

E. Kesavan Vs. Assistant Collector of Customs (Prosecution) Preventive Department Customs House, Madras

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Court : Chennai

Decided On : Apr-11-1986

Reported in : 1987(27)ELT640(Mad)

Judge : Bellie, J.

Acts : [Customs Act, 1962](#) - Sections 135(1); India Evidence Act - Sections 25; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 465

Appeal No. : Criminal Revision Case No. 222 of 1982 and Criminal Revision Petition No. 220 of 1982

Appellant : E. Kesavan

Respondent : Assistant Collector of Customs (Prosecution) Preventive Department Customs House, Madras

Advocate for Def. : P. Rajamanickam, Central Government Public Prosecutor

Advocate for Pet/Ap. : Abdul Ghani, Adv.

Judgement :

1. Petition under Sections 397 and 401 of the Code of Criminal Procedure, 1973, praying the High Court to revise the Order of the Principal Sessions Judge,

Madras in C.A. No. 71/81 (C.C. No. 10113/80 Chief Metropolitan Magistrate, Egmore, Madras).

This petition coming on for hearing on Friday the 4th day of April 1986, upon perusing the Petition, and the Judgment of the Lower Courts, and the record in the case, and upon hearing the arguments of Mr. Abdul Ghani, Advocate for the Petitioner, and of Mr. P. Rajamanickam, Central Government Public Prosecutor on behalf of the State, and the Case having stood over for consideration till this day, the Court made the following Order :-

The revision petitioner has been convicted by the learned Chief Metropolitan Magistrate, Madras, under Section 135(1)(a)(ii) of the [Customs Act, 1962](#), and sentenced to pay a fine of Rs. 1,000/- with a default sentence of imprisonment. On appeal by the revision petitioner/accused, the learned Principal Sessions Judge confirmed the conviction and sentence. There were two accused in this case and the revision petitioner was the second accused, and the first accused has been acquitted by the trial court itself.

2. The case of the prosecution is that on 28-11-1979 Preventive Officer of the customs found Arokiasamy (A. 1) carrying two cloth bags of things at the Gangway proceeding towards the ship M.V. Chidambaram (A. 1 was a Dock Utility hand in the ship). P.W. 1 asked A. 1 to declare the contents of the cloth bags, and on suspicion he himself verified. Then he found each of the bags containing among other articles like kumkum, Kajal and wooden combs, opium also, in one bag a packet of 938 grams and in the other bag a packet of 935 grams. P.W. 1 Preventive Officer seized them under a mahazar Ex. P. 2. Then P.W. 1 took A. 1 with him and produced him before the Superintendent. On direction by the Superintendent, P.W. 3 another Preventive Officer recorded a statement Ex. P. 5 from A. 1. In that statement A. 1 stated that the two bags were given to him by Kesavan (A. 2) (Cabin mate of A. 1) to be kept in the ship. On account of this, when A. 2 was entering the gangway, P.W. 2 another Preventive Officer intercepted A. 2 and took him to the Customs House and there interrogated him upon which A. 2 gave a voluntary statement Ex. P. 3 in which he has stated that the two bags were given to him by one Jaffar Ali of Ilayangudi asking him to

transmit them to the shop and hand them over to him there, and he promised to give for that Rs. 500/-. He (A. 2) in turn handed over the two bags to A. 1 asking him to take them to the ship where he would receive them. Then A. 2 was also arrested.

3. A. 1 and A. 2 were both charge-sheeted under Section 135(1)(a)(ii) of the Customs Act. The Chief Metropolitan Magistrate, on a consideration of the evidence adduced in this case, found that A. 1 was not aware that opium was in the bags, and therefore, he cannot be held to be guilty, and on this finding he acquitted A. 1 but he found A. 2 guilty and convicted and sentenced him as aforesaid, and on appeal by A. 2 the Appellate Court has confirmed the conviction and sentence.

4. The main evidence on which the prosecution relies is the confessional statement (Ex. P. 3) of A. 2. This confessional statement has been retracted by him. The evidence of P.W. 2 is that the Superintendent directed him to record the statement from A. 2 by questioning. He has further stated that he questioned for about 10 or 15 minutes. Then he would say that A. 2 started writing and he took 2 to 3 hours. This evidence of P.W. 2 itself creates an impression of compulsion or coercion or threat. He has denied a suggestion that A. 2 was beaten by him and other officers. Then, he hastened to add that he did not know whether other officers beat him. It has been further suggested to this witness that A. 2 was made to copy a statement already prepared by P.W. 2, and of course, this suggestion has been denied by him. Now it is very pertinent to note that there is even medical evidence to show that A. 2 sustained injuries. It is the evidence of D.W. 1 Assistant Surgeon, Government General Hospital, Madras, that on 30-11-1979 he examined Kesavan (A. 2) for injuries alleged to have been sustained by him on 28-11-1979 at the Customs House, and he found on him a small contusion on the lateral aspect of the left fore-arm, and the injured was also complaining of pain on the back and the left leg. The Doctor has further stated that the injury could have been caused due to beating with stick. (Ex. D. 5 is the copy of the accident register and Ex. D. 6 is the wound certificate). His further evidence is to the effect that the injured told him that he was assaulted with sticks and hands and a pin. This evidence of the doctor certainly probabalises the case of A. 2 that he was beaten by the

Customs Officers. It is not in dispute that this injury has been sustained by the accused when he has been in custody, and the prosecution has not explained it. In the cross-examination the doctor has stated that the injury could have been caused by a fall, but it is not the definite case of the prosecution that due to any fall the injury was sustained.

According to the Doctor, A. 1 also had sustained injuries like A. 2, and this injury too has to been explained by the prosecution. It would be rather preposterous to think that both the accused have sustained similar injuries by falling down. As per the evidence of P.W. 3, two letters were received by the Additional Collector from A. 1 and A. 2 on 3-12-1979 and 4-12-1979 alleging ill-treatment by the Customs Officers. These letters are Exs. D. 1 and D. 2 dated 30-11-1979. In these letters A. 1 and A. 2 have complained that they have been ill-treated by the Customs Officers, and they have told about the ill-treatment before the Magistrate also when they have been produced before him. It further appears from the letters that both the accused have written the letters no sooner than they were released on bail. They have made a fervent plea in these letters they they were innocent and further action against them may be dropped.

5. From the letter Ex. D. 1 it is see that A. 1 has retracted his confessional statement Ex. P. 5 and has alleged that it has been obtained by coercion and ill-treatment. As aforesaid, he has also been examined by the doctor (D.W. 1) on 30-11-1979, and the Doctor found on him a contusion on the posterior aspect of the right thigh, and he has further stated that the injured (A. 1) complained of pain in the left lumbar region of the back. As regards the injury the doctor has stated that the injury could have been caused by beating with stick. He has further stated to the effect that the injured told him that the Customs Officials beat him with sticks and hands. Ex. D. 3 is the copy of the Accident Register and Ex. D. 4 is the wound Certificate. As said above, A. 1 has also sent a letter to the Additional collector (Ex. D. 1) alleging ill-treatment.

In view of the facts and circumstances discussed above, it is indeed difficult to believe that Ex. P. 3 confessional statement of A. 2 is voluntary, and, the confessional statement (Ex. P. 5) of A. 1 also does not appear to be voluntary.

Certainly, the confessional statements were made to persons in authority. These circumstances would indicate that the confessional statements have been made because the two accused entertained some impression that they would gain some advantage or avoid some evil of the temporal nature with reference to the proceedings against them. Hence, the confessional statements Exs. P. 3 and P. 5 relating to A. 2 and A. 1 cannot be considered as relevant in the criminal proceedings in view of section 25 of the India Evidence Act.

6. De hors the said confessional statements, there is no other reliable evidence incriminating A. 2, and even A. 1. It is stated that P.W. 2 has stated in his evidence that A. 2 told him that opium was given to him by one Jaffar Ali of Elayangudi. But he is the person said to have obtained the confessional statement from A. 2 and his evidence is not in the least corroborated by any shred of evidence. Even if the confessional statement of A. 1 is to be believed as voluntary and true, that will not at all be sufficient evidence to convict A. 2. Thus, there is no reliable evidence on the basis of which A. 2 can be convicted. Both the Courts below have not properly considered the salient features of the defence with regard to the alleged confessional statements especially of A. 2 i.e., Ex. P. 3. Thus, on this ground alone A. 2 is entitled for acquittal.

7. The learned counsel for the revision petitioner has also argued that there is no valid sanction for the prosecution. The sanction order according to the prosecution is Ex. P. 11. A reading of this would disclose that not a single fact of the case has been stated therein and no grounds of satisfaction has been mentioned. Therefore, it appears sanction has been granted in a mechanical manner without proper application of mind. In this connection, the learned counsel relies on a decision R. Sivaraj In re 1980 M.L.J. 742 wherein Varadarajan, J has quoted a passage from the Judgment of the Supreme Court in Mohd. Iqbal v. State of Andhra Pradesh : 1979 CriLJ633 in which it has been observed :

'What the prosecution did was merely to examine two witnesses, P.Ws. 2 and 7. P.W. 2 has produced the order implementing the Resolution of the sanctioning Authority which is Ex. P. 10 and is dated 21st April, 1969, that is to say after the sanction was given. This document no doubt contains the facts constituting the

offence but that does not solve the legal issues that arise in this case. It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways; either -

(1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction; and

(2) by adducing evidence aliunde to show that the facts placed before the sanctioning authority and the satisfaction arrived at by it.

It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect (sic defect) in the prosecution, the entire proceedings are rendered void ab initio. In the instant case no evidence has been led either primary or secondary to prove as to what were the contents of the note mentioned in Ex. P. 16 which was placed before the Sanctioning Authority. The evidence of P.W. 2 or P.W. 7 is wholly irrelevant because they were not in a position to say as to what were the contents of the note which formed the subject matter of the sanction by the Standing Committee of the Corporation.'

8. As said above, Ex. P. 11 the sanction order does not contain a word of the facts of the case. There is no mention of any ground of satisfaction at all. It is just stated therein that,

'Whereas it appears from the records of the case and from the facts and materials placed before me that adequate grounds exist for prosecuting.'

The Sanctioning Authority has not been examined. There is no evidence as to what were the records or facts or materials placed before him. From the said statement in Ex. P. 11 alone it cannot be believed that, in fact, the facts of the case were really placed before the Sanctioning Authority. In the Supreme Court case aforesaid at least the sanction order itself contains facts constituting the offence. As pointed out by the learned counsel for the revision petitioner, the present sanction order does not contain any such thing. Therefore Ex. P. 11 cannot be considered as a valid sanction. The validity of the sanction order is in

question and not any error or irregularity in the sanction as ensconced in section 465 Cr.P.C. The learned counsel for the respondent, however, relies on a decision in *Tulsi Ram v. State of U.P.* 1963 Supp. 1 S.C.R. 382. In this case no sanction order was filed, but some communication referring to the sanction order was filed, and with regard to this no objection was raised before the Courts below and the objection was raised before the Supreme Court contending that there was no sanction order. In these circumstances, the Supreme Court held that at this stage such a contention cannot be entertained, and from the evidence adduced it must be presumed that there was a valid sanction order. In the present case right from the trial Court it was contended on behalf of the accused that there was no valid sanction order. Therefore, the said decision of the Supreme Court relied on by the respondent's counsel cannot be of any use. As observed by the Supreme Court in *SIVARAJ IN RE* 1980 M.L.J. 742 Supra the entire prosecution in the present case is rendered void ab initio. On this ground also the revision petitioner/accused must be acquitted.

9. The learned counsel for the Revision Petitioner argues yet another point which also appears to be quite reasonable. According to him there is no evidence to assure that the alleged contraband recovered from the accused was really sent to the Chemical Analyst. The evidence of P.W. 1 is that immediately after recovery of the contrabands, M.Os. 1 and 2, they were given to the Superintendent. This witness says that he does not remember when M.Os. 1 and 2 were sent to the Chemical Analyst. After referring to records he states that they were sent to the Laboratory on 6-12-1979. Then he would admit that he does not know where the Superintendent kept the contraband till they were sent to the Laboratory. He would further say that normally the goods handed over to the Superintendent would be kept in the Custom warehouse, and the Assistant Collector and Superintendent and other Preventive Officers are in charge of the warehouse. But this witness has no knowledge as to whether these goods were really kept in the warehouse. Then he would state that only after referring to the records he could tell as to whom they were given to be delivered at the Warehouse. In re-examination he would state that through one Swamidoss M.Os. 1 and 2 were sent by the Superintendent to the Warehouse on 30-11-1979. This witness is not in a position to say where were M.Os. 1 and 2 before they were sent to the Warehouse on 30-11-1979. This

witness says that before sending the goods to the Warehouse they were kept by the Superintendent in his safe. Neither the Superintendent nor the said Swamidoss nor the Chemical Analyst has been examined. Thus, there is no reliable evidence to hold that there was no chance of changing the M.Os. or tampering with them. it would be highly risky to convict the accused on this evidence.

10. In view of the above discussion, the conviction of the revision petitioner/accused by the trial court and the lower appellate court cannot be sustained.

11. In the result, the criminal revision case is allowed. The revision petitioner-accused is acquitted. The fine amount, if paid will be refunded.

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