

CRIMINAL APPEAL NO. 165/2014.

JUDGMENT

MHCC020030042014



Presented On : 28.02.2014.

Registered On : 28.02.2014.

Decided On : 22.08.2023.

Duration : 09Y 05M 22D

IN THE COURT OF ADDITIONAL SESSIONS JUDGE MUMBAI,

AT GR. BOMBAY

CRIMINAL APPEAL NO. 165 OF 2014.

IN

CRIMINAL CASE NO. 129/SW/2012

(OLD NO.28/CW/1986).

Ashutosh Prafulchandra Nanavaty.

... accused No.3.

Vs.

1. The State of Maharashtra,

2. Collector of Customs,

3. Assistant Collector of Customs.

... Respondents.

Appearance :-

Ld. Adv. Mr. Adithya Iyer A/w Adv. Advait Helekar for the accused No.3.

Ld. APP Mr. Abhijeet Gondwal for the State/Respondent No.1.

Ld. SPP Mr. Natarajan for Customs/Respondent No.2 and 3.

CORAM : H.H. THE ADDITIONAL SESSIONS JUDGE

DR. A. A. JOGLEKAR (C.R.NO.37)

DATED : 22ND AUGUST, 2023.

JUDGMENT

This is an appeal against the judgment/order dated 31.01.2014 passed by the Additional Chief Metropolitan Magistrate, 03rd Court, Esplanade, Mumbai, (in short the Trial Court) in C.C.No.129/SW/2012 (Old No.28/CW/1986), convicting the accused under Section 135 (1) (a) of Customs Act and sentenced him to suffer simple imprisonment for the period of six months and pay fine of Rs.2,50,000/- in default of payment of fine, he shall suffer simple imprisonment for five months.

2. The parties in the appeal i.e. the accused No.3 and respondent, would be referred as per their original nomenclature in the case.

THE GRAVAMEN OF THE COMPLAINANT'S CASE IN BRIEF ENSUES AS UNDER :

3. It is stated that as on 19.03.1985 accused No. 2 and the present accused No. 3 were traveling to Hong Kong from Mumbai when they were apprehended by the officers of respondent No. 2 at the Sahar International Terminal. On examination of their checked-in baggages, it was found that certain foreign currency, (Rs.46,63,340/- i.e. Rupees Forty Six Lakhs Sixty Three Thousand three hundred and forty only) USD 34,256/-, was kept inside their red and black coloured traveling bag. The said bags were checked-in by accused No. 2. The accused No. 2 and 3 claimed that they were carrying the foreign currency at the behest of accused No. 1. Thereafter, accused

No. 1 was apprehended at Santacruz airport and brought to Sahar Airport where accused No. 2 and the accused No. 3 were detained. Further statements of the accused persons were recorded under Section 108 of the Customs Act, wherein either accused, i.e. accused No. 1 and 2 confessed to their role in the alleged offence. In furtherance of the same, accused persons were put under arrest and a Criminal Complaint came to be filed. Post conclusion of the testimonial evidence being recorded the statement of the accused under Section 313 (1) (b) of Cr.PC. was recorded and after affording opportunity to either party all being heard. The Ld. Trial Court held the present accused No. 3 guilty under the impugned judgment/order and sentenced him to suffer simple imprisonment for a period of six months and pay a fine of Rs.2,50,000/- and in default, he shall suffer simple imprisonment of five months by way of impugned order. Thus, aggrieved by the impugned judgment/order the accused has filed the appeal as such.

4. It is pertinent that accused No. 4 to 7 are already discharged and accused No. 1 and 2 have pleaded guilty. Further the accused No. 3 retracted his statement recorded under section 108 of the Customs Act, 1962, as on 25.03.1985. Accused No. 4 and 7 came to be quashed by the Hon'ble High Court and accused No. 5 and 6 were discharged by the Ld. Trial Court. Prosecution had examined in all six witnesses.

5. Ld. Advocate for accused has filed their written notes of arguments vide Exh. 13 alongwith the case laws. It is vehemently

stated that the entire statement recorded under Section 313 (1)(b) of Cr. P.C., alongwith the contentions in the written statement filed by the accused No. 3 is not considered by the Ld. Trial Court. It is vehemently stated that, the accused No. 3 is exonerated on merits in the FERA proceedings. It is further stated that the Ld. Trial Court as failed to consider the fact that the purported confessional statement of the accused No. 3 recorded under Section 108 of the Customs Act, 1962, was retracted as on 23.03.1985. So also, testimonial evidence led by the prosecution does not inspire of the fact that the bag allegedly containing the foreign currency was not checked in my the accused No. 3. Lastly it is stated that the accused No.2 was illegally converted as a prosecution witness. Thus, on all such set of facts the Ld. Advocate for accused No.3 prayed for allowing the appeal.

6. Per contra the Ld. Prosecutor has vehemently argued that, the prosecution has proved their case beyond reasonable doubt. The presence of accused at the spot is duly proved by the investigating officer and in this regard, the role of the accused is well established. Further it is stated that the exoneration from FERA proceedings does not per se exonerate the accused No. 3 from the present crime and the same will have no bearing upon the present proceedings. The prosecution evidence clearly inspires for the guilt of the accused No. 3 . Therefore, in view of the same the Ld. Prosecutor states that, the order/judgment of the Ld. Trial Court does not required any such interference at the hands of this Court. Hence, the Ld. Prosecutor prayed for dismissal of appeal.

7. Heard Ld. Advocate for accused No.3 and Ld. SPP for the State/Respondent. Perused record and proceedings of the case and written notes of arguments filed by either parties. In the aforesaid parlance following points arise for determination. I have recorded my findings for the reasons as follows:

Sr. No.	Points	Findings
1.	Does prosecution prove that, in the month of March, 1985, at Bombay and Ahmedabad, accused No. 3 alongwith the co-accused being the member of continuing criminal conspiracy for the purpose of illegal exporting of foreign currency in contravention of Notification No. GSR-92, dated 01.01.1974, under Section 13(2) of the Foreign Exchange Regulation Act and thereby committed an offence under Section 135(1)(a)(ii) of the Customs Act?	...No.
2.	Whether any interference or indulgence is required in the judgment/order of the Ld. Trial Court ?	...Yes.
3.	What Judgment / Order ?	Appeal is allowed.

: REASONS :

AS TO POINTS NOS. 1 TO 3 :-

8. As Point Nos.1 to 3, are being interwoven or interlinked are held for appreciation together for the sake of convenience and to avoid re-agitation of facts. It is stated that as on 19.03.1985, accused No. 2 and the present accused No. 3 were traveling to Hong Kong from Mumbai when they were apprehended by the officers of respondent No. 2 at the Sahar International Terminal. On

examination of their checked-in baggages, it was found that certain foreign currency, (Rs.46,63,340/- i.e. Rupees Forty Six Lakhs Sixty Three Thousand three hundred and forty only) USD 34,256/-, was kept inside their red and black coloured traveling bag. It is case of prosecution that alleged foreign currency seized at Sahar Airport as on 19.03.1985, by the sleuth of customs wherein accused No. 2 presented baggage i.e. muster colour suitcase which in turn contained another smaller suitcase inside it. The contents small suitcase are stated to have been claimed by accused No. 3. Further accused No. 3 presented a tourist suitcase containing clothes, documents and canvas handbag. It is alleged that the said bag contained 9 bundles of US dollars, travellers cheques valued to Rs. 46,51.230/-. It is further stated that the accused No. 3 presented a second samsonite suitcase, having the name label of accused No. 2. Apart from the same, three gunny bags and a hand bag were searched but nothing incriminating in the same.

9. It palpably evinces to myself that, upon anvil of cross examination it brought on record that the tourist suit case was has name and label of accused No. 2 and is booked in the name of accused No. 3. on perusal of the testimonial evidence led by the P.W.1 Anantraman, he stated for the factum of seizure as he being the seizing officer. P.W.2 Reginold Claude Kingford, Superintendent of Customs, he has stated for the seizure under panchnama.

10. Considering this particular aspect while adverting to the testimonial evidence of the P.W.5 C.S. Amin, in his examination in

chief at paragraph No. 4 last three lines deserves crucial consideration, and are required to be reproduced.

“Except the Customs officer in uniform and we three, nobody was present when the bags were opened. I again say that there may be intelligence officer present there.”

11. Testimonial evidence of the PW.5 C.S. Amin reveals for the fact that PW.5 Amin and the accused No. 3 were traveling at the instance of the accused No. 1 and the accused No. 3 was unaware of the locking code of the suitcase. The relevant portion of the examination in chief vide paragraph 4 requires to be reproduced.

“The tag attached to checked-in baggage i.e. yellow suitcase and its counter part was attached to my ticket. The customs officer inside asked me as to whether I had anything to declare and whether I was carrying any contraband with me. I replied in negative. Then I opened the yellow bag after picking it up from Baggage-area on identifying it. Nanawati’s bag was there inside the yellow bag. It was a green coloured cloth bag. While this was going on, I saw the accused No.3 coming in the Customs area. He brought my Samsonite bag and the brown Americal Tourist bag with him. I don’t know what Customs officer asked him, but he opened my Samsonite bag. I had opened the yellow bag as I was having the key of it with me. But the green coloured cloth bag was locked and hence I asked the Customs officer to help me to open the same. Accused No.3 opened my Samsonite bag since I had given key of it to him. Accused No.3 could not open the brown coloured bag, being

ignorant about the combination keys. So I provided him the combination Nos. and myself and Accused No.3 then opened that bag. Before, opening it, I told Customs officer that the said brown coloured bag was containing foreign exchange. The combination lock was bearing No. 182. I also told the Customs officer that the said foreign exchange was belonging to Accused No.1.”

12. Thus, it is evident that while the bags were opened panchas were not present. So also, panchas are not examined by the prosecution and this speaks in quantum. Therefore the recovery effected cannot be held to have proved except from that of the investigating officer but it is sans corroboration. Thus it palpably transpires that the accused No. 3 was unaware of the key lock combination. Apart from the same it was P.W.5 C.S. Amin who had revealed to the customs officers prior to opening of bag that it contained foreign exchange. It is pertinent that the panch witnesses are not examined. Moreover when it was already revealed by the P.W.5 C.S. Amin to the agency officials that the bag contained foreign exchange then immediately the agency officials ought to have called upon the panchas. This aspect raises serious doubt about the incident and more especially with regard to the implication of the accused No. 3, as it was P.W.5. C.S. Amin who disclosed the foreign exchange and therefore nowhere it reveals that the accused No. 3 knowingly conspired with co-accused as alleged. It is translucently clear that, the accused No.3 had no knowledge with regard to the foreign exchange being kept under the suitcase which was duly number coded by the accused No.2, who has admittedly stated for the same.

Further, it also reveals that, conducting panchnama post knowledge of the fact that, foreign exchange was contained in the bag and in the absence of the panchas the bags were opened and this raises serious doubt over the theory of prosecution.

13. Furthermore, it is pertinent that, the prosecution has not rebutted for congruent FERA Proceedings to have commenced and concluded in the favour of the accused No.3 and the said proceedings were dealt upon the same premise and facts as stated in the complaint. Thus, the same amounts to jeopardizing the accused No.3, more especially when the accused No.3 is exonerated all such charges by the FERA Appellate Authority. Accused No.3 has relied upon the FERA Appellate Order and the FERA discharge order. This particular aspect was well stated by the accused while his statement was recorded under Section 313 of the Code of Criminal Procedure and as rightly pointed out by the Ld. Counsel for accused No.3, the said fact finds no place throughout the judgment and this major aspect had slipped from the judgment. The statement recorded under Section 313 of Cr.PC. is the only place where the accused has the right to explain his case and due consideration to such statement is obligatory on the Ld. Trial Court. In this regard, sans such consideration the accused No.3 cannot be left remediless at the mercy of the prosecution.

14. Ld. Counsel for accused No.3 has filed and relied upon the case of **Ushanes Nrupendra Mehta Vs. The State of Maharashtra and**

Ors., MANU/MH/0030/2004, wherein the Hon'ble Bombay High Court has observed that,

“21. Since in this case, the adjudicating authorities have exonerated the petitioner and the said orders have not been challenged and have thus assumed finality, it is improper on the part of the respondents to prosecute the petitioner on the same facts. If the authorities were serious, they would have challenged the order passed by the Additional Director, Enforcement Directorate, dated 27.09.1992. They would have also challenged the order dated 11.09.1998 passed by the CEGAT. They seem to have accepted the conclusions of the adjudicating authority that, the petitioner is innocent. In such circumstances, the pending prosecution will have to be quashed. Hence, the following order.”

15. Further, Ld. Counsel for accused No.3 has invited attention of this Court upon the purported confessional statement of the accused No.3 recorded under Section 108 of the Customs Act, 1962. It is settled that, the statement recorded under Section 108 of the Customs Act are considered to be part and parcel of the judicial proceedings and therefore, their authenticity follows presumption and it would assumed such significance only if such statement is corroborated with sufficient material. Accused No.3 in the present crime has retracted his confessional statement as on 23.03.1985. Even such statement of retraction is not considered by the Ld. Trial Court, more especially when the accused No.2 i.e. PW.5 C. S. Amin in variably stated for the knowledge that, the suitcases contained

foreign exchange and therefore, in this regard, the said retraction will naturally assume significance because there is no material on record to substantiate the allegation that the accused No.3 had knowledge about the foreign exchange.

16. On perusal of the testimonial evidence of the PW.1 Anantraman and PW.2 Reginold Kingford, it is apparently corroborated by PW.5 C. S. Amin, originally arrayed as accused No.2, who pleaded guilty. While comparatively analyzing the testimonial evidence of these three prosecution witnesses there is no record to show that the accused No.3 had checked-in such bags containing foreign currency and PW.1 Anantraman, PW.2 Reginold Kingford, and PW.5 C. S. Amin have consistently stated that, the accused No.3 has not checked-in the said bag and the said fact was required to be considered by the Ld. Trial Court, more especially in the light of the fact that, even the said bags were opened in the absence of panchas inspite of having knowledge from PW.5 C. S. Amin that, the bags contained foreign exchange.

17. It is at the face of the record that, PW.5 C. S. Amin was initially arrayed as an accused No.2 and thereafter, was converted as prosecution witness. As stated supra, accused No.2 admittedly has stated to have checked-in the baggage of the accused No.3 and the said fact is also corroborated by the other prosecution witness. The Ld. Advocate for accused No.3 has relied upon the case of **Abdul Razak Vs. Union of India, Cri. M. C. No.2917/2021**, wherein the Hon'ble Kerala High Court has observed that, an accused person

cannot simply be converted into a witness and made to give testimony against his co-accused. A relevant excerpt from the said judgment is reproduced hereunder;

“Paragraph no.20 : The salutary principle in section 306 could have been availed of by the prosecution before hand. But once, co-accused is convicted he cannot be called to the stand on behalf of the prosecution, to speak for them and against the other accused. A convict in the same offence is not an approver and though an accomplice, his trial and conviction, even if in separate proceedings, renders him an incompetent witness. In considering the aspect of delay in proffering the additional witness, the Special Court in the impugned order reasons that earlier he was undergoing trial and now he is convicted by the other Court. The prosecution cannot avail of such fortuitous circumstances to get over the prohibition in Article 20(3) read with section 315 Cr.PC.

18. Considering the conspectus of the aforesaid case law, it congruently appears to myself that, the prosecution has not sought for any such permission for examining the accused No.2 as prosecution witness from the Ld. Trial Court. This particular aspect goes to the route of the matter and therefore, the testimonial evidence laid by PW.2 C. S. Amin will have no bearing upon the proceedings. So also, on perusal of his testimonial evidence is in contradiction with his statement under Section 108 of Customs Act. Therefore, considering the same the case of prosecution palpably fails to establish the guilt of the accused No.3.

19. I have minutely perused the order of the Ld. Trial Court and it palpably evinces to myself that, the Ld. Trial Court while assessing the facts have barely stated vide para 8 that, after going through the entire evidence there is no reason to disbelieve discard this evidence on the ground of minor discrepancy. It is pertinent that, while rejecting such discrepancies the Ld. Trial Court have failed to support such rejection with reasoning. Merely having acquaintance with co-accused, more especially accused No.1 will not lay the role of the accused No.3 under speculation, as he being a professional chartered accountant. So also, the Ld. Trial Court has failed to propel out such link between the accused No.1 and the accused No.3 as to derive such factum of connivance. It is also observed that, the voluntary statements under Section 108 of the Customs Act cannot be rejected as regards the admissibility of the statement and that can be the sole reason to prove the offence of the accused No.3. It is pertinent that, the Ld. Trial Court has failed to assess the said fact upon the basis of retraction statement as well as the statement of the accused No.3 under Section 313 (1) (b) of the Code of Criminal Procedure. Surprisingly, the Ld. Trial court has also mentioned that, P.W.1 and P.W.2 are not independent witnesses, and still have stated them to be trustworthy witnesses. Therefore, considering the fact that, P.W.5 C. S. Amin has admittedly stated for the knowledge of such foreign exchange to be carried in the bag and that the link with regard to such knowledge pertaining to the accused No.3 being missing, I hold that, the prosecution has missed an important link so as to secure the conviction of the accused.

20. On perusal of the judgment/order of the Ld. Trial Court it has failed to consider the aforementioned aspect discussed hereinabove and thus, I have inferred that, prosecution has failed to prove the case beyond reasonable doubt. Therefore, the accused is required to be acquitted from such charge under Section 13(2) of the Foreign Exchange Regulation Act and thereby committed an offence under Section 135(1)(a)(ii) of the Customs Act. Resultantly, I answer Point No. 1 in the negative, point No. 2 is answered in the affirmative and with that I hold that the judgment and order passed by the Ld. Trial Court has to be quashed and set aside and requires interference at the hands of this Court and ergo point No.3 is answered accordingly, hence order infra :-

ORDER

1. Criminal Appeal No. 165 of 2014 is allowed.
2. The Judgment/order dated 31.01.2014 passed by the Additional Chief Metropolitan Magistrate, 03rd Court, Esplanade, Mumbai, (in short the Trial Court) in C.C.No.129/SW/2012 (Old No.28/CW/1986) is hereby set aside.
3. Accused **Ashutosh Prafulchandra Nanavaty** is acquitted of an offence punishable under Section 135 (1) (a) of the Customs Act.
4. Accused shall execute fresh P. R. and S. B. of Rs.15,000/- to appear before the higher court as and when such court issues notice in respect of any appeal or petition filed against the judgment of the case and such bail bond shall be in force for 6 months in consonance with Section 437-A of the Code of Criminal Procedure, 1973.
5. The bail bond of the accused stands cancelled.

6. The copy of order and findings be sent to the District Magistrate, Mumbai City vide Section 365 of the Cr.P.C.
7. Record and proceedings be sent back to the Ld. Trial Court.
8. Criminal Appeal No. 165 of 2014 stands disposed of accordingly.

Judgment is dictated and pronounced in the open Court.



Date : 22.08.2023.

(DR. A. A. JOGLEKAR)
Additional Sessions Judge,
City Civil & Sessions Court,
Gr. Bombay (C.R. No. 37)

Dictated on : 22.08.2023.
Transcribed on : 23.08.2023.
HHJ signed on : 04.09.2023.

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

Upload Date	Upload Time	Name of Stenographer
04.09.2023	05.34 p.m.	Mahendrasing D. Patil (Stenographer Grade-I)

Name of the Judge (With Court Room No.)	HHJ DR. A. A. JOGLEKAR (Court Room No.37)
Date of Pronouncement of JUDGMENT /ORDER	22.08.2023
JUDGMENT /ORDER signed by P.O. on	04.09.2023
JUDGMENT /ORDER uploaded on	04.09.2023