

Gian Mahtani and Another

Vs

The State of Maharashtra and Another

Criminal Appeals Nos. 66 and 69 of 1968

(K. S. Hegde, A. N. GroverJJ)

21.07.1971

JUDGMENT

GROVER, J. -

1. These appeals have been brought by certificate from a judgment of the Bombay High Court. Gian Mahtani the sole appellant in Cr. A. 66/68, has been convicted by the High Court of charges under Section 135(b)(ii) of the Customs Act, 1962 and section 5 of the Imports and Exports Control Act, 1947. He has been sentenced to two years on each of the several charges Nos. 28 to 33 and 38 to 41, the sentences being concurrent. On charges Nos. 63 to 66 a sentence of six months' rigorous imprisonment has been imposed. It has been directed that the sentences on all the charges shall run concurrently. In Cr. A. No. 69 of 1968 the sentence of Budhoo and two others was reduced by the High Court to rigorous imprisonment for six months. It may be stated that Gian Mahtani had been acquitted by the Additional Chief Presidency Magistrate but Budhoo and others had been convicted and sentenced to nine months rigorous imprisonment by him on charges Nos. 51, 52, 54, 55, 57 and 58 which related to commission of offences under the aforesaid enactments and under Section 120-B of the Indian Penal Code.

2. The Assistant Collector of Customs, Preventive Department, Bombay, filed a complaint, dated August 10, 1964, against 21 persons. Only 10 out of them were tried because the rest had absconded. The accused, who were tried, were Nos. (1) Gian Mahtani, (2) Gobindram Harjani, (3) Ramchand Motwani, 7, 8, 9, (10) Budhoo, (11) Mohamed Ismail B. Bashir, (12) Nazruddin and (13) Abdul Latif. The complaint was on charges under Section 120-B, Indian Penal Code, read with Section 135 of the Customs Act, 1962 and Section 5 of the Imports and Exports Control Act, 1947. Accused Nos. 1, 2 and 3 were arraigned as the principal conspirators who were alleged to have smuggled large quantities of watches and luxury goods from Singapore to Bombay between August, 1963 and January 20, 1964. Accused Nos. 7 to 13 were charged as the carriers of these goods and who had arrived by the steamship S. S. Marconi at Bombay on January 20, 1964. The Trial magistrate acquitted accused Nos. 1 and 2. Accused No. 3 was convicted and sentenced to rigorous imprisonment for three years. He filed an appeal before the High Court but during the pendency of the appeal he is stated to have committed suicide and his appeal abated. Out of accused Nos. 7 to 13 only accused Nos. 10, 11 and 12 appealed to the High Court. The State filed an appeal against the acquittal of accused Nos. 1 and 2. Accused No. 2 died during the pendency of the appeal. The High Court allowed the appeal against accused No. 1 and dismissed the appeal of accused Nos. 10, 11 and 12 although their sentences were reduced to six months' rigorous imprisonment.

3. The table given below will indicate the relationship between the principal accused persons, the main witness, P.W. 1 Ramchand Harjani and certain other persons who figure in the case.

#X|-----|| |Daughter Gobindram
Ramchand Atma RamMarried Harjani Harjani Harjanito (A-3) (A-2) (P.W. 1)
married(Ramchand to sisterMotwani) of (A-1)Gian Mahtani##

4. According to the case for the prosecution accused Nos. 1 and 2 entered into a criminal conspiracy with P.W. 1 Harjani in the first week of August, 1963, the object of conspiracy being to purchase wrist watches and other luxury goods like saris, perfumes, electric cookers, etc., from Singapore and smuggle them into India at Bombay. Accused No. 1 was the principal financier and his share in the profits was fixed at 75%. Accused No. 2 and Harjani were to receive 25%. Accused No. 3 Motwani was to be sent to Singapore as an employee of this Syndicate on a fixed salary. He was to arrange for purchasing and sending the goods from there.

5. The modus operandi of the conspirators was that wrist watches were concealed in tins meant for provisions and electric cookers in such a way that nobody's suspicion might be aroused. Certain persons were employed as carriers. They were paid their passage to Bombay mostly in the cabin class and also the additional sum of Rs. 300/- to Rs. 400/- each. The duty which was levied on other luxury goods which were sent with them was paid by the conspirators at the docks in Bombay.

6. The Customs Officers took various steps from January 31, 1964, onwards in the matter of unearthing the conspiracy. Details are not necessary. Mention may be made only of a confessional statement of A-1 which is Ext. Z.70 in which he admitted the hatching of the conspiracy and the smuggling of luxury articles pursuant thereto. He has ascribed to himself a minor part and put the blame largely on A-2 and P.W. 1 Harjani. In all 66 charges were framed. Harjani was made the principal prosecution witness. The evidence on behalf of the prosecution considered of the testimony of Harjani, the cables which passed between the conspirators and the confession of A-1 which was retracted at the trial as also the deposition of Jagtiani and Vaswani (P.W. Nos. 2 and 10).

7. The trial Magistrate held that there was a conspiracy to smuggle luxury goods and watches on a large scale as alleged in the complaint filed by the Assistant Collector of Customs on August 10, 1964. He was of the view that A-1 was engaged in smuggling business during the period of the conspiracy. He, however, found that A-1 was involved in a separate business of smuggling which was independent of the conspiracy and, therefore, the conspiracy charge which had been framed against him had not been proved. He acquitted A-1 of all the charges but convicted the other accused as mentioned before. The High Court considered the evidence including the cables which had passed between A-1 and the other alleged conspirators and came to the conclusion that no clear inter-connection was established between Harjani and A-1. The case A-1 was that he was doing his own business with Atma Ram till about the middle of December, 1963 and thereafter he did business with A-3. The High Court was satisfied that the decision of the learned Magistrate was correct about A-1 doing a separate business and not being a member of the conspiracy. It, however, proceeded to examine the version given by A-1 in defence which was that he was doing business in currency. The High Court rejected this part of the case of A-1 and was of the opinion that he was doing the same kind of business as Harjani, i.e., smuggling of watches and luxury goods. The approach of the High Court was as follows :

8. Although the charges as framed of conspiracy had not been proved against A-1 and it would not cover the separate conspiracy that had actually been proved between A-3 and A-1 for smuggling goods but he was guilty of the overt acts covered by charges Nos. 28 to 33, 38 to 42 and 63 to 66. The first set of charges were in respect of the goods alleged to have been smuggled by three carriers of A-1 whose names were Ivan, Baptists and Farooq into Bombay on January 3, 1964, by the ship S.

S. 'Roma'. The second set of charges related to the goods smuggled through two carriers of the name of Aziz and Herbert who arrived by the ship S. S. 'Asia' on January 12, 1964. The third set of charges related to the goods which were brought by Jagtiani and Vaswani (P. Ws.) who arrived by the ship S. S. 'Marconi' which arrived on January 20, 1964. As regards the three carriers who came by 'Roma' it was not disputed on behalf of A-1 that they had actually arrived by that ship. His case was that these carriers did smuggle goods for him but the same consisted of Indian currency in specie. The High Court proceeded to reject the defence and entertained no doubt that A-1 was smuggling watches and luxury goods. The Court agreed that apart from the bare word of Harjani that these carriers brought luxury goods worth Rs. 15,000 and 18,000/-, watches there was no other evidence relating to the nature of the goods. But weight was attached to the fact that on each of these carriers a sum of Rs. 1,800/- or so had been spent from which it followed that goods of a large value must have been smuggled. The cables by which A-1 is stated to have made a large provision for smuggling were relied upon and from those cables it was found established that goods worth at least Rs. 35,000/- had been smuggled into Bombay through the three carriers who arrived by 'Roma'. The position with regard to the goods which came by the other ship 'M. V. Asia' through Aziz and Herbert was similar. The reasoning of the High Court was that the carriers who had arrived by these two ships had admittedly smuggled contraband articles and since the version of A-1 that these goods consisted of Indian currency in specie was false it followed that A-1 must have smuggled into India through these carriers luxury goods and watches worth Rs. 35,000/- on January 3, 1964 and 20,000 Dollars on January 11, 1964, respectively.

9. As regards the goods which had arrived by 'S. S. Marconi', the High Court found that the charges relating to them (63 to 66) related only to importing of goods otherwise than as bona fide personal baggage. It came to the conclusion that A-1 was interested in the cookers and other luxury articles which were sent by A-3 to A-1 with the two carriers who came on the ship 'Marconi' and these goods had been delivered to him. A-1 was, therefore, found guilty of charges 63 to 66.

10. In the special field by accused Nos. 10, 11, and 12, it was held that they had been almost caught red-handed and they had carried goods similar to those which had been admittedly received for the conspirators. It was found that these appellants were carriers of tins which contained watches and they knew that they were smuggling valuable goods. The High Court felt difficulty in sustaining their conviction on the conspiracy charge which was set aside. Their conviction, however, on charges 51, 52, 54, 55, 57 and 58 was maintained.

11. Mr. Jethmalani for the appellant Gian Mehtani (A-1) has raised the following principal contentions with regard to charges 28 to 33 and 38 to 41 which related to the goods alleged to have been smuggled by means of carrier who arrived by the two ships 'Roma' and 'Asia' :

(1) No cognizance could be taken or had been taken of the offences which formed subject-matter of the above charges because no complaint had been filed in respect of these offences as required by Section 137 of the Customs Act, 1962.

(2) The conviction of A-1 on the aforesaid charges was based on no evidence. As a matter of fact A-1 had been convicted on the falsity of his own explanation or version.

(3) The High Court had relied upon inadmissible evidence and had failed to consider that the prosecution had accepted in the Trial court the explanation given by A-1 and had actually filed an application that he should be convicted for importing Indian

currency in specie.

(4) At any rate, such evidence including the evidence and circumstances which had been relied upon was wholly insufficient to warrant the conviction of A-1 who had been rightly acquitted by the Trial Magistrate.

12. In our judgment it is not necessary to examine all the above contentions because we are inclined to agree with Mr. Jethmalani with reference to his second contention that the conviction of A-1 could not be sustained on the charges based on the alleged smuggling by means of the carriers who arrived by the two ships 'Roma' and 'Asia'. One of the essential facts which had to be established by the prosecution was the exact nature of the goods stated to have been smuggled. In the complaint these goods had been described as wrist watches and other luxury goods such as saris, electric goods, toiletries, cosmetics, electric cookers, etc. The learned Trial Magistrate found that there was no evidence about the exact nature of the goods which had been smuggled through the carriers of A-1 who arrived by the ships 'Roma' and 'Asia'. The High Court also, as already noticed, observed that apart from the bare word of Harjani that these carriers brought luxury goods and watches, there was no other evidence relating to the nature of the goods brought by them. It does not appear that the High Court was prepared to rely on the sole evidence of Harjani nor indeed it is possible to do so particularly in the light of the findings of the Trial Magistrate and the High Court itself. The High Court was, however, swayed by the amount spent on the carriers and the cables which had passed between A-1 and his associates in Singapore. Reference was made inter alia to Ext. Q a cable sent by A-1 to A-3, Ext. T which was sent by A-1 to Mohan Nagrani, Ext. U a cable from A-3 to A-1, etc. Now these cables do relate to certain arrangements having been made about finances which were being arranged by A-1 for being utilized in Singapore and it was even admitted by the latter that these cables related to his own separate business of smuggling Indian currency in specie. But there was nothing in these communications which would show that the nature of the goods was for the smuggling of which the finances were being arranged. The High Court could legitimately entertain a grave suspicion that once the story of A-1 about the smuggling of Indian currency in specie was not accepted the money which was being remitted as also the cable in question related to the smuggling of luxury goods and watches in the same way as A-3 and Harjani were doing. But suspicion, however great cannot take the place of proof a dictum which can always bear repetition. The prosecution had set out and sought throughout to establish one conspiracy which was the subject matter of the complaint and which involved A-1. It was concurrently found by the Trial Magistrate and the High Court that A-1 was not a member of that conspiracy. The charges relating to smuggling for which A-1 was convicted clearly recited that the alleged overt Acts had been done pursuant to the conspiracy which was the subject-matter of the complaint. It is a moot question, which need not be decided, whether A-1 could be convicted of any overt act which was pursuant to a conspiracy for which he had not been charged and which was the result of quite a different conspiracy. But it is not possible to lose sight of the fact that even if A-1 was proved to have smuggled certain articles through the three carriers who arrived by 'Roma' and the two carriers who came by 'Asia', he could not be convicted of smuggling something which was unknown and about the nature of which there was total lack of evidence. To say that luxury goods of the nature specified in the complaint and watches had been smuggled would be purely conjectural. Unless the link about the nature and the description of the goods could be established the chain of circumstantial evidence would necessarily break and this is what was lost sight of by the High Court. We would accordingly hold that the Trial Magistrate was right in acquitting A-1 of the aforesaid charges and the High Court was in error in convicting him.

13. As regards the charges 63 to 66 which related to the goods brought by Jagtiani and Vaswani

(P.Ws.) who arrived by the ship 'Marconi', A-1 had been convicted only for importing goods otherwise than as bona fide personal baggage. According to the High Court, A-1 was interested in the cookers and other luxury articles which had been sent by A-3 to him with the carriers Jagtiani and Vaswani who had delivered them to him. He had thus smuggled the goods in contravention of the prohibition under the Imports and Exports Control Act, 1947. The goods were liable to be confiscated under Section 111 of the Customs Act, 1962 and thus offences under Section 135 of that Act had been committed. According to the High Court, the evidence which connected A-1 with the goods specified in those charges consisted of the deposition of Harjani, the confession of A-1 and the testimony of witnesses Jagtiani and Vaswani. The learned Trial Magistrate gave cogent and clear reasons for not placing any reliance on the statements of Harjani and of Jagtiani and Vaswani (P.Ws. 2 and 10). It may be mentioned that even according to the evidence of the latter all that they had done was that they had delivered two electric cookers and other articles to A-1. The duties on these articles had not found any objectionable or contraband articles like watches, etc., concealed in the electric cookers or the other packages that Jagtiani and Vaswani had brought with them. However, once the evidence of these two persons is discarded as was rightly done by the Trial Magistrate, we are only left with the so called confession of A-1. The learned Trial Magistrate had gone into the question of the voluntary nature of the confession at length and had come to the conclusion that the statement made by A-1 to the customs authorities Ext. Z-70 was not voluntary. The High Court came to the contrary conclusion. After carefully considering the reasoning of the two Courts we are of the opinion that the Trial magistrate was fully justified in not relying on the statement Ext. Z-70 as it had not been made in circumstances which inspired confidence about its voluntary nature. We are, therefore, unable to sustain the conviction of A-1 with regard to charges 63 to 66.

14. There can be no manner of doubt that A-1 played a leading role in extensive smuggling operations on his own admission, he had been illegally smuggling Indian currency in specie (for which, however, no charges were preferred against him). The entirety of facts and circumstances do create a serious suspicion of the commission of offences with which A-1 was charged and of which he is being acquitted. But according to the system of jurisprudence which we follow, conviction cannot be based on suspicion nor on the conscience of the Court being morally satisfied about the complicity of accused person. He can be convicted and sentenced only if the prosecution proves its case beyond all reasonable doubt. This is what it has failed to do with regard to A-1. His appeal is allowed and his conviction and sentences on the various charges are hereby set aside.

15. As regards appellants Budhoo and others, a great deal of stress has been laid by Mr. Nuruddin Ahmed who appears on their behalf on their being poor persons who had been the victims of the machinations of seasoned smugglers. It has been urged that they had no personal knowledge that the fruit tins which they were asked to carry contained watches or contraband articles. For the reasons given by the High Court, we are unable to accede to the suggestion that they were as innocent as has been sought to be made out. We have no doubt that the High Court rightly upheld their conviction. Their appeals shall stand dismissed. As they were released on bail, they shall surrender to their bailbonds.

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