

Ratilal Bhanji Mithani

Vs

State of Maharashtra and Others

Criminal Appeal No. 117 of 1970 [with Special Leave Petition (Criminal) No. 89-C of 1970],

(CJIS. M. Sikri, P. Jagmohan Reddy JJ)

04.02.1971

JUDGMENT

REDDY, J. -

1. This Appeal is by Special Leave against the Judgment of Division Bench of High Court of Bombay which while directing "that the prosecution must pay to each of the accused Nos. 1, 3, 4, 5, 6 and 7 the tourists' class air fare for one lawyer plus Rs. 100/- per day for the expenses of the stay of the lawyer in Germany for executing the Commission".... denied to accused No. 2 the appellant before us, the same facility. The High Court had in fact stated that the appellant will not be entitled "to be paid anything at all in respect of the expenses that he will have to incur if he chooses to be represented by a lawyer for the purpose of cross-examination the prosecution witnesses who will be examined on Commission in Germany, as there is a concluded finding of fact that he had intimidated and tempered with the German witnesses both of the High Court as also of the Supreme Court". The Special leave petition also raised several other questions of law which were stated to be important namely whether the High Court had power to issue Commission on an interlocutory application in a revision application against the discharge of an accused person, whether it was entitled to grant an application for Commission when a similar application was rejected by another Bench of the same High Court on the merits and substantially on the same facts, whether the case falls within the provision of Section 503, Criminal Procedure Code, for issue of a Commission and if not whether the High Court has inherent jurisdiction to enlarge the scope of the Section on the ground that there is a lacuna in the said provision which can be filled in by the exercise of the inherent jurisdiction of the High Court and other legal points which it is unnecessary to recapitulate. When this application came up for consideration this Court by an order, dated 25-8-70, limited the Special leave only to the question "whether the order of the High Court refusing to allow any expenses for the lawyer of the petitioner to be taken in Germany is justified or not justified". Subsequent to the filing of this appeal another accused namely Accused 3 Sibal also filed an application for grant of Special Leave against this very same order in which the order of the High Court has been challenged on various grounds including the ground that the amount allowed for expenses of the applicant was insufficient and that while the order by the Magistrate directing the accused to be discharged which order was confirmed by the High Court in earlier proceedings, was still operative, the learned Judges had no power to pass any orders appointing a Commission for examination of witnesses abroad. Some of these grounds it will be seen are similar to those raised in the Special Leave Petition filed by the appellant where as we noticed earlier leave was limited to the question whether the High Court was justified in disallowing the expenses and air fare to the appellant's lawyer. The learned Advocate for the appellant though he sought to extend the scope of the appeal, we have confined his submission only to that limited question.

2. In order to understand the nature of the order and the circumstances in which it was passed it is necessary to set out briefly the history of the prosecution which demonstrates a striking example of the manner in which the provisions of law designed to ensure a fair, and speedy trial have been taken full advantage of to prolong and procrastinate and in fact negative the main purpose of Criminal Justice namely an expeditious trial. The 7 accused including the appellant as Accused 2 and the petitioner in Special Leave petition, Accused 3 are being tried for an offence under Section 120(b) of Indian Penal Code, read with Section 167(81) of the Sea Customs Act, 1878, and Section 5 of the Exports and Imports Control Act, 1947. The offence with respect to which this prosecution has been lodged are said to have been committed between August, 1957 and March, 1960, by the 7 accused along with one Ram Lal Laxmidutt Nanda who died on 15-9-60 before the Assistant Collector of Customs filed Criminal Case No. 42/W of 1962, in the Court of the Presidency Magistrate, Bombay. Of the 7 accused, Accused 4 is clearing Agent while Accused 5, 6 and 7 are pretty employees. The prosecution case is that the main brain behind the conspiracy is that of the deceased Nanda who along with 7 accused imported into India contraband goods in contravention of the Customs Act and Export and Import Control Act. It is alleged that there were six business concerns which were importing certain goods from Germany; (1) The Eastern Trading Corporation of which the deceased Nanda was the proprietor and the 1st accused who is the nephew was is Manager. The second was Shantilal Chaganlal and Co., of which the second accused was one of the partners. The 3rd concern is Hind Trade Service in which the deceased Nanda and the first accused are partners. The 4th concern was Suresh Trading Co., of which the proprietor was the 3rd accused who resided permanently in Delhi. The second accused Mithani holds a General Power of Attorney from Suresh Trading Co., and a Power of Attorney limited only to operate the bank accounts with Hong Kong and Shanghai Bank for the Eastern Trading Corporation. Apart from these four concerns there were 2 other concerns namely D. Deepak and Co., and Raj Trading Co. The proprietor of the former was one Desh Deepak while of the later was the deceased Nanda and its Manager first accused. In respect of Deepak and Co., Accused 2 held a comprehensive Power of Attorney to manage the work of the concern and to operate its Bank account. The modus operandi adopted by the accused in the commission of the offences with which they are charged is that under the pretext of importing goods of small value under a licence they fraudulently imported without licence valuable goods like wrist-watches, mathematical sets, cut glass articles, thermometers etc., of a total value of over Rs. 50 lakhs and evaded a duty of about Rs. 20 lakhs. The last 4 consignments themselves which were impounded were of about Rs. 5 lakhs, the market-value of which is estimated at Rs. 15 lakhs. It is alleged that the accused in the perpetration and execution of their criminal design obtained the collaboration of certain foreign firms in West Germany by obtaining false invoices showing that goods were those for which they had licences and which they could legitimately bring into India. It appears that when goods are exported the forwarding agent of the Exporting Company obtains from the shippers what is known as Verlatescheins which we are told in commercial parlance ware mate's receipts. This form is filled in by the forwarding agent, in which among other things the number of packages, the nature and quantity of goods contained therein have to be specified. After this form is duly filled in by the forwarding agent it is sent to the ship with the consignments and after the goods are checked the verlatescheins is forwarded by the ship to its shipping agent. The forwarding agent then obtains a form of the bill of lading, fills it with the required particulars with the number of the verlatescheins and despatches to the shipping agent who after comparing the number of the bill of lading with the mate's receipt, signs the bill of lading and sends it to the forwarding agent who in his turn sends it to the consignee of the goods. It is however admitted that when the shipping agent receives the bill of lading duly filled up from the forwarding agent it is his duty to compare the particulars in the mate's receipts with those in the bill of lading, but we are told that since there are thousands of packages which is shipping agent has to

deal with, generally only the number in the mate's receipt is checked up with the bill of lading and if it tallies the bill of lading is signed and returned to the forwarding agent. The prosecution allege that they were able to get about 10 verladescs in respect of certain consignments which discloses that the foreign co-conspirators probably due to certain regulations in Germany which might require inspection of the consignments to be sent out used to enter correctly actual contents, their nature and quantity in the verladescs but when the bill of lading is filled in, taking advantage, it is said of the practice in the shipping Companies of only checking the number of the verladescs with that stated in the bill of lading, false description of goods and other particulars were given so that when the bill of lading was received by the importers in Bombay the Customs Officials would only know that the consignment contains those goods stated in the bill of lading which were goods permitted to be imported under the licence. Shri Khandelwala explained the further case of the prosecution as to what happened when the goods were received in the Bombay Port which of course has yet to be established by credible evidence. It appears that invariably another consignment would also be despatched which contained the actual goods shows in the bill of lading for which the bill of lading would not be forwarded. When the consignment arrives there will be two sets, one of 13 Packages containing importable goods which are shows in the bill of lading along with another of 11 packages containing contraband goods. The 13 packages would have markings with letter 'I' and the 11 packages would have markings with letter 'T' which could be made into 'I' by giving a stroke at the end of the letter. When the bill of lading is received and the Customs Officers clear the consignment after checking up one or two packages out of the 13 the letter 'T' in the other consignment of 11 packages is changed to the letter 'I' by giving stroke at the end of it and these 11 packages along with two from the consignment of 13 which has been examined and passed would be taken away leaving the remaining 11 behind in the docks. After several consignments had been cleared over a period of few years the Customs Officials began to suspect and ultimately they detected the conspiracy and detained the last 4 consignments. Their investigation, it is said, has disclosed the modus operandi referred to above. It is the case of the prosecution that the accused by following the system narrated above brought into India 24 consignments of which the last 4 consignments were seized. With regard to 8 of the remaining 30 consignments the prosecution say that it has in its possession verladescs which give description of contraband goods, though the bill of lading in respect of these 8 very consignments shows these goods as covered by licences. The further case of the prosecution is that verladescs related to consignments in the name of Suresh Trading Co., and D. Deepak and Co., and that it has in its possession ten verladescs which have to be proved in order to bring home the offence to the accused. The prosecution commenced examination of witnesses in March, '62 and in all examined 200 witnesses by December '62 but in August, '62 it wanted to mark these 10 verladescs without examining any witnesses, either under Section 32 or under Section 10 of the Evidence Act. The Magistrate by his order of 24-8-62 while holding that these were inadmissible under Section 32, held 9 out of 10 admissible under Section 10 of the Evidence Act. After so holding he framed charges on the basis of 9 verladescs as also on the footing that the alleged conspiracy had ended on 1-2-60 (instead of 31-3-60). It would be seen that the charges framed by the Magistrate were fewer than what the prosecution desired and consequently in February, 1963, it filed Criminal Revision Application No. 107 of 1963 in the Bombay High Court in which in inter alia challenged the order of the Magistrate rejecting the 10 verladescs as not being admissible under Section 32 of the Evidence Act in not admitting one out of 10 verladescs under Section 10 of the Evidence Act and framing fewer charges than requested by the prosecution on the footing that the conspiracy had ended on 1-2-60 and not on 31-3-60 as contended by the prosecution. This revision petition took over a year to come up for hearing and was ultimately heard and determined by Gokhale, J., on 19/20 August, '64. The learned Judge upheld the order of the Magistrate that the 10 verladescs were inadmissible under Section 32 of

the Evidence Act. He however reversed the order of the Magistrate admitting 9 of the 10 verladescheins under Section 10 of the Evidence Act because he was of the view that even those 9 were not admissible under that Section. In this view he remanded the case to the Magistrate for reconsidering the charges framed by him. The prosecution applied for a certificate of leave to appeal to this Court which was rejected and subsequently two Special Leave Petitions Nos. 965 and 966/65 were filed against that Judgment but this Court dismissed both of them on 27-1-66.

3. When the case went back to the Magistrate the prosecution applied for taking photostat copies of certain documents from the Magistrate's Court in order to enable it to send them to West Germany where witnesses were proposed to be examined for proving the verladescheins as also in respect of other matters relevant and necessary to support the prosecution case. The Magistrate granted this application but Accused 1 challenged it before the High Court of Bombay. The High Court however prescribed 3 months time for the prosecution to call the foreign witnesses namely up to 4-1-67 but it was alleged that before the time for expiry arrived an anonymous letter was written by the appellant Mithani on 4-8-67 to German witnesses in an attempt to tamper with them and also warning them of the fate that would befall them in case they came to India to give evidence. When this fact came to be known through the Government of India's representative in Germany the prosecution filed Criminal Application 24 of 1967 for cancellation of bail in the High Court. Chandrachud, J., by his order, dated 3rd/6th March, '67, held that though the letter was an anonymous letter there was internal evidence to connect Accused 2 with it and consequently cancelled the bail and directed Accused 2 to surrender, with liberty to him to move the Court on or after 26-6-67 for a fresh order of bail. Against this order Criminal Application 64/67 by Special Leave was filed but on 4-5-67 this Court while dismissing the appeal fixed 26-6-67 as the date within which the prosecution were to examine German witnesses. When the foreign witnesses were however not examined by that date Accused 2 was released on bail. The prosecution thereafter applied to the Magistrate for examination of the witnesses at Hamburg or Berlin or London. The Magistrate not only rejected this application on 8-8-67 but also directed on 9-8-67 that the case should go on. On the order of the Magistrate, dated 8-8-67, the prosecution again preferred Criminal Revision 882/67 but that was dismissed by Desai and Wagle, JJ., on 9-8-68. Against that order it filed Special Leave Petition No. 944/68 in this Court which was allowed to be withdrawn on 4-11-68. On 2-12-68 the prosecution made another application to the Magistrate to examine certain witnesses but the Magistrate rejected that application on 9-1-69 and on 26-2-69 he discharged the appellant and the petitioner Sibal. Against this order Criminal Revision Application No. 565/69 was filed on 25-8-69 and later Criminal application 873/69 in Criminal Revision Application No. 565/69 was also filed for the issue of a Commission for examining the German witnesses which was allowed by the High Court. The High Court also granted time to the prosecution and fixed 31-5-70 for return of the Commission which date was subsequently extended up to 31-8-70. The appellant filed Special Leave Petition No. 618/67 in the Supreme Court against the order of 25-5-70 but leave was granted limited only to the question of whether the to and for tourist class air fare and expenses at Rs. 100/- a day for the lawyer of the petitioner should be paid by the State. During the pendency of this appeal before us, the High Court extended time for the return of the Commission up to 16-9-70 and this Court has extended that time till 31-12-70 and further extension was given till 31-3-71.

4. The brief history of this case would show how a prosecution which was launched in 1961 has been shuttling up and down for 10 years between all the Courts from the lowest to the highest, in which as we said earlier all the provisions of the law designed to ensure speedy criminal justice has been taken advantage of to thwart it. It may be noticed that there are a number of hurdles which the prosecution has to face having regard to what it has to establish because of the alleged conspiracy extending beyond the frontiers of India into a country with whom India had till recently no

agreement to enable Criminal Courts in this Country to issue Commissions for examination of witnesses in that country. Be that as it may, we do not wish to be drawn into or determine any of the question which have been hotly contested namely as to who is responsible for the laches and whether the prosecution suppressed documents before the Court in getting the cancellation of bail or whether as stated by the prosecution it was the appellant who was responsible for the predicament of the prosecution in whose path he has been throwing obstacles and delaying the trial because we are anxious to ensure that anything we might say in this regard should not even remotely influence the result of the case one way or the other. What we are not concerned with is the question whether having regard to the leave to appeal being limited to the specific question set out already, the appellant should be given the same facilities as were accorded to other accused. The Magistrate's order against the appellant is obviously based upon what it considered to be concluded finding of fact of the High Court as also of the Supreme Court that the appellant intimidated and tampered with the German witnesses. In every criminal trial the accused is entitled to have the witnesses examined in his presence and if a departure is made and witnesses cannot be brought here for one reason or the other whether due to the action of the appellant or the inaction or want of diligence on the part of the prosecution, and they have to be examined on commission beyond the frontiers of this Country it is incumbent upon the prosecution and the Court in ensuring a fair and impartial trial to afford to the accused the same facilities for employment of a lawyer, the payment of his to and for air fare to the place where the Commission will examine witnesses and his daily expenses while he is engaged in the work of the Commission. When the Court had directed the prosecution to give facilities in respect of payment of the transport charges and foreign exchange at Rs. 100/- as daily allowances to Accused 1, Accused 3, Accused 4, Accused 5 and Accused 7 we find little merit in the Court singling out the accused appellant. It is not a case of punishment for something he is said to have done during the initial stages for which he in any case has had his retribution by the loss of personal freedom for nearly three months when his bail was cancelled and he was directed to surrender. We think interest of justice requires that he also should be treated in the same way as the other accused and consequently we allow the appeal and direct that the prosecution do pay to the appellant also the tourists class air fare for one lawyer plus Rs. 100/- per day for the expenses of the stay of the lawyer in Germany during the actual time required for executing the Commission.

5. In so far as the Special Leave Petition (Criminal) No. 890 of 1970 of Accused 1 is concerned similar grounds to those urged by Accused 2 when he filed his Special Leave Petition were also urged namely that the High Court could not without setting aside the order of discharge direct a Commission for the examination of German witnesses to issue. This Court had in Accused 2's application specifically limited the question only to his grievance that he was neither paid his lawyer's air fare to Germany and back nor his daily allowance, and did not think that the other questions raised therein were such as to merit leave being granted. Apart from this consideration even on the question of jurisdiction of the High Court to make the impugned orders there is a decision of this Court in *Rajeswar Prosad Misra v. State of West Bengal* (1966 (1) SCR 178.) which supports the contention of the learned Advocate for the respondent that the Criminal Courts and the High Courts have ample power and jurisdiction even in a case of a conviction to direct additional evidence in the interest of justice and fair-play rather than take a different view of the oral evidence. Much more so can the High Court in a case of discharge direct even before setting aside the order of discharge to take further evidence or additional evidence if it considers that it is necessary in the interest of justice to do so. In our view of the matter this is not a case in which leave should be granted. The petition is accordingly rejected.

</html