

State of Madhya Pradesh

Vs

Narayan Singh and Others

State of Madhya Pradesh

Vs

Shamshersingh and Another

Criminal Appeals Nos. 49 and 24 of 1978

(S. Natarajan, Kuldeep Singh JJ)

25.07.1989

JUDGMENT

NATARAJAN, J. –

1. In both the appeals by special leave, a common question of law is involved and hence they were heard together and are being disposed of by a common judgment. In Criminal Appeal No. 49 of 1978, a lorry driver and two cleaners and in Criminal Appeal No. 24 of 1978 a lorry driver and a collie were prosecuted for exporting fertilisers without a permit therefor from Madhya Pradesh to Maharashtra in contravention of the Fertilisers (Movement Control) Order, 1973 (for short the 'FMC Order') read with Sections 3 and 7 of the Essential Commodities Act, 1955, (for short the 'EC Act'). In both the cases, the trial Magistrate held that the prosecution had failed to prove that the accused were attempting to export the fertilisers and he therefore acquitted them. On the State preferring appeals against acquittal under Section 378(3) Criminal Procedure Code, the High Court declined to grant leave. Hence the State has preferred these appeals by special leave.

2. The facts in the two case are identical. In Criminal Appeal No. 49 of 1978, a truck bearing registration No. MPP 3668 carrying 200 bags of fertilisers and proceeding from Indore to Maharashtra was intercepted on February 12, 1974 at Sendhwa sales tax barrier situate at a distance of 8 miles from the border of Maharashtra State on the Agra-Bombay Road viz. National Highway No. 3. The lorry driver was in possession of invoices and other records but they did not include a permit issued under the FMC Order. In Criminal Appeal No. 24 of 1978, a lorry bearing registration No. MPM 4866 proceeding from Indore to Maharashtra was similarly intercepted on October 30, 1973 at Sendhwa sales tax barrier. The truck was carrying 170 bags of fertilisers. The documents seized from the lorry driver contained the invoices and other records but they did not include a permit issued under the FMC Order. Consequently, the lorry driver and the cleaners in the first case and the lorry driver and the coolie in the second case were prosecuted under the FMC Order read with Sections 3 and 7 of the EC Act for exporting fertilisers from Madhya Pradesh to Maharashtra without a valid permit. In both the cases, the accused did not deny the factum of the transport of fertiliser bags in their respective lorries or the interception of the lorries and the seizure of the fertiliser bags or about the fertiliser bags not being covered by a permit issued under the FMC Order. The defence however was that they were not aware of the contents of the documents sized

from them and that they were not engaged in exporting the fertiliser bags from Madhya Pradesh to Maharashtra in conscious violation of the provisions of the FMC Order.

3. The trial Magistrate as well as the High Court have taken the view that in the absence of the evidence of an employee of the transport company, there was no material in the cases to hold that the fertiliser bags were being exported to Maharashtra from Madhya Pradesh. The trial Magistrate and the High Court refused to attach any significance or importance to the invoices recovered from the lorry drivers because the drivers had said they had no knowledge of the contents of the documents seized from them. The trial Magistrate and the High Court have further opined that the materials on record would, at best, make out only a case of preparation by the accused to commit the offence and the evidence fell short of establishing that the accused were attempting to export the fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order.

4. As we have already stated, the respondents admit that the trucks in question were intercepted at Sendhwa sales tax barrier on February 12, 1974 and October 30, 1973 and they were carrying 200 bags and 170 bags of fertilisers respectively and the consignments were not covered by export permits issued under the FMC Order. In such circumstances what falls for consideration is whether the prosecution must prove mens rea on the part of the accused in exporting the fertiliser bags without a valid permit for securing their conviction and secondly whether the evidence on record established only preparation by the accused for effecting export of fertiliser bags from one State to another without a permit therefor and not an attempt to export fertiliser bags. For answering these questions, it is necessary to refer to some of the relevant provisions in the Fertiliser (Movement Control) Order, 1973 framed in exercise of the powers conferred under Section 3 of the EC Act. In the said Order, the relevant provisions to be noticed are clauses 2(a) and 3 :

2. Definitions. - In this Order unless the context otherwise requires, -

(a) "Export" means to take or cause to be taken out of any place within a State to any place outside that State;

3. Prohibition of Export of Fertilisers. - No person shall export, or attempt to export, or abet the export of any fertilisers from any State.

5. Section 7 of the Essential Commodities Act, 1955 provides the penalty for contravention of any order made under Section 3 and reads as under :

7. Penalties. - (1) If any person contravenes whether knowingly, intentionally or otherwise any order made under Section 3 -

(a) he shall be punishable -

(i) in the case on order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine; and

(ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine;

6. Taking up the first question for consideration, we may at once state that the trial Magistrate and the High Court have failed to comprehend and construe Section 7(1) of the Act in its full

perspective. The words used in Section 7(1) are "if any person contravenes whether knowing, intentionally or otherwise any order made under Section 3". The section is comprehensively worded so that it takes within its fold not only contraventions done knowingly or intentionally but even otherwise i.e. done unintentionally. The element of mens rea in export of fertiliser bags without a valid permit is therefore not a necessary ingredient for convicting a person for contravention of an order made under Section 3 if the factum of export or attempt to export is established by the evidence on record.

7. The sweep of Section 7(1) in the light of the changes effected by the legislature has been considered by one of us (Ahmadi, J.) in *Swastik Oil Industries v. State* ((1978) 19 Guj LR 1117). In that case, *M/s Swastik Oil Industries* ((1978) 19 Guj LR 1117), a licensee under the Gujarat Groundnut Dealers Licensing Order, 1966 was found to be in possession of 397 tins of groundnut oil in violation of the conditions of the licence and the provisions of the Licensing Order. Consequently, the Collector ordered confiscation of 100 tins of groundnut oil from out of the 397 tins under Section 6(1) of the Essential Commodities Act. On the firm preferring an appeal, the appellate authority viz. Additional Sessions Judge, Kaira at Nadiad held "that clause (11) of the Licensing Order had been contravened but such contravention was not deliberate as it arose out of a mere bona fide misconception regarding the true content of clause (11) of the Licensing Order". The Additional Sessions Judge therefore held that the contravention was merely a technical one and not a wilful or deliberate one and hence the confiscation of 100 tins of groundnut oil was too harsh a punishment and that confiscation of only 25 tins would meet the ends of justice. Against this order, the firm preferred a petition under Article 227 of the Constitution to the High Court. Dealing with the matter, the High Court referred to Section 7 of the Act as it originally stood and the interpretation of the section in *Nathu Lal v. State of Madhya Pradesh* (AIR 1966 SC 43) wherein it was held that an offence under Section 7 of the Act would be committed only if a person intentionally contravenes any order made under Section 3 of the Act as mens rea was an essential ingredient of the criminal offence referred to in Section 7. The High Court then referred to the change brought about by the legislature to Section 7 after the decision in *Nathu Lal* case (AIR 1966 SC 43) was rendered by promulgating Ordinance 6 of 1967 which was later replaced by Act 36 of 1967 and the change effected was that with effect from the date of the Ordinance i.e. September 16, 1967 the words "whether knowingly, intentionally or otherwise" were added between the word "contravenes" and the words and figure "any order made under Section 3". Interpreting the amendment made to the section the High Court held as follows :

The plain reading of the section after its amendment made it clear that by the amendment, the legislature intended to impose strict liability for contravention of any order made under Section 3 of the Act. In other words, by the use of the express words the element of mens rea as an essential condition of the offence was excluded so that every contravention whether intentional or otherwise was made an offence under Section 7 of the Act. Thus by introducing these words in Section 7 by the aforesaid statutory amendment, the legislature made its intention explicit and nullified the effect of the Supreme Court dicta in *Nathu Lal* case (AIR 1966 SC 43).

8. The High Court thereafter proceeded to consider the further amendment effected to Section 7 of the Act pursuant to the recommendation of the Law Commission in its Forty-seventh Report.

9. Though for the purpose of the two appeals on hand, it would be enough if we examine the correctness of the view taken by the High Court in the light of the words contained in Section 7 of the Act as they stood at the relevant time viz. a contravention made of an order made under Section

3 "whether knowingly, intentionally or otherwise", it would not be out of place if we refer to the further change noticed by the High Court, which had been made to Section 7 by Parliament by an Ordinance which was later replaced by Amending Act 30 of 1974. The High Court has dealt with the further amendment made to Section 7(1) in the Swastik Oil Industries ((1978) 19 Guj LR 1117) as follows and it is enough if we extract the same :

But again in the year 1974, pursuant to the recommendations of the Law Commission in their Forty-seventh Report and the experience gained in the working of the Act, by an Ordinance, Section 7 of the Act was amended whereby the words "whether knowingly, intentionally or otherwise" which were introduced by Amending Act 36 of 1967 were deleted and the material part of Section 7(1) restored to its original frame and a new provision in Section 10 of the Act was added which reads as under :

10-C(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

This Ordinance was replaced by Amending Act 30 of 1974. The effect of this subsequent change in the statute is that a presumption of guilty mind on the part of the accused in respect of offences under the Act, including Section 7, would arise and it would be open to the accused to rebut the same. As the law now stands in any prosecution under the Act which requires a culpable mental state on the part of the accused, the same must be presumed unless the accused proves that he had no such mental state with respect to the offence for which he is tried. Now according to the explanation to Section 10-C(1) culpable mental state includes intention, motive, knowledge of a fact and belief in or reason to believe a fact. The degree of proof expected to rebut the presumption has been indicated by sub-section (2) thereof which says that a fact will be said to be proved only if it exists beyond reasonable doubt and it will not be sufficient to prove its existence by preponderance of probability. Thus the burden of proof lies heavily on the accused to rebut the statutory presumption and the degree of proof expected that required for the proof of a fact by the prosecution. There can therefore be no doubt that the aforesaid legislative changes have reversed the thrust of the decision of the Supreme Court in Nathu Lal case (AIR 1966 SC 43) and the same no longer holds the field.

10. Reverting back to Section 7 of the Act as amended by Act 36 of 1967, it is manifestly seen that the crucial words "whether knowingly, intentionally or otherwise" were inserted in Section 7 in order to prevent persons committing offences under the Act escaping punishment on the plea that the offences were not committed deliberately. The amendment was brought about in 1967 in order to achieve the avowed purpose and object of the legislation. To the same end, a further amendment came to be made in 1974, with which we are not now directly concerned but reference to which we have made in order to show the scheme of the Act and the amplitude of Section 7 at different stages.

11. We are in full agreement with the enunciation of law as regards Section 7 of the Act in Swastik Oil Industries ((1978) 19 Guj LR 1117). We therefore hold that the trial Magistrate and the High Court were in error in taking the view that the respondents in each of the appeals were not liable for conviction for contravention of the FMC Order read with Sections 3 and 7 of the EC Act since the prosecution had failed to prove mens rea on their part in transporting fertiliser bags from Madhya Pradesh to Maharashtra.

12. As regards the second question, we find that the trial Magistrate and the High Court have again committed an error in taking the view that the respondents can at best be said to have only made preparations to export fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order and they cannot be found guilty of having attempted to export the fertiliser bags. In the commission of an offence there are four stages viz. intention, preparation, attempt and execution. The first two stages would not attract culpability but the third and fourth stages would certainly attract culpability. The respondents in each case were actually caught in the act of exporting fertiliser bags without a permit therefor from Madhya Pradesh to Maharashtra. The trucks were coming from Indore and were proceeding towards Maharashtra. The interception had taken place at Sendhwa sales tax barrier which is only 8 miles away from the border of Maharashtra State. If the interception had not taken place, the export would have become a completed act and the fertiliser bags would have been successfully taken to Maharashtra State in contravention of the FMC Order. It was not therefore a case of mere preparation viz. the respondents trying to procure fertiliser bags from someone or trying to engage a lorry for taking those bags to Maharashtra. They were cases where the bags had been procured and were being taken in the lorries under cover of sales invoices for being delivered to the consignees and the lorries would have entered the Maharashtra border but for their interception at the Sendhwa Sales tax barrier. Surely, no one can say that the respondents were taking the lorries with the fertiliser bags in them for innocuous purposes or for mere thrill or amusement and that they would have stopped well ahead of the border and taken back the lorries and the fertiliser bags to the initial place of despatch or to some other place in Madhya Pradesh States itself. They were therefore clearly cases of attempted unlawful export of the fertiliser bags and not cases of mere preparation alone.

13. We have already seen that clause 3 forbids not only export but also attempt to export and abetment of export of any fertiliser from one State to another without a permit. It would therefore be wrong to view the act of transportation of the fertiliser bags in the trucks in question by the respondents as only a preparation to commit an offence and not an act of attempted commission of the offence. Hence the second question is also answered in favour of the State.

14. In the light of our pronouncement of the two questions of law, it goes without saying that the judgments of the trial Magistrate and the High Court under appeal should be declared erroneous and held unsustainable. The State ought to have been granted leave under Section 378(3) CrPC and the High Court was wrong in declining to grant leave to the State. However, while setting aside the order of acquittal in each case and convicting the respondents for the offence with which they were charged we do not pass any order of punishment on the respondents on account of the fact that more than fifteen years have gone by since they were acquitted by the trial Magistrate. The learned counsel for the appellant State was more interested in having the correct position of law set out than in securing punishment orders for the respondents in the two appeals for the offence committed by them. Therefore, while allowing the appeals and declaring that the trial Magistrate and the High Court were wrong in the view taken by them of the Fertilizer (Movement Control) Order read with Sections 3 and 7 of the Essential Commodities Act, we are not awarding any punishment to the respondents for the commission of the aforesaid offence.

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