A DEVCHAND KALYAN TANDEL

v.

STATE OF GUJARAT AND ANR.

AUGUST 8, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Customs Act, 1962 : Sections 11-K, 135 and 138-A.

Accused—Carrying silver ingots in a car without transport voucher—
C *Seizure made in a specified area notified under section 11-K—Accused not discharging their burden to prove that they were not aware of ingots being transported—Courts below concurrently finding that offence against the accused person was proved—Held their conviction and sentence was valid—Courts below were justified in taking recourse to statutory presumption under Section 138-A—Object of presumption explained.*

D

Constitution of India, 1950 : Article 136.

Supreme Court—Power to interfere with finding of fact and to re-appreciate evidence.

E

Sentencing—Economic offences—Courts should not take lenient view.

Appellants D and J were prosecuted under section 135(1) of the Customs Act, 1962. The charge against them was that they were carrying 10 silver ingots without any transport voucher within the specified area
F **notified under section 11K of the Act. The prosecution case was that on the day of occurrence a vigilance squad of the Customs Department intercepted a fiat car, in which D was one of the occupents, at Bhilad Customs Check post. As nothing objectionable was found on search the vehicle was allowed to pass. After sometime the other group of the vigilance**
G **squad signaled ambassador car coming from Sanjan to stop but it disregarded the same and proceeded straight. The vigilance party chased the car and apprehended it. On search 10 silver ingots were recovered from a secret cabinet in the hind portion of the car. D who had earlier passed through the customs check post in the fiat car was found in the ambassador car J admitted to have purchased the silver ingots but took the plea**
H **that he had sold the same to his brothers and therefore, he had no role in**

the transportation of silver ingots by the offending ambassador car. D took the plea that due to breakdown of his fiat car he had taken left in the ambassador car and had, therefore, no knowledge of silver ingots being transported in the ambassador car.

Rejecting the plea of the accused persons the Trial Court convicted and sentenced them. On appeal the High Court enhanced their sentence. Both the trial court as well as High Court relied upon the statutory presumption under section 138-A of the Act and held that the accused failed to discharge the necessary burden of proof. The High Court also recorded a finding that the evidence on record had clearly established J's link with the 10 silver ingots as he was the last purchaser and therefore, the seized ingots belonged to him.

In appeal to this Court it was contended on behalf of the appellants that (i) the courts below have committed serious error in disbelieving the defence plea of D as well as in raising the presumption under section 138-A of the Act; (ii) in view of the fact that sufficient time had elapsed between the date of occurrence and the judgment and that the appellants had spent about 18 months in custody their sentence should be reduced to the period already undergone.

Dismissing the appeals, this Court

HELD : 1. This Court usually does not reappreciate the evidence and in this case no justifiable reasons have been advanced for taking a different path. The two courts below have appreciated the evidence on record and have rejected the defence plea of D that his fiat car broke down and so he was taking a left in the ambassador car and as such he was not aware of the transportation of silver ingots therein. The said plea of D has rightly been rejected. There has neither been any perversity in the matter of appreciation of evidence nor any important piece of evidence has been ignored by the courts below. [389-C-E]

2. It is no doubt true that in a charge for violation of the provisions of Section 135(1)(a) it is required for the prosecution to establish that the accused have fradulently evaded or attempted to evade any duty chargeable on the goods or violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under section

A 138-A and without such presumption an accused can be convicted under section 135(1)(a). The main object of section 138-A is to raise a presumption as to culpable mental state on the part of the accused when he is prosecuted in the court of law. If a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was knowingly concerned in the fradulent evasion
B or attempted evasion of any duty chargeable on the goods in question.

[390-D-G]

3. The circumstances of the case unhesitatingly point towards the complicity of the accused D in the commission of offence under section
C 135(1). In the proved facts and circumstances the courts below were justified in taking recourse to the statutory presumption under section 138-A of the Act. The burden lay on the accused to establish that either he did not know about the fact of silver ingots being transported in the vehicle or that he was in no way connected with the same. But D has utterly failed to discharge the said burden. His conviction was well founded and sentence
D imposed justified. [391-C-E]

Bhanabhai Khalpabhai v. *Collector of Customs and Anr.*, [1994] Supp. 2 SCC 143, referred to.

E 4. It has been proved beyond reasonable doubt that J was the last purchaser of seized silver ingots. His plea that he sold the same to his brothers has not been accepted by the courts below. The two courts below have affirmed that he was the owner of the seized silver ingots which was meant for transportation and illegal export and he was involved in commit-
F ting the offence in question. There is no reason warranting interference.

[392-C-D]

5. Though sufficient time has elapsed between the date of occurrence and the date of judgment and further the accused persons have served their sentence for a major part but yet in such economic offences the courts
G should not take any lenient view. Smuggling has got serious deleterious affect on legitimate trade. Taxation Enquiry Commission had suggested that stringent measures, both legal and administrative, should be adopted to minimise the scope of the evil. Question of taking a lenient view of the matter, therefore, does not arise. Any leniency in economic offences will
H send a wrong signal. [391-E-H; 392-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 812 of 1996 Etc. A

From the Judgment and Order dated 10.8.92 of the Gujarat High Court in Crl.A. No. 734, 829-31/82 and Crl.R.A. No. 371 of 1982.

K. Madhava Reddy and Ms. Lata Krishnamurthy for the Appellant. B

K.T.S. Tulsi Additional Solicitor General, V.K. Verma, Y.P. Mahajan, Vikas Pahwa and B.N. Babu Chava for the Respondents.

The Judgment of the Court was delivered by

C

PATTANAIK, J. Leave granted.

Both these appeals arise out of the same judgment of the Additional Chief Judicial Magistrate, Valsad dated 7th of May, 1982 in Criminal Case No. 60 of 1980 and therefore heard together and are being disposed of by this common judgment. D

On the basis of a complaint filed by the customs authorities both these appellants stood charged of having committed the offences under Section 135(1)(a) of the Customs Act (hereinafter referred to as 'the Act') on the allegation that on the date of occurrence they were found to be carrying silver without any transport voucher within the specified area E which is duly notified under Section 11-K of the Act. The appellants denied their complicity and pleaded not guilty. The learned Additional Chief Judicial Magistrate convicted the appellants under Section 135 of the Act and sentenced them to undergo six months rigorous imprisonment and to pay a fine of Rs. 4,000, in default, undergo further rigorous imprisonment F of three months. Against the aforesaid conviction and sentence of the learned Additional Chief Judicial Magistrate the appellants preferred appeals to the court of Sessions and the State also preferred appeal for enhancement of sentence in the High Court. The customs authorities who were the complainant also invoked the revisional jurisdiction of the High Court being aggrieved by the inadequacy of the sentence. After admission G of the State's appeal in the High Court, the appeals preferred by the accused - appellants were ordered to be transferred and accordingly all the appeals and revision were heard together and were disposed of by common judgment. The High Court dismissed the appeals filed by the accused - appellants and allowed the State's appeals and enhanced the sentence of H

A rigorous imprisonment to two years and fine of Rs. 4,000 so far as accused No. 2 is concerned and enhanced the sentence of rigorous imprisonment for two years and fine of Rs. 40,000 and in default further rigorous imprisonment for three months so far as accused No. 3 is concerned. Thus the present appeals by special leave.

B

The prosecution case in nutshell is that the customs authorities had received secret information that certain contraband goods were likely to pass through the National Highway No. 8. The authorities, therefore, kept watch during the early hours of 5th August, 1973 around the Bhilad Customs Check Post. At about 8.30 a.m. a fiat car bearing R.T.O. Registra-
C tion No. GJN 5953 came from Vapi side and proceeded towards Bombay side. The car was intercepted by the vigilance squad of the Customs department but nothing objectionable was found therefrom. The vehicle was allowed to pass. The appellant - Devchand Kalyan Tandel, who was accused No. 2, was one of the occupants in the said fiat cat. The customs
D authorities thereafter suspected some foul play and then divided themselves in two groups, one group was sent on the way to Umbergaon and the other group was sent on the way to Sarigam. The further prosecution case is that while the second group was on its vigil, an ambassador car was found coming from Sanjan. When the vehicle was signaled to stop, it ignored the signal and proceeded straight towards Bhilad railway station and from
E there it took turn towards the underground bridge. The vigilance party chased the said car and when they found that the car is about to reach the National Highway, they took resort to firing and on hearing the sound of firing, the car stopped. The said ambassador car bore RTO Registration No. MRH 5042. The car was brought to the customs office at Bulsar and
F in presence of two witnesses a search was conducted. On search, ten silver ingots worth more than Rs. 1,90,000, weighing 293.300 kilograms were recovered from a secret cabinet in the hind portion of the car. Appellant - Devchand and the other accused who is not an appellant namely Ishwarbahi Gopalbhai Tandel were found to be in the car made their statements under Section 108 of the Act. After completion of investigation a complaint
G was filed in the Court of learned Additional Chief Judicial Magistrate, Valsad which was registered as Criminal Case No. 60 of 1980. The accused - appellants stood charged under Section 135(1) of the Act. The accused persons pleaded not guilty of the charge and were accordingly tried. After the prosecution led evidence to establish the charge against the accused -
H appellants, the witnesses were cross-examined by the accused persons. The

statements of the accused persons were also recorded under Section 313 of the Cr.P.C. and accused No. 2 appellant - Devchand also examined witnesses in defence. The plea of appellant - Devchand is that while he was proceeding in the fiat car after crossing the customs check post, the car had a break down and he was therefore looking for a lift, so that, he can get a mechanic and at that point of time an ambassador car was found coming, he, therefore, raised his hand requiring the car to stop and the accused No. 1 who was driving the ambassador car stopped the same and gave lift and accordingly he did not know about the alleged transportation of silver ingots in the secret chamber of the ambassador car. Accused No. 3 though admitted to have purchased the silver ingots from one Pratapsingh Dhorda of Pratap and Company but he took the plea that he had sold the same to his brothers and therefore he has no role in the transportation of the silver ingots by the offending ambassador car. The learned trying Magistrate on consideration of oral and documentary evidence led before him discarded the plea of the accused persons and came to hold that the prosecution has been able to establish the charge beyond reasonable doubt, accordingly he convicted the accused - appellants and sentenced them as already stated. The High Court reconsidered the entire evidence and by the impugned judgment affirmed the conviction passed by learned trying Magistrate and enhanced the sentence as already stated. Both the trying Magistrate as well as the High Court not only relied upon the evidence led by the prosecution but also relied upon the statutory presumption under Section 138 A of the Act and held that the accused failed to discharge the burden which lay on them.

Mr. K. Madhava Reddy, learned senior counsel appearing for the appellants raised the following contentions in assailing the conviction and sentence :

(1) On the facts and circumstances of the case the learned trying Magistrate as well as the High Court committed serious error in disbelieving the plea of appellant - Devchand that his fiat car has a break down and he has taken lift in the ambassador car and he had no knowledge of silver ingots being transported in the ambassador car.

(2) The two courts below committed gross error of law in raising the presumption available under Section 138-A of the Act. No presumption can be raised unless the prosecution establishes minimum ingredients of

A offence under Section 135(1). consequently the judgments of the courts below are wholly unsustainable in law.

(3) In any view of the matter, appellant - Devchand having already been in custody for about 15 months and appellant - Jayantilal being in custody for about 18 months and the occurrence in question being of the B year 1980, it will not be just and proper to order for surrender to serve the balance period of sentence and therefore the courts should sentence to the period already undergone.

Mr. K.T.S. Tulsi, learned Additional Solicitor General on the other C hand contended that finding it difficult to check the large scale smuggling as well as violation of the provisions of the Foreign Exchange Regulation Act, the Parliament introduced Section 138A of the Customs Act by Act 36 of 1973. While construing the provisions of the Act the court should bear in mind the legislative intent of the provision and in cases of economic D offences the provisions should be construed strictly. It is further contended that the facts and circumstances as found by the High Court irresistibly point towards the guilt of the accused and this Court should not interfere with the conviction and sentences passed by the High Court. It is further urged that in any view of the matter it would not be appropriate for this Court to reappreciate the evidence on record.

E

Before examining the rival contentions at the Bar it would be appropriate to notice certain undisputed facts as well as the finding arrived at by the High Court. The undisputed facts are that the Central Government had issued the Notification under Section 11 K of the Act prohibiting F transport of silver within the specified area unless accompanied by transport voucher and the place were the ambassador car was stopped and silver ingots recovered from the said ambassador car was within the specified area. Appellant - Devchand was one of the occupants of the said car. Said appellant - Devchand earlier had passed through the customs check post in the fiat car and shortly thereafter when the ambassador car G was intercepted he was found accompanying therein. Apart from the aforesaid undisputed facts the High Court on appreciation of evidence further found that the version of accused Devchand that the fiat car had a break down near Sanjan looks more fictitious than real and this version had rightly been rejected by learned trying Magistrate. The High Court H also did not accept the defence of accused Devchand that he took a lift in

the ambassador car which was being driven by accused No. 1 in view of the inherent contradiction in the version given by both the accused persons. So far as appellant Jayantilal is concerned the High Court recorded the finding that the evidence on record has clearly established his link with the 10 silver ingots recovered from the ambassador car he was the last purchaser therefor and the prohibited goods recovered from the ambassador car on the 5th of August, 1973 belonged to the accused No. 3 which has been established at the trial.

We would now examine the contentions raised by the Mr. K. Madhava Reddy, learned senior counsel for the appellants. So far as the first contention of Mr. Reddy the learned senior counsel for the appellants is concerned, the same is in realm of appreciation of evidence and the two courts below have already appreciated the evidence on record and have rejected the defence plea of Devchand that his fiat car broke down and so he was taking a lift in the ambassador car and as such not aware of the transportation of silver ingots therein. We have scrutinised the judgments of the learned trying Magistrate as well as the High Court and we find no infirmity in either of them in the matter of appreciation of evidence. We are of the considered opinion that the said plea of appellant - Devchand has rightly been rejected. In our view there has neither been any perversity in the matter of appreciation of evidence nor any important piece of evidence has been ignored by the courts below. It is well settled that this Court usually does not reappreciate the evidence and no justifiable reasons have been advanced for taking a different path. Accordingly, the first contention of Mr. K. Madhava Reddy must be rejected.

So far as second contention of Mr. K. Madhava Reddy is concerned it depends upon an interpretation of the provisions of Section 138-A of the Act. For better appreciation of the point in issue Section 138-A is extracted hereinbelow in extenso :

> 138-A. *Presumption of culpable mental state.* - (1) In any prosecution for an 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.
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> Explanation - In this section, "culpable mental state" includes

A intention, motive, knowledge of a fact and belief in, or reason or 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
B preponderance of probability.

Mr. K. Madhava Reddy urged that before the presumption under section 130-A(1) is attracted the prosecution must establish the basic ingredients of the offence for which charge has been framed and in the
C case in hand, the necessary ingredients of section 135(1)(a) must be proved and then only the presumption under section 138-A can be attracted. According to Mr. Reddy this is apparent from sub-section (2) of section 138-A of the Act. On a scrutiny of provisions of the Act particularly Section 138-A thereof and the object for which the aforesaid provision was inserted
D into the statute by Act No. 36 of 1973 it is difficult for us to accept the contention of Mr. K. Madhava Reddy. It is no doubt true that in a charge for violation of the provisions of Section 135(1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted to evade any duty chargeable on the goods or that violated the prohibition imposed under the Act in respect of the goods. But if the
E prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under section 138A and without such presumption and accused can be convicted under section 135(1)(a). But the legislature having found it difficult to establish the necessary ingredients of such evasion of duty or prohibitions and the economic offences
F having grown in proportion beyond the control, came forward with the presumption available under section 138A of the Act. The main object of Section 138A is to raise a presumption as to culpable mental state on the part of the accused when he is prosecuted in a court of law. In other words, if a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was
G knowingly concerned in the fraudulent evasion or attempted evasion of any duty chargeable on the goods in question. In the case *Bhanabhai Khalpabhai* v. *Collector of Customs and Another,* [1994] Supp 2 SCC 143, this Court has held that in view of Section 138-A a presumption has to be drawn in respect of existence of the alleged mental state. An option has been given
H to the accused to prove by way of defence the fact, that he did not have

any such mental state with respect to the act charged which is an offence. The question, therefore, arises as to whether in the proved facts and circumstances the courts below were justified in taking recourse to the statutory presumption under section 138A of the Act. The answer must be in the affirmative. The fact that accused was found to be inside the vehicle from which the silver ingots were recovered; the fact that the vehicle did not stop even though customs authorities signaled for stopping; the fact that two courts below disbelieved the plea of accused - Devchand about the break down of his fiat car and he is taking a innocent lift by the ambassador car from the secret pocket of which the silver ingots were recovered; and that the place from where the recovery was made is undoubtedly a place within the notified area under Section 11K of the Act and further that there was no transport voucher as required under section 11K of the Act, unhesitatingly point towards the complicity of the accused - Devchand in the commission of offence under section 135(1) and the presumption under section 138-A having been rightly attracted. The burden lay on the accused - appellant to establish that either he did not know about the fact of silver ingots being transported in the vehicle or that he was no way connected with the same. But the accused - Devchand has utterly failed to discharge that said burden. In our considered opinion the conviction must be held to be well founded and the sentence passed thereunder is wholly justified.

So far as the third submission of Mr. K. Madhava Reddy is concerned it is no doubt true that sufficient time has elapsed between the date of occurrence and the date of judgment and further the accused persons have served their sentences for a major part but yet we do not think that in such economic offences the courts should take any lenient view in the matter. Smuggling has become a threat to the effective fulfilment of the objectives of foreign trade control. The extent of the leakage of revenue that takes through the process of tax evasion cannot be estimated. It has got serious deleterious effect on legitimate trade. Taxation Enquiry Commission had suggested that stringent measures both legal and administrative should be adopted to minimise the scope of the evil. For the purpose of achieving the desired objective Parliament came forward with insertion of Section 138-A into the statute book. Question of taking a lenient view of the matter, therefore, does not arise. In view of large scale smuggling activities in the border area and large scale evasion of duty the country has faced severe economic imbalance. Notwithstanding stringent legislation

A having been made it has not been possible to eradicate the evil. Any leniency therefore in economic offences will send a wrong signal. In this view of the matter, we are unable to accept the last contention of Mr. K. Madhava Reddy, the learned senior counsel for the appellants.

So far as Jayantilal is concerned the prosecution has been able to
B establish that the ten silver ingots hold mark of Narandas Manordas and accused Jayantilal had purchased the said silver ingots from the Refinery of Narandas Manordas. The accused admitted the aforesaid fact and it was proved beyond reasonable doubt that he was last purchaser of said silver ingots. His plea that he convered the ingots into pieces and sold the same
C to his Brothers under Exhibits 18 to 72 has not been accepted either by the trying Magistrate or by the High Court. On elaborate discussion of the evidence on record the two courts below have affirmed that accused No. 3 was the owner of the seized silver ingots which was meant for transportation and illegal export and he was involved in committing the offence in question. No convincing argument has been advanced on his behalf to
D interfere with the findings and conclusions arrived at by the courts below and consequently we do not find any case warranting interference by this Court has been made out.

In the net result, therefore, both the appeals are dismissed. The bail
E bonds stands cancelled. The appellants are directed to surrender forthwith to serve the balance period of sentence.

T.N.A. Appeal dismissed.