Assistant Collector of Customs and ors. Vs. P.V. Thomas and ors.

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Court : Kerala

Decided On : Feb-29-1988

Reported in : 1988(17)ECC265; 1988(35)ELT300(Ker)

Judge : S. Padmanabhan, J.

Acts : Dangerous Drugs Act, 1930 - Sections 2, 7, 7(1), 7(2), 13, 20, 32 and 38; Customs Act, 1962 - Sections 108, 135, 135(1), 138 and 138(A); Evidence Act - Sections 25; Constitution of India - Article 20(3); Customs (Amendment) Act, 1973

Appeal No. : Crl. A. Nos. 23, 226 and 227 of 1986

Appellant : Assistant Collector of Customs and ors.

Respondent : P.V. Thomas and ors.

Advocate for Def. : V. Parameswara Menon,; P.C. Chacko, Public Prosecutors

Advocate for Pet/Ap. : P.C. Chacko and; A. Balasubramonian and; V.G. Balakrishn

Disposition : Appeal dismissed

Judgement :

S. Padmanabhan, J.

1. In C.C. No. 59 of 1985, three persons were prosecuted by the Assistant Collector of Customs, Cochin before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam for an offence punishable under Section 13 of the Dangerous Drugs Act as well as Section 135(1) of the Customs Act for having contravened Section 7 read with Section 20 of the Dangerous Drugs Act. Accused 1 and 2 were convicted and sentenced to suffer simple imprisonment for six months each. Third accused was acquitted. Crl.A. No.23 of 1986 was filed by the complainant against the acquittal of the third accused. Accused 1 and 2 filed appeals against their convinction and sentence before the Sessions Judge. Those appeals were recalled to this court. They are Crl.A Nos. 226 and 227 of 1986. All the three appeals were heard together.

2. First accused is a Dutch National having Netherland passport and residing at Cochin. Second accused is a person belonging to Tamil Nadu and he was residing along with the first accused as his employee. Third accused is the Manager of a licensed export agency authorised by the Reserve Bank of India. The prosecution case is that the three accused attempted to export 90 bundles of palmirah leaf basket containing 134.595kgs. of Ganja concealed in them to Netherland. This was without the authority of a valid licence.

3. On 16.1.1985, the first accused sent the bundles to the third accused along with Ext.P 24- letter through the second accused in a lorry. It was for the purpose of being exported to one Cocoa B.V. at Netherland. Ext.D 1 is the contract between accused 1 and 3. It is dated 17.1.1985 and it shows that the third accused was acting only as the seller's agent. Third accused himself is only the Manager of the exporting agency. He was not present at the time when the goods were delivered by the second accused. The goods were received by PW 6 and kept locked in the godown +ill 8.2.1985, on which day the employees of the exporting agency produced them before PW1 for customs clearance preliminary to export. Export from any part could be had only through exporting agents authorised serve.Bank of India, Documentation for that purpose will have to be necessarily signed by the authorised exporting agents. These documents necessarily include declarations also, Exts P l(c), P3, P4 and P5 are the papers and they were signed by the third accused as Manager of the exporting agency. The evidence of PWs 6 and 9

revealed the fact that the goods were kept locked in the godown and not opened by the exporting agency at any time. That evidence is not challenged by the prosecution.

4. There is no obligation or evidence that the third accused was actually aware of the fact that the bundles contain concealed Ganja packets or that he was in any way acting in collusion with accused 1 and 2. He was implicated by the prosecution only on account of the declarations made by him in the exporting documents mentioned above. The case of the prosecution is that especially in view of Section 138(a) of the Customs Act creating a legal presumption of culpable mental state the third accused had the duty of satisfying himself of the correctness of the goods attempted to be exported before signing the declarations.

5. At the time of custom clearance, PW 1 Customs Examiner made random checking and found three packets of Ganja concealed in one basket. Therefore, all the baskets were opened and verified. 50 baskets were found to contain altogether 134.595kgs. of Ganja in 94 packets. According to the Indian rate, they are valued at Rs.86,300/1, but the value according to international market is Rs.ll,35,000/-.PW7 Chemical Examiner examined these items and in Ext P 25 report as well as in his evidence before Court said that this is a Ganja which is a dangerous drug coming under Section 2(h) of the Dangerous Drugs Act, 1930. PW 4 is the Superintendent of Customs and Appraiser. He conducted an enquiry under Section 108 of the Customs Act. In that enquiry, he recorded Ext. P. 8 statement of the first accused, Ext. P 9 statement of the second accused and Ext. P 10 and 11 statements of the third accused. Statements of accused and 2 revealed all the details of their involvement in the matter. Those statements and the statements of the third accused showed that the third accused had actually no involvement in the concealment of Ganja. PW 4 searched the residence of all the three accused. Ext. P 12 is the search list prepared after searching the residence of accused 1 and 2. He was able to recover several incriminating items including the balance palmirah leaf baskets and Ganja as well as the materials used for packing and concealment. Photos of the Netherland purchaser were also recovered from the residence. Even though the godown of the third accused was also searched on the same day, nothing incriminating was recovered.

6, PW 4 frankly admitted that his enquiry was not capable of revealing any materials showing involvement of the third accused or his knowledge about the procurement of the prohibited dangerous drugs. On the other hand, the materials collected by him and the evidence adduced * by the prosecution established that Ganja was procured by the first accused from one Mathew at Kattappana. So also, it is in evidence that this Mathew delivered Ganja at the residence of the first accused as per arrangements between them. It is also seen from the evidence that polythene bags and other items necessary for packing and concealing Ganja in the baskets were also procured by the first accused and along with the second accused, he worked for two days for the packing before bundling the baskets. The evidence of DW 1 supported these facts.

7. The suggestion of the thrid accused is that it is violative of business etiquette to open the bundles entrusted for export and that such opening is practically difficult also. Whatever that may be the evidence is to the effect that these bundles were not actually opened and the exporting agency did not come to know that Ganja was concealed.

8. The purchaser from Netherland was at Cochin. He was staying in the Paulson Tourist Home. Ext. P 27 is the hotel arrival report proved by PW 15, Ext. P 27 shows that he gave his address as that of the first accused. In this connection, it has to be remembered that PW 4 was able to recover the photos of this man from the residence of the first accused. All these items of evidence established that the concealment and attempt to export the prohibited items were made only by accused i and 2 and that the third accused produced the goods for customs clearance in an attempt to export without actually knowing that prohibited articles were kept concealed. Liability of the third accused will have to be considered in the back-ground of these facts and circumstances. Section 7(1)(b) of the Dangerous Drugs Act prohibits export from India of any dangerous drugs except in accordance with the rules and under the authority of a valid licence issued under Sub Section (2). Section 20 makes attempt also an offence, Section 13 is the penal provision and Section 32 says that in trials under the Act it may be presumed, unless and until the contrary is proved, that the accused had committed an offence under Chapter III which deals with offences and penalties. Such

presumption is available only in cases where possession of the accused is established and he fails to account for the possession satisfactorily. By application of Section 38, the prohibitions and restrictions are deemed to be porohibitions and restrictions under the Customs Act also. The penal Section in the Custom Act is Section 135. Section 135(1)(a) of the Customs Act takes in prohibitions under other laws also. Therefore, the prohibitions under the Dangerous Drugs Act also will come within the ambit of that provision. What is required for the purpose of Section 135(1)(a) of the Customs Act [so far as this case is concerned] is that the accused was knowingly concerned in the violation of the prohibition. Requirement under Section 135(1)(b) is the knowledge or a reasonable belief that the acquisition of possession is regarding items liable to confiscation for violation of the prohibitions. By an amendment of 1973 Section 138(A) was introduced in the Customs Act. According to that provision, in any prosecution for an offence under the Customs Act which requires a culpable mental state on the part of the accused, the Court has to presume the existence of such mental state and if it is for the accused to establish that he had no such mental state with respect to the act charged as an offence by the prosecution.

9. So far as accused 1 and 2 are concerned, even without the pres m-ption under Section 138(A) of the Customs Act and Section 32 of the Dangerous Drugs Act, the culpable mental state is sufficiently there. Though they denied the paternity of the statements contained in Exts P 8 and P 9 and pleaded that these documents were prepared in a language not fully understandable to them, I am not fully satisfied of that contention. Ext P 8 statement of the first accused was recorded in English and Ext P 9 statement of the second accused was recorded in Malayalam. The evidence of PW 4 shows that portions of the statement of the first accused happened to be recorded by him only because the first accused was not able to write in English with sufficient speed. So also, his evidence shows that even though the second accused is a Tamilian, he was able to understand Malayalam fully in spite of his inability to write in Mala-layam. There cannot be any objection regarding the admissibility of Exts P 8 of P 11 inspite of the prohibition under Section 25 of the Evidence Act because PW 4 cannot be said to be a police Officer. The prohibition under Article 20(3) of the Constitution is also not attracted because these persons were not accused at the time when the statements were

recorded and the enquiry under Section 108 is not an investigation after registeration of a case. These statements could be accepted as substantive items of evidence. Even though it was argued on behalf of accused 1 and 2 that these statements are the only items of evidence against them, I do not think that the argument is correct. There are over so many other items of evidence afforded by the testimonies of PWs 4 and 15. Therefore, do not think that there is any question of interfering with the convinction as against accused 1 and 2.

10. But the case of the third accused stands on a different footing. He is also having the added advantage of the finding of innocence by the trial court. This Court may be justified in interfering only if that finding is found to be not reasonable or perverse according to the weight of the evidence adduced by the prosecution. I do not think that I will be able to come to such a conclusion.

11. Though Sections 7, 13 and 20 of the Dangerous Drugs Act do not refer to the culpable mental state, Section 32 dealing with the presumption of guilt says that the question of adverse presumption will arise when the accused failed to account satisfactorily for the possession established by the prosecution. 'Knowingly concerned' in Section 135(1)(a) of the Customs Act in so far as this is concerned is regarding the violation of the prohibition imposed by the Dangerous Drugs Act.

12. It is true that Section 138A of the Customs Act and Section 32 of the Dangerous Drugs Act are drastic provisions making far reaching changes in the concept regarding mens reaconsidered as applicable in criminal cases. Those provisions make it incumbent on the part of the court to presume the existence of a mental state without actual materials to support the same. The burden cast upon the accused to displace the presumption is also very heavy. Preponderence of probability, which is the normal criterion in other criminal cases regarding discharge of burden by the accused, is converted into one of proof beyond reasonable doubt. That is equivalent to the burden cast on the prosecution. Culpable mental state is the knowledge or the reasonable belief entertained by the accused. Acquisition of possession for being exported or attempted to be exported a prohibited item need not necessarily be as owner or purchaser of the goods. Such a narrow construction is likely to defeat the object of the provisions and

undermine their efficiency as instruments for suppression of the mischief which the legislature had in view. In the light of the scheme of the status and the purpose of the provisions, the words 'acquired possession' are of vide amplitude capable of taking in acquisition of possession other than as owner or purchaser also. Even temporary control or custody of a carrier or keeper may be sufficient for the purpose. But one thing must be there. He must know or must have reason to believe that the goods are prohibited items or he must have been knowingly concerned in the violation of the prohibition (State of Maharashtra v. Netherland Damodardas Soni - A.LR. 1980 Supreme Court 593) But the burden of proof cast on the accused could not only be discharged by adducing positive evidence. Prosecution evidence itself could be relied on for that purpose. If the evidence or admissions made by the prosecution witnesses is capable of displacing the culpable mental state the accused need not adduce independent evidence for that purpose. He can rely on the prosecution vidence itself and say that in spite of the legal presumption the culpable mental state is lacking and therefore he cannot be convicted.

13. As against the third accused, what we are concerned is whether he acquired possession of the goods knowing or having reason to believe that they are liable to confiscation on account of the violation of the prohibitions and attempted to export being knowingly concerned about it. The presumptions take in intention, knowledge as well as belief and reasonable belief. It is not possible for the third accused to. say that he did not acquire possession or attempt to transport the goods. Acquiring ossession as exporting agent also will be possession sufficient for the prohibitions because temporary possession of an agent also could be taken as possession for the purpose of the status. Even though only as Manager of the exporting agency he actually acquired possession of the goods through his subordinates and continued the possession till they were taken to the wharf on 8.2.1985 in an attempt to export them. All the documents and declarations were signed by him. Therefore, the prosecution must be taken to have established possession as well as attempt to export on the part of the third accused also. If so, what remains to be considered is whether he acquired possession and attempted to export knowing or having reason to believe that the prohibited goods are there.

14. n this respect the prosecution is entitled to rely on the presumptions under Section 32 of the Dangerous Drugs Act and Section 138A of the Customs Act against the third accused. In this connection, the learned counsel for the complainant relied on the decision of the Patna High Court in Raghubir Dayal Missir v. Emperor (A.I.R. 1941 Patna 177). That was a case in which possession of a dangerous drug was established but there was no proof that it was imported. Their Lordships said that the presumption under Section 32 of the Dangerous Drugs Act would have been available against the accused provided there was also evidence to show that what is possessed was imported dangerous drug covered by the prohibitions.

15. But the presumptions under Section 32 of the Dangerous Drugs Act and Section 138A of the Customs Act are not conclusive presumptions. In spite of the purpose behind the introduction of these presumptions, they are liable to be rebutted. No provision of law could be interpreted to be meant to convict an innocent person. Further, this is a case in which culpable mental state is an essential ingredient. Presumptions were introduced by the statutes only on account of the national interest involved and the practical difficulty on the part of the prosecution in ail cases to establish the mental state. Instead of asking the prosecution to establish the presence of the culpable mental state, the statutes require the accused to establish absence of it by adducing evidence. From the facts already discussed by me in the earlier paragraphs, I am of the opinion that the prosecution evidence itself if sufficient to dispel the existence of the culpable mental state on the part of the third accused.

16. The evidence in this case is that the third accused signed the documents only believing accused 1 and 2. His action is wrong especially in view of the provisions of the newly introduced Section 138A. He had the duty of satisfying himself that the goods attempted to be exported are not involved in any contravention. Whatever be the business practice, etiquette or practical difficulty, the third accused had the duty of satisfying himself of the correctness of the goods before giving the declarations on the basis of which the export had to be effected. Those declarations and the consequent attempt to export were sufficient to penalise him, but for the existence of proved facts showing that the prohibited goods were there

without his knowledge and consent and he had actually no involvement. In other words, he is being exonerated not because the presumption is not available against him but only because there is evidence to displace the presumption of the existence of the culpable mental state. When there is evidence to show that the presumption is not available and there was no culpable mental state, law does not allow him to be convicted. In this connection, the learned counsel for the complaint brought my attention to the decision in Bal Kiasan Kejriwal v. The Collector of Customs and Ors. (A.I.R. 1959 Calcutta 533) and A.I.R. 1962 Calcutta 460 which reversed A.I.R. 1959 Calcutta 533. The reversal was only on the ground of natural justice. In that case, signing of the export papers by the agent was held to create the presumption of culpable rnental state. But that was on account of facts peculiar to that case. In that case, as the judgment itself shows, massive evidence was available. The exporting agency was guilty of misdescription of goods in quality and undervaluation also. So also, circumstances dispelling the presumption of culpable mental state were not there. On facts the case in hand is entirely different. Here the maximum that could be said is that the third accused did not bestow proper care and attention that was expected of him as the exporting agent. I do not find any reason to interfere with the acquittal of the third accused in these circumstances.

17. In the nature of the offences and the calculation with which it was perpetrated by accused 1 and 2 and the economy of the State involved by the offence, I do not think that the sentencing discretion exercised by the Magistrate is in any way disproportionate. Therefore, interference in that respect is also found unnecessary.

18. The acquittal of the third accused and the convictions and sentences as against accused 1 and 2 are confirmed and all the three appeals are dismissed.