IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 518 OF 2002

Union of India,
(at the instance of Dy.Commissioner
of Customs, Prosecution Cell,
C.S.I. Airport, Mumbai- 99. ... Appellant.

V/s.

1. Nisar Ahmed Mustaq Siddiqui
having his address as
Opp. Dr.N.R.Purandare,
Teli Galli, Versova, Andheri (W),
Bombay- 400 061.

2. State of Maharashtra. ... Respondents.

None for the appellant.

Dr.F.R.Shaikh, APP for respondent No.2- State.

CORAM : S.B. SHUKRE, J.

DATED : 19th October 2015.

<u>JUDGMENT</u> :

This is an appeal preferred against the judgment and order dated 26th December 2001 passed in C.C. No.727/CW/1990 by the Chief Judicial Magistrate, Esplanade, Mumbai thereby acquitting the respondent

No.1- accused of the offences punishable under sections 135(1)(a) and 135(1)(b) of the Customs Act, 1962 and section 5 of the Imports and Exports (Control) Act, 1947. Briefly stated, the facts of the case are as under:

On 22nd September 1981, the respondent No.1 arrived at Sahar Airport, Mumbai by Air-India flight No.738 from Dubai. He presented his baggage consisting of one hand bag and one suitcase and made declaration at Counter No.16 that he was carrying with him goods worth Rs.2,050/-. The Customs officials suspected genuineness of the declaration and, therefore, they subjected the baggage to re-examination and further scrutiny. Upon re-examination, it was found that the gold in the form of strips was kept concealed in the metallic rim of the suitcase. It was taken out from the concealed part of the suitcase and upon weighing, it was found to be of 1,648 grams. It was also found to be of foreign origin. The respondent No.1 told the Customs officials that he was merely a carrier of the gold and he was to deliver it to the deceased accused No.2 who was waiting for him outside the airport. Therefore, respondent No.1, who was accused No.1, was taken outside the airport and, with his assistance, accused No.2 (since deceased) was apprehended. Deceased accused No.2 informed the Customs officials that this gold was in turn to be handed over to one more person i.e. absconding accused No.3, who had come to Sahar Airport from Cochin for collecting contraband gold. At his instance, absconding accused No.3 was also arrested. Statement of the respondent No.1- accused under section 108 of the Customs Act was recorded. He admitted concealment, possession and non-declaration of the gold and further stated that he carried the gold in the suitcase for financial benefit of Rs.1,500/- together with free passage to Dubai and back to India.

On completion of investigation, sanction was obtained and complaint was presented against respondent No.1 as well as remaining two accused persons. During the pendency of the trial, accused No.2 died while accused No.3 went absconding. Therefore, trial of the present respondent was separated from the absconding accused. The respondent was then charged with the offences punishable under the relevant sections of the Customs Act and Imports and Exports (Control) Act. As he pleaded not guilty, he was tired in accordance with law. On merits of the case, learned Magistrate found that the prosecution could not prove beyond reasonable doubt its case against respondent No.1 and, therefore, acquitted him of the said offences vide judgment and order dated 26th December 2001. It is this judgment and order which is under challenge in the present appeal filed by the Union of India.

2. Nobody has appeared on behalf of the appellant- Union of India as also for respondent No.1- accused. Learned A.P.P. is present on behalf of respondent No.2- State. The case being very old and pending for final hearing for a long period of time, I decided to take up this appeal for final hearing in accordance with the mandate of section 386 of Cr.P.C.. Accordingly, I have heard learned A.A.P. for respondent No.2- State. I have carefully gone through the entire record including the impugned judgment and order.

3. The learned Chief Metropolitan Magistrate, as seen from the impugned judgment and order, has carefully and minutely appreciated the prosecution evidence and, in my opinion, the view taken by the learned Magistrate is neither illogical nor impossible. The evidence shows that primarily the prosecution failed to lead proper evidence regarding declaration of the goods by respondent No.1. Especially, it is not proved as to what goods the respondent No.1 did not declare before the officials. It is further seen that there was some contradiction regarding identity of the suitcase in question in the Court. The seizure Panchanama produced by the witness at Exh.2 described the colour of the suitcase as "Grey" while one of the Panch witnesses, namely, Subramaniam Kannan (PW-4) admitted in his cross-examination that the colour of the bag produced before the Court was "Black". The second Panch witness was not examined by the prosecution. Although, while drawing Panchanama, annexure was prepared, this annexure was not signed by the accused. It has also not come on record that the copy of the annexure was given to respondent No.1- accused and no explanation for the same has been given by the concerned officer. The prosecution also failed to prove beyond reasonable doubt that the contraband seized in this case was of foreign origin as mint report was not produced in the evidence and no explanation for its non-production was given.

4. The aforesaid glaring infirmities in the prosecution case led the learned Magistrate in treating the confessional statement of respondent No.1- accused, recorded under section 108 of the Customs Act, with caution and it was concluded by the Magistrate that because the

confessional statement was retracted and that there was no sufficient corroboration to the facts admitted in the statement, as held in ***K.I.Pavunny v. Asstt. Collector (Hq.) Central Excise Collectorate, Cochin***, 1997 (90) E.L.T. 241 (SC) and ***Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Limited***, 2000 (120) E.L.T. 280 (SC), the confessional statement did not inspire any confidence of the Court. The view taken by the learned Magistrate cannot be said to be perverse or so illogical as would not arise from the prosecution evidence. Such being the case, there is no justification available for this Court to make any interference in the impugned judgment and order. The appeal deserves to be dismissed.

5. The appeal stands dismissed.

(S.B. SHUKRE, J.)

Sanjay Nanoskar, P.S..