

MOHAMED SHUMS AND ANOTHER
v,
ATTORNEY-GENERAL

SUPREME COURT
WANASUNDERA, J., VICTOR PERERA, J., AND COLIN-THOMÉ, J.
S.C.43/81.
C.A. 631/75(F).
D.C. - COLOMBO 2796/Z
JULY 7, 1982.

Customs Ordinance, sections 44, 57, 125 and 130 - Seizure of goods in exporters stores - Goods marked and labelled for export - What constitutes an attempt.

The plaintiffs who are exporters of Ceylon Produce obtained a licence from the Controller of Exports to export 50 long tons of mixed sesame seed.

The plaintiffs had informed the Customs authorities in the specification form that they intended to export the goods in 800 bags carrying the full weight of 112,000 lbs. Therefore each of the 800 bags had to carry 140 lbs. of sesame seed.

On 16.2.73 the plaintiffs despatched to the Wharf 400 bags of sesame seed which were put on board a vessel.

On 19.2.73 the plaintiffs despatched 160 bags of sesame seed. At the gates it was discovered by Customs Officers that the bags contained 168 lbs. each and not 140 lbs. The bags already on board were also found to contain 168 lbs. each. Thus as a result there were in the Port 560 bags carrying 94080 lbs. of sesame seed. The Customs Officers suspecting that the plaintiffs were planning to export more than the permitted amount raided the stores of the plaintiff and took into custody 110 bags of sesame seed marked 168 lbs. and labelled "Noor Singapore". Taking these bags into account the total weight of mixed sesame seed was 112,560 lbs. Consequent to this seizure the plaintiff was sent a letter by the Principal Collector of Customs on 21.2.73 requesting him "to show cause why he should not be dealt with for being concerned in attempting to export or take out of Sri Lanka restricted goods in contravention of the Customs Ordinance read with the Exchange Control Act."

After the inquiry the plaintiff was fined Rs. 41,463.29 and the goods were forfeited. On appeal to the Principal Collector the forfeiture was mitigated and fine the reduced. The District Court and Court of Appeal held against the plaintiff. The plaintiff appealed to the Supreme Court.

Held -

Having regard to all the circumstances of the case there was a serious doubt whether it would be desirable and safe to regard the facts as constituting an attempt.

Case referred to:

(1) *Attorney-General v. Nagamany* 40 C.L.W. 86.

APPEAL from judgment of the Court of Appeal.

S.C. *Crossette Thambiah* with *K. Thevarajah* for the plaintiffs-appellants.

Suri Ratnapala, State Counsel, for the defendant-respondent.

Cur. adv. vult.

August 9, 1982.

VICTOR PERERA, J.

This is an appeal from the judgment of the Court of Appeal dated 12th May 1981 dismissing an appeal from the judgment and decree entered by the District Court of Colombo. The plaintiffs-appellants had obtained a licence to export 50 long tons of mixed sesame seed

from the Controller of Imports and Exports and they had taken 560 bags containing 94080 lbs. to the Wharf for shipment. In February 1973 the Principal Collector of Customs had made order forfeiting the said goods as well as a further 110 bags containing 18480 lbs. which had been in the Stores of the plaintiffs-appellants and also a sum of Rs. 25,000/-. The plaintiffs-appellants having furnished the necessary security filed this action on 18th April 1973 against the Attorney-General for a declaration that they were entitled to the said goods and to have the forfeiture annulled. The District Judge by his judgment dated 30th October 1975 held that the plaintiffs-appellants had attempted to export 560 lbs, in excess of the 50 long tons authorised and dismissed the plaintiffs-appellants' action with costs. The Court of Appeal holding that the plaintiffs-appellants had not given a satisfactory explanation to the Collector of Customs in terms of Section 57 of the Customs Ordinance, dismissed the appeal with costs.

Before dealing with the matters that have been urged before us at the hearing of this appeal, it will be necessary to set out the facts which had admittedly been established in this case in order to decide whether sections 44, 57 and 130 of the Customs Ordinance (Chap.235) have been correctly considered and applied.

The plaintiffs-appellants were exporters of Ceylon Produce carrying on business under the name, style and firm of "Westway Trades and Industries". They had contracted with Messrs Nomanbhoy & Sons, Singapore, to export 50 long tons or 112000 lbs. of white and black mixed sesame seed and had obtained a letter of credit dated 5.1.73 for the full value thereof (P1). Thereafter they made an application for a licence in terms of the Imports and Exports (Control) Act No. 1 of 1969 on 12.3.73 (P6) and obtained the same. In that application, the goods were correctly described as mixed white and black sesame seed, the quantity was stated to be 50 long tons and the F.O.B. value was stated to be Rs.82,515/80. The column 12 in regard to the number of packages was left blank. In the form P2 column 16 which had to be completed by the Exporter before the shipment, the number of packages was stated to be 800 bags. Column 17 in P2 had to be completed by the Customs Officer after shipment. This column has been left incomplete. The Export Entry document P3 is dated 15.2.73. In it had been entered the name of the Vessel in which sesame seed were to be exported as the 'Maldive Exporters', the description of goods is given as 800 bags of mixed sesame seed, stated to be duty free and total quantity is given as 50 long tons or 112,000 lbs.

In the Specification Form dated 15.2.73 (P3) the plaintiffs-appellants had informed the Principal Collector of Customs that they intended to export the goods in 800 bags of seed for the full weight of 112,000 lbs. and for the value of Rs. 82515/80. These two documents, the Export Entry Form and the Specification Form had been filled up on 15.2.73 before the goods for export had been actually brought into the Wharf. Therefore it is clear that the appellants had intended to have the full consignment in 800 bags and in that event each bag if filled equally would have contained 140 lbs. In point of fact it was only on the 16.2.73 that the plaintiffs-appellants had despatched 400 bags in five lorries supported by Cart Chits P8 - P12 to the Wharf. These chits have been signed and sealed by the Customs. These bags had been permitted to be put on board the Vessel. On 19.2.73 the plaintiffs-appellants had despatched 160 bags in two lorries supported by Cart Chits P13 - P18 also to the Wharf. On 19.2.73 a Customs Officer had examined the bags which were being transported to the Wharf on that day at the gate and he had noticed that the nett weight of each bag was marked 168 lbs. The bags on board the ship too were examined thereafter and these bags too had each marked 168 lbs. The plaintiffs-appellants had so far sent only 560 bags, but the total weight had not exceeded 50 long tons or 112,000 lbs, it was actually 94080 lbs.

Acting on that basis that each bag should contain 140 lbs, even before the rest of the consignment sufficient to complete the 112,000 lbs was brought into the Wharf or even attempted to be brought in, the Customs Officers seized the bags on board and in the Wharf. They then proceeded to the Stores of the plaintiffs-appellants at Old Moor Street, Colombo, which it was conceded were quite a distance away from the Customs Warehouse. The witness A. K. Nagam, Asst. Preventive Officer who gave evidence for the defendant-respondent stated that he went to the plaintiffs-appellants' Stores at 7.15 p.m. on 19.2.73 for two reasons, one to see if the 1st plaintiff-appellant was there and secondly to see if there were bags with sesame seed there. As the place was closed he placed a guard and went back. He returned at 8 a.m. on the following day with two other officers. But before he went to the Stores he went to meet the 1st plaintiff-appellant at his residence at Stace Road, Colombo, and accompanied the 1st plaintiff-appellant to the Stores at Old Moor Street, Colombo. He found a whole heap of sesame seed on the ground and there were several bags containing sesame seed, actually 161 bags in all, stacked on some planks one over the other. Of the

161 bags, 110 bags were marked 168 lbs and labelled "Noor Singapore" and the 51 bags contained 144 lbs white sesame seed but had not been labelled. All the 161 bags were removed to the Customs Office and thereafter 51 bags containing white sesame seed were returned as they contained no label. Thereafter inquiries proceeded in regard to an alleged violation of the conditions of the permit as each of the 560 bags brought into the Wharf by the plaintiffs-appellants and the 110 bags brought into the Wharf by the Customs Officers contained 168 lbs making a total of 112,560 lbs, 560 lbs more than the amount allowed to be exported.

On 21.2.73 the Principal Collector of Customs sent a letter (P19) to the plaintiffs-appellants in the following terms:-

"You are requested to show cause as to why you should not be dealt with for being concerned in *attempting to export* or *take out* of Sri Lanka restricted goods to wit, Tons 8-7-2-00 (approximately) of sesame seed valued at Rs. 13,821/43 cts. in contravention of Sections 44, 57, 125 and 130 of the Customs Ordinance (Chap.235) read with Exchange Control Act."

An inquiry was held on the 21st and 22nd February, 1973, and on 24. 2. 73 the letter P20 was sent to the plaintiffs-appellants as follows:-

"Attempted export of 670 bags
sesame seed ex. "Maldiva Exporters"

Reference the inquiry held by me on the 21st and 22nd of February 1973, in the abovementioned case, I have to inform you that the following, viz.

670 bags sesame seed,
Lorry No.CY 7211,
Lorry No.22 Sri 493

are declared forfeit in terms of Sections 44, 57 and 125 of the Customs Ordinance, Chap.235.

I also elect that you further forfeit a sum of Rupees Forty One Thousand Four Hundred and Sixty Four and Cents Twenty Nine (Rs.41,464/29) *being treble the value of the excess quantity* (viz.Tons 8-7-2-00 approximately) of sesame seed in terms of section 130 of the Customs Ordinance, Chap.235.

You are requested to remit this sum within two weeks from the date of receipt of this letter."

The plaintiffs-appellants by a letter dated 27th February 1973 (P21) made representations against this order to the Principal Collector of Customs in which they stated that "they were at all times ready and willing to make the necessary corrections in the Bill of Entry". In response to their appeal they received a letter dated 15.3.73 that the forfeiture of the lorries was mitigated to a payment of Rs. 1000/- for each lorry and the sum of Rs.41,464/29 was mitigated to a sum of Rs. 25,000/-.

According to the proved facts on 19.2.73 the stage contemplated in section 57 of the Customs Ordinance had not been reached, when the Customs Officers sought to initiate action against the plaintiffs-appellants. On a careful analysis of the provisions of section 57, there is a chain of events following one after another. A person exporting goods shall deliver a Bill of Entry of such goods on a specified form giving all the necessary particulars required therein to the Collector of Customs. If such a Bill is not delivered, the exporter is liable to a penalty of Rs. 50/-. After the payment of any dues or duties, the exporter shall deliver two or more copies of such Bill. The Bill of Entry shall be *signed by the Collector of Customs* or the person authorised by him to do so.

It is only after the Bill is so signed that it operates as a warrant to the proper officer *for the examination and delivery* of such goods for shipment. If the goods do not agree with the particulars in the Bill of Entry the Collector of Customs could then call for an explanation. In the absence of an explanation to the satisfaction of the Collector of Customs, the goods shall be forfeited under section 57. Section 58 provides that the Collector of Customs on an application made to him, could permit the exportation of the goods prior to the presentation of the Bill of Entry without affecting the penalties the exporter would have become liable to for any misdescription or undervaluation in the application. The mandate for the examination and delivery of the goods obviously could operate only after the goods are brought into the Wharf by the exporter on his own and before the shipment.

In the instant case the Bill of Entry (P3) dated 15.2.73 was prepared in anticipation of the packaging and transport to the Wharf. A part of the consignment of goods was taken to the Wharf on the 15th February 1973 and a further consignment was taken on the 19th February 1973. But before the plaintiffs-appellants attempted to do or did anything further to bring to the Wharf any further goods

from their stores if they had intended to have these too exported in this Vessel the Customs Officers transported and brought into the Wharf 161 bags. This latter exercise was not a voluntary act of the plaintiffs-appellants. It is therefore clear the plaintiffs-appellants had not attempted even to transport the 161 bags or additional 110 bags seized even if they had planned or intended to have them included in that consignment for export. To my mind the Customs Officers in their enthusiasm had rushed to procure whatever sesame seeds that were in bags in the plaintiffs-appellants' stores on suspicion before the plaintiffs-appellants had time to act in any particular way they may have contemplated. Clearly this action of the Customs Officers was not warranted by section 57 of the Customs Ordinance or even if warranted was premature and no imputation could be made of a guilty intention on the part of the plaintiffs-appellants.

The Attorney-General also relied on section 44 of the Customs Ordinance which reads as follows:

"If any person exports or attempts to export or take out of Ceylon any goods enumerated in the table of prohibitions and restrictions in the Schedule B, in contravention of the prohibitions and restrictions contained in such table in respect thereof, such goods shall be forfeited and shall be destroyed or disposed of as the Principal Collector of Customs may direct."

This section clearly deals with a person who exports or attempts to export goods the exportation of which are prohibited or are restricted. The sesame seeds do not come within the exports prohibited in Schedule B but would come within the terms of goods the exportation of which are restricted in that a licence had to be obtained from the Controller of Imports and Exports. The word 'export' has been held to mean 'carried out of the Port' (in the case of *Attorney General v. Nagamany* (1)). An 'attempt to export' must therefore also mean an attempt to take the goods out of the Port. In this case there has been no such attempt at least in the case of the 110 bags which were discovered stacked away in the plaintiffs-appellants' Stores and which were not even in the process of being transported to the Port. As remarked by Gratiaen, J. in the said case, "the Customs Official is concerned on such occasion only with the fact of exportation, and he need not seek to probe the dark and mysterious workings of a smuggler's mind". It is relevant to note that in the Imports and Exports (Control) Act, Chap.236, which was enacted

to be read and construed with the Customs Ordinance (Section 5) the word 'exportation' was defined as follows:

“ 'exportation' with its grammatical variations and cognate expressions, means the carrying and taking out of Ceylon or causing to be carried or taken out of Ceylon, whether by sea or by air.”

As regards what is an 'attempt', the courts have not yet succeeded in formulating an abstract test that is entirely satisfactory and which could distinguish with precision a preparation from an attempt. The principles laid down in the older cases are being questioned in the more recent cases and it is still early to say which of the many theories referred to in these judgments would ultimately prevail. Coming back to the instant case, the Customs authorities, upon a search of the plaintiffs-appellants' private store, discovered 110 bags of mixed sesame seed bearing the export marks, 61 bags of white sesame seed bearing no marks and a large quantity of sesame seed in a heap. State Counsel stated categorically that he was making no suggestion that apart from the technical violation involved (an excess of 560 lbs in a shipment of 112,000 lbs) there was any devious plan to effect some large scale fraud or deception. The effect of the plaintiff's admission to which undue weight appears to have been given, was that the 110 bags too would have been despatched in the normal course. As to whether the matter stood at the stage of a preparation or had ripened into the stage of attempt is not an easy question to answer. This is undoubtedly a marginal case. However, having regard to all the circumstances, balancing both the rights of the citizen and the rights of the State, I entertain a serious doubt whether it would be desirable and safe to regard the facts of this case as constituting an attempt.

I accordingly set aside the judgment of the Court of Appeal and of the District Court and direct that judgment be entered for the plaintiffs-appellants without costs.

WANASUNDERA, J. — I agree.

COLIN-THOMÉ, J. — I agree.

Appeal allowed.