

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.500 OF 2002

Union of India	]	
At the instance of Asstt. Commissioner	]	
of Customs, C.S.I. Airport, Sahar,	]	 Appellant /
Mumbai – 400 099.	]	(Org. Complainant)

Versus

1. Mohammed Ali Akabar Ali Arsiwala	]	
R/at Man-Mandir, Bldg. No.4/B,	]	
Flat No.79, J.V.P.D. Scheme,	]	
Mumbai – 400 049.	]	 Org. Accused No.1
	]	
2. State of Maharashtra	]	 Respondents

Mr. N. Natrajan for the Appellant / UOI.

Mr. Amin Solkar for Respondent No.1.

Mrs. A.S. Pai, A.P.P., for Respondent No.2 / State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 9TH DECEMBER 2015.

ORAL JUDGMENT :

1. This Criminal Appeal is directed against the Judgment and Order dated 25th September 2001, in R.C.C. No.327/CW/2000, Old Case No.346/CW/1993, of Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai. By the said Judgment and Order, Respondent No.1 is acquitted of the offences punishable under Section 5(a) of Import and

Export (Control) Act, 1947 and under Sections 135(1)(a) and 135(1)(b) punishable under Section 135(1)(ii) of the Customs Act, 1962.

2. Brief facts of the Appeal can be stated as follows :-

On 24th February 1992, the Officers from the Preventive Department of the Customs kept watch on the passengers arriving by Cathay Pacific Flight from Hong-Kong. At about 9 pm, they found Respondent No.1 clearing his baggage through walk-through channel and proceeding towards the exit gate. On suspicion, he was intercepted and on inquiries about whether he is carrying any contraband articles, he replied in negative. The Customs Officers were not satisfied with his reply and took him, with his zipper suite-case and other baggage at the counter, for taking his search. In the said search, eight packets (six polythene and two white plastic) were recovered. These packets were concealed in "Instant Klim Full Cream Milk Powder" tin and "Sugus Fruit Ceramels made in Switzerland" tin. They were wrapped in a lungi and trouser. On examination of these packets, they were found to be containing white chemical powder known as Beta-plain valued about Rs.45,000/- per kg. at local market value. The total weight of eight packets was 5,930 kgs. valued at Rs.8,00,550/-. As Respondent No.1 could not give any

explanation for possession of the same, nor could produce any documents authorizing the import of the said packets, they were seized under Panchanama.

3. The statement of Respondent No.1 came to be recorded under Section 108 of Customs Act, in which he admitted that the said powder was given to him by one Shashi in Hong-Kong for delivery of the same to one Mumtaz Ali, who was to collect the same from his residence in Mumbai. In consideration thereof, he was to get reimbursement of the cost of air-fare and free stay at Hong-Kong plus Rs.6,000/-. The said chemical powder was then tested and analyzed by Bee Pharma Labs Pvt. Ltd. and it was found to be Betamethasone to the extent of 5.17 kgs. and 0.760 gms. powder was found to be Cyanocobalamin. Hence, Respondent No.1 came to be prosecuted before the Trial Court, after completing the necessary investigation.

4. In support of its case the prosecution examined five witnesses, namely, PW-1 Edward Joseph, the Assistant Collector of Customs, PW-2 Umesh Dalvi, Superintendent of Customs, PW-3 Narendra Kakar, another Superintendent of Customs, PW-4 Shriram Iyer, Cargo Service Officer at Cathay Pacific Airways, and PW-5 Madhukar Motling, Preventive Officer

A.I.U. of Customs. On appreciation of their evidence, the Trial Court was, however, pleased to acquit Respondent No.1, finding sufficient lacunae and infirmities in the prosecution case.

5. In this Appeal, I have heard learned counsel for the Appellant / UOI and Respondent No.1. I have also perused the record and proceedings of the Trial Court. So far as PW-5 Madhukar Motling is concerned, he has not supported the prosecution case. He has deposed that he was not present when Respondent No.1 was intercepted and interrogated. The Panchanama was also not prepared in his presence, as deposed by him. He did not participate also in the inquiry or investigation of the case.

6. So far as evidence of PW-4 Shriram Iyer, who was working as Cargo Service Officer at Cathay Pacific Airways, is concerned, he has admitted that, he was not present at the relevant time when Respondent No.1 was intercepted. Further he has categorically admitted that he cannot say whether the packets were containing milk powder or any other powder. No immediate test was carried out then and there to establish that it was not a milk powder. Further, the alleged baggage tag or the identification tag were not seized and produced before the Court at the time of trial to prove that the tins were imported by Respondent No.1. The

alleged empty tins or their photographs were also not produced before the Trial Court. Surprisingly, this witness has even declined to identify Respondent No.1, though he was very much present before the Court. The Trial Court also found number of discrepancies in his evidence, which are discussed in detail in the Judgment of the Trial Court and in view thereof, it has to be held that the Trial Court has rightly refused to place reliance on his testimony.

7. Hence, as a result, the entire emphasis of the prosecution is on the evidence of PW-1 Edward Joseph, PW-2 Umesh Dalvi and PW-3 Narendra Kakar. All these three witnesses are on the same point of interception of Respondent No.1 and recovery of the contraband packets. However, everyone is giving different version. According to PW-1 Edward, the particular powder Beta-plain is a chemical and not a contraband article, as per Government Notification. No document was produced before the Trial Court to show that it was a contraband article. PW-2 Umesh Dalvi has contradicted PW-1 Edward by deposing that the alleged bag was a suite-case. However, neither the said bag was produced before the Court nor the Complainant or the Sanctioning Authority was examined.

8. Further, the Trial Court also found that the seized powder was kept

with Customs Department, without having any preservatives, and it was sent for analysis on 15th May 1992 i.e. almost about three months thereafter. In the light of these various lacunae and infirmities in the prosecution case, the Trial Court extended the benefit of doubt to Respondent No.1 and, in my considered opinion, rightly so. These lacunae are going to the root of the matter and proving fatal to the prosecution case.

9. Hence, the impugned Judgment and Order of the Trial Court dated 25th September 2001 passed in R.C.C. No.327/CW/2000, Old Case No.346/CW/1993, thereby acquitting Respondent No.1 of the offences charged and levelled against him, does not call for any interference. Hence, the order.

10. Appeal stands dismissed. The Bail Bonds of Respondent No.1 stands cancelled.

[DR. SHALINI PHANSALKAR-JOSHI, J.]