

IN THE COURT OF SPECIAL JUDGE (CUSTOMS, TAXATION & ANTI-SMUGGLING) KARACHI

BEFORE : Sadaf Asif
(Judge)

Case No. 44 of 2019

The State vs..... 1. Ali Akber s/o Mohammad Hanif
2. Kirishan s/o Banji Maisri

Crime No. M-2573/DCI/Seiz/2019

U/s 156(1) (8) & (89) of the Customs Act, 1969

Mr. Aqil Ahmed, advocate for the applicants/accused
Mr. Ashiq Ali Anwar Rana, Special Prosecutor for the State

ORDER
29-8-2019

1. This Court put learned Special Prosecutor on notice to verify whether there exist any notification of the Federal Government in respect of betel nuts under Section 2(s) of the Customs Act, 1969. The learned Special Prosecutor confirms that till this date though request had been sent but Federal Government has not issued any notification for betel nuts as notified item under Section 2(s). Now admittedly betel nuts are not listed in SRO 566(I)/2005 dated 6-6-2005 issued under Section 2(s) of the Customs Act, 1969 nor as a notified item specified therein.

2. The clause (s) of Section 2 of the Customs Act, 1969 refers only to goods specified therein and other goods notified by the Federal Government. It does not refer to goods the importation or exportation of which is prohibited elsewhere, which situation is governed by clause (9) of Section 156. If the goods are one not specified in this clause or notified by the Federal Government under this clause, notwithstanding that its export or import may be prohibited or restricted by any law, there cannot be any offence of smuggling in respect thereof. This is clear from clause (9) of Section 156 which makes an offence to import or export goods in violation of any prohibition or restriction on the importation or exportation of

clear that it will not include goods which come within clause (8) of Section 156 and, therefore, merely because importation or exportation of goods is prohibited by any law, it will not follow that its importation or exportation will amount to smuggling in absence of its inclusion under a Notification by the Federal Government under sub-clause (ii) of clause (s) of Section 2 of the Act. Clause (8) and (9) of Section 156 must run parallel for the goods covered by the former are excluded from the latter.

3. Before proceeding further on this point this Court will rely on the following dictas:-

4. In a case of *Abdur Rauf Khan vs Collector, Central Excise & Land Customs* reported in 1980 SCMR 114, it was held that Clauses (9) and (90) of S. 156 deal with goods of every description except smuggled goods for which special provision made in clauses (8) and (89) of S. 156. Words "any other law" in S. 156(9) referring to S.3 (1) . Imports and Exports (Control) Act, 1959 where under notifications dated 24th July, 1968 and 25th June 1973 issued prohibiting import of cars except under an import licence or permit and S. 3(3) , Imports and Exports (Control) Act, 1950 deeming all goods prohibited to be imported or exported under notifications to be goods import or export of which prohibited or restricted under S.16, Customs Act, 1969 action of Customs authorities justified". Vehicles were later on included in said Notification.

5. In a case of *Zafar Mahmood Paul vs The State* reported in 1981 P Cr.L.J. 66 Karachi, it was held that Offence of "Smuggling" as defined in 2(s) of Customs Act-can only be committed, if goods expressly mentioned in S. 2(s) or any other goods notified thereunder, brought in or taken out of Pakistan -Goods seized not falling within purview of Notification under S. 2(s) and person found in possession of such goods, held, could not be liable for "smuggling".

6. In a case of *Amanullah Khan Sindhoo vs Shabir Hussain S.H.O. Police Station Sutrah District Sialkot* reported in 1984 P Cr. L.J. 3096 (1) Lahore, it was held that "S. 561-A Customs Act (IV of 1969), Ss. 156(89), 156(1), clauses (9) & 2(s)

Federal Government under S.2(s) & (a) of Customs Act, at relevant time-Such arms and ammunitions, held, could not fall within mischief of "smuggling" Proceedings quashed, in circumstances".

"In this case legal point urged is that at the relevant time i.e. 2nd June, 1971 and 16th August, 1971 arms and ammunition were not a notified item hence such could not be filed in the Court of learned Special Judge Customs because he had no jurisdiction in the matter as such proceedings arising from alleged incident are coram-non-judice and suffer from serious illegality, which is a jurisdictional defect which is not curable in any provision of law including Section 537, Cr.P.C. Learned counsel for the applicant has cited case law in support of proposition advanced by him and quoted the case of Niaz Ahmad and others v State (1) in which Division Bench of this Court has held that mere fact of importation of exportation of certain goods being prohibited by law does not amount to smuggling for which such item must be specified in clause (9) of section 156(1) of the Customs Act, 1969 or it should be notified by the Federal Government under section 2(s) and (a) of the said Act. This point was raised in the High Court and in consequence proceedings before the trial Court were quashed on the ground that there was illegality. Second case is of Syed Shabbir Ahmed Shah v Pakistan (1). In this case car was not notified item and it was held that the same cannot be made subject of smuggling notwithstanding the fact that import thereof was prohibited under notification issued in exercise of powers conferred by section 3(1) of Import and Export (Control) Act. Third case is of Mrs. Hiam Tabbara v. Director-General, Pakistan Coast Guards (2). In this case motorcar was not a notified item at the relevant time under section 2(a) (s) of the Customs Act, 1969 although the same were prohibited under a notification issued in exercise of powers conferred by subsection (1) of section 3 of Imports and Exports (Control) Act. It was held that the same still not attracted within the mischief of smuggling. Another case cited on the same point is that of Zafar Mahmood Paul v. Stat (3). In view of case law cited above it has become crystal clear that when at the relevant time item was not notified as contemplated under the provision of Customs Act, the same cannot be said to have been attracted by the mischief of smuggling".

7. In a case of Mrs. Hiam Tabbara vs Director General, Pakistan Coast Guards, Karachi and other reported in PLD 1980 Karachi 44, it was held that " Ss 2, cl, (s) & 156(9) read with Imports and Exports (Control) Act (XXXIX of 1950), S. 3(1) "Smuggling" Motor cars Not a notified item under S. 2 (a) (s) Customs Act

import of cars having been prohibited under a notification issued in exercise of powers conferred by subsection (1) of S. 3 of Imports and Exports Control) Act, it fell within mischief of smuggling-Repelled and, held, not correct”

“To my mind clause (s) refers only to goods specified therein and other goods notified by the Federal Government. It does not refer to goods the importation or exportation of which is prohibited elsewhere, which situation is governed by clause (9) of section 156. If the goods are one not specified in this clause or notified by the Federal Government under this clause, notwithstanding that its export or import may be prohibited or restricted by any law, there cannot be any offence of smuggling in respect thereof. This is clear from clause (9) of section 156 which makes an offence to import or export goods in violation of any prohibition or restriction on the importation and exportation of such goods imposed by or under this Act or any other law. Clause (9) makes it clear that it will not include goods which come within clause (8) of section 156 and, therefore, merely because importation or exportation of goods is prohibited by any law, it will not follow that its importation or exportation will amount to smuggling in the absence of its inclusion under a notification by the Federal Government under sub-clause (a) of clause (s) of section 2 of the Act- Clauses (8) and (9) of section 156 must run parallel for the goods covered by the former are excluded from the latter. If these clauses are not so ready they will be destructive of each other. To give an example, if an import policy prohibits import of furniture, such import will be in contravention of law and if it is, as was argued by the learned Additional Advocate-General, punishable under clause (8) of section 156, it will make its clause (9) redundant. The law clearly contemplates two separate categories of goods, one under clause (s) of section 2 and the other goods the import or export of which is prohibited under any other law or for that matter under any other section of the Customs Act, and the offence of smuggling is limited to the former category. I am further fortified in this view by the fact that the Federal Government at a later stage deemed it necessary to notify charas as an additional item under said clause (s) of Section 2. Therefore, the fact that importation and exportation of charas is prohibited under the Dangerous Drugs Act, 1930 which will be deemed to be prohibited or restriction notified under section 16 of the Act, in absence of inclusion of charas as one of the items notified under clause (s) of section 2, there cannot be any smuggling of charas though of course it is an offence under clause (9) of Section 156”.

PLD 1979 Karachi 68, it was held that "Smuggling limited to goods specified in sub-clause (a) of cl. (8) or such goods as notified by Federal Government – Case not a notified item under S. 2(s) (a)- Held, case could not, therefore, be subject of smuggling notwithstanding the fact that import thereof prohibited under Notification issued in exercise of powers conferred by S. 3(1) Import and Export (Control) Act (XXXIX of 1950)"

9. In a case of The State vs Muhammad Irfan reported in 1987 P Cr.L.J. 325 Karachi. The accused had pleaded guilty & Court convicted the accused whereas V.C Rs. and cassettes were not specifically notified under S. 2 (s), however subsequent notification superseding earlier one mentioning V.C Rs. and cassettes, was issued. It was held that "Possession of seized goods not notified under S. 2(s) could not constitute offence under S. 156(1)(8)—**Charge, trial and conviction for possession of such goods would be unlawful and without any legal consequence—conviction and sentence set aside in circumstances**"

10. In view of the case laws cited above this court has no jurisdiction to try the accused found in possession of betel nuts which is not a notified item under 2(s) without valid import documents.

11. Before parting with this order, it is important to mention that mere taking of cognizance earlier does not confer any jurisdiction to this court if otherwise it does not exist. Further continuation of the proceeding after coming such fact in notice for the reason that court has already taken jurisdiction will amount to abuse of the process of court.

12. Under Section 156(1) (9) & (90) there is exclusive jurisdiction lies with custom adjudication authority. In this particular case 102 Bags weighing 2040 kgs betel nuts loaded in dumper bearing registration No. TKW-932 were recovered which falls under Section 156(1) (90) of the Act, 1969 within exclusive jurisdiction of Customs' Adjudication Authority.

13. Since proceeding before this Court is coram-non-judice therefore I return the challan to the Investigating Officer as only custom adjudication is a proper forum in this case.

Announced in open court.

Given under my hand and seal of this Court, this 29th day of August , 2019.

(Sadaf Asif)
SPECIAL JUDGE
SPECIAL JUDGE (CUSTOM & TAXATION)
KARACHI

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