

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO 14 OF 1996

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, P.C., O.J.
PRESIDENT
THE RT. HON. MR. JUSTICE TELFORD GEORGES, P.C., J.A.
THE HON. MR. JUSTICE JAMES KERR, J.A.

BETWEEN: (1) AVALON TOURS LTD.
(2) PETER SAVILL
(3) SOUND FINANCIAL MANAGEMENT LTD.
PLAINTIFFS/RESPONDENTS

AND: (1) HER MAJESTY'S ATTORNEY GENERAL
(2) THE COLLECTOR/DEPARTMENT
OF CUSTOMS
(3) THE PORT AUTHORITY
OF THE CAYMAN ISLANDS
DEFENDANTS/APPELLANTS

Appearances:

Messr. WILLIAM HELFRECHT FOR THE APPELLANTS

Messr. RAMON ALBERGA, Q.C. with Messr. MICHAEL PARKINSON
FOR THE RESPONDENTS

DECEMBER 4, 5, 6, 1996., APRIL 3, 1997

ZACCA, PRESIDENT:

The first Respondent Company, with assistance of the second Respondent, imported into the Cayman Islands three coaches. The company runs coach tours on Grand Cayman for cruise ship passengers. The second Respondent has an interest in providing excursions for cruise ship passengers in the Cayman Islands, through a Company Don Foster's (Subsee) Ltd. in which he has an interest.

The first Respondent Company has a contract with Subsee which in turn had contractual obligations directly with the cruise lines.

The second Respondent went to England and located three coaches which he purchased for £94,000. An additional £40,750 was expended to have air conditioning installed, together with other minor repairs. The coaches were shipped from the United Kingdom to Cayman via Jacksonville and Miami. The total freight charges were U.S. \$24,091.20.

The three coaches arrived in Cayman on the "North King" on 26th November, 1993. Lester Avalon Bush is the sole shareholder and Director of Avalon Tours Ltd.

Both Mr. Bush and Mr. Savill were aware that the law had been amended in July 1993, prohibiting the importation of a coach which is over ten feet in height, without the permission of the Governor in Council.

On the arrival of the coaches, Mr. Bush contacted his employee, Carlos Ebanks, to see to the clearing of the coaches. Bill of Lading and Invoices were collected and taken to the Customs Office by Mr. Ebanks. A Customs entry Form was completed by Mr. Ebanks, by reference to the Bill of Lading. The value of the coaches was taken from the bill of lading. However, the freight charges on the bill of lading only covered the cost of freight for the Miami Cayman leg of the journey.

Under the Custom's Law, the cost of freight from the United Kingdom to Cayman should have been included and there was therefore an underassessment of the Customs duty. Also the cost of the work done on the coaches was not declared. An adjustment was made to the figures on the entry form by Customs and the duty was paid to the Custom's Officer.

Mr. Bush and Mr. Ebanks then went to the Port Authority where they paid the port handling charges. They then went to the Custom's Officer on the dock, one Ronnie Miller, who inspected the coaches. By that time two of the coaches had been off loaded. After inspecting the coaches, Mr. Miller wrote "*OK to release by Customs*" on the receipt from the Custom's Officer. That receipt is headed "*Authority to Deliver*". Mr. Bush was advised that he could take the coaches. Unfortunately, the coaches would not start and Mr. Bush went off to find someone to assist him in getting the coaches started.

At the same time local taxi drivers demonstrated outside the Legislative Assembly

Building, protesting the importation of the coaches. It appears that the Solicitor General, then Acting as Attorney General, was contacted. He in turn telephoned the Collector of Customs, John Carlton Powery, informing him of the importation of the coaches and making reference to a height restriction under S. 12A of the Traffic Law. Mr. Powery then called the Custom's Officer, Ronnie Miller and asked him to examine the coaches and to take their height measurement. Mr. Miller called back Mr. Powery and told him that the coaches were slightly over ten feet in height. The Solicitor General was informed of Mr. Miller's inspection and he told Mr. Powery that in his opinion the coaches were restricted under the Traffic Law and should not be released from Customs. Mr. Powery then called the Port Director, Mr. Errol Bush, to direct him not to release the coaches. When Mr. Lester Avalon Bush returned to the Port, he was informed by the Port Director that he could not take the coaches off the Dock and that he should go to see Mr. Powery.

Along with Mr. Ebanks, Mr. Bush went to the Tower Building where he saw Mr. Powery who informed him that the coaches were too high and their importation contravened the Traffic Law. He was also informed that he would have to take up the matter with the Attorney General or his office. Mr. Bush thereafter gave instructions to his Attorneys. There followed telephone calls and exchange of letters between the Attorneys for Mr. Bush and the Solicitor General. It will be necessary later to refer to some of the correspondence.

In the event, the coaches were not released, and the Respondents sought from the Court the following declarations:

[1] That the coaches did not exceed the height restriction set out in s. 12A of the Traffic Law (Amendment) Law, 1993;

[2] That the coaches were lawfully imported into the jurisdiction and that the provisions of the Customs [Amendment] Law, 1993 do not or should not apply to them;

[3] That the second and third defendants unlawfully seized the coaches on or about the 26th November, 1993 and that they were thereafter unlawfully detained by one or other of them.

It appears that there was an extractor on the roof of the bus. There is no evidence as to the height of the extractor.

In giving his judgment, the learned trial Judge refused to make the first two declarations sought.

However, in relation to [1], he stated:

“The declaration I am prepared to make is that had the roof extractors been removed from the coaches, they would have come within the height restriction set out in Section 12A of the Traffic Law as amended by the Traffic [Amendment] Law, 1993 which was the relevant legislation at the time of importation.”

As to [11] he stated:

“I am prepared to and I do, declare that if the roof extractors had been removed from the coaches they would have been lawfully imported into the jurisdiction.

In granting the third declaration sought the trial Judge stated:

“The declaration I make is that the second defendant unlawfully seized the coaches on the 26th November, 1993 and thereafter unlawfully detained them. I make an Order for delivering up of the coaches to Avalon Tours.”

Having made the declarations, the learned trial Judge held that the Respondents, Avalon Tours, were entitled to damages and awarded the sum of U.S.\$134,960 up to 2nd October, 1995 and a figure to be computed on the same basis from 2nd October, 1995 to date.

It is from this Order that the appeal is brought by the appellants. Mr. Helfrecht for the appellants submitted that having regard to the evidence and the findings of the learned trial Judge, he was wrong in holding that the coaches were not seized or detained on 26th November, 1993 by the second defendant as goods liable to forfeiture under section 59[1][b] of the Custom's Law 1990.

Mr. Alberga for the Respondent sought to affirm the Judgment of the trial Judge and also submitted that there could be no lawful seizure in that the coaches were not over 10 feet high. He also urged that the appellants were estopped from the seizure once there is a delivery of coaches.

Were the coaches over 10 feet in height? The evidence before the trial Court was that Mr. Powery called the Custom's Officer, Mr. Ronnie Miller, and asked him to measure the coaches. Mr. Miller informed Mr. Powery that the coaches were slightly over 10 feet. Documentary evidence was

admitted showing the specifications of these type of buses. They showed that the height of the buses were 3 metres. This would be just under 10 feet. However, a letter from Mr. Quainton was admitted in evidence in which he stated that he did not know the height of the extractor.

It is to be observed that neither party made any attempt to measure the coaches after it was measured by Mr. Miller.

The learned trial Judge in his reasons for Judgment stated at page 20:

“The plaintiff’s case is that, in any event, the coaches are not 10 feet in height. Ten feet is 3.048 metre. There is ample documentary evidence for me to find that if one does not include the added height of a small roof extractor the height of each one is 3 metre, ie: under 10 feet. The English Government inspecting officers regard this type of bus as 3 metre in height and do not include the roof extractor in their calculations. No reason is given for that. I should have thought that the height of an object is the distance from the ground to the top of its topmost appendage. We do not know the height of the bus to the top of the roof extractor: Avalon Tours has not proved that it is less than 10 feet or 3.048 metres.”

At page 24:

“First is sought a declaration that the coaches which were imported into the jurisdiction do not exceed the height restriction set out in Section 12A of the Traffic Law as amended by the Traffic [Amendment] Law, 1993. I am not satisfied by the evidence that such was the case. If the roof extractor is included in the overall height of the coaches, then the coaches may well have exceeded 10 feet in height. We do not know by how much, but it would not be a great deal.”

In our view, the learned trial Judge was correct in finding that the buses were over 10 feet in height. This is borne out by the totality of the evidence which was before the Court.

The learned trial Judge held that although the Customs could have seized the coach on the 26th November, 1993, no seizure had taken place. He also held that no seizure had taken place under section 59 of the Custom's Law subsequent to that date. In coming to his conclusions, the trial Judge relied on correspondence which passed between the Solicitor General and the Attorneys for the Respondent subsequent to the 26th November, 1993.

The learned trial Judge stated that it was common ground between the parties that the Collector of Customs seized or detained the three coaches on the 26th November, 1993. However, he held that such seizure was unlawful and that their detention was unlawful.

The question for determination is whether the three coaches were lawfully seized on the 26th November, 1993. Were they lawfully seized or detained under section 9[h] of the Custom's Law, 1990, as being goods liable to forfeiture under Section 59[1] of that Law? Section 9[h] of the Custom's Law provides:

“9. Without prejudice to any other powers conferred upon them by this or any other Law, every officer or any person acting under the direction of an officer has power - [h] to seize and detain any vessel or goods which he believes to be liable to forfeiture under this Law and to hold such vessel or goods in the Queen's Warehouse subject to the right of appeal conferred by subsection (4) of section 64 or,

in default of such appeal, for disposal under the provisions (of) subsection (1) or (4) of section 28.”

The relevant portions of S. 59(1) of the Custom’s Law states:

“59 (1) Where -

(a) except with the permission of Customs, any imported goods being goods chargeable on their importation with Customs duty or package tax, are without payment of that duty or tax - (i) unshipped in any port; (ii) unloaded from any aircraft in the Islands; or (iii) removed from their place of importation or examination or any approved transit shed; or

(b) any goods are imported, loaded or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of this or any other Law; or

(e) any imported goods are found whether before or after delivery, not to correspond with the entry made thereof;

those goods shall be liable to forfeiture”.

The learned trial Judge at page 14 of his Judgment said:

“The Collector of Customs believing as he did, that the coaches were over 10 feet in height and that Mr. Bush had not obtained the approval of the Governor in Council to bring the coaches into the islands, had the power under section 59[1][b] to seize and detain the coaches.”

Did the Collector of Customs seize or detain the coaches under these provisions of the Custom’s Law? Mr. Powery’s evidence was to the effect that having ascertained from Mr. Miller the coaches were over 10 feet in height, he then instructed Mr. Errol Bush, the Port Director, not to release the coaches. When Mr. Avalon Bush returned to the Port he was informed by Mr. Errol Bush that he could not take the coaches off the Dock and that he should go to see Mr. Powery.

Mr. Bush went to see Mr. Power y at the Tower Building. Mr. Powery stated in evidence that he was asked by Mr. Avalon Bush the reason why he did not release the coaches. He told him the reason was that the coaches were too high and that they were in contravention of the Traffic Law.

In considering the evidence of Mr. Powery, the trial Judge in his Judgment at

Page 8 stated:

“I should say at once that I accept the evidence of Mr. Powery that he believed, when he issued the direction to Mr. Errol Bush, that the coaches were over 10 feet in height and were restricted under the Traffic Law. I also accept his evidence that up to the time of that direction, Mr. Powery had spoken to no politician about the coaches and that the reason for his direction was that he genuinely believed that he had no authority to release the coaches because they were restricted under the Law.”

On the 29th November, 1993, the Solicitor General wrote to the Respondent’s

Attorneys in the following terms:

“Following our telephone conversation on Friday, I am writing to confirm my instructions that the buses imported by Avalon Tours Ltd. exceed the height restrictions in section 12(A) of the Traffic Law (revised). As your clients did not obtain the prior written approval of the Governor in Council, they imported the buses illegally.

Your clients should now make immediate arrangements to return the buses to the United States. Until they do so, the buses must remain on the dock.”

The Attorneys pressed for a reply as to the authority under which the buses were being held.

The Solicitor General replied in a letter dated 30th November, 1993.

The letter reads:

“Thank you for your letter of 30th November. I am sorry but for the time being I am not prepared to add anything to my earlier letter to you. Your clients’ buses have been imported illegally and this is sufficient justification for the action taken. Your clients’ will not be permitted to make the alterations to use the buses in Grand Cayman.”

On 6th December, 1993, the Solicitor General wrote to the Attorneys.

The letter reads in part:

“Thank you for your letters of 1st and 6th December. The legal problems with Avalon Tours Ltd. have now resolved themselves into three principal concerns -

1. The three new buses have been imported illegally in that they contravene the height restrictions in section 12A of the Customs Law (Revised). This is a criminal offence and the buses are subject to seizure under section 59(1)(b). No formal action has been taken under the Law.
2. xxxx xxxx xxxx
3. It seems that your clients have also committed a criminal offence under Section 54 of the Customs Law (Revised) by failing to declare the costs of shipping the buses from the United Kingdom to Miami;”

For the Respondents it was submitted that no where in the letters from the Solicitor General is it stated the buses were seized on 26th November, 1993, because of the height of the buses being over 10 feet. It was also submitted that in their pleadings, the appellants did not advance the height as the reason for the detention of the buses. The defence of the 1st appellant was filed on 20th June, 1994. The defence pleaded that a wrong value was declared on the Custom’s entry form. It was stated that it was not until a rejoinder was filed by the 1st appellant on 13th

September, 1995, that it was being contended that the seizure was done under S. 59[1][a]; 1[b] and [e] of the Custom's Law.

Having accepted the evidence of Powery which clearly indicated that the coaches were not being released because of the height restriction, the learned trial Judge fell into error in finding that the coaches were not seized for that reason. His evidence also clearly indicates that Mr. Avalon Bush was informed that the coaches could not be released because they were too high and that their importation contravened the Traffic Law.

Whatever view was taken as to what transpired after the 26th November, 1993, it is clear from the evidence that the coaches were in fact seized on that date. Mr. Avalon Bush was aware that they were seized. This seizure was done in the presence of Mr. Avalon Bush and so no notice was required to be served on him as provided for by S. 64 of the Custom's Law.

From as early as 29th November, 1993, the Solicitor General informed the Attorneys that the buses exceeded the height restrictions and that they were imported illegally.

Again, on 30th November, 1993, the Solicitor General wrote: "*your clients buses have been imported illegally and this is sufficient justification for the action taken*".

One might ask: "*what action was taken?*" The only reasonable inference is that the action taken referred to the seizure and detention of the buses. S. 64 of the Custom's Law states :

“64. (1) The proper officer shall, except as provided in subsection (2) of this section give notice of the seizure of any thing as liable to forfeiture and of the grounds therefore to any person who to the officer’s knowledge was at the time of the seizure the owner or one of the owners thereof.

(2) Notice need not be given under this section if the seizure was made in the presence of -

- (a) the person whose offence or suspected offence occasioned the seizure; or
- (b) the owner or any of the owners of the thing seized or any servant or agent of his; or
- (c) in the case of anything seized in a ship or aircraft, the master or commander as the case may be.

(3) Notice under subsection (1) shall be given in writing and shall be deemed to have been duly served on the person concerned -

(4) Any person claiming that anything seized as liable to forfeiture is not so liable, may within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, appeal to a summary court, which such seizure including any order for costs as may be considered appropriate.

(6) if on the expiration of the relevant period under subsection (4) for the giving of notice of appeal in respect of any thing no such notice has been lodged, with summary court, or if, in the case of any such notice being given, any requirement of subsection (5) of this section is not complied with. the thing in question shall be deemed to have been duly condemned as forfeited.

(7) Where anything is, in accordance with subsection (5), condemned or deemed to have been condemned as forfeited, then, without prejudice to any delivery up for sale of the thing by the Collector under subsection (8), the forfeiture shall have effect as from the date when the liability to forfeiture arose.”

Once the coaches have been seized under Section 9[h] of the Custom's Law, forfeiture automatically follows in the absence of an appeal to Summary Court under Section 64(4). The Respondents, having not appealed within the 30 days as provided for in S. 64(4), the coaches were liable to forfeiture.

The only reasonable view of the evidence is that the coaches were seized and detained by the Customs on the 26th November, 1993 because the buses were over 10 feet high. They were restricted goods and their importation was prohibited.

It was also submitted by the Respondents' Counsel that once delivery is permitted, there can be no seizure and so the buses were not liable to forfeiture.

Reliance was placed in the case of CUSTOMS AND EXCISE COMMISSIONERS -V- TAN AND ANOTHER [1977] 1 ALL ER. 432.

The circumstances of that case is entirely different from the present case. The buses were prohibited and restricted goods. Their importation was prohibited and they could be seized at any time and in fact were seized before they were removed from the Dock.

In our view the TAN CASE cannot avail the Respondents. The seizure after the receipt for delivery was tendered, was permitted under the Custom's Law.

In the circumstances, we are of the opinion that the trial Judge was in error in holding that the buses were not lawfully seized or detained on the 26th November, 1993. Having been seized and detained in the presence of Mr. Avalon Bush, because of the height restriction, the Respondents, if they were of the view that the buses were not over 10 feet, ought to have appealed to the Summary Court within 30 days of the seizure. Not having done so, the buses were liable to forfeiture.

This appeal is allowed and the Order of the trial Judge vacated. An Order that the Summons be dismissed will be substituted with costs to the appellants to be agreed or taxed.

President

Justice of Appeal

KERR. J.A. :

I am in agreement with Zacca, P., that the appeal be allowed as and for the reasons set out in his Judgment.

J.S. Kerr