Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Customs Reference No. 48 of 2018

Collector of Customs, MCC, Islamabad, etc.

Vs

Israr and others.

DATE OF HEARING: 12-01-2021.

APPLICANTS BY: M/s M.D Shahzad and Ch. Talib Hussain, Advocates.

RESPONDENTS BY: Barrister Ahsan Jamal Pirzada and Mr. Muahmmad Amin Feroze Advocates.

BABAR SATTAR, J.- Through this judgment, we intend to adjudicate instant Customs Reference and Customs Reference 56/2018 titled *"Israr and others vs. Customs Appellate Tribunal, etc"* filed under section 196 of the Customs Act, 1969 ***("Customs Act"***) and the questions of law proposed for our consideration in the two references arising from the same judgment of the learned Customs Appellate Tribunal dated 05.07.2018 and the facts recorded in the said judgment.

2. The facts in brief are that applicants in Customs Reference No. 56/2018 (*to be referred to as* ***"applicants"*** *for purposes of this judgment*) excluding applicant no. 2 intended to travel from Benazir Bhutto International Airport to Dubai via flight no. PA-210 on 02.06.2016. After they reached the departure lounge and had their luggage scanned through Airport Security Force (ASF) scanners, Customs Officials examined their bags and asked about their contents. Applicant no. 1 (Israr s/o Muhammad Amin) disclosed the presence of foreign currency in his baggage. Customs Officials found foreign currency (Saudi Riyals 330,000/- and UAE Dirhams 42,500/-) in his bag, seized the foreign currency alleging violation of sections 156(1), 157 and 178 of the Customs Act, 1969 and also registered a criminal case against the appellants vide FIR No. 33/2016 dated 02.06.2016.

3. The Customs Officials submitted Seizure Case No.33/2016 dated 02.06.2016 for adjudication before the Adjudicating Officer seeking action under sections 156(1) and (8), 157 and 178 of the Customs Act, read with section 3(3) of the Import & Export (Control) Act, 1950 for violation of sections 2(s) and 16 of the Customs Act, section 3(1) of the Import & Export (Control) Act, 1950 and the Foreign Exchange Regulations Act, 1947. At the time of seizure of foreign currency, Israr, applicant in Customs Reference No. 56/2018 and respondent no.1 in Customs Reference No. 48/2018 (*to be referred to as* ***"applicant no.1"*** *for purposes of this judgment*)

did not possess documentary evidence establishing procurement of the foreign currency from an authorized dealer. Customs Officials arrested applicant no. 2/Peerzada (*to be referred to as* ***"applicant no.2"*** *for purposes of this judgment*) on identification by applicant no. 1 as his relative who had handed him the foreign currency. Applicant no. 2 was not traveling outside Pakistan and was present outside the departure lounge in order to see off his family members i.e. applicants no.1 and 3 to 6.

4. Applicants no.1 and 2 were issued a show cause notice ***(SCN)*** by Collector of Customs (Adjudication) under section 180 of the Customs Act dated 05.08.2016 to "*show cause as to why the recovered/seized foreign currency should not be confiscated and why penal action should not be taken against you under section 156(1)(8), 157 and 178 of Customs Act, 1969 for violation of above mentioned provisions of law*."

5. Applicants no. 3 to 6 moved an application before the Collector of Customs (Adjudication) to be impleaded as necessary and proper parties for being joint owners of the foreign currency seized from applicant no. 1. All applicants also filed a statement in response to the SCN stating, *inter alia*, that they were joint owners of the foreign currency seized from applicant no.1, which was lawfully procured and owned by them, and the foreign currency was seized by Customs Officials on the basis that it was in excess of the quantum allowed by the State

Bank of Pakistan (SBP) even though its presence was correctly declared by applicant no.1 for purposes of sections 139 and 142 of the Customs Act.

6. Collector of Customs (Adjudication) passed Order-in-Original No. 38 of 2017 dated 09.03.2017 ***("Order-in-Original")*** wherein it was noted that "*the single issue in the case is whether the recovered and seized currency is liable to confiscation under law?*" The Order-in-Original held, *inter alia*, that the seized foreign currency could not be attributed to the applicants as at the time of seizure applicant no.1 was alone, according to the seizing officer, and the names and particulars of persons claiming to be family members did not fall within the definition of family members as per CNIC details, and held that the seized foreign currency was liable to confiscation under sections 156(1) and (8), 157 and 178 of the Customs Act.s

7. The applicants in Customs Reference 56/2018 then challenged the Order-in-Original before the learned Customs Appellate Tribunal and asserted, *inter alia*, that they were lawful and joint owners of the seized foreign currency, that the presence of the foreign currency was disclosed to the Customs Officials and not concealed thus no offence could be made out, and that the Order-in-Original was time barred as it was passed beyond the mandatory period prescribed in section 179 of the Customs Act.

8. The learned Customs Appellate Tribunal in its judgment has reproduced the grounds for challenge taken up by the applicants and held the following:

> *"Perusal of case file has transpired that appellants have annexed copies of their E-Tickets and passports with the memo of appeal which supports the version of the applicants and makes the prosecution story doubtful. The applicant no. 1 also produced the receipt of purchase of foreign currency along with affidavit, whereas no counter affidavit was filed by the department. Therefore, we are inclined to partly accept the appeal. The foreign currency is ordered to be released to the applicants, except appellant no.2 as according to appellants' version Mr. Peerzada son of Hazrat Gull only visited the airport to see off his relatives and was not traveling to Dubai, in terms of permission given by the State Bank of Pakistan vide notification No.F.E.1/2015-SB dated 1st June, 2015 i.e. a major person is allowed to carry maximum US$ 10,000/- and a minor from 5-18 years is allowed to carry maximum US$ 5000/-. The remaining foreign currency shall remain confiscated in favor of the state. The impugned Order-in-Original No. 38/2017 dated 09.03.2017 is modified to the above extent only."*

9. The questions framed in References No. 48/2018 and 56/2018 are as follows:

Customs Reference No. 48/2018:

1. *Whether after confession/admission of crime in subject case by accused namely "ISRAR" (presently respondent No. 1) in his confessional statement dated 19.11.2016 before judicial forum i.e. Judge Special Court (Customs, Taxation & Anti-Smuggling) Rawalpindi can change his entire plea and bring four more respondents as his co-travelers for the want of releasing the confiscated money before both departmental forums i.e. Collectorate of Customs (Adjudication) and Customs Appellate Tribunal Bench-II, Islamabad, if so under what law?*
2. *Whether the impugned judgment, dated 31.07.2018 of Customs Appellate Tribunal Bench-II, Islamabad is result of negligent and conscious overlooking of prevailing laws specially when confession has been made before a competent judicial forum i.e. Judge Special Court (Customs, Taxation & Anti-Smuggling) Rawalpindi, by accused, mentioning himself as "single carrier" in subject criminal case i.e. No. 33/2016 dated 02.06.2016 under criminal procedure code of Pakistan and is also derogatory and against the law under section 2(s), section 156(1),(8) of Customs Act, 1969.*

Customs Reference No. 56/2018:

1. *Whether the learned Customs Appellate Tribunal was correct in partially allowing appeal under section 194*

where it stands proven that the show cause notice is a result of mala fide intentions and ulterior motives and the case was false and fabricated?

2. *Whether in case of non-filing of counter affidavits by the respondent department before the learned Appellate Tribunal, the contents of the affidavit filed by the appellants should be taken to be true in terms of Order 19 Rule 1 of the Code of Civil Procedure, 1908?*
3. *Whether the confiscation can be affected under section 2(s) of the Customs Act, 1969 read with sub-section 8 of section 156 where it is not a case of smuggling and the goods have been correctly declared in terms of section 139 of the Customs Act, 1969?*
4. *Whether the Order-in-Original No. 38 of 2017 is miserably time barred in terms of section 179 of the Customs Act, 1969?*
5. *Whether the seized goods are liable to be released as the issuance of show cause notice under section 180 was barred in terms of sub-section 2 of section 168 of the Customs Act, 1969?*

10. We note that the learned Customs Appellate Tribunal neither adjudicated the question (i) whether confiscation could be affected under section 2(s) read with section 156(8) of the Customs Act, given that presence of foreign currency was disclosed to Customs Officials and consequently this was not a case of attempt to smuggle, and (ii) whether the Order-in-Original was issued beyond the mandatory period prescribed

under section 179(3) and (4) of the Customs Act and therefore of no legal effect.

11. The learned counsel for the applicants in Reference No. 56/2018 stated that the SCN was issued on 05.08.2016 and the Order-in-Original was issued on 09.03.2017, which was beyond the 120-day mandatory period prescribed for issuance of such order under section 179(3) of the Customs Act, and that neither the said period was extended by the Collector after recording reasons in writing as required by the Customs Act nor the Federal Board of Revenue exercised its power to grant an extension under Section 179(4) of the Customs Act. He has placed reliance on *"Javed Iqbal vs. Director General of Intelligence and Investigation, FBR, Karach*i" [2017 PTD (Trib) 2357] wherein the learned Customs Appellate Tribunal held that orders passed by the adjudicating authority beyond the mandatory period prescribed in section 179(3) of the Customs Act suffered from grave legal infirmity and were ab initio illegal and of no legal effect. The learned counsel for the department has not controverted the factual or legal submissions made by the learned counsel for the applicants in this regard.

12. The learned counsel for the applicants has further submitted that a case of attempt to smuggle cannot be brought home to the applicants as in the instant case there was no concealment of foreign currency and the said currency was recovered and seized after disclosure by applicant no.1 to

Customs Officials that he possessed foreign currency which formed part of the content of his baggage, and there existed no "intent" to smuggle foreign currency outside Pakistan. The learned counsel for the applicants further submits that the foreign currency was seized from applicant no.1 at the entry of the departure lounge of the airport immediately after his luggage was scanned by FIA scanners and he had neither been issued a boarding pass for an international flight nor had he passed the immigration post and received an exit stamp on his passport and thus it could not be said in any event that he had taken steps pursuant to an intent to smuggle foreign currency that could be termed as an "attempt" and has relied on *Central Board of Revenue vs. Khan Muhammad* [PLD 1986 SC 192].

13. Learned counsel for the Department has opposed the contentions of the applicants regarding "intent" and "attempt" and submits that presence of the foreign currency in the baggage of the applicants in excess of the limit prescribed by the State Bank of Pakistan at the time they entered the departure lounge and had their baggage pass through the ASF scanners reflected the required intent to smuggle prohibited amounts of foreign currency outside Pakistan and constituted sufficient steps in pursuance of such intent to qualify as attempt. Learned counsel for the Department has placed reliance on *Collector of Customs vs. Khud-e-Noor* [2006 SCMR 1609].

14. The learned counsels have been heard and we have perused the record with their assistance.

15. The case against the applicants is that of "attempt" to "smuggle" currency outside Pakistan within the meaning of section 2(s) of the Customs Act, beyond the limit prescribed by the State Bank of Pakistan, which is a breach of the restriction under section 16 rendering such currency liable to confiscation under section 17 of the Customs Act. The relevant provisions of the Customs Act are as follows:

> *2(s) "smuggle" means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force, or evading payment of customs-duties or taxes leviable thereon, (i) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or (ii) manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed one hundred and fifty thousand rupees in value; or (iii) any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs-station and includes an attempt, abetment or connivance of so bringing in or taking out of such goods; and all cognate words and expressions shall be construed accordingly;*
>
> *16. Power to prohibit or restrict importation and exportation of goods.- The Federal Government may, from time to time, by notification in the official Gazette, prohibit or restrict the bringing into or taking out of Pakistan of any goods of specified description by air, sea or land.*
>
> *17. Detention, seizure and confiscation of goods imported in violation of section 15 or section 16.- Where any goods are*

imported into, or attempted to be exported out of, Pakistan in violation of the provisions of section 15 or of a notification under section 16, such goods shall, without prejudice to any other penalty to which the offender may be liable under this Act or the rules made there under or any other law, be liable to detention, for seizure or confiscation subject to approval of an officer not below the rank of an Assistant Collector of Customs, and seizure for confiscation through adjudication, if required.

139. Declaration by passenger or crew of baggage.- The owner of any baggage whether a passenger or a member of the crew shall, for the purposes of clearing it, make a verbal or written declaration of its contents in such manner as may be prescribed by rules to the appropriate officer and shall answer such questions as the said officer may put to him with respect to his baggage and any article contained therein or carried with him and shall produce such baggage and any such articles for examination 1 [:] 2[Provided that where the Customs Computerized System is operational, all declarations and communications shall be electronic.]

16. In this reference, which emanates from the exercise of adjudicatory authority by the Collector, we are concerned only with the confiscation of currency seized from the applicants and not the criminal case registered against the applicants, the proceedings in such case or the evidence adduced therein. The proceedings in the criminal case and those in the adjudicatory matter are independent of each other. We can therefore only take into account the SCN, the Order-in-Original, the judgment of the learned Appellate Customs Tribunal, the material considered in passing such adjudicatory orders and the reasoning of such orders.

17. We however note that as the actions of the applicants leading to the imposition of the civil sanction of confiscation under section 17 of the Customs Act must amount to "attempt" to "smuggle" for purposes of section 2(s), the ingredients of the offense must exist and be proved. Whether the Collector imposes the sanction under section 17 or pursues criminal penalties under section 156 or both, the difference really is that in the former case the Department would need to establish the infraction on a balance of probabilities and in the latter beyond reasonable doubt.

18. In this regard we are guided by dicta of the august Supreme Court in *Asghar Ali vs State* [PLD 2003 SC 250], where the accused were charged with attempt to smuggle currency and after exchange of gunfire Pakistani currency was recovered from them and also foreign currency from secret cavities of their vehicle. The august Supreme Court observed the following:

> *"The petitioner has claimed the possession of Pak currency but denied the possession of foreign currency which was recovered from the secret cavities of the vehicle in which the petitioner and his companions were traveling. Thus the part of the transaction relating to recovery of foreign currency from the secret cavities of the vehicle would constitute an offence under section 156(1)(8) of the Customs Act, 1969 whereas the part relating to the recovery of Pak currency from the possession of the petitioner while traveling in the territory of Pakistan would*

> *not be an offence under the Customs Act, 1969, therefore, the seizure of Pak currency and registration of case under Customs Act, 1969 to the extent was illegal and consequently, the trial of the petitioner before the Special Judge Customs and also the adjudication proceedings before the departmental authorities would jurisdiction and illegal.*

It went on to hold that:

> *"This is correct that the order of confiscation of the property in the adjudication proceedings is independent to the verdict given by the Special Court in the criminal case but the seizure of Pak currency itself being illegal and without jurisdiction, the subsequent proceedings either on the criminal side of before the departmental authorities would be without legal authority. The order of confiscation of Pak currency passed by the adjudicating authority being a void order, was of no consequence and must be ignored. The facts on the basis of which the order was passed, would not make out a case for exercise of jurisdiction under Customs Act, 1969 and if is allowed to hold field, it would defeat the dictates of justice and law."*

On what constituted attempt to smuggle the august Supreme Court observed the following:

> *"The attempt, abetment or connivance to commit offence of smuggling would include in the expression "smuggle" which being an offence, is punishable under the provisions of the Customs Act, 1969, but the attempt to smuggle has not been specifically defined in the said Act. The intention, preparation,*

attempt and completion of an act are the essential components of an offence but an attempt to commit an offence in the criminal administration of justice, is a distinct offence which is completed if in consequence to the preparation, an overt act is taken to commit the crime. The preparation to commit an offence is devising or arranging the means and measures which are necessary to commit the crime but the decision of this mixed question of law and fact always depends upon the circumstances of each case. In short the attempt to commit an offence is taking of steps to do something which if done in a criminal offence and if the act in consequence of such steps does not amount to a criminal offence, it is not an attempt…In a case in which is a person is found in possession of smuggled goods it is for such person to explain the legal possession of the goods but in a case in which the possession of goods is legal and it is not at all required to be explained, the seizure of such goods would be illegal and further neither the burden of proof can be shifted to the person in whose possession the goods were seized not a presumption of guilt can be raised in such a case and thus the act of the taking of the Pak currency by the petitioner to the sea shore even if is presumed that he intended to smuggle it out of Pakistan would not constitute an offence of smuggling under Customs Act, 1969."

19. The issue of attempt to smuggle came up before the learned Sindh High Court in "*Ehsan Elahi Malik vs. State"* [1980 P Cr. L J 186]. This was a case that included a false declaration by the accused. The learned Sindh High Court held:

> *"It is in evidence that the appellant had purchased a ticket for going to Hong Kong, he checked-in at the Swiss Airline Counter, he was given the boarding card and the baggage tags and finally he was asked by the Customs Officer to make a declaration. In this declaration in writing, which is on record as Exh. 31, the appellant suppressed the information regarding the huge quantity of foreign currency in his possession and the precious stones carried by him. Having regard to all these facts it is clear that but for the interception by the Customs Officials the appellant had done everything in his power to take out of Pakistan the contraband articles. The Court is entitled to infer the existence of a fact regard being had to the common course of natural events and human conduct. There is nothing on record to indicate that the appellant could have retracted his steps from the commission of the offence. There is, therefore, no force in this submission that the evidence does not establish the case of attempt to smuggle."*

The learned Sindh High Court adopted the "but for" test i.e. but for the intervention of state authorities, the accused was near taking the penultimate step in commission of the offence and there was no possibility of him retracting his steps.

20. The meaning of attempt to smuggle was then considered by the august Supreme Court in *Central Board of Revenue vs. Khan Mohammad* [PLD 1986 SC 192]. This was the case of a citizen of Afghanistan who arrived in Pakistan, in transit to UK, through Torkham Land Customs Station. He

travelled to Islamabad and the foreign currency in his possession was checked by Customs Officials at Islamabad. But he had left behind visa related documents in Peshawar and thus couldn't continue his onward journey from Islamabad. He returned to Peshawar and booked a flight from Peshawar to Karachi. Before embarkation on his flight in Peshawar, he was intercepted by Peshawar Customs Officials and foreign currency seized from him. The august Supreme Court held the following in paragraphs 8 and 9:

> *"Attempt to smuggle has not been defined in the Act but clause (8) of section 156 makes the attempt to smuggle also punishable by virtue of the aforesaid definition of the word "smuggle" which is inclusive of an attempt to bring in or take out goods coming within the mischief of the main provisions. The classic analysis of the course of conduct of a culprit from the stage of conception to consummation of crime has laid down four distinct stages, namely, (i) intention, (ii) preparation, (iii) attempt, and (iv) completed act. As observed by Sir H. S. Gour in his commentary on the Penal Law of India, the first of the aforesaid four stages, the Criminal Codes of all countries exempt from punishment. The Penal Code of Pakistan punishes the second stage of certain offences, by constituting them separate and distinct offences. The third, namely, attempt, marks a distinct advance in the development of criminality, so that it is punishable everywhere. Ordinarily then, law allows locus poenitentia only up to the second stage after which it regards the development of the scheme as too far advanced to remain*

unpunished. But this has led, as the reports of cases indicate, to an important question as to when the preparation ends and an attempt begins…"

"The case in which mere preparation to commit an offence has not been made punishable presents the problem to determine whether the act or omission committed by the culprit constitutes merely preparation or amounts to attempt. Often times in such cases the transition between what is preparation and an attempt is so gradual as to be imperceptible. The preparation to commit an offence consists in devising or arranging the means and measures necessary for the commission of the offence. It implies the taking of previous measures necessary for the crime. But it is difficult to give an abstract definition of the term "attempt", in a juridical context, for it is largely a mixed question of law and fact depending upon the circumstances of each particular case. Lord Parker, C.J., in Devey v. Lee has pointed out that the term has been described variously in the authorities but he has preferred to adopt the definition given in Stephen's Digest of the Criminal Law, 5th Edition (1894), which is as follows:

> *"An attempt to commit a crime is an act done with the intent to commit that crime, and forming part of a series of acts which could constitute its actual commission if it were not interrupted."*

"Another definition referred to in this case was from Archbold's Criminal Pleading, Evidence and Practice, which reads as under:

> *"It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime."*

"It seems that the modern view of attempt does not make it necessary that the interruption which aborts the consummation of the crime should be the penultimate act for the completion of the crime.

"9. Applying the aforesaid principles to the present case we are of the firm view that the acts done by the respondent before he was intercepted at Peshawar Airport did not constitute attempt to smuggle the alleged foreign currency out of Pakistan but at best the stage reached was that of mere preparation to commit that offence. As already discussed even if there is undoubted evidence of intention to commit the offence on the part of the offender and of preparation to carry out that intention the law does not make the person entertaining such intention or doing such acts of preparation culpable, so far as the offence of smuggling is concerned. Because there is always in such cases a possibility of change of mind or locus poenitentia to give up the prosecution of the criminal intent beyond the stage of preparation. We, therefore, agree with the learned Judges of the High Court, that the mere act of boarding internal flight from Peshawar to Karachi was not an act of such an approximate

nature as would amount to an attempt to smuggle, although it might constitute preparation to commit that offence."

21. The matter of smuggling of currency came up before the august Supreme Court in *Collector of Customs vs. Khud-e-Noor* [2006 SCMR 1609] that the learned counsel for the Department also relied upon. However, the said case is distinguishable, as it turned on illegal possession of currency. There the receipts produced by the accused, to establish purchase of currency from money changers during trial for the offence under section 156(1)(8) read with section 2(5) of the Customs Act, were found to be fake.

22. Attempt has been defined in Black's Law Dictionary as follows:

"An overt act that is done with the intent to commit a crime but that falls short of completing the crime. Attempt is an inchoate offence distinct from the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed. Model Penal Code S 5.01"

23. Advanced Law Lexicon, Reprint 2009, has defined "attempt" while reproducing dicta from laws reports, and the relevant part is as follows:

"…an intention to do a thing combined with an act which falls short of the thing intended.

"Preparation to commit an offence is not attempt. Covert or overt acts preceding to committing an offence with an intention to commit the offence amount to attempts. Intention to commit a particular offence, some act necessarily done towards the commission of the offence and proximity of such act to the intended result constitute 'attempt'. *State of Maharashthra v. Mohd. Yakub*, AIR 1980 SC 1111, 1115, 1114, 1117."

24. While defining "attempt" the learned Lahore High Court held the following in *Abdul Salam vs. State* [PTCL 1984 (CL) 29]:

"An act, in order to be a criminal attempt, must be immediately, and not remotely, connected with and directly tending to the commission of an offence. Merely to make preparations for the commission of an offence is distinct from an attempt to commit the offence… In order to constitute an attempt, there has, therefore, to be some overt act on the part of the offender which if not frustrated, would lead to the commission of the offence."

25. In the instant matter, the question before us is twofold:

a. *has the department been able to establish intent on part of the applicants, on a balance of probabilities, to smuggle foreign currency out of Pakistan;*

b. *in the event that intent has been established or can be inferred from the record, did the applicants take a series of steps in pursuit of their criminal intent that falls beyond the domain of preparation and had crystalized into an attempt, where there was "no possibility of change of mind or locus poenitentia to give up the prosecution of the criminal intent beyond the stage of preparation" in accordance with the test laid out by the august Supreme Court in Khan Mohammad's case.*

26. Criminal law as a general matter is not forgiving of those who act in ignorance of the law and hence the maxim *ignotantia juris neminem excusat* (ignorance of the law excuses no one). But exclusions to this general rule exist, especially when there is ignorance or mistake as to civil law. The argument is that if the purpose of law is to punish individuals for culpability, it would be unfair to punish a person who acts under the belief that the conduct is not criminal or without the knowledge that it is criminal.

27. The question of mistake of law or mistake of fact is even more germane when it comes to specific intent offences or inchoate offences, such as "attempts", where there is no actual

damage inflicted on another individual or the society, and punishment is meted out for possessing a guilty mind and for taking actions inspired by such mind, in the interest of public policy motivated by the deterrence theory of punishment and the recidivism theory of punishment: to deter legally reprehensible conduct and protect society against a possible recurrence of the defendant's harmful conduct.

28. However, deterrence is ineffective if the act projected as an attempt to commit a crime is for want of knowledge regarding the wrongfulness of the act. Ignorance of law not being an excuse is based on the logic that individuals are aware of the natural consequences of their actions and if their actions would lead to an injury to another, they ought to be able to foresee such injury. However, in a case such as the present one involving the accusation of an attempt to smuggle currency, the state is essentially seeking to enforce a civil right against a citizen and not acting to protect other members of the society from a direct injury. In such cases, the object of deterring attempt is inspired not by the interests of other members of society from being protected against violence or harm, but by the collective interest of the society in enforcement of the law.

29. In relation to such inchoate offences, especially involving the relationship between the state and the citizen as opposed to relationship inter se citizens, the state has an obligation to give a fair warning of the underlying prohibition to

citizens, which would then make any defense of mistake of law or mistake of fact untenable. We see the state discharging such obligation through speed limit signs on roads and highways, together with warnings that the state is undertaking surveillance and will punish those who do not comply with the law. This makes abundant sense as where the object of the state is to encourage compliance with the law as opposed to letting citizens commit actions that attract punitive measures due to lack of knowledge or negligence, it must educate the citizen instead of seeking enrich itself by collecting fines or confiscating citizens' property resulting from their mistakes or ignorance.

30. When a person is charged with "attempt", "the intent becomes the principal ingredient of the crime", argued Lord Goddard CJ, in Whybrow [(1951) 35 Cr. App R 141]. An essential first step in making out an "attempt" offence is to show that the defendant intended to commit the proscribed wrong and had the necessary knowledge of facts and circumstances. Professor Andrew Ashworth, in summarizing the debate on the components of attempt, notes in *Principles of Criminal Law* (3rd Edition), "*that the word 'attempt' connotes trying, trying connotes purposeful behavior, and therefore there can be no such thing as a reckless or negligent attempt*" (Ashworth; 464). And thus, in jurisdictions where reckless behavior is to be criminalized, it is done so explicitly.

31. With regard to the conduct element in relation to "attempt" offences there exist two approaches: a fault-centered approach and an act-centered approach. From the stand point of fault-centered approach, an individual is guilty if he possesses a guilty mind and when he takes steps in pursuance of such criminal intent, he is liable to be punished. From the standpoint of act-centered approach, law should require an unambiguous act close to the commission of the crime to attract penalty, in order to protect individual liberty and agency and to give the individual the benefit of doubt if he recedes prior to the penultimate act and resiles from the criminal intent.

32. The test laid out by the august Supreme Court in *Khan Mohammad*'s case follows the act-centered approach and calls for imposition of penalty only once the accused crosses a stage in pursuit of the crime where the intent to commit such crime is manifest and the penultimate step leading to its happening is imminent. The test laid out for us to follow comprises two limbs: one, there must exist intent to commit the offence of smuggling, which cannot be assumed or inferred but must be established by the state on a balance of probabilities; and two, steps must have been taken in pursuit of such intent, which if not interrupted by the state, made the commission of the offence imminent, and were interrupted at a time before the penultimate step when there existed no possibility of the accused receding from the commission of the offence.

33. Intent in relation to an "attempt to smuggle" foreign currency at an airport may be established in one of two ways: there can be a mis-declaration by an individual traveling outside Pakistan establishing dishonest intent; or intent may be inferred in view of the facts and circumstances of the case where there is positive evidence of concealment of foreign currency coupled with other attendant circumstances. However, no objective test can be employed to presume intent to commit such offence merely because an individual arrives at the airport carrying foreign currency in excess of the limit prescribed by the Federal Government or State Bank of Pakistan.

34. An attempt to smuggle is not a strict liability offence and the state is under an obligation to establish *mens rea*. For purposes of section 2(s) read together with sections 16 and 17, the Department would need to establish guilty mind on a balance of probabilities. In the absence of an objective test for presuming intent, in case of a frequent traveler who has a history of declaring foreign currency which confirms his knowledge of the law and the permitted legal limit of foreign currency that can be carried out of Pakistan or in case of a repeat offender, together with positive evidence of concealment, it may be possible to establish intent on a subjective basis.

35. But the possibility of mistake of law or mistake of fact cannot be ignored altogether in the absence of attendant circumstances. Foreign currency is not a prohibited item in Pakistan just like Pakistani currency. The laws of Pakistan allow citizens to open foreign currency accounts and own and acquire foreign currency from banks and authorized dealers. Likewise, possession of foreign currency is also not an offence, unlike drugs or other proscribed goods. Whether or not an individual is liable for the offence of attempting to smuggle foreign currency or confiscation of such currency under section 17 of the Customs Act, thus rests only on exceeding the quantum prescribed by the State Bank of Pakistan.

36. It is not unreasonable to assume that a traveler, especially an infrequent or uninformed one, might not be aware of the limit prescribed by the State Bank of Pakistan at a given time. And even a frequent traveler might suffer from a mistake of fact regarding the quantum of foreign currency he is carrying. Given that this is a matter of the state enforcing a civil right against the citizen, it places a higher burden on the state to disclose the limit of permissible foreign currency that can be carried, so that neither the citizen falls within the shackles of law inadvertently nor the state unjustly enriches itself due to a mistake committed by the citizen. It would not be onerous for the state to require every international traveler to make a mandatory disclosure of foreign currency on a form that states that maximum permitted quantum of currency that can be

carried, for purposes of section 139 of the Customs Act, at the time of check in or at the immigration counter etc. A false declaration would then automatically infer guilty intent.

37. The element of conduct required to constitute attempt also requires consideration in view of the test in *Khan Mohammad*'s case. The mere possession of foreign currency in excess of the permitted limit in the luggage of a passenger scanned at the ASF scanners at the entrance of the Departure Lounge cannot constitute a step, in pursuance of guilty intent, that makes the carrying out of the offence imminent or can be treated as having crystallized into attempt. At this stage the passenger has not checked in his baggage or been issued a boarding pass. He has also not passed the immigration counter and received an exit stamp on his passport. At this stage, even in presence of initial intent to attempt smuggling of foreign currency, the passenger could recede and return excessive currency to someone waiting outside the Departure Lounge, as passengers often do in case of excess baggage. Even in case intent can be inferred, the conduct would still not have crossed the threshold of preparation and culminated into attempt.

38. In the instant case, the Department has failed to establish intent in view of the record. Applicant no.1 disclosed the presence of foreign currency to Customs Official who asked him about the content of his luggage next to ASF scanners. The currency was in plain sight within the luggage according to the

seizure memo, having been placed amongst "un-stitched clothes". Thus, there was neither any mis-declaration nor any attempt to conceal the foreign currency in view of the facts and circumstances of the case. In the absence of intent being established by the Department, the question of confiscation of currency on grounds of attempt to smuggle doesn't arise.

39. As aforesaid, the possession of foreign currency (receipts for acquisition of which from authorized dealers were produced during adjudication proceedings) at the entry of the Departure Lounge prior to checking in baggage and having been issued a boarding pass or having passed through the immigration counter along with any handbag that contained excess foreign currency that the passenger had refused to declare or mis-declared, cannot be deemed a stage in conduct that qualifies as attempt for purposes of section 2(s) read together with section 17. Thus, the conduct of the applicants in the instant case also does not qualify the attempt test laid down in *Khan Mohammad*'s case.

40. The Order-in-Original was thus void as the conduct for which applicant no.1 was apprehended did not satisfy the ingredients required to bring home the case of attempt to smuggle foreign currency to applicant no.1 or 2. In failing to observe that the alleged conduct was not culpable for purposes of section 2(s) read together with sections 16 and 17 of the Customs Act, the judgment of the learned Appellate Customs

Tribunal suffers from basic legal infirmity. The learned Appellate Customs Tribunal did not appreciate that the state cannot unjustly enrich itself by confiscating the property of citizens when the mandatory ingredients for the offence of "attempt to smuggle" do not exist. The learned Appellate Customs Tribunal ought to have released the confiscated currency and set aside the Order-in-Original for being void and of no legal effect.

41. The question whether the timeline for issuance of the adjudicatory order after issuance of a show cause notice as prescribed under section 179(3) of the Customs Act is directory or mandatory has been settled by this court in *Irfanullah vs The Collector of Customs, etc.* in Customs Reference No.2/2017, being guided by the judgment of the august Supreme Court in *The Collector of Sales Tax, Gujranwala etc. vs M/S Super Asia Mohammad Din & Sons etc.* (PTCL 2017 CL 736), in the following terms:

> *9. A combined reading of subsections 3 and 4 of section 179 restricts the power of the adjudicating officer to decide or adjudicate a show cause notice within the time prescribed therein. The legislature has used the expression 'shall'. The adjudicating officer has to decide a case within one hundred and twenty days from the date of issuance of a show cause notice. This period can be extended by the Collector for a period not exceeding sixty days and that too for reasons that are required to be recorded in writing. Moreover, time has not been prescribed for granting an extension by the Federal Board of Revenue under subsection 4 of section 179. The Board while*

> *exercising this power in relation to extending the time has to justify same on the basis of exceptional circumstances and in the light of the law expounded by the august Supreme Court the power is not unfettered. It is further noted that the time for adjudicating a show cause notice was introduced for the first time by inserting the same through the Finance Ordinance 2000.*

42. We have carefully examined the above provisions in juxtaposition to subsection 3 of section 36 of the Sales Tax Act, 1990. We have not been able to find any distinguishing features between the two provisions so as to distinguish the law laid by the august Supreme Court in the case titled *"The Collector of Sales Tax, Gujranwala, etc vs. M/S Super Asia Mohammad Din & Sons etc"* [*PTCL 2017 CL 736]*. Following the said principles and law we hold that the timelines prescribed under subsection (3) of section 179 of the Act of 1969 are mandatory and not directory. Moreover, the period of exclusion provided under the proviso, can also not exceed thirty days as has been held by the august Supreme Court while interpreting the provisions of section 36(3) of the Sales Tax Act, 1990. The power of the Federal Board of Revenue under subsection (4) of section 179 is also to be interpreted in light of the aforesaid law laid down by the august Supreme Court. We, therefore, hold that this power is also not unfettered and that it ought to be exercised within a period of six months from the date when the time period provided under section 179(3) or the extension granted thereunder has lapsed. Moreover, the power exercised by the Federal Board of Revenue

under subsection 4 of section 179 to grant an extension has to be for a reasonable time i.e. not more than a period of six months.

43. The question of the Order-in-Original being time barred was raised before the learned Appellate Customs Tribunal but was not considered or adjudicated. In view of the ratio of *M/s Squibb Pakistan Pvt. Ltd* [PTCL 2017 CL 646] and the questions framed for our consideration in Reference No. 56/2018, this is a question arising out of the judgment of the learned Appellate Customs Tribunal. The fact that the Order-in-Original was issued beyond the mandatory adjudication period prescribed under section 179(3) is not disputed. We therefore find that the Order-in-Original to be of no legal effect on this score as well.

44. We answer the questions raised in Customs References 48/2018 and 56/2018 accordingly. Office is directed to send this order to the learned Appellate Customs Tribunal and consequently the department shall release the currency seized from the applicants in Customs Reference 56/2018 forthwith.

CHIEF JUSTICE (BABAR SATTR)
JUDGE

Approved for reporting

Saeed.