IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.410 OF 2013

Manish Kumar,
Assistant Commissioner of Customs,
Bhavnagar, Union territory, Daman and Diu Applicant
versus
1. Mammumiya Panjumiya, Major,
Jamadar Faliya, Momanwada,
Porbunder, Gujarat.

2. Naran Jadav Postaria @ Naran Sudha,
Major, Near Jain Apasara, Nava Nagar Wada,
Porbunder, Gujarat.

3. The State of Maharashtra Respondents

Ms.Purnima H. Kantharia I/by Ms.Nitee Punde, Special Public Prosecutor for applicant.
Mr.R.R.Shah I/by Advani, Sachwani and Heera for Respondent no.2.
Mr.P.H.Gaikwad, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 9th August 2018

PC :

1. This revision application is preferred by Union Territory of Daman and Diu challenging the judgment and order dated 9th September 2008 passed by Chief Judicial Magistrate, Diu acquitting the respondent nos.1 and 2 in Regular Criminal Case No.5 of 1989, and judgment and order dated 28th December 2012 passed by Sessions Judge, Diu dismissing Criminal Appeal No.2 of 2009.

2. Respondent nos.1 and 2 were prosecuted for the offence u/s 135 of Customs Act, 1962 along with Section 85 of Gold (Control) Act, 1968 read with Section 120B of Indian Penal Code. The prosecution case is that respondent nos.1 and 2 were impleaded as accused nos.11 and 12, who alleged to have formed criminal conspiracy with accused nos.1 to 10 and smuggled 1,175 gold bars weighing 10 tolas each worth of Rs.4,30,19,570/- from Kofarkhan, Pakistan to India and thereby violated the provisions of Customs Act and Gold (Control) Act. The accused nos.1 to 10 were prosecuted and they were convicted for the said offences. During the course of patrolling, the vessel Al-Maklai registered at Karachi, Pakistan was intercepted by Customs officers at Diu and the crew members of the said vessel viz accused nos.1 to 10 were arrested. During the interrogation with the crew members, their statements were recorded. It is alleged that accused no.1 had disclosed that the crew members had started the voyage on 26th November 1988 and reached Kofarkhan. They loaded smuggled gold biscuits for delivery to accused nos.11 and 12 on Veraval Port, Gujarat. However, mistakenly they reached on the sea shore of Diu on 3rd December 1988 and they were apprehended by the patrolling party of Customs. The gold was seized from the said vessel. Accused nos.1 to 10 were prosecuted for illegal entry in the Indian territory and also prosecuted for violation of Passport Act. On the basis of statements of the arrested accused, the respondent nos.1 and 2 were impleaded as accused in the said case.

3. Respondent nos.1 and 2 were arrested subsequently and hence they were tried separately. Charge was framed against them u/s 135 of Customs Act as well as Section 85 of Gold (Control) Act and

Section 120B of Indian Penal Code. After framing the charge the evidence was recorded. After analyzing the evidence, the Trial Court acquitted the respondent nos.1 and 2 vide judgment and order dated 9th September 2008. The said judgment was challenged by the revision applicant before the Sessions Judge by preferring Criminal Appeal No.2 of 2009. The said appeal was dismissed by judgment and order dated 28th December 2012. Hence, the applicant has invoked revisional jurisdiction of this Court challenging the impugned judgments and orders.

4. Learned counsel for applicant Ms.Kantharia submitted that the Courts below have erred in acquitting the accused-respondent nos.1 and 2. There was sufficient evidence against them to establish their involvement and thus the impugned orders are required to be set aside. Learned counsel pointed out the observations of the Trial Court as well as Appellate Court and submitted that the impugned orders require interference. Learned counsel for respondent nos.1 and 2, however, submitted that the Trial Court as well as the Appellate Court has analyzed the evidence and it was found that there was no admissible evidence against the accused nos.11 and 12/respondent nos.1 and 2 herein and thus acquitted them. There is no reason to disturb the concurrent findings of two Courts.

5. Having heard both the sides and on perusal of the evidence on record it can be seen that the accused nos.11 and 12 i.e. respondent nos. and 2 herein were prosecuted on the basis of statements of co-accused. The Trial Court after scrutinizing the evidence on record had come to the conclusion that the prosecution has failed to bring home the guilt of accused nos.11 and 12 for the alleged offences.

6. The prosecution had examined in all eight witnesses in support of its case. PW-1 Ashwinkumar Shah-Inspector of Customs, PW-2 Chandrakant S. Dave, PW-3 Pancha Kanji Lakhma, PW-4 Ramjiram Pratap Meena, PW-5 M.S.Parikh-Superintendent of Customs, PW-6 Hariprasad S. Meena, PW-7 Jhala Ghanshamsingh Chandrasinh -Superintendent of Customs Bhavnagar and PW-8 Dilip Kailash Rajyaguru. The prosecution also relied upon documents viz postal telegrams, inventory of gold, letter to the General Manager-Government of India Mint-Mumbai and description of gold biscuits, acknowledgement issued by Government Mint dated 7th March 1989, letter dated 31st March 1989 sent to Government Mint-Mumbai and other documents.

7. The Trial Court had observed that the prosecution has not examined the complainant on account of his death. The complainant had not recorded the statement of accused nos.11 and 12 by summoning them u/s 108 of Customs Act. The prosecution has relied on the evidence of Superintendent of Customs, Inspector of Customs, panchnama which was recorded during the inquiry and search of vessel from the period between 3rd December 1988 and 6th January 1989. The prosecution placed strong reliance on the statements of accused nos.1 to 10 allegedly disclosing names of accused nos.11 and 12. According to the prosecution, the co-accused had disclosed in their statements that the smuggled gold was to be carried to the Port of Veraval in Gujarat and it was to be delivered to accused nos.11 and 12 and on the basis of said statements, the said accused were prosecuted. The Trial Court analyzed the evidence of all the witnesses who were examined by the prosecution. After

analyzing the evidence, the Court in paragraph 18 of the judgment has observed that on perusal of evidence of eight witnesses of the prosecution and documents relied, the Court came to the conclusion that prosecution has failed to prove that the respondent nos.1 and 2 knowingly and fraudulently with intention to evade the customs duty found in possession of any smuggled gold. The prosecution also failed to prove that the respondent nos.1 and 2 were found in possession or connected with carrying, disposing, harbouring, keeping, concealing, selling or purchasing any quantity of smuggled gold biscuits or gold in any form. The prosecution also failed to prove that respondent nos.1 and 2 were in possession of any quantity of gold and thereby violated the provisions of Customs Act and Gold (Control) Act. The prosecution also could not establish the evidence of conspiracy against respondent nos.1 and 2.

8. From the evidence on record and the observations made by the Lower Courts it is apparent that the prosecution had relied on the statements of accused nos.1 to 10 as relevant u/s 138 of Customs Act to prosecute the respondent nos.1 and 2. It is the settled law that statements of the co-accused cannot be read as a confession to prove the charge against other accused. The statements of the co-accused thus could not be relied upon in convicting the accused. It was noted that except the statements of the said accused, there was no other evidence against the respondent nos.1 and 2 to prove the charge against them. I have also perused the judgment passed by the Appellate Court. The findings of the Trial Court were confirmed by the Court in appeal. The Appellate Court also took into consideration several decisions relied upon by the prosecution in support of their argument. In paragraph 11 of the judgment of

Appellate Court, the finding is recorded that there is absolutely no evidence on record showing that the respondent nos.1 and 2 had entered into a conspiracy with accused nos.1 to 10. The co-accused were already tried and convicted. The present respondent nos.1 and 2 were prosecuted merely on the basis of statements of the co-accused. Since the statements of co-accused were not sufficient to show their involvement in the said crime, they were rightly acquitted by the Trial Court. I do not find any reason to take a different view of the matter. The Revisional Court has limited scope. There is an embargo of converting an order of acquittal into an order of conviction in exercise of revisional powers. The prosecution has not given any exceptional circumstance to disturb the findings of Courts below and to set aside the impugned judgments and orders. In the circumstances, the revision application is devoid of merits and the same is required to be dismissed. Hence, I pass following order :

ORDER

(i) Criminal Revision Application No.410 of 2013 is dismissed.

(PRAKASH D. NAIK, J.)

MST