"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 5TH DAY OF JUNE 2024 / 15TH JYAISHTA, 1946

CRL.A NO. 1275 OF 2007

AGAINST THE JUDGMENT DATED 30.09.2006 IN CC NO.45 OF 2001 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE (E&O),ERNAKULAM

APPELLANT/COMPLAINANT:

THE ASSISTANT COMMISSIONER
AIR CUSTOMS, CALICUT AIRPORT, KARIPUR.

BY ADV SRI.SALISH ARAVINDAKSHAN

RESPONDENTS/ACCUSED NOS.1 & 2:

1 ANIS MOHAMMED HUSSAIN
S/O MOHAMMED HUSSAIN, ROOM NO.6, 3RD FLOOR,
2 NIZAN STREET, IBRAHIM REHMATHULLA ROAD,
MUMBAI-3.

2 MOHAMMED ELYAS MOHAMMED
HUSSAIN KAPPADIA, S/O MOHAMMED HUSSAIN, ROOM NO.6, 3RD FLOOR, 2 NIZAM STREET, IBRAHIM REHMATHULLA ROAD, MUMBAI-3.

3* THE PASSPORT OFFICER (POLICY),
REGIONAL PASSPORT OFFICE, MANISH COMMERCIAL CENTRE, 216-A, DR.A.B.ROAD, WORLI, MUMBAI.

*IMPLEADED AS THE ADDITIONAL 3RD RESPONDENT IN CRL.A. 1275 OF 2007 AS PER THE ORDER DATED 03.08.2009 IN CRL.MA NO.7218 OF 2009 IN CRL.MA NO.2551 OF 2009.

R1 & R2 BY ADV SRI.SUNNY MATHEW
R3 BY SMT.SEENA C., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 27.05.2024, THE COURT ON 05.06.2024 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J. "C.R."

Crl.Appeal No.1275 of 2007

Dated this the 5th day of June, 2024

JUDGMENT

This is an appeal filed under Section 378(4) of the Code of Criminal Procedure, 1973 (Code).

2. The appellant initiated prosecution against the respondents by filing a complaint before the Additional Chief Judicial Magistrate (Economic Offences) Court, Ernakulam. In C.C.No.45 of 2001 thereby instituted, respondents were tried on a charge for the offence punishable under Section 135(1)(ii) of the Customs Act, 1962. The learned Magistrate acquitted the respondents.

3. The allegations levelled against the respondents were as follows:

On 21.12.1999, the respondents, who are brothers, arrived from Sharjah by Indian Airlines flight at International Airport, Karipur at about 9.00 a.m. After collecting their registered baggage, they proceeded through Green Channel. On

suspicion, they were intercepted near the exit gate. On examination of the baggage of the 1st respondent three cartons each containing 5.5 kgs. of white power with label "OMO stain remover powder" were found. The baggage of the 2nd respondent contained two such cartons. The said articles were found in the chemical examination to be 'Dexamethasone'. Since the respondents did not declare import of the said articles and attempted to evade customs duty, they have committed the offences under Sections 132 and 135 of the Customs Act.

4. After recording evidence under Section 244 of the Code, a charge for the offence punishable under Section 135(1)(ii) of the Customs Act was framed. The respondents denied the accusation. The prosecution has examined PWs.1 to 8 and proved Exts.P1 to P17. During examination under Section 313(1)(b) of the Code, the respondents denied the incriminating circumstances appeared against them in evidence. They maintained that there was no suppression, misinformation or attempt to evade duty. The 1st respondent

gave evidence as DW1. The trial court, after considering the evidence on record, found the respondents not guilty. It was held that the evidence of PW1, the detecting officer, was insufficient for a conviction, inasmuch as there was total lack of independent corroboration. The delay in preparing the mahazar and the incongruity arose on account of the failure to seize the articles soon after noticing the non-declaration were the other reasons to discard the evidence of the prosecution. Also, Exts.P7 and P8, the statements of respondents recorded under Section 108 of the Customs Act were found to be incomplete and unreliable.

5. Heard the learned Special Public Prosecutor for the appellant and the learned counsel for the respondents.

6. The allegations forming the basis for the charge are that the respondents brought 27.5 Kgs. of Dexamethasone, enclosed in their baggage and they went through Green Channel without making a declaration before the customs authorities with a view to evade payment of customs duty. In order to prove that fact the prosecution relies essentially on

the evidence of PW1, who was the Superintendent, Intelligence, Air Customs, Karipur Airport, the seizure mahazar, chemical examination report and statement of the respondents under Section 108 of the Customs Act. Ext.P1 is the seizure mahazar, Ext.P3 is the chemical analysis report and Exts.P7 and P8 are the respondents' statements. Of course, other attending circumstances were also placed reliance on for establishing the guilt. The trial court, however, took the view that the said evidence was insufficient to have a conviction.

7. The learned Special Public Prosecutor would submit that the trial court took such a view without adverting to the evidence in the proper perspective. Had evidence of PW1 been appreciated in a practical way, such a view could not have been taken. There was no delay in preparing Ext.P1 mahazar for, the requirement of seizure emerged only on fixing that the article was a dutiable item. It is also urged that the finding concerning Exts.P7 and P8 statements is totally misconceived. The learned Special Public Prosecutor accordingly would submit that the impugned judgment deserves reversal.

8. The learned counsel for the respondents, on the other hand, would submit that the respondents went to the Red Channel only and they declared that they possessed a medicinal preparation, Dexamethasone, but the authorities were confused as to whether that was a dutiable item or a prohibited article. Only on account of that doubt the customs officers retained the articles, and ultimately initiated the prosecution without any *bona fides*. The respondents arrived in the Airport at 9.00 a.m. Ext.P1 mahazar was prepared only at 6.00 p.m. The learned counsel would submit that if the respondents tried to pass through the Green Channel the articles in their possession should have been seized and a mahazar prepared immediately. The learned counsel for the respondents would further submit that when an attempt to pass through Green Channel with an undeclared dutiable article is illegal, the delay in preparing the mahazar stands testimony to the *mala fides* on the part of the officials.

9. This is an appeal against acquittal. The learned counsel for the respondents would urge that the view taken

by the trial court shall not be interfered unless it is perverse or against law. In this regard the decisions of the Apex Court in **Bannareddy and others v. State of Karnataka and others [(2018) 5 SCC 790]** and **Mallappa v. State of Karnataka [(2024) SCC OnLine SC 130]** are placed reliance on.

10. The rule governing powers of an appellate court while dealing with an appeal against acquittal was laid down by the Apex Court in a slew of decisions. The Apex Court in **Chandrappa and others v. State of Karnataka [(2007) 4 SCC 415]** enunciated the following general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal: (i) an appellate court has the power to review, re-appreciate and reconsider; (ii) an appellate court may reach its own conclusion, both on questions of fact and of law; (iii) an appellate court shall be slow in coming to its own conclusion; (iv) an appellate court must bear in mind that in case of acquittal, there is double presumption in favour of the accused; and (v) if two

reasonable conclusions are possible, the appellate court should not disturb the finding of acquittal recorded by the trial court.

11. In **Shyam Babu v. State of U.P. [(2012) 8 SCC 651]** the Apex Court held that it would not be possible for the appellate Court to interfere with the order of acquittal passed by the trial Court without rendering a specific finding, namely, that the decision of the trial Court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate Court, while entertaining an appeal against the judgment of acquittal by the trial Court, is entitled to re-appreciate the evidence and come to an independent conclusion. While doing so, the appellate Court should consider every material on record and the reasons given by the trial Court in support of its order of acquittal and should interfere only on being satisfied that the view taken by the trial Court is perverse and unreasonable resulting in miscarriage of justice. It was further held that if two views are possible on a set of evidence, then the Appellate Court need

not substitute its own view in preference to the view of the trial Court which has recorded an order of acquittal.

(Underline supplied)

12. What the Apex Court held in **Central Bureau of Investigation v. Shyam Bihari and others [(2023) 8 SCC 197]** is that in an appeal against acquittal, the power of the appellate court to re-appreciate evidence and come to its own conclusion is not circumscribed by any limitation. But it is equally settled that the appellate court must not interfere with an order of acquittal merely because a contrary view is permissible, particularly, where the view taken by the trial court is a plausible view based on proper appreciation of evidence and is not vitiated by ignorance/misreading of relevant evidence on record.

13. The said view was reiterated in **Bannareddy** (supra). The parameters concerning powers of the Appellate court while dealing with appeals against acquittal were summarised by the Apex Court in **Mallappa** (supra), which reads as follows:

(i) Appreciation of evidence is the core element of a criminal

trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;

(ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

(iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

(iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

(v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.

The evidence in this case shall be appreciated bearing in mind the aforesaid principles of law.

14. PW1 deposed categorically that both the respondents passed through Green Channel and just before the exit gate, they were restrained and questioned. Three cartons containing white powder were found in the baggage of the 1st respondent and two similar cartons in the baggage of

the 2nd respondent. The version of PW1 is that respondents claimed the said article to be OMO stain remover powder. The cartons had such a label also. On suspicion the baggage and articles were kept for detailed examination. The respondents were therefore asked to come by 1.00 p.m. On the preliminary estimation that the white powder in the cartons was a dutiable product, PW1 proceeded to draw samples and seized the same by preparing Ext.P1 mahazar. It is pointed out that the powder was odorless whereas the carton had the strong smell of washing powder. Three samples each of 20 grams were drawn from each carton and the samples and the articles were seized under Ext.P1. It is seen that after the 1st respondent's coming back and bringing the 2nd respondent, who by that time was trying to board a domestic flight bound to Bombay, PW1 started drawing the samples and the seizure. It is seen that the process took time beyond 6.00 p.m.

15. The facts that the seized article was brought by the respondents by enclosing in their baggage and it was seized by the customs authorities after drawing samples are not in

dispute. The contest is concerning the question, whether or not they declared before the customs authorities that they had such a product, and if not, it was with the objective of evading payment customs duty.

16. While considering that question the evidence tendered by the 1st respondent as DW1 is quite relevant. He stated that it was he who brought the articles, including two cartons kept in the baggage of the 2nd respondent and that they declared before the customs officials that the article was Dexamethasone. Due to confusion, the customs officials retained the articles and initiated subsequently the prosecution illegally. He stated in detail in the chief examination admitting that such an article was brought by enclosing in the baggage of himself and the 2nd respondent. In the cross-examination he stated as follows:-

> "Ext.P7 statement is written by me. Ext.P1 seizure mahazar contains 8 pages. All pages containing my signature. There have total 5 cartons. All contained Dexamethasone. I brought the goods to Calicut through my personal baggage. When I was produced before the Magistrate I did not make any complaint. Ext.P4 cartons

> gate pass, 2 Nos., bear my signature and also my brother's signature. In Ext.P4 the value of the dutiable goods imported is not mentioned. That does not show that I went through the green channel. It is not correct that we are not eligible to bring those item as personal baggage. In my retraction statement the market value of the goods is not stated. I am not lying before this court."

17. From the said version, the case of the prosecution that the articles in the possession of the respondents was Dexamethasone and it was seized on preparing Ext.P1 mahazar stands admitted. In the customs gate pass, possession of such materials with the respondents was not declared. The respondents did not mention in the pass that the article they brought was Dexamethasone. Even in their retraction statements they did not state that fact. In view of those admissions and proven circumstances the delay in preparing Ext.P1 mahazar and seizing the article immediately on finding the articles in their baggage, cannot have any adverse effect in the case of the prosecution.

18. The success of the prosecution depends still upon the question whether or not the respondents declared at the customs counter that the product with them was

Dexamethasone. Section 77 of the Customs Act obliges every owner of a baggage to make a declaration of its contents for the purpose of clearing it. Incidentally, it is submitted by the learned counsel for the respondents that Section 77 of the Customs Act does not attract in the case of baggage, but only posts and couriers. I am unable to agree with that submission. A reading of Section 77 in the light of the headings of the section and Chapter XI in the Customs Act make it clear that the said provision applies to not only baggage, but also posts and couriers.

19. If the respondents informed the proper officer of the customs that the article was Dexamethasone, that would have constituted due compliance of Section 77 of the Customs Act. If so, the charge would not lie against them. DW1 deposed that he informed the customs authorities that the article in the baggage was Dexamethasone. But, it may be noted that DW1 made such a statement first time before the court.

20. Dexamethasone is a dutiable item as per the provisions of the Customs Tariff Act, 1975. It is item

3004.39.13 in the Schedule to the Act. Exts.P7 and P8 statements given by the respondents under Section 108 of the Customs Act were discarded by the trial court stating that it did not contain all the details. On going through the said statements, it can only be said that the said observation of the trial court is incorrect. All necessary particulars regarding import of the article in question are stated in it. It is not a requirement of Section 108 that the person giving the statement should give an exhaustive statement in order for it to be acted upon. Of course, the person giving the statement is bound to state the truth upon the subject respecting which he is making the statement. That does not mean that omission to state about one or two aspects of the matter would make the statement worthless altogether. Of course, those statements were retracted by the respondents. But when DW1 deposed before the court admitting import of the article in question, the relevancy of the said statements is only concerning whether or not the respondents made a declaration about the contents of the articles they brought.

21. Either in Exts.P7 and 8 or in the retraction statement of DW1, it was stated that the white powder they brought was Dexamethasone and despite such declaration the prosecution was initiated. Ext.P17 is the order in the adjudication proceedings in the matter. The defence set up by the respondents before the Adjudicating Officer (Additional Commissioner of Customs) has been recited in detail in Ext.P17. The respondents have no case that any contention beyond what has been recited in Ext.P17 were raised before the Adjudicating Officer. In that also no such contention was raised. In the light of the said evidence and circumstances, the assertion by DW1 first time before the court that he declared the article to be Dexamethasone cannot be believed. When the said version is against the oral testimony of PW1, which goes in tandem to Ext.P1 and also other circumstances emerged from the evidence, the irresistible conclusion is that the respondents tried to take away the articles in question without declaring before the customs authorities. I have no hesitation to hold that no other view is possible in the light of

the evidence on record. When the evidence on record eloquently establishes that fact, it is obligatory, in the light of the principles laid down in the aforesaid decisions, on this Court to interfere with the view taken by the trial court. I hold that the prosecution proved beyond doubt that the respondents did not declare the contents of their baggage and that was with a view to evade payment of duty on the article they imported, which is Dexamethasone. They thereby had committed the offence punishable under Section 135(1)(ii) of the Customs Act. Hence, on reversing the findings of the trial court, the respondents are convicted of the said offence.

22. The article imported by the respondents was ordered to be confiscated as per Ext.P17 by giving an option to them to redeem on payment of the duty, penalty and fine. DW1 stated that he redeemed the article by making payment of the duty, penalty and fine. Taking that into account and the period elapsed after detection of the offence, I do not propose to sentence the respondents to imprisonment. The respondents are accordingly sentenced to pay a fine of

Rs.50,000/- each and in default of payment, to undergo simple imprisonment for a period of six months. Appeal is allowed accordingly.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr