SUPREME COURT OF INDIA

State of Maharashtra

Vs.

Mohd. Yakub S/O Abdul Hamid

(R.S. Sarkaria, O. Chinnappa and R Singh JJ.)

04.03.1980

JUDGMENT

SARKARIA, J.-

This appeal by special leave preferred by the State of Maharashtra, is directed against a judgment dated November 1, 1973, of the Bombay High Court. Mohd. Yakub respondent 1, Shaikh Jamadar Mithubhai respondent 2, and Issak Hasanali Shaikh respondent 3, were tried in the court of the Judicial Magistrate First Class, Bassein, Bombay, in respect of three sets of offences punishable under section 135 read with section 135 (2) of the Customs Act, 1962. The first charge was the violation of sections 12(1), 23(1) and 23 (d) of the Foreign Exchange Regulation Act, 1947, the second was violation of Exports (Council) Order No. 1 of 1968 E.T.C. dated March 8, 1968; and the third was the contravention of the provisions of Sections 7, 8, 33 and 34 of the Customs Act, 1962. They were also charged for violation of the Exports (Control) Order No. 1/68 E.T.C. dated March 8, 1968 issued under sections 3 and 4 of the Imports and Exports (Control) Act, 1947 punishable under section 5 of the said Act. The gist of the charges was that the respondents attempted to smuggle out of India 43 silver ingots, weighing 1312.410 kgs., worth about Rs. 8 lakhs, in violation of the Foreign Exchange Regulation Act, the Imports & Exports (Control) Act, 1947, and the Customs Act.

The facts of the case were as follows:

On receiving some secret information that silver would be transported in Jeep No. MRC-9930 and Truck No. BMS-796 from Bombay to a coastal place near Bassein, Shri Wagh, Superintendent of Central Excise along with Inspector Dharap and the staff proceeded in two vehicles to keep a watch on the night of September 14, 1968 at Shirsat Naka on the National Highway No. 8, Bombay City. At about mid-night, the aforesaid jeep was seen coming from Bombay followed by a truck. These two vehicles were proceeding towards Bassein. The officers followed the truck and the jeep which, after travelling some distance from Shirsat Naka, came to a fork in the road and thereafter, instead of taking the road leading to Bassein, proceeded on the new National Highway leading to Kaman village and Ghodbunder Creek. Ultimately, the jeep and truck halted near a bridge at Kaman creek

whereafter the accused removed some small and heavy bundles from the truck and placed them aside on the ground. The Customs Officers rushed to the spot and accosted the persons present there. At the same time, the sound of the engine of a mechanised sea-craft from the side of the creek was heard by the officers. The officers surrounded the vehicles and found four silver ingots near the footpath leading to the creek. Respondent 1 was the driver and the sole occupant of the jeep, while the other two respondents were the driver and cleaner of the truck. The officers sent for Kana and Sathe, both residents of Bassein. In their presence, respondent 1 was questioned about his identity. He falsely gave his name and address as Mohamad Yusuf s/o Sayyad Ibrahim residing at Kamathipura. From the personal search of respondent 1, a pistol, knife and currency notes of Rs. 2,133/- were found. Fifteen silver ingots concealed in a shawl were found in the rear side of the jeep and twenty- four silver ingots were found lying under saw-dust bags in the truck. The truck and the jeep together with the accused- respondents and the silver ingots were taken to Shirsat Naka where a detailed panchanama was drawn up. Respondent 1 had no licence for keeping a pistol. Consequently the matter was reported to Police Station Bassein, for prosecuting the respondent under the Arms Act.

The respondents and the vehicles and the silver ingots were taken to Bombay on September 15, 1968. The statements of the respondents under section 108 of the Customs Act were recorded by Shri Wagh, Superintendent of Central Excise. The Collector, Central Excise, by his order dated May 28, 1969, confiscated the silver ingots. After obtaining the requisite sanction, the Assistant Collector, Central Excise made a complaint against all the three accused in the court of the Judicial Magistrate, Bassein for trial in respect of the aforesaid offences.

The plea of the accused was of plain denial of the prosecution case. They stated that they were not aware of the alleged silver and that they had just been employed for carrying the jeep and the truck to another destination. They alleged that they were driven to the creek by the police. The trial Magistrate convicted the accused of the aforesaid offences and sentenced accused 1 to two years' rigorous imprisonment and a fine of Rs. 2,000 and, in default, to suffer further six months' rigorous imprisonment. Accused 2 and 3 were to suffer six months' rigorous imprisonment and to pay a fine of Rs. 500 and, in default, to suffer two months' rigorous imprisonment. The accused preferred three appeals in the court of the Additional Sessions Judge, Thana, who, by his common judgment dated September 30, 1973, allowed the appeals and acquitted them on the ground that the facts proved by the prosecution fell short of establishing that the accused had 'attempted' to export silver in contravention of the law, because the facts proved showed no more than that the accused had only made 'preparations' for bringing this silver to the creek and "had not yet committed any act amounting to a direct movement towards the commission of the offence". In his view, until silver was put in the boat for the purpose of taking out of the country with intent to export it, the matter would be merely in the stage of 'preparation' falling short of an 'attempt' to export it. Since 'preparation' to commit the offence of exporting silver was not punishable under the Customs Act, he acquitted the accused.

Against this acquittal, the State of Maharashtra carried an appeal to the High Court, which, by its judgment dated November 1, 1973, dismissed the appeal and upheld the acquittal of the accused-respondents. Hence, this appeal.

In the instant case, the trial court and the Sessions Judge con-currently held that the following circumstances had been established by the prosecution:

(a) The officers (Shri Wagh and party) had received definite information that silver would be carried in a truck and a jeep from Bombay to Bassein for exporting from the country and for this purpose they kept a watch at Shirsat Naka and then followed the jeep and the truck at some distance.

(b) Accused 1 was driving the jeep, while accused 2 was driving the truck and accused 3 was cleaner on it.

(c) Fifteen silver ingots were found concealed in the jeep and 24 silver ingots were found hidden in the truck.

(d) The jeep and the truck were parked near the Kaman creek from where they could be easily loaded in some sea craft.

(e) Four silver ingots from the vehicle had been actually unloaded and were found lying by the side of the road near the foot-path leading to the sea.

(f) On being questioned accused 1 gave his false name and address.

(g) The accused were not dealers in silver. The trial Magistrate further held that just, when the officers surrounded these vehicles and caught the accused, the sound of the engine of a mechanised vessel was heard from the creek. The first appellate court did not discount this fact, but held that this circumstance did not have any probative value.

The question, therefore, is whether from the facts and circumstances, enumerated above, it could be inferred beyond reasonable doubt that the respondents had attempted to export the silver in contravention of law from India ? At the outset, it may be noted that the Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proved' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstances listed above establish such a high decree of probability that a prudent man ought to act on the supposition that the appellant was attempting to export silver from India in contravention of the law, that will be sufficient proof of that fact in issue. Well then, what is an "attempt" ? Kenny in his 'Outlines of Criminal Law' defined "attempt" to commit a crime as the "last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control." This definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in Abhayanand Mishra v. State of Bihar(1) there is a distinction between 'preparation' and 'attempt'. Attempt begins where preparation

ends. In sum, a person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. Now, let us apply the above principles to the facts of the case in hand. The intention of the accused to export the silver from India by sea was clear from the circumstances enumerated above. They were taking the silver ingots concealed in the two vehicles under cover of darkness. They had reached close to the sea-shore and had started unloading the silver there near a creek from which the sound of the engine of a sea-craft was also heard. Beyond the stage of preparation, most of the steps necessary in the course of export by sea, had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea- craft for moving out of the territorial waters of India. But for the intervention of the officers of law, the unlawful export of silver would have been consummated. The calendestine disappearance of the sea-craft when the officers intercepted and rounded up the vehicles and the accused at the creek, reinforces the inference that the accused had deliberately attempted to export silver by sea in contravention of law.

It is important to bear in mind that the penal provisions with which we are concerned have been enacted to suppress the evil of smuggling precious metal out of India. Smuggling is an antisocial activity which adversely affects the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. A narrow interpretation of the word "attempt" therefore, in these penal provisions which will impair their efficacy as instruments for combating this baneful activity has to be eschewed. These provisions should be construed in a manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus, construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold any one or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export. The inference arising out of the facts and circumstances established by the prosecution, unerringly pointed to the conclusion, that the accused had committed the offence of attempting to export silver out of India by sea, in contravention of law.

For reasons aforesaid, we are of opinion that the High Court was in error in holding that the circumstances established by the prosecution fell short of constituting the offence of an 'attempt' to export unlawfully, silver out of India. We, therefore, allow this appeal, set aside the acquittal of the accused-respondents and convict them under Section 135(a) of the Customs Act, 1962 read with Section 5 of the Imports and Exports Control Act, 1947 and the Order issued thereunder, and sentence them as under: Accused-respondent 1, Mohd. Yakub is sentenced to suffer one year's rigorous imprisonment with a fine of Rs. 2,000 and, in default, to suffer six months' further rigorous imprisonment. Accused respondents 2 and 3, namely, Sheikh Jamadar Mithubhai and Issak Hasanali Shaikh are each sentenced to six months' rigorous imprisonment with a fine of Rs. 500 and, in default to suffer two months' further rigorous imprisonment.

CHINNAPPA REDDY, J. I concur in the conclusion of my brother Sarkaria, J. in whose Judgment the relevant facts have been set out with clarity and particularity. I wish to add a few paragraphs on the nature of the actus reus to be proved on a charge of an attempt to commit an offence. The question is what is the difference between preparation and perpetration?

An attempt to define 'attempt' has to be a frustrating exercise. Nonetheless a search to discover the characteristics of an attempt, if not an apt definition of attempt, has to be made.

In England Parke B described the characteristics of an 'attempt' in Reg. v. Eagleton,(1) as follows:- "the mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit but acts immediately connected with it are..... "

The dictum of Parke B is considered as the locus classicus on the subject and the test of 'proximity' suggested by it has been accepted and applied by English Courts, though with occasional but audible murmur about the difficulty in determining whether an act is immediate or remote. Vide Lord Goddard C.J. in Gardner v. Akeroyed.(2) "....it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt". Parke B. himself appeared to have thought that the last possible act before the achievement of the end constituted the attempt. This was indicated by him in the very case of Reg. v. Eagleton (supra) where he further observed:

"................ and if, in this case .... any further step on the part of the defendent had been necessary to obtain payment........ we should have thought that the obtaining credit.......... would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself towards the payment of the money, and therefore it ought to be considered as an attempt".

As a general principle the test of 'the last possible act before the achievement of the end' would be entirely unacceptable. If that principle be correct, a person who has cocked his gun at another and is about to pull the trigger but is prevented from doing so by the intervention of someone or something cannot be convicted of attempt to murder.

Another popular formulation of what constitutes 'attempt' is that of Stephen in his Digest of the Criminal Law where he said:

"An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts, which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case".

While the first sentence is an attempt at defining 'attempt', the second sentence is a confession of inability to define. The attempt at definition fails precisely at the point where it should be helpful. See the observations of Parker C.J. in Davey v. Lee(1) and of Prof. Glanville Williams in his essay on 'Police Control of intending criminals' in 1955 Criminal Law Review.

Another attempt at definition was made by Professor Turner in [1934] 5 Cambridge Law Journal 230, and this was substantially reproduced in Archbald's Criminal Pleading, Evidence and Practice (36th Edn.). Archbald's reproduction was quoted with approval in Davey v. Lee(1) and was as follows:

'........... the actus reus necessary to constitute an attempt is complete if the prisoner does an act

which is a step towards the commission of a specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime".

We must at once say that it was not noticed in Archbald's (36th Edn.) nor was it brought to the notice of the Divisional Court which decided Davey v. Lee (supra) that Prof. Turner was himself not satisfied with the definition propounded by him and felt compelled to modify it, as he thought that to require that the act could not reasonably be regarded as having any other purpose then the commission of the specific crime went too far and it should be sufficient "to show prima facie' the offender's intention to commit the crime which he is charged with attempting".

Editing 12th edition of Russell on Crime and 18th edition of Kenny's Outlines of Criminal Law, Professor Turner explained his modified definition as follows: "It is therefore suggested that a practical test for the actus reus in attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they themselves clearly indicate that was the end towards which they were directed. In other words the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime which he is charged with attempting. That there may be abundant other evidence to establish his mens rea (such as a confession) is irrelevant to the question of whether he had done enough to constitute the actus reus".(1) We must say here that we are unable to see any justification for excluding evidence aliunde on the question of mens rea in considering what constitutes the actus reus. That would be placing the actus reus in too narrow a pigeon-hole. In Haughten v. Smith,(2) Hailsham L. C. quoted Parke B from the Eagleton case (supra) and Lord Parker, C.J. from Davey v. Lee (supra) and proceeded to mention three propositions as emerging from the two definitions: "(1) There is a distinction between the intention to commit a crime and an attempt to commit it........ (2) In addition to the intention, or mens rea, there must be an overt act of such a kind that it is intended to form and does form part of a series of acts which would constitute the actual commission of the offence if it were not interrupted...... (3) The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in Reg. v. Eagleton, as being 'proximate' to the completion of the offence in Davey v. Lee [1968] 1 Q.B. 366, 370, as being 'immediately and not merely remotely connected' with the completed offence...... "

In Director of Public Prosecutions v. Stonehouse,(1) Lord Diplock and Viscount Dilhorne, appeared to accept the 'proximity' test of Parke B, while Lord Edmund-Davies accepted the statement of Lord Hailsham as to what were the true ingredients of a criminal attempt. Whatever test was applied, it was held that the facts clearly disclosed and attempt in that case.

In India, while attempts to commit certain specified offences have themselves been made specific offences (e.g. 307, 308 Indian Penal Code etc.), an attempt to commit an offence punishable under the Penal Code, generally, is dealt with under section 511 Indian Penal Code. But the expression 'attempt' has not been defined anywhere.

In Abhayanand Mishra v. The State of Bihar,(2) Raghubar Dayal and Subba Rao, JJ., disapproved of the test of 'last act which if uninterrupted and successful would constitute a criminal offence' and summarised their views as follows: "A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such

an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence".

In Malkiat Singh & Anr v. State of Punjab,(3) a truck which was carrying paddy, was stopped at Samalkha 32 miles from Delhi and about 15 miles from the Delhi-Punjab boundary. The question was whether the accused were attempting to export paddy from Punjab to Delhi. It was held that on the facts of the case, the offence of attempt had not been committed. Ramaswamy. J., observed: "The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha barrier and the Delhi-Punjab boundary and not have proceeded further in their journey". We think that the test propounded by the first sentence should be understood with reference to the facts of the case. The offence alleged to be contemplated was so far removed from completion in that case that the offender had yet ample time and opportunity to change his mind and proceed no further, his earlier acts being completely harmless. That was what the Court meant, and the reference to 'the appellants' in the sentence where the test is propounded makes it clear that the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.

Let me now state the result of the search and research: In order to constitute 'an attempt', first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be 'proximate' to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention; but, that it must be, that is, it must be indicative or suggestive of the intention. For instance, in the instant case, had the truck been stopped and searched at the very commencement of the journey or even at Shirsad Naka, the discovery of silver ingots in the truck might at the worst lead to the inference that the accused had prepared or were preparing for the commission of the offence. It could be said that the accused were transporting or attempting to transport the silver somewhere but it would not necessarily suggest or indicate that the intention was to export silver. The fact that the truck was driven upto a lonely creek from where the silver could be transferred into a sea-faring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course of intercoastal trade. But, the circumstance that all this was done in a clandestine fashion, at dead of night, revealed, with reasonable certainty, the intention of the accused that the silver was to be exported. In the result I agree with the order proposed by Sarkaria, J.

P.B.R. Appeal allowed.