. Shri Louis Thomas further deposed that he contacted one loader of Air India who agreed to do the job in return of Rs. 5000/-. Shri Nandwani in return promised to arrange an air ticket for him to Spain as he had to go to collect a share of profit in the earlier smuggling business from one Jagannathan. He further stated that he went to room No. 1517 of Ashok Yatri Niwas on 18-1-1986, where he met a person by the name of Rana and he alongwith Raj Kumar Karwal and Rana shifted the heroin to his house in Saket from where the recovery has been made. He also admitted the recovery of the said heroin.

1.5 Shri K.B. Nandwani in his statement under Section 108 of the Customs Act stated that he was in the business of man power export.

He further stated that he had met Rana on 2-1-1986 at Phagwara who offered for visas for U.S.A. for a price of Rs. 16,000/- per visa.

Kashmiri met Rana in Delhi and paid Rs. 1,30,000/- and Rana got made a visa for Raj Kumar Karwal on payment of Rs. 15,000/-. The said amount of Rs. 15,000/- was paid by Raj Kumar Karwal's father Govind Paul Karwal in Nandwani's presence. He inculcated Rana for meeting the idea of heroin business and that Rana purchased 2.000 kgs. of heroin from a boy. Shri Nandwani further stated that Ashok Pahuja had told him that Louis Thomas would be helpful in smuggling heroin out of India inasmuch as he could help in heroin being taken to aircraft without customs check at the time of Raj Kumar's departure on 20-1-1980 to New York. He further stated that Kashmiri who had financed the purchase of the heroin was to accompany Raj Kumar on the same flight to the U.S.A. and that he was to get U.S. $ 15,000 in that deal.

1.6 Shri Kashmiri in his statement dated 19-1-1986 recorded under section 108 of the Customs Act, 1962 admitted that he knew K.B. Nandwani; that Nandwani introduced him to one Rana; that they offered him U.S. $ 2000 for carrying heroin to U.S.A.; that he turned down the offer; that Nandwani again offered him to carry heroin to U.S.A. and he invested Rs. 1,30,000/- in that business since he was convinced of Rana's contacts in U.S. embassy. He further admitted that Nandwani informed that he had purchased heroin with the said amount of Rs. 1,30,000/-. He also admitted that on 17-1-1986 Nandwani brought the passport of his cousin Raj Kumar and asked him to book Raj Kumar's ticket for New York for 20-1-1986 and further asked him to get his own seat booked for the same flight.

Accordingly, he booked the passage for himself and Raj Kumar.

1.7 Shri Ashok Pahuja in his statement dated 19-1-1986 admitted that he knew Louis Thomas @ William involved in smuggling case and that he had introduced Louis Thomas to Nandwani for the purpose of carrying the goods straight to aircraft without Customs check.

1.8 On the basis of the aforesaid material it was alleged that Raj Kumar Kar-wal, K.B. Nandwani, Louis Thomas, Kashmiri and Ashok Pahuja had entered into a criminal conspiracy to export out of India the seized 2.000 Kgs of heroin in contravention of the provisions of Section 23 read with Section 8 of NDPS Act, 1985 and Section 11 read with Section 135 and 135(a) of the Customs Act, 1962 and have thereby rendered the seized 2 Kgs. of heroin liable to confiscation under the provisions of Section 113(d) of the Customs Act, 1962 read with Section 60(1) of NDPS Act, 1985 and have also rendered themselves liable to penal action under the provisions of Section 114 of the Customs Act, 1962 and under the relevant provisions of NDPS Act, 1985.

1.9 After due adjudication, the adjudicating authority has found that the statements of various persons indicated that there was a conspiracy amongst the notices to smuggle out 2 Kgs. of heroin from India. He, accordingly, confiscated the seized heroin under Section 113(d) of the Customs Act, for contravention of Section 8 read with Section 79 of NDPS Act, 1985. He has also imposed the following penalties on 4 of the appellants herein:- 2. The learned advocate for the appellants, inter alia, has urged that three of the appellants namely Raj Kumar Karwal, K.B. Nandwani and Kashmiri were detained at the Central Jail, Tihar, New Delhi. As a result they did not receive the show cause notice or could not get any opportunity for making effective representation. He also submitted that they had given only interim replies that they were behind the bars and therefore, sufficient time be given to them to enable them to give effective and proper reply. Shri Nandwani, however, had given some reply in detail through the Superintendent, Central Jail, Tihar. The learned advocate further submitted that the adjudicating authority did not give to the appellants an opportunity for personal hearing because no notices in this regard were received by them. He also stated that the statements said to have been recorded under Section 108 of the Customs Act from the various appellants, were taken under coercion and torture. He also submitted on the merits of the case as a common ground for all the appellants that even assuming that the said heroin was recovered from the flat in Saket, New Delhi, there is no evidence that the same was liable to be exported. The heroin in question was not seized from the Airport and therefore, there was no attempt to export the said heroin for which the goods had been confiscated and the appellants had been penalised under the Customs Act. From the overall evidence on record he submits that no case for attempt to export heroin illegally out of India could be made out against the appellants. He, therefore, submits that the penalties against all the appellants be set aside.

3. Learned SDR, on the other hand, reiterates the findings of the adjudicating authority.

4. We have carefully considered the pleas advanced on both sides. We observe from the impugned order that the heroin has been confiscated under Section 113(d) of the Customs Act for contravention of Section 8 of NDPS Act, 1985. In this connection, finding of the adjudicating authority in para 26 of the impugned order is reproduced below :- "It is established beyond doubt that S/Shri Raj Kumar Karwal, K.B. Nandwani, Louis Thomas, Kashmiri and Ashok Pahuja had entered into criminal conspiracy to export out of India the seized 2 Kg. of Heroin is liable to confiscation Under Section 113(d) of the Customs Act, for the contravention of Section 8 of Narcotic Drugs and Psychotropic Substances Act, 1985." 4.1 As regards the role of the various persons leading to imposition of penalty on them the finding of the adjudicating authority para 25 is reproduced below :- "Further I also find the active involvement of S/Shri Louis Thomas, Raj Kumar Karwal, Ashok Kumar Pahuja, K.B. Nandwani in the attempt to smuggle out 2 Kgs. of seized Heroin from the fact that the confirmed tickets of Shri Raj Kumar Karwal and Kashmiri were recovered from the Room No. 7 of Hotel Little Star under occupation of Shri Kashmiri and Nandwani. I also firmly conclude that Shri Raj Kumar Karwal and Kashmiri were to travel on PANAM Air ticket No. 026:9215, 604:304, 026:215, 604:303 respectively and back to Delhi on PANAM Air craft Flight No. PA-73 on 20-1-1986.

I also find that Passport No. V518980 dated 27-3-1984 issued at Jullundur in favour of Raj Kumar is valid upto 26th March 1989 and visa was also granted by American Embassy in Delhi on 10th January 1986 for USA. Similarly, passport No. X-706955 dated 15-10-1985 issued by Regional Passport Officer, New Delhi in favour of Kashmiri was valid upto 20th March, 1987 and the visa was granted by American Embassy for USA in New Delhi upto 6th December 1985, All the above discussions and evidence on record show that S/Shri Raj Kumar Karwal and Kashmiri were to travel together and to smuggle" -out 2 Kgs. seized quantity of heroin to USA which was to be taken into Aircraft with the collission and connivance of Shri Louis Thomas clandestinely without Customs examination. I also find that the said heroin deal was financed by the said Nandwani and he (Nandwani) alongwith Sh.

Ashok Pahuja were actively con-cerned in acquisition, possession, transportation and attempt to export seize3 heroin out of India." 4.2 Section 113(d) for a proper appreciation of its application to the facts and circumstances of the case, is reproduced below :- "113(d) - any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported contrary to any prohibition imposed by or under this Act or any other law for the time being in force".

4.3 It is apparent from the facts of this case that heroin has been seized from a house in Saket at Delhi. This has not been seized cither within or near the customs area or in the course of its transmission towards Airport or Customs area so that the charge of attempt of export could be sustained in the instant case. 'Attempt' has not been defined in the Customs Act. However, attempt at export came to be examined before the Supreme Court in the case of State of Maharashtra v. Yakut and Ors. [AIR 1980 SC 1111]. Two separate judgments have been delivered by the two learned Judges of the Supreme Court comprising the Division Bench of the Supreme Court which heard and decided that matter. After examining the case law and several authorities on the subject one of the Judges (Sarkaria J) observed 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. 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 pernultimate 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. As pointed out in Abhayanand Mishra v. State of Bihar (1962) 2 SCR 241 there is a distinction between 'preparation' and 'attempt'. Attempt begins where preparation ends. In sum, a person commits the offence of 'attempt' to commit a particular offence' when (i) he intends to commit that particular offence, and (ii) he, having made preparations and with the intention to commit the offence, docs an act, need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence".

4.4 On the basis of the above exposition the learned Judge held that in the facts and circumstances of that case the expression 'attempt' within the meaning of these penal provisions is wide enough to take in its fold any 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. [Emphasis supplied] 4.5 Similarly, the other learned Judge (Chinnappa Reddy J.) explained the meaning of expression 'attempt' as follows and held that in the facts and circumstances of that case it was clearly an attempt at unlawful export of the silver. In para 31 of his judgment he has observed as follows :- "31. Let me now state the result of the search and research: In order to constitute 'an attempt first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be proximate' to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but that it must be, that is, it must be indicative or suggestive of the intention. For instance, in the instant case, had the truck been stopped and searched at the very commencement of the journey or even at Shirsat Naka, the discovery of silver ingots in the truck might at the worst lead to the inference that the accused had prepared or were preparing for the commission of the offence. It could be said that the accused were transporting or attempting to transport the silver somewhere but it would not necessarily suggest or indicate that the intention was to export silver. The fact that the truck was driven up to a lonely creek from where the silver could be transferred into a seafaring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course of inter-coastal trade. But, the circumstances that all this was done in a clandestine fashion, at dead of night, revealed with reasonable certainty, the intention of the accused that the silver was to be exported".

4.6 From the meaning of the 'attempt' as ruled by the Supreme Court in the aforesaid case it will not be possible to hold in the instant case that the appellants had attempted to export heroin unlawfully under the Customs Act when the seizure of such heroin was made from a house at Saket. The mere fact that two PANAM tickets in the names of Raj Kumar and Kashmiri were also found from the Hotel at Paharganj, would not by itself lead to the conclusion that they were attempting to smuggle heroin out of the country. Packing of heroin in Saket, purchase of tickets in the names of the aforesaid two persons and other acts of the appellants brought on record might indicate that they were preparing to export heroin unlawfully out of India. However, it would be premature to hold that the attempt at smuggling out of India was being made.

4.7 It is pertinent to mention that Section 135-A of the Customs Act provides for imprisonment of a person extending three years or with fine or with both who had been making preparation to export any goods in contravention of the provisions of the said Act but we find that no corresponding provision of this type is available in respect of confiscation of goods and conveyances and imposition of penalties under Chapter XIV of the Customs Act, 1962. In the absence of any such provision for confiscation and imposition of penalties corresponding to Section 135-A of the Customs Act, confiscation of goods or imposition of penalty for preparation to export the goods in contravention of the provisions of the Customs Act cannot be upheld. Accordingly, we hold that heroin was not liable to confiscation for attempt at unlawful export. Consequently imposition of penalty on the appellants is not justified. Hence we set aside the penalties on the appellants.

4.8 Section 8 of the NDPS Act, 1985 prohibits, inter alia, export from India of any narcotic drug or psychotropic substances except for medical or scientific purposes etc. Section 8 of the said Act, however, prohibits possession of narcotic drugs and psychotropic substances as well. Possession of heroin and the concern of the appellants in possession of heroin is not a subject matter of the appeal before us.

Section 79 of the NDPS Act, 1985 makes, inter alia, prohibition and restrictions imposed under that Act in respect of export from India of narcotic drugs and psychotropic substances as prohibition and restrictions under the Customs Act. Therefore, we are not concerned with the prohibition on possession of heroin by the appellants in respect of the appeal under the Customs Act.

5. Hence the above order is passed without prejudice to any action that might be taken against the goods as well as the appellants under the NDPS Act, 1985 or any other law for the time being in force. In fact, the impunged order passed by the Additional Collector makes this clear in the last para.