(1990) 04 BOM CK 0047

Bombay High Court

Case No: Criminal Appeal No. 432 of 1982

Assistant Collector		APPELLANT
	Vs	
Evangelist Francies Almeida		RESPONDENT

Date of Decision: April 9, 1990

Acts Referred:

- Customs Act, 1962 - Section 108, 135(1)

Citation: (1991) 51 ELT 295

Hon'ble Judges: I.G. Shah, J

Bench: Single Bench

Judgement

1. The Assistant Collector of Customs, the original complainant, has preferred this appeal against the order of acquittal of the Original accused No. 2 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Appeal No. 412 of 1980.

2. Briefly stated the facts giving rise to this appeal are as under.

The present appellant filed a complaint against the present respondent No. 1 and original accused No. 1 Mohsin Abdul Kadar alleging that on 12-2-1976 at about 8.00 p.m. the Customs Officer Shri Tiverekar had stopped the car bearing registration No. B.M.C. 9762 which was driven by original accused No. 1 and by his side the present respondent No. 1, the original accused No. 2, was sitting. The complainant alleged that the Customs Officer Shri Tiverekar after stopping the car searched the car after asking the accused Nos. 1 and 2 if there were any dutiable goods in the car and after he was informed that there were none and in the search 32 electronic calculators of Japanese make valued at Rs. 24,450/-;a cash amount of Rs. 3,300/- and two hundies of the value of Rs. 60,000/- were found under the rear seat of the car. The complainant alleged that the said calculators were brought by accused No. 2 from Muscat on a ship "Varun Yamini" on which he was working as a Second Engineer and thereafter the accused Nos. 1 and 2 were taking the said contraband articles

namely calculators outside the dock area. The said officer therefore, seized the said calculators in the presence of two panch witnesses and panchnama Ex. A was prepared. The Superintendent of Customs Mr. Hudah was then informed and he also arrived at the gate of the dock where the said car was intercepted. Mr. Hudah P.W. 2 thereafter is alleged to have recorded the statement of accused Nos. 1 and 2 and in that statement both the accused are alleged to have admitted their guilt. On completion of investigation the Assistant Collector of Customs filed a complaint in the Court of Chief Metropolitan Magistrate, Bombay. The case was ultimately tried before the learned Additional Chief Metropolitan Magistrate, 11th Court, Kurla, Bombay. It appears that the accused No. 1 initially pleaded not guilty but subsequently at some stage before recording of evidence pleaded guilty and accepting the said plea of guilt of the accused No. 1 he was convicted of the offence punishable under Sections 135(1)(a), 135(1)(b) read with 135(1)(ii) of the Customs Act, 1962 and Section 5 of the Imports and Exports (Control) Act, 1947 for the breach of Imports (Control) Order 17/55 dated 7-12-1975 and sentenced him to heavy fine. The trial proceeded against the accused No. 2 as he had not pleaded guilty. On the strength of evidence that was led before the learned Additional Chief Metropolitan Magistrate, the accused No. 2 was also found guilty of the offence under Sec. 135(1)(a), 135(1)(b) read with 135(1)(ii) of the Customs Act and Sec. 5 of Imports & Exports (Control) Act, 1947 and he was sentenced to pay a fine of Rs. 2000/- on each of the two counts namely under Sec. 135(1)(i) read with 135(1)(ii) and 135(1)(b) read with 135(1)(ii) of the Customs Act. In default he was ordered to undergo S.I. for six months on each count. He is also sentenced to undergo R.I. for six months for offence punishable under Sec. 5 of the Imports and Exports (Control) Act, 1947 and a fine of Rs. 2000/- and in default of payment of fine he was ordered to undergo S.I. for six months for the offence punishable under Sec. 5 of the Imports and Exports (Control) Act, 1947 in Criminal Case No. 142/CW/80. Accused No. 2 being aggrieved by the said order of conviction and sentence preferred the appeal to the Sessions Court at Greater Bombay. The learned Additional Sessions Judge allowed the appeal and acquitted the accused of the offences of which he was convicted. Being aggrieved by the said order of acquittal, the Asst. Collector of Customs has come in appeal before this Court.

3. On behalf of the appellant, it is contended before me by Shri Gupte that the findings of the learned Additional Metropolitan Magistrate were based on material placed before him and there was sufficient evidence to hold that the calculators were in possession of the accused No. 2 also and they were being tried to be taken out of the dock without paying the duty. He contended that the learned Additional Chief Metropolitan Magistrate has relied on the evidence of (1) Shri Tiverekar, the Customs Officer, (2) Shri Hudah P.W. 2, the Superintendent (3) the deposition of accused No. 1, who was also examined as witness by prosecution in the case and (4) statements of accused Nos. 2 and 1 recorded by Shri Hudah P.W. 2, the Superintendent under Sec. 108 of the Customs Act and there was no infirmity in the

said evidence on the basis of which it could be said that the said evidence should be discarded as unreliable. He, therefore, contended that the learned Additional Sessions Judge was in error in not accepting the evidence led by prosecution and discarding the same. He also contended that the learned Additional Sessions Judge has used double standards for appreciation of evidence as he has relied on the evidence of the accused No. 1 which was in favor of the accused No. 2 and has discarded his evidence which was in favor of the prosecution. Now, really speaking there are certain admitted facts and, therefore, certain discrepancies in the evidence of Mr. Hudah, P.W. 2 which have been given some importance while appreciating the evidence of Mr. Hudah do not assume much importance. It does appear that Mr. Hudah in his deposition has stated that there was a taxi which was intercepted while in fact the prosecution''s case all the while has been it was a car which was belonging to the wife of the accused No. 1. But it is clear that even both the accused No. 2 as well as accused No. 1 admitted that 32 calculators were actually found in the car below the rear seat of the car. Therefore whether it was a taxi or a car does not assume any importance and the learned Additional Sessions Judge no doubt appears to have erred in giving importance to the acid discrepancy. Similarly there are certain other discrepancies in the evidence of Mr. Hudah which also have been given importance by the learned Additional Sessions Judge though they are not material. But in view of the fact that the accused No. 2 as well as the accused No. 1 do not deny the finding of 32 calculators from the car, the said discrepancies also ought not to have been given importance. Therefore, one has to proceed on the assumption that the prosecution has been able to establish that 32 calculators were found underneath the rear seat of the car and in the said car the accused Nos. 1 and 2 were sitting. It is also admitted position that it was the accused No. 1 who was driving the said car and that the said car belonged to his wife. It is further admitted position that the accused No. 2 was also found sitting by the side of accused No. 1 in the said car when it was intercepted. Now, therefore, the main question that arises for determination is as to whether the accused No. 2 could be attributed any knowledge about the 32 calculators which were found underneath the rear seat of the car. If the answer is in the affirmative then conviction of accused must follow. If answer is in the negative then the accused No. 2 must get benefit and his acquittal must be confirmed.

4. Now there is also evidence to show that some currency notes of Rs. 3,300/- and hundies of accused No. 1 were found near the calculators and they had nothing to do with the accused No. 2. Therefore, on behalf of the accused No. 2, it was canvassed that presence of these currency notes and hundies belonging to accused No. 1 by the side of contraband calculators indicates that the said calculators were also belonging to the accused No. 1 and the possibility of accused No. 2 having no knowledge of the same cannot be excluded. It was tried to be canvassed that if such possibility cannot be excluded then unless there is some other evidence produced by the prosecution which is reliable, the accused No. 2 cannot be held responsible

for the offence with which he was charged. As against this on behalf of the appellant, it is contended that there is sufficient material in the form of statement of accused No. 2 recorded by P.W. 2. Mr. Hudah under Sec. 108 of the Customs Act and also in the evidence of the accused No. 1 who has been examined as prosecution witness and there is sufficient material available by way of corroboration to the statement made in the statement of accused No. 2 recorded by customs officer and, therefore, the Trial Court was justified in accepting the said evidence and concluding that the calculators were tried to be carried from the dock by both accused Nos. 1 and 2 and it was the accused No. 2 who has brought the said calculators from abroad through the ship on which he was working. Now we have to consider as to whether the statement of the accused No. 2 which is heavily relied upon by Shri Gupte could be considered as a voluntary statement and whether it is corroborated by other witnesses. Shri Gupte very strenuously tried to contend that the learned Additional Sessions Judge has discarded the statement under Sec. 108 of the Customs Act of the accused No. 2 on very flimsy grounds. He tried to contend that merely because the accused No. 1 in his deposition had stated that on the day of incident when the car was intercepted, one officer from the ship was slapped by another officer and as the accused No. 2 in his letter addressed to the Asst. Collector of Customs dated 16-2-1976 has stated that soon after he was halted he saw one officer slapped another ship officer who had come back, and he was scared and nervous it can not be having some substance and the learned Additional Sessions Judge erred in holding that on that basis that the statement under Sec. 108 recorded of the accused No. 2 was not voluntary. On behalf of accused No. 2 on the other hand it is contended that normally the statement recorded by investigating authorities is not admissible and under the criminal procedure code there is a complete bar against admission of the statement recorded by police officer which are normally investigating agency but under the Customs Act the statement recorded by the Customs Officer are held to be admissible and, therefore, even if there is some indication which shows that the accused could have entertained the fear, that must be taken into consideration and for any confessional statement as the Court must be satisfied that it is a voluntary one, when it comes on record that the possibility of the accused being frightened due to certain things which took place immediately prior to the recording of his statement such a statement should be discarded completely. Reliance was tried to be placed on ruling AIR 1979 705 (SC) wherein the Supreme Court was not directly concerned with the voluntary nature of the confession of the accused No. 15 in the appeal before them in the circumstances which appear in that case which could have directly affected the confessional statement of the other accused No. 13 as some injuries were noticed on his person, the statement recorded by customs officer of appellant/the accused No. 15 was also not accepted as voluntary. The said case, it appears, was also relied upon before the Trail Court. On behalf of the prosecution Shri Gupte however has tried to contend before me that the facts of that case are entirely different and have no application to the facts of the present case. It was contended that in that case another co-accused

was found to be having some injuries and, therefore, there was some substance in the contention of the appellant/accused before the Supreme Court that his confessional statement was also no voluntary. It was contended that in the present case at the most what is brought on record is that some officer was slapped by another officer when the car was intercepted and this was seen by the accused Nos. 1 and 2. It was contended that there is no evidence to show that it was the customs officer who has assaulted the officer from the ship so that it could give an apprehension in the mind of accused No. 2 that even the officers from the ship are treated in that manner by customs officers. As against this on behalf of the accused No. 2 it is tried to be contended that the accused No. 2 immediately on 16-2-1976 while retracting his statement recorded by Hudah P.W. 2 had inferred that soon after he halted he saw one officer slapped another shipping officer who had come there and he was scared and nervous and this reference could be only to the customs officer slapping the shipping officer and, therefore, the contention of Shri Gupte appearing for the Assistant Collector has no substance. It is also contended that the accused No. 1 who is examined as prosecution witness has also supported this contention of accused No. 2 and he has in clear terms stated that one officer has slapped another officer.

Therefore, the statement made by the accused No. 2 as long back as on 16-2-1976 while retracting his statement under Sec. 108 can not be said to be without any substance. It was tried to be said further that when a shipping officer noticed that another shipping officer is actually slapped by the customs officer near the gate of the dock it would definitely have and effect of frightfulness and nervousness. There is some force in this contention. If some such incident had taken place, which I am inclined to hold, in view of the evidence on record, to have taken place, it would definitely affect the mind of the accused No. 2 who was admittedly the shipping officer. It would, therefore, definitely support the contention of the accused No. 2 that he was frightened and was nervous when he was made to give the statement. For creating panic in the mind of the person it is not necessary that he himself must be assaulted. Even if another person is assaulted in his presence by the person in authority, it would definitely put him in fear of being dealt with in a similar manner if he would act against the wishes of the officer in authority. Under these circumstances there is some substance in the contention of the accused No. 2 that the statement which was recorded by Mr. Hudah could be out of fear and apprehension that could be said to have been reasonably entertained by him. Reliance was also tried to be placed on the ruling reported in Romesh Chandra Mehta Vs. State of West Bengal, by Shri A.R. Gupte to contend that Section 24 of the Indian Evidence Act has no application in the present case as accused No. 2 at that stage was not accused at all. No doubt, if one reads the authority that has been relied upon, an impression is created that Supreme Court in the said authority wanted to say that unless the person is made accused, he cannot be covered by Section 24 of the Indian Evidence Act. But as a matter of fact it is difficult to say that

the accused No. 2 was not accused at that stage once the Customs officer had found him to be possessing contraband articles and they had seized those articles he definitely could be held to be act actually the accused person at that stage itself. Hence the statements of these persons must be held to be of the persons who were accused of the offence and, therefore, I do not find much force in the contention tried to be raised before me in this respect. Apart from this any confessional statement which is sought to be relied upon by prosecution must be a voluntary. If it is not a voluntary one, it definitely can not be considered as sufficient to fasten the blame on the accused. Once it is established that the confessional statement relied upon by the prosecution is not a voluntary one and that it was given out of fear or frightfulness which was the result of the act of the officer in authority then such a statement must be discarded as unreliable.

5. In the present case apart from the above infirmity there are other infirmities also in respect of the statement of the accused No. 2. It is clear from the statement that details of certain vouchers have been recorded in the statement alleged to have been given by the accused No. 2. It is clear from the evidence on record that when the accused No. 2 was replying he was not referring to any documents. Similarly it is also clear from the evidence of Mr. Hudah, P.W. 2, himself that he was also not referring to any documents at all. Under these circumstances if there are certain details which could not have been told by the accused No. 2 from memory without reference to the documents, insertion of them was definitely not at the instance of accused No. 2. Therefore, it does appear that there are seeds in the statement relied upon by the prosecution and alleged to have been given by accused No. 2 which indicate that the said statement was not a statement made by accused No. 2 alone. Certain contents in the said statement definitely appear to be not possibly told by accused No. 2 and once it is held that the said statement is not as per the version given by the accused No. 2 alone then it must be discarded. Once the said statement alleged to have been given by the accused No. 2 is discarded we are left only with the evidence of the accused No. 1 and statement of accused No. 1 recorded under Sec. 108 of the Customs Act in addition to the finding of articles from the car. Now, therefore, we are required to see the evidence of accused No. 1 and his statement recorded by the Customs Officer.

6. As far as the evidence of accused No. 1 is concerned, it must be also stated that accused No. 1 definitely was an accomplice at least. Hence unless his evidence is corroborated in material point it can not be acted upon. Apart from this it is also necessary to consider as to whether the prosecution could have been examined him as witness. It is clear that accused No. 2 was also the main accused, along with the accused No. 1 in the same case. It is also clear that the accused No. 1 initially pleaded not guilt and claimed to be tried. It is at the later stage that accused No. 1 gave an application and pleaded guilty and accepted the said plea of guilt he was convicted by the learned Additional Chief Metropolitan Magistrate. It appears that he was only sentenced to pay fine though he was also convicted for the offence u/s

5 of the Imports and Exports (Control) Act, 1947 which provides for minimum sentence of six months which no doubt could be reduced further by giving special or adequate reasons. Under these circumstances when the accused No. 1 was let off on fine only the evidence of such a witness will have to be considered very cautiously and unless it is corroborated in material aspect it can not be acted upon. As a matter of fact I am doubtful as to whether he could be examined as a prosecution witness at all. He definitely was tried jointly with the accused and, therefore, even as per the ruling Laxmipat Choraria and Others Vs. State of Maharashtra, it would be a matter for consideration as to whether he could be considered as a competent witness. In the said case before the Supreme Court the person who had acted as a carrier in a conspiracy to smuggle gold in India, admitted her role in the statements made to the Customs Officials investigating the case under the Sea Customs Act, but instead of being included in the array of accused and sent up for trial, was examined as a witness against her former associates, Supreme Court considered the question as to whether she could be held to be a competent witness and merely because she was included in the array of accused person and she was not sent up for trail she would not become an incompetent witness. The Supreme Court also held in the said decision that she would be an accomplice and her evidence was necessary to be considered as of an accomplice and test necessary for appreciation of evidence of the accomplice must be applied. However, while considering the said aspect, the Supreme Court concluded that she was a competent witness because she was not jointly tried with the other co-accused. In the present case accused No. 1 was definitely jointly tried and charge was also framed against him alongwith the accused No. 2. It is only because the accused No. 1 at a later stage pleaded guilty he was separated and convicted and then trial proceeded against the accused No. 2. Under these circumstances, whether it would be said that accused No. 1 who was later on also tried to be examined as a witness was not jointly tried with accused No. 2. I can not persuade myself to accept the position as tried to be canvassed before me on behalf of the prosecution that once he was convicted and the trial proceeded against accused No. 2 only he can not be said to have been jointly tried and, therefore, he can be examined as a prosecution witness again against the accused No. 2. At any rate such practice if it is prevalent must be deprecated. It would definitely be a very grave weapon in the hands of unscrupulous prosecutor. Under these circumstances at least it must be held that the value of evidence of accused No. 1 is very such reduced. Apart from this even on the basis of the evidence and material which is available in this case, the evidence of accused No. 1 which is tried to be relied upon by the prosecution by way of corroboration, it is clear that the said evidence shows also that the statement of accused No. 2 recorded by the Customs Officer could not be possibly true. In the deposition of the accused No. 1 there are several statements which are clearly contrary to the prosecution''s case as made out in the statement of accused No. 1 recorded by the Customs Officer. The said accused No. 1 in his deposition before the Court has changed his version several times.

Therefore, his evidence must be characterised as that of prevaricating witness. According to his deposition he had gone to the dock to deliver some electrical goods and he claimed to have met the Chief Engineer on the ship "Varun Yamini" first and it was a per his direction that he met the accused who was the Second Engineer on the ship and he delivered the goods to the accused. He further claims that by the time he had delivered the goods to the accused, the Chief Engineer had left the ship and so he could not take the signature of the Chief Engineer on the shipping bill and, therefore, he went to the ship in the evening again and at that time he met the accused No. 2 and it is at this time that the accused is alleged to have told him that he had brought some calculators from Muskat and whether he could help him to take out those calculators outside the port area i.e., the dock. The accused No. 1 further deposed that he then told accused No. 2 that he had done so before and then the accused No. 2 told him that if he would carry the calculators in his car he would pay him Rs. 25/- for each calculator, and then he agreed to do so. In the deposition he also very clearly stated that he had no talk with the accused No. 2 about the delivery of electrical items at the time of his morning visit. Similarly in his deposition he has also stated that it was only on that evening of 12-2-1976 that he had talked with accused No. 2 for removing the calculators for the first time and he saw him for the first time in the evening despite his several visits to the ship in the past. In the statement recorded by the customs officer the accused No. 1 on the other hand claims that he had met accused No. 2, 2-3 months prior to February 1976 and at that time he had a talk in respect of some contraband articles to be brought. This statement, in the statement before the customs officer is contrary to what he has stated in his deposition before the Court. It is also clear that deliver voucher instead of having the signature of the accused No. 2 bears the signature of one Sukhtankar. Therefore, it is actually doubtful as to whether accused No. 1''s claim that he had delivered the electrical goods as per the say of the Chief Engineer to the accused No. 2 is truthfully. If the accused No. 2 had taken the delivery then normally he would have signed the said delivery challan. In view of this entire story of the accused No. 1 becomes doubtful. Under these circumstances the Trial Court was definitely in error in relying upon the evidence of accused No. 1 as corroborative piece of evidence. Once the evidence of accused No. 1 is discarded as unreliable there is no corroboration available at all to the statement u/s 108 of the Customs Act of the accused No. 2. Further it is also clear from the evidence of panch witness as well as evidence of the accused No. 1 that the contraband articles consisting of calculators were actually taken out from the car before arrival of panchas and thereafter panchnama was recorded. The panchnama however shows that in the presence of panchas the said articles were seized from the car. This reflects on the ethical standard of the customs officer who effected the said panchnama. This also necessarily will have to be taken into consideration while considering the statement recorded by customs officer u/s 108 of the Customs Act of the accused Nos. 1 and 2. One, therefore, can not rely upon the evidence of all the customs officers as well a statements recorded by them to base a conviction. Once the statement of accused

No. 2 alleged to have been recorded by the Superintendent of Customs is discarded as unreliable, and the evidence of accused No. 1 is discarded also as being unreliable there is no evidence on the basis of which it could be said that it must be the accused No. 2 who must have brought the calculators on a ship and then handed over the same to the accused No. 1 for being carried out the dock by hiding them beneath the rear seat of the car of the accused No. 1. The possibility of the accused No. 1 having obtained the said calculators from elsewhere is not excluded. The presence of other documents and currency notes belonging to accused No. 1 near the said contraband calculators points rather towards the fact that the said calculators were of accused No. 1 than accused No. 2. The possibility of the version of the accused No. 2 being given a lift by the accused No. 1 for going to his residence near the Crowfard Market cannot be said to be excluded. Therefore, one can not definitely conclude on the evidence on record that the version of the accused No. 2 that he was not knowing at all about the hidden calculators which were found in the car is false. At least at any rate the accused No. 2 must be held to be entitled to the benefit of doubt and the learned Additional Sessions Judge was right in coming to the said conclusion and reversing the judgment of the Trial Court.
7. In the result the appeal has no merit and the same will have to be dismissed.

8. Appeal stands dismissed. Bail bond of the accused shall stand canceled.