PITCHCHEI AND ANOTHER

v.

COLLECTOR OF CUSTOMS

COURT OF APPEAL
B.E. DE SILVA, J., AND ABEYWARDENA, J.
S.C. 245 - 246/77 - M.C. MANNAR, 3883.
NOVEMBER 7, 1983.

Criminal Law – Attempt to commit an offence – What constitutes an attempt.

The two accused-appellants and another were charged in the Magistrate's Court with having been concerned in attempting to export or take out of Sri Lanka goods, the exportation of which is restricted, in contravention of section 12 of the Customs Ordinance read with section 22 (1) (e) of the Exchange Control Act. After trial, both accused-appellants were found guilty and sentenced. The co-accused was acquitted. The accused-appellants appealed to the Court of Appeal against this conviction and sentence.

Held

Mere preparation for the intended crime antecedent to the actual commencement of the crime itself does not amount, in law, to an attempt to commit it. There should be a physical act which helps in a sufficiently 'proximate' degree to carry out the crime that has been contemplated. There must be a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so.

Cases referred to

(1) *D.P.P. v. Stonehouse, 1977 (3) The Law Weekly Reports, 143.*

(2) *Regina v. Engleton, (1855) Dears 515, 538.*

APPEAL from a conviction of the Magistrate's Court, Mannar.

V.S.A. Pullenayagam with *Miss M. Kanapathipillai* and *Miss Deepali Wijesundera* for the accused-appellants.

Nihara, E. Rodrigo, State Counsel, for Attorney-General.

Cur. adv vult.

January 10, 1984.

ABEYWARDENA, J.

The two accused-appellants together with one Mustapha Seenimdar Hadja were charged in the Magistrate's Court of Mannar and the charge against them was that on or about the 22nd of

August, 1975, they were concerned in attempting to export or take out of Sri Lanka goods, the exportation of which is restricted, to wit, five pieces of gold weighing twenty five and a half sovereigns valued at Rs.10,200/- in contravention of section 12 of the Customs Ordinance (Chapter 235) read with section 22 (1) (*e*) of the Exchange Control Act, and in terms of section 130 of the Customs Ordinance the first accused-appellant became liable to forfeit treble the value of the said goods, viz. Rs.30,600/- and the second accused-appellant became liable to a penalty of Rs.2,000/- and they thereby were guilty of an offence punishable under section 146 of the Customs Ordinance, as amended by Customs (Amendment) Law, No. 35 of 1974.

The learned Magistrate, after trial, found both the 1st and 2nd accused-appellants guilty of the charge and acquitted the co-accused. The first accused-appellant was sentenced to two years' rigorous imprisonment and the second accused-appellant was sentenced to two years' rigorous imprisonment suspended for a period of five years. It is against the conviction and the sentence that the two accused-appellants have appealed.

The first accused-appellant was a Serange of Labourers belonging to the Talaimannar Port Central Service Co-operative Society. The second accused-appellant was a cook for the officers of the Indian ship, SS. Ramanujam which was docked in the Talaimannar pier.

The case for the prosecution was that the first accused-appellant, on 22.8.1975 was going around inside the ship at 9 a.m. On that day and at that time the officers and the crew of the ship were not working as the inward passengers had already been cleared and the outward passenger's work had not been undertaken and the first accused-appellant had no authority to go on board the ship at that time. The first accused-appellant has gone to the ship's galley, which is the kitchen of the ship and dropped a parcel which fell on the cutlery, thereby causing a metalic sound. When this happened, two other cooks, Shanmugam and Subramaniam (who were both witnesses for the prosecution) were near about the kitchen. They had seen the first accused-appellant walking out of the ship's galley and the second accused-appellant removed the parcel from where the cutlery was and kept it aside and covered it with a canvas cloth. Shanmugam who saw this, took the parcel himself and, according to instructions regarding anything

found in the ship, handed over the parcel to the Captain of the ship who referred the matter to the Customs authority for inquiry. The parcel contained the amount of gold as stated in the Charge Sheet and the Government Analyst reported that the parcel contained gold. The Customs, after inquiry, found the two accused-appellants and one Hajah guilty and imposed the penalty on them in addition to the forfeiture of the gold. The first accused-appellant was ordered to pay Rs.30,600/-, the equivalent of three times the value of the gold found in the parcel, and the second accused-appellant was ordered to pay Rs. 2,000/-. As these payments were not made by the two accused-appellants, the Collector of Customs, Mannar District, filed the case against them in the Magistrate's Court of Mannar. Learned Counsel who appeared for the accused-appellants made no submissions regarding the facts dealing with the evidence led in the case. The learned Magistrate has very carefully analysed the entire evidence led in the case and has arrived at the finding that :

(1) The parcel consisted of twenty five and a half Sovereigns of gold valued at Rs. 10,200/-.

(2) He rejected the evidence of the first accused-appellant that he was nowhere about the ship on that day and at that time, and rejected his alibi and stated that he believed beyond reasonable doubt the evidence of Subramaniam and that of Hadja, who testified to the presence of the first accused-appellant at that time in the ship.

(3) He rejected the evidence of the second accused-appellant that he never removed the parcel and placed it elsewhere and covered it with a canvas cloth and has accepted the evidence of Shanmugam, beyond reasonable doubt, regarding the part played by the second accused-appellant.

Learned Counsel for the accused-appellants submitted that the charge against the accused-appellants was that they were "concerned in attempting to export or take out of Sri Lanka ". He submitted that conceding the entire evidence led in the case against the accused, that the charge of attempting to commit the act with which they were charged, has not been proved according to law, that acts that are preparatory to the commission of the offence does not constitute an attempt to commit the offence. Learned Counsel for the accused-appellants cited the House of

Lords case of The *D. P. P. v. Stonehouse* (1) and more particularly the judgment of Lord Diplock wherein the case of *Regina v. Engleton* (2) has been cited by His Lordship, viz. " The mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are ". Lord Pollock has very aptly stated thus, that in order to commit the offence of attempt, "the offender must have crossed the Rubicon and burnt his boats ".

It is very clear that to commit the offence of an attempt to commit a crime, mere preparation for the intended crime antecedent to the actual commencement of the crime itself does not amount, in law, to an attempt to commit it. There should be a physical act which helps in a sufficiently " proximate " degree to carry out the crime that has been contemplated. There must be a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so. In the instant case the evidence against the accused-appellants were circumstantial in nature. The presence of the first accused-appellant in the galley of the ship at a time when he had no authority to do so, at which time a metallic sound was heard, which sound was caused by a parcel falling on the cutlery, whereupon the first accused-appellant left the galley and the act of the second-appellant in taking it and keeping it in another place covered with a canvas cloth was indeed the final and proximate act that had to be done to export or take out of Sri Lanka the gold that was in that parcel. There was no further act that was needed to be done since the gold was placed in a ship docked in a pier of Sri Lanka and this ship was due to leave the shores of Sri Lanka for India shortly carrying with it the parcel so dropped into the galley of the ship. When the first accused-appellant threw it there, according to the dictum of Lord Pollock, he had already ' crossed the Rubicon and already burnt the boats' so far as his act to commit the offence was concerned. The first accused-appellant was involuntarily prevented from accomplishing what he had contemplated due to the metallic sound caused which resulted in the detection. The second accused-appellant covered it up to keep it in safe custody in the ship till it left the shores of Sri Lanka.

For these reasons we are unable to agree with the submissions made by the learned Counsel for the accused-appellants and we affirm the convictions and sentences passed on the first and 2nd accused-appellants by the learned Magistrate and dismiss their appeals.

B. E. DE SILVA, J.–I agree.

Appeals dismissed.