Md. Sulaiman Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/864926

Court : Kolkata

Decided On : Apr-22-1943

Reported in : AIR1944Cal330

Appellant : Md. Sulaiman

Respondent : Emperor

Judgement :

Khundkar, J.

1. The appellant has been convicted of a charge containing three counts under Rule. 6, Non-Ferrous Metals Control Order, 1941, as amended by a Central Government Notification, dated 8th January 1942, read with Rule 81, Sub-rule (4), Defence of India Rules, which are statutory rules under the Defence of India Act, 1939. The appellant pleaded guilty, and was sentenced to suffer rigorous imprisonment for a period of three months, and to pay a fine of one thousand rupees. The present appeal is directed against the sentence. Mr. Suhrawardy who appears for the appellant has urged us to set aside the sentence of imprisonment, but this prayer has been opposed by the learned Advocate-General, who appearing on behalf of the Crown, has contended that the offences committed by the appellant were so serious that a fine would not be a sufficient punishment, and that a sentence of imprisonment is called for. The material portions of Rule 81, Defence of India Rules, should be set out. Sub-rule 2 (a) is in the following terms:

The Central Government (or the Provincial Government), so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community may by Order provide: (a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever and in particular for prohibiting the withholding from sale, either generally or to specified persons or classes of persons, of articles or things kept for sale, and for requiring articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances;' Sub-rule (4) is as follows: 'It any portion contravenes (any Order made under this rule), he shall be punishable with imprisonment for a term which mayextendto three years (or with fine or with both).' On 12th July 1941, there was published in the Gazette of India, Notification No. 288 embodying the Non-Ferrous Metal Control Order, 1941. Clause 3 of this Order provides that no person shall be a stockholder or dealer except under and in accordance with the conditions of a license in a prescribed form granted by the Controller. Clause 6 provides that no stockholder or dealer shall sell the metals to which the Order applies unless he has obtained from the Controller a permit in a prescribed form. On 10th January 1942, there was published in the Gazette of India a Notification by the Central Government which had the effect of adding tin and lead to the list of metals to which Non-Ferrous Metal Control Order, 1941, applied. It is not disputed that the appellant was aware of both the Notifications just referred to. In his business premises was found a cutting from a newspaper, Ex. 29/1, dated 12th January 1942, which reproduced a Notice from the Department of Supply informing the public that the Non-Ferrous Metal Control Order would henceforward include lead and tin. This Notice left the position in no manner of doubt, for it stated as follows:

All persons interested in these metals are informed that

(1) Persons who now have in their possession or under their control two or more tons of tin or lead and persons who have in their possession or under their control quantities of tin or lead which in the aggregate in any one calendar month are not less than two tons, are stockholders' and as such require licenses..

(4) Licenses and certificates are obtainable from the Controller of Non-Ferrous Metals, who is the .Director-General, Munitions Productions, Department of Supply, 6 Esplanade East, Calcutta

(5) Sales of tin in lead can be made only under permit from the Controller.

(6) Stockholders and dealers .... are required to send the Conlroller within 14 days, and thereafter: by the seventh day of each calendar month, a return of all quantities of tin or lead in their possession or under their control.' India received her supplies of tin and lead very largely, if not indeed entirely, from Malaya and Burma. Early in January 1942, supplies from Malaya had ceased, and those from Burma were becoming jeopardised. These metals were in urgent demand for the manufacture of munitions, and Government found it imperative to control all stocks and sales in this country. It accordingly took measures to ensure that all stocks would be disclosed by the holders thereof, and that dealers would not dispose of their stocks without the knowledge and consent of Government. How essential these measures were, and how rigorous was the necessity for their meticulous observance can readily be imagined. The appellant had stocks of these metals, and he dealt in them by way of purchase and sale. It was therefore incumbent on him to obtain forthwith a stockholder's license and never to self without a permit, a permit being required for each sale. It has now to be seen what regard be paid in his dealings to the Order above noted. It may here be stated that it would appear to have been a custom of this firm to enter a transaction in their book as a sale on one day but to make delivery of the goods sold on a day much later. It therefore often happened that there was an appreciable interval of time between the sale and the delivery. Although the Government Order required stockholders and dealers to obtain a permit before selling, it is reasonably clear that what were really sought to be controlled were deliveries, and I am of the opinion that the appellant would have been protected had he obtained a permit even in the interval before delivery, but after sale, in those cases which are described by him as advance sales. But evidence has been given to show that the appellant frequently sold a controlled article without applying for a permit, and that in some instances when he applied for a permit after he had done so, he proceeded to deliver the goods without receiving the permit. Although the appellant knew of the Control

Order on 12th January 1942, he did not apply for a stockholder's license until 23rd January. This was issued on 27th January. Even before applying for a stockholder's license he sold fifteen slabs of tin to Ghulam Ali Abdul Hossein, eight slabs on the 14th and seven slabs on 15th January. These were shown in the books of the appellant's firm as advance sales. The eight slabs sold on the 14th were delivered to the purchaser on that day. The seven slabs sold on the 15th were delivered on 21st January. This delivery was the subject-matter of the first count in the charge. The appellant did not even apply for a permit to cover this transaction, and he did not take any steps to inform the Controller that such a transaction had taken place. On 20th January, there was entered in the books of the appellant's firm an advance sale of a quantity of tin to the Kamani Metal Refinery and Metal Industries. On 23rd January, the appellant submitted, as required by the Control Order, a return of his stocks. This purported to show his stocks as they stood on 21st January. Item 2 of this return reads as follows:____

Quantity. Date on which Remarks.of stock and price atiwhich acquired____

1-42. Advance soldTin-.Burma T. Cwt. qrs. 1b. @Rs. 150 Advance sold9- 1 -'2-12. per md. 8 lb.@Rs.200per md.

2. It has been argued on behalf of the appellant that the note in the remarks column relates to the advance sale of 20th January, and was a sufficient intimation to the Controller of the fact that an advance sale had taken place in respect of nineteen slabs. The argument is without substance. The number of slabs is not mentioned, and the identity of the purchaser is not disclosed. No permit was obtained or even applied for in respect of this transaction. It is sale and delivery without permit which constitutes the offence, and it is no answer to say that the Controller had notice that an offence was about to be committed. On 11th February the appellant's firm delivered ten slabs of tin to the Kamani Metal Refinery. This was the subject-matter of the second count. The appellant attempts to justify it as a part of the transaction indicated in the above-mentioned entry in his return of stock submitted on 23rd January. As already stated, that was no justification and the sale and delivery were not covered by any permit. It was however argued on the appellant's behalf that he was persuaded to deliver these

ten slabs to the Kamani concern by the Chief Controller of Purchase (Munitions), who on 11th February wrote a letter (Ex. 19) to the appellant's firm which is in these terms:

Kindly arrange immediately to deliver 25 Ingots of tin to Messrs. Kamani Metal Refinery and Metal industries, Calcutta. The necessary Sanction for releasing the store has already been obtained by this office from Deputy Director of Metal (Non-ferrous) Calcutta to whom an application may be made by you for obtaining the necessary permit to sell the above store. In this connection, it is pointed out that, as the material is urgently required for Government use delivery is considered essential prior to receipt of any confirmation or formal permit from the D. D. M. (N. F.) Calcutta. Kindly confirm urgently that you are taking action accordingly.

3. On behalf of the appellant it is contended that as the Chief Controller of Munitions Purchase was pressing tor a delivery of tin to the Kamani concern, the appellant was performing a public duty in complying with this urgent request. The argument would have been sound but for one fact. The Chief Controller of Munitions Purchase was asking for delivery not of ten but of 25 slabs oi tin which the appellant's firm actually delivered to the Kamani concern a few days later, on 16th February. This sale and delivery of 25 slabs is an entirely different transaction. The appellant applied on 6th February for a permit to supply 25 pieces of tin to the Kamani Metal Refinery and Industries (Ex. 8). On 11th February the Controller of Non-Ferrous Metals wrote a letter to the appellant's firm refusing the request for a permit (Ex. 9). On the same date the Controller of Munitions Purchase wrote the letter (Ex. 19) above quoted pressing for delivery of 25 slabs to the Kamani Refinery. The appellant's firm delivered this quantity to the Kamani Concern on 16th February. No charge has been preferred in regard to this sale or delivery, obviously because of the letter, Ex. 19. But if Ex. 19 is to be regarded as justifying a delivery of 25 slabs on 16th February, it can have no relation to the delivery of ten slabs on 11th February which was therefore entirely unauthorised.

4. The third count of the charge relates to sale and delivery of 18 slabs of tin to Bhagwandas Bendiprosad on or about 11th February. By a letter, Ex. 10, dated 9th February, the appellant had asked for a permit to supply 23 pieces of tin

weighing 42 cwts. to Bhagwandas Bandiprosad. It is said that this application included 18 slabs covered by contracts of sale entered into on 2nd, 3rd and 4th February. If this is so, then these contracts also represented advance sales made before any permit in respect of them was applied for. The application for a permit was refused by the Controller in a letter dated 17th February Ex. 11. But the appellant's firm had meanwhile already delivered 18 slabs of tin to the purchaser on 11th or 12th February. Now, I would reier to another transaction with respect to which there was no charge. On 11th February the appellant wrote another letter, Ex. 21, asking for a permit to supply a further quantity of tin weighing about 11 cwts. to the same party, Bhagwandas Bendipro-sad. On the very next day, 12th February, he delivered 11 slabs of the metal to this purchaser. No permit was ever issued lor this delivery. On 12th February, the appellant wrote a letter, Ex. 12, to the Controller which is in these terms: 'Please note that to-day We have delivered to lihagwandas Bendiprosad the undermentioned Burma tin as per their license No. 594/595: 20 pcs. K. C. M., weight 55 cwt. 3 qrs. 20 lbs.' Here '29pcs.' stands for 29pieces, being the 18 mentioned in the third count of the charge, and the 11 delivered on 12th February in respect of which delivery, no charge was framed. On 16th February, the Controller wrote a letter, Ex. 13, to the appellant's firm demanding to know on what authority they had delivered the tin mentioned in Ex. 12, the letter quoted above to Bhagwasdas Bendiprosad. No reply was vouchsafed to this enquiry. But there can be little doubt that the appellant was aware of the fact that an explanation was called for, and a justification needed. He accordingly armed himself with a letter, Ex. B, which a concern called 'The Eyre Smelting Co., Ltd.' addressed to his firm on 26th February. The contents of this letter are as follows: 'Dear-Sirs,

Please note that we have taken delivery of 55 cwts. 2.20 tin Ingot which is required for orders received from the Department of Supply and concerns of national importance.

Our License Number is 594 dated 6th November 1941, and the Department of Supply have authorised us to purchase Tin Ingot. No responsibility therefore is attached to you. Yours faithfully,For the Eyre Smelting Co. Ltd.,Sd/- Stanley Brown, Manager, Indian Branch.

5. It is now contended on behalf of the appellant that Bhagwandas Bendiprosad was the person 'who was purchasing on behalf the Eyre Smelting Co., Ltd. It is urged in this connexion that the License No. 594, mentioned in Ex. B, is really the same as the License No. 594/595, attributed to Bhagwandas Bendiprosad in Ex.12, the appellant's letter of 12th February, in which he stated that he had supplied twenty-nine pieces to that person. On 13th March, the Controller addressed an express letter, Ex. 14, to the appellant's firm inviting reference to his previous letter of 16th February in which he had called for an explanation of the delivery to Bhagwandas Bendiprosad. The appellant then replied on 31st March by a letter, Ex. A, which is as follows:

Dear Sir,Re. Supply Dept. No. ENF/4283/GRI dated 13th March, 1942.

Further to our letter of 12th February 1942, we find that a mistake has occurred in the correct name of the purchaser. The real purchasers were Messrs. The Eyre Smelting Go. Ltd., holder of License No. 594 dated 6th November 1941, which number was also mentioned in our above quoted letter. Messrs. Bhagwandas Bondiprosad acted on behalf of the License-holders.

We also send you herewith a copy of the letter of Messrs. The Eyre Smelting Go. Ltd., dated 26th February 1942.

Please note and oblige.

Yours faithfully.

6. It has been strenuously contended by learned counsel for the appellant that this letter Ex. A contains a satisfactory explanation, and that the letter Ex. B discloses a sufficient justification for selling and delivering the tin mentioned therein to Bhagawndas Bendiprosad. The argument is that the appellant satisfied himself that the party to whom the tin was going was a proper party because the operations of that party were covered by a license. This, in my judgment, in no way mitigates, the offence of violating the stringent Order which requires a permit to be obtained for every sale and delivery. Enough has been stated to show that on several occasions the appellant deliberately violated the Control Order by

selling and delivering quantities of tin without a permit. It has been argued in extenuation that all the sales and deliveries were to persons who had licenses either to stock or to manufacture, and that the goods were not passing into wrong hands. This, as just stated, is beside the point. The infringement of an absolute prohibition cannot be at all justified on the ground that the transgressor thought that no harm would be done thereby.

7. It has been next contended that the appellant was being urged to make deliveries to concerns engaged in. the manufacture of munitions, and attention is called, to the letter of 11th February 1942 from the Chief Controller of Munitions Purchase (Ex. 19) pressing for the delivery of twenty-five slabs of tin to the Kamani Metal Refinery. In the circumstances, this delivery which was made on 18th February though not covered by a permit was excusable, and as already stated no charge has been founded upon it. But the other delivery of ten, slabs to the Kamani Concern on 11th February, which was the subject-matter of count 2 of the charge was without such justification. The sale of this consignment shown as an advance sale, was effected as early as 20th January, and was not the consignment to which the letter of the Controller of Munitions Purchase nad reference. It was not covered by a permit, and indeed no permit to sell or deliver this lot of ten slabs was. ever applied for.

8. In support of this appeal Mr. Suhrawardy has strenuously contended that the offence, which the appellant did not ever deny, was devoid of any element of moral turpitude. The appellant was not a profiteer, nor was be a dealer in what is known as the black market. His action in selling and delivering quantities of tin without permits was misguided, and at the most he was guilty of carelessness. He never concealed the state of his stocks because he regularly submitted the returns which the rules called for. He felt he was not contravening the spirit of the Control Order because the persons he was supplying the metal to were not unauthorised to deal in this metal. He has further, contended that the appellant is deserving of mercy because he has lost a large fortune which he had invested in Burma, and because here in Calcutta he was devoting a great deal of money and time to the care of refugees from Burma, and that at the same time he was managing the affairs of his firm single handed. I have given all these considerations my anxious

attention, but I feel that in the present case moral turpitude is not the criterion of punishment. Tin and lead are not now just ordinary commodities of domestic or industrial use. Inasmuch as they are needed in the manufacturejof munitions, they have become materials required by the State for the defence of the community in a time of national emergency. The available stocks of these commodities are extremerely limited. It was clearly imperative that these stocks should be conserved. The strictest control over all dealings in these metals was called for. Any system of control had of necessity to be stringent, and the measures taken had to be strictly enforced. It follows that punishment for any violation of prohibitions which such measures involved should be deterrent. It is true that Sub-rule (4) of Rule 81 prescribes the alternative penalty of fine for the contravention of any orders made under the rule. But it is the duty of the Court to determine which punishment is called for by the circumstances of the case, and the Court would be failing in its duty if it lost sight of the inclination of dealers to make profit out of irresponsible commerce in commodities which are needed by the nation and sought to be controlled by Government.

9. I think a sentence of imprisonment is necessary in the present case, but in deference to all the considerations urged in mitigation, I also think that the imprisonment to which the appellant has been sentenced should be simple imprisonment. Regard being had to the appellant's social position, I am of the opinion that imprisonment, even though it is simple, will be a sufficient punishment in his case. We direct that the sentence passed by the Magistrate be altered to one of simple imprisonment for three months. Subject to this modification the appeal will stand dismissed. The accused appellant must surrender forthwith to serve out the sentence.

Sen, J.

10. This is an appeal on the ground of sentence, the appellant having pleaded guilty to three charges of having sold tin without a permit in contravention of the provisions of Rule 6 of the Non-Ferrous Metal Control Order of 1941. The appellant has been sentenced to three months rigorous imprisonment and to pay a fine of one thousand rupees, in default, to a further term of rigorous imprisonment

for one month. This was the sentence passed on the first charge, no sentence has been passed on the other charges. Mr. Suhrawardy characterises this as a 'savage' sentence and places certain circumstances before us which he says should induce us to reduce the sentence to one of a nominal fine. The learned Advocate-General on the other hand, contends that the violation of the Order has been defiant and deliberate, if not worse. We have spent a very great deal of time on this matter more time, perhaps than it merited. I am of opinion that this is not a case where a nominal sentence would be sufficient. It is true that the prosecution has not shown- and indeed it has not attempted to show-that these sales without permit were to parties who had no license to deal in this metal, nor has the prosecution shown or attempted to show that the accused has sold the metal at an excessively high price, but the Crown has been able to prove quite satisfactorily that the appellant has deliberately disobeyed the Order not only in the 3 instances which formed the subject-matter of the charges but also in some other instances.

11. The Order was promulgated in July 1941 and on 10th January 1942 tin was added to the list of non-ferrous metal affected by the order. A newspaper cutting of the Order dated 12th January 1942, was found in the office of the appellant. The appellant was obviously aware of the Order on that date yet on 13th, 14th and 16th January he sold and delivered tin to Ghulamali Abdul Hussain without a permit. Mr. Suhrawardy argues that the appellant could not quite appreciate what the Order meant at that time. I cannot believe this. It is stated in the Order that it is to take immediate effect. Next the Order says that no tin is to be sold without a permit from the Controller. Nothing could be simpler to understand, Mr. Suhrawardy points to Rule. 8 of the Order which is Ex. 3. It says that every stock-holder of tin is to submit a return of the nature described therein within 14 days from the commencement of Order and thereafter on the 7th day of every month. He says that his client was misled by this Rule into thinking that the Order would not come into force till 14 days after 10th January, i.e., till after 23rd or 24th of January. I am not able to accept this excuse. According to the accused's own statement his firm was doing very extensive business for a large number of years in Burma and India. He was not an ignorant petty trader but a merchant of standing and experience. I cannot believe that he did not understand the simple directions given in the order. The violation was deliberate.

12. As regards the 2nd charge, it relates to the delivery of 10 slabs of tin to Kamani Brothers on 11th February 1942. In respect of this delivery the explanation is that on that day he got a letter from the Chief Controller of Purchases to deliver tin to Kamani Brothers in anticipation of a permit being granted and that as a result of this letter he delivered the tin. This explanation is not convincing. The letter from the Chief Controller did not relate to these 10 slabs at all, it related to a sale of 25 slabs for which permission was asked on 6th February 1942. These 25 slabs were actually delivered on 16th February 1942. For the ten slabs no permission had been asked for or granted. Another explanation given is this. The sale of these 10 slabs was shown as an advance sale in the return of 23rd January 1942 and no objection was taken by the authorities, accordingly the accused thought he was free to deliver the 10 slabs. The showing of an advance sale in the return cannot absolve a stock holder from getting a permit to deliver. This must have been clear to any merchant who had read the Order as this merchant undoubtedly had. It is thus clear that this violation was also deliberate.

13. The last charge relates to the sale of 29 slabs to Bhagwandas Bendiprosad. Permission was asked for on 9th February and 11th February. Without waiting for permission to be granted delivery was given on 11th February. The explanation is founded on the letter of 11th February from the Chief Controller. It is said that this letter created an impression on the mind of the accused that delivery of tin was to be made at once to all purchasers in anticipation of permission. This is an absurd explanation. The letter in terms referred to a particular contract only, viz., the contract to sell 25 ingots or slabs to Kamani Brothers. No sensible person would construe the letter to mean that it embraced all contracts. Next it was pointed out on behalf of the appellant that Bhagwandas Bendiprosad were merely the brokers of Messrs. Eyre Smelting Co. Ltd. who gave a letter to the accused stating that the metal was required for concerns of national importance and absolving them from liability. This letter was taken on 26th February long after delivery was given and after permission had been refused. Obviously it was taken for the purposes of meeting a criminal case. I do not believe that at the time of delivery these representations were made by the Eyre Smelting Co. Ltd. If, as the accused now says, he gave delivery because of a misapprehension on the meaning of the letter of the Chief Controller of Purchases of 11th February asking him to deliver tin to

Kamani Bros, in anticipation of permission, then there would be no need for asking the Eyre Smelting Co. Ltd. or any one else to absolve him from responsibilit.

14. It is thus clear that all these deliveries were made by the accused deliberately and with the knowledge that he was acting contrary to the order. Mr, Suhra-wardy says that there could be no motive in the accused flouting the Order as he was not selling at an excessively high price or to persons not authorised to buy this metal. It is not possible to determine what the motive of the accused was, but one might speculate and find many motives which are not honest ones. I do not propose however to ascribe any such motive to the accused. The Crown has not proved any particular motive. All I need say is that if a dishonest motive had been proved the accused would be liable to get a far severer sentence than that which he has got. The maximum sentence is three years imprisonment.

15. Mr. Suhrawardy pointed out that the appellant had recently lost a great deal of his property by reason of the Japanese occupation of Burma and he says that this loss had so disturbed the appellant's frame of mind us to make him confused. I have taken this factor into consideration but cannot believe that the conduct of the appellant in respect of these offences was influenced by his loss of property in Burma. I take a serious view of thus offence. As the learned Magistrate had said the metal tin was vitally necessary for the production of munitions and war materials. The Government had taken definite action to conserve this metal by regu-lating and controlling its sale. A disobedience of orders passed for this purpose clearly endangered the war effort and any such disobedience requires such punishment as would deter others from indulging in a similar disobedience. I am of opinion that a sentence of fine is not enough and that a sentence of imprisonment also is very necessary; however, having regard to all the circumstances of this case I am not prepared to disagree with my learned brother that the sentence of imprisonment passed should be made simple instead of rigorous. With this modification in the sentence the appeal is dismissed.