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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA 196/91

BETWEEN	CHARLES H. HAYLOCK	APPELLANT
AND	THE ATTORNEY GENERAL	RESPONDENT

For the Appellant: Norman Hill Q.C. and Mr. S. McCann
For the Crown : Mr. Ivor Archie

HARRE C.J. **JUDGMENT**

This appeal concerns the forfeiture of the vessel "Real Thing", which lay in George Town Harbour on 3rd October 1990. After the vessel was unloaded the Captain (who was not the present appellant) purported to declare all firearms aboard by declaring one shotgun and a quantity of ammunition to the Customs Department.

On 27th January 1991 police came aboard the vessel, which had not left Harbour in the meantime, and discovered other firearms and ammunition, including an AK 47 Assault Rifle, a Browning Rifle, a pistol and a revolver, after forcibly entering the captain's locked cabin.

The Customs Department seized the vessel, acting under s 59 (1) (c) and (2) of the Customs Law.

This appeal involves interpretation of the Customs Law and the Firearms Law. I here set out the most relevant provisions of these enactments in full,and there will be others to which I shall refer.

1. THE CUSTOMS LAW 1990

> "59. (1) Where -
> ...
> ...
> (c) any goods being chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft; ...
> those goods shall be liable to forfeiture.
>
> (2) Where anything has become liable to forfeiture under this law -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it later became so liable,
>
> shall also be liable to forfeiture.".

2.THE FIREARMS LAW (Revised)

Part II of the Law deals with the importation and exportation of firearms. Sections 7 and 40 read as follows -

> "7. For the purpose of this Part, a person shall not be deemed to import any firearm into the Islands merely by reason of such firearm being in his possession or under his control on some vessel within the territorial waters of the Islands or on some aircraft flying over the Islands unless he causes or attempts to cause or permit such firearm to be disembarked from such vessel or aircraft in the Islands otherwise than for the purpose of being

delivered to a Customs Officer in accordance with section 5.

...

40. The provisions of this Law shall not apply -

...

(b) to any firearm forming part of the equipment of any ship or aircraft or of any aerodrome at any time when such firearm is on board of such ship or aircraft or at such aerodrome, as the case may be; or

...

...

(e) to any officer or member of the crew of any ship or aircraft or any employee of any aerodrome in respect of his possession on board of such ship or aircraft or at such aerodrome, and in his capacity as an officer or member of the crew of such ship or aircraft or an employee of such aerodrome, as the case may be, of any firearm referred to in paragraph (b);".

The grounds of appeal as originally lodged were as follows -

"GROUNDS OF APPEAL

"The Learned Magistrate erred in Law in his finding that the seizure of the vessel 'Real Thing' by the Cayman Islands Customs Department under the provisions of Section 59 (2) of the Customs law was lawful."

The amended supplementary grounds address that general ground with more particularity and I will deal with the appeal by reference in numbered sequence to those.

"1. The learned Magistrate erred in finding that forfeiture of the said vessel pursuant to Section 59 (1) (c) and (2) of The Customs Law 1990 did not depend upon the commission of any offence or conviction thereafter, whether under the Customs Law 1990 or other Law."

First I refer to two English cases.

Denton v John Lister Ltd. & Anor. (1971) 3 All ER 669 was a case of importation of prohibited goods. Such goods were liable to forfeiture under section 44 of the English Customs and Excise Act 1952. That also provided a power of seizure and in Schedule 7 was a procedure whereby the liability to forfeiture could be challenged. The following propositions are taken from the judgment of Lord Widgery C.J. with which the other judges of the Court concurred -

> "...
> I observe again that Schedule 7 and the procedure which it lays down is concerned in my judgment with the single issue of whether the article in question is liable to forfeiture under the Act or the Acts, because there may be others relevant in other cases. In this case the question whether the thing is liable to forfeiture under the Act is determined by the provisions of section 44 which I have read.
> ...
> Although in form the summons alleges that the respondents were the importers, there is no allegation of a criminal offence in this information, nor are the proceedings criminal proceedings against an importer. These are forfeiture proceedings under Schedule 7 of the 1952 Act.
> ...
> It seems to me quite clear that the forfeiture proceedings in schedule 7 are, as counsel for the appellant submits, proceedings in rem and not in personam, that is to say the issue which is to be dealt with in forfeiture proceedings is whether the goods in question are liable to be forfeited. If they are liable to be forfeited then those proceedings are not interested in the identity of the persons who imported them. Forfeiture or no depends on whether the goods were imported contrary to a prohibition.".

This issue arose again some 20 years later in Customs and Excise Commissioner v Air Canada (1991) 1 All ER in relation to the forfeiture of an aircraft under the Customs and Excise Management Act 1979. In Schedule 3 of that act was an express provision that the

process invoked was a civil proceeding. That process was a forfeiture on the ground that an aircraft, which was a commercial jet on a scheduled flight had been "used for the carriage of a thing liable to forfeiture". That thing was cannabis resin, the importation of which was prohibited.

After an extensive review of the statutory history and the authorities Purchas LJ accepted the submission that section 141 of the 1979 Act and its predecessor sections in the 1952 Act and the 1876 Act provided -

> "A process in rem against any vehicle, container or similar article which was in fact used in the process of smuggling, to use a crude expression, defined in the legislation as the carriage of goods liable to forfeiture at the time of carriage. The object to be seized under the provisions is incapable of motive or state of mind which can only exist in the proprietor, user or other person involved in the smuggling. Thus the confiscatory provisions, as was said in the judgments already recited, operated against the thing and were wholly independent of the knowledge, motive or attitude of owners or other persons associated with the thing.
>
> The wording of section 141 is, in my view, clear and unambiguous and does not permit of any implication or construction so as to import an element equivalent to mens rea nor does it involve in any way a person in the widest sense whether as

user, proprietor or owner but depends solely on the thing being used in the commission of the offence which rendered the goods liable to forfeiture."

I take the following from the concurring judgments of Balcombe LJ and Sir David Croom-Johnson.

Balcombe LJ said this -

> "In my judgment the wording of S 141 (1) of the 1979 Act is clear and free from ambiguity. It does not itself create a criminal offence so that the authorities on which the judge below and counsel for Air Canada before us, relied to justify the implication of requirement of knowledge on the part of Air Canada (by its appropriate offices of servants) are of no direct relevance.".

Sir David Croom-Johnson said this -

> "It is not possible say that S 141 of the Customs and Excise Management Act 1979 has no connection with crime. Mr. Laws has submitted that S 141 (1) does not create an offence. That is true. It creates a liability to forfeiture, which may arise from the commission of an offence without the necessary criminal intent having been that of the owner of the ship, aircraft, vehicle or other thing. If that happens, then section 141 (3) creates an offence by the owner, master or commander of the ship who may be innocent of any transgression. That is indeed harsh, but in my view it is the Law.".

There is another interesting passage in the judgment of Sir David Croom-Johnson dealing with the relationship between the commission of a criminal offence and forfeiture. It is this -

> "Criminal offences, as opposed to forfeiture, are created by S 50. It covers both those committed in connection with failure to pay duty on chargeable goods and those committed by importing prohibited and restricted goods.".

He then refers to ss (2) and (3) of S 50 which cover those matters, and continues as follows -

> "S 50 (2) and (3) therefore create criminal offences in connection with those matters for which goods are liable to forfeiture under section 49 (1) (a) and (b). In each case as specific criminal intent is required. A wholly innocent importation is not an offence under that section but that does not affect the liability to forfeiture." (my emphasis)

The last passage from the judgment of Sir David Croom-Johnson to which I wish to refer is this -

> "The position of the owner of the aircraft in respect of forfeiture and of the owner and commander under the penal provisions of section 141 (3) where they have no knowledge or means of knowledge of the presence of the cannabis resin or the criminal intent on the part of the of the importer eventually to avoid paying duty, seems hard indeed. One would turn with sympathy to Mr. Webb's arguments based on Warner v Metropolitan Police Commissioner (1968) 2 All ER 356, (1969) 2 AC 256 and Sweet and Parsley (1969) 1 All ER 347, (1970) AC 132 but for two matters. The first is that this claim for forfeiture is an action in rem. The precursor of section 141 of 1979 Act was S 277 of the Customs and Excise Act 1952, which was an identical term and on which the judgment of Lord Parker CJ in Customs & Excise Commissioners v Jack Bradley (Accrington) Ltd. (1958) 3 All ER 219 is based ... When Parliament in 1979 re-enacted S 277 of the 1952 Act it must have done so in the knowledge of the cases to which Purchase LJ has made reference. The explanation may well lie in the special importance to be attached to statutes dealing with Customs and Excise.".

In these cases statutory provisions which differ from those in Cayman are being reviewed against different facts, and Mr. Hill's argument is based not on the question of whether a criminal act has been committed by the person whose goods are liable to forfeiture but whether any criminal act has been committed by anyone at all. He urges me to adopt a liberal construction of the statute.

Forfeiture is undoubtedly a penalty and the phrase "penal statute" is used to cover both statutes creating criminal offences and those providing for recovery of penalties in civil proceedings. As Lord Esher said in Tuck & Sons v. Priester (1887) 19 QBD 629 at 638 -

> "If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for constructions of penal sections".

I accept that that is the correct approach, but despite the references to the commission of an offence in the passages to which I have just referred, their clear import in my view is that the wording of a forfeiture provision is to be construed on the basis that it is the state of affairs described therein which is the basis of the forfeiture, irrespective of such extraneous considerations as mens rea or even the identity of any suspected wrongdoer.

Both the English cases to which I have just referred were involved with what was acknowledged to be an illegal importation of goods - the commission of an offence - and the judgments are expressed on that basis. But they all proceed on the basis that the nature of the proceedings is that they are an action in rem based on the existence of a particular state of facts - in the two English cases the importation of prohibited goods liable to forfeiture - which in the Air Canada case led to the secondary stage, the forfeiture of the aircraft used to carry them. In the present case the factual basis for the forfeiture of the goods is that they were goods, the importation of which was prohibited or restricted (as firearms clearly

are under S. 10 (3) (a) of the Customs Law) and that they were found, whether before or after the unloading thereof to have been concealed aboard the vessel "Real Thing". In my judgment the wording of the provision is quite clear. If that state of affairs can be shown the goods are liable to forfeiture, and if that can be shown that the vessel is liable to forfeiture also. I acknowledge that there are references to an offence or a suspected offence in S. 59 (2) (a) and 64 (2). Clearly there are some matters described in S 59 (1) which will also be the subject of criminal proceedings in personam. I do not conclude from that that there is a requirement to show, in relation to each element in S 59, a basis for such proceedings.

So I reject the proposition in Ground I and turn to the second ground of appeal.

> "2. The Learned Magistrate erred in law in finding that the said firearms in question did not form part of the equipment of the said vessel pursuant to section 40 (b) of the Firearms Law (Revised)."

I have already set out section 40 (b) which excludes, inter alia, any firearm forming part of the equipment of and on board any ship from the provisions of the Firearms Law.

There is an affidavit by the appellant in which he relates stories the dangers of piracy in the Caribbean area on the basis of which he says that he was informed by the captain of the "Real Thing" that the firearms had been acquired and secured by him solely for the purpose of protecting the vessel and its crew while at sea. It is hearsay, but I would have dealt with the point nevertheless were it not for the fact that the question of whether or not the firearms were

equipment of the vessel seems to me to be irrelevant to the determination of this appeal. The issue of whether firearms are goods the importation of which is prohibited or restricted by or under any enactment does not need to be answered by recourse to the Firearms Law. A restriction on import or export of firearms is to be found in section 10 (3) of the Customs Law.

There was no attempt to bring the firearms ashore in this case and I do not need to go into any of the provisions about importation, whether under the Customs law or the Firearms Law. The test which I have to apply is whether there was concealment of prohibited or restricted imports (whether before or after unloading). I make the observation, however, that success under this ground of appeal would have the appearance of a hollow victory, in that if the Firearms Law does not apply the protection of S 7 of that Law with regard to importation is lost.

From there I proceed to the third ground of appeal.

> "3. The Learned Magistrate erred in law in finding that the said vessel was in fact used for the concealment of the firearms and ammunition within the meaning of Section 53 (1) of The Customs Law 1990.".

The firearms were securely stored under lock and key on board the vessel. To that extent the way in which they were dealt with was commendable. But there was a clandestine element also which resulted in a deadly arsenal being within George Town harbour for months on

end without anyone in authority knowing about it. That was the failure to make a full declaration of all the firearms aboard. The affidavit of the appellant gives his source of information and belief - the master of the vessel - that all the guns and ammunition were not declared to the Customs in October 1990 because of the difficulty he had experienced in the past with the Customs' inability to return a weapon in their possession late at night. He decided to keep quiet about what he had. That was concealment, and the concealment took place on board the ship. The fourth ground of appeal was this -

> "4. The Learned magistrate misdirected himself on the burden and standard of proof, and the nature of the proceedings and as a consequence his decision ought not to stand.".

The learned Magistrate described the hearing before him as an appeal against seizure of the vessel "Real Thing" by the Cayman Customs Department and it may be assumed from that that he regarded the burden of proof as being on the appellant. As to standard of proof there is one express reference. He says that the Court was satisfied on the balance of probabilities that the firearms in question did not form part of the equipment of the Real Thing.

The Magistrate was quite right in referring to the proceedings as an appeal. That is how they are described in S. 64 of the Customs Law. A notice and grounds of appeal were filed and the order of submissions followed those customary in an appeal, with the appellant opening and ultimately responding to submissions made by the Crown. A bond to prosecute the appeal was lodged on the 28th April 1993, following an application that it should be struck out for want of prosecution. The only deviation from the normal course of any

appeal which I have discovered is the fact that in opening Mr. Hill described the proceedings as an application under the provisions of the Customs Law supported by affidavit. That was the affidavit by Mr. Haylock to which I have already referred.

The following passage in the transcript of the hearing of the appeal appears after the submissions on both sides, which related, except to the extent of what was contained in Mr. Haylock's affidavit, to matters of statutory interpretation. I think I have to read it in full. It is not very long -

> "THE COURT: I, however -- we need a background of the facts here, especially as you hve been relying on your Affidavit because you know I need -- if this -- if I were to find a certain way, it will go further and we really haven't got the basic facts behind this thing.
> MR. HILL: Let me put it this way, there was no evidence --
> THE COURT: I am not going to guess about it any further.
> MR. ARCHIE:I was going to determine --
> THE COURT: I am not going to guess about it any further, I need the transcript.
> MR. ARCHIE: May it please you we had hoped to have it.
> THE COURT: Yes, I need a transcript.
> MR. HILL: That's fine, in those circumstances, if there is any matter which arises as a result of that, if you feel it necessary for either of us to be of any assistance, then you will have --
> THE COURT: We need to know what was done and what wasn't done since we are speaking about offences and whatever.".

The transcripts of previous proceedings which are on the file are those of the ruling by the former Senior Magistrate on an application by the Crown under S. 59 (1) (c) of the Customs Law 1990 for the forfeiture of the firearms on the vessel following a finding that the mate, who was charged with 8 offences under the Firearms Law,

had no case to answer and the hearing of the evidence against the mate. The learned Senior Magistrate rejected the application on the basis that section 59 creates no offence, nor does it prescribe a penalty for one, and that where there is no offence at law there can be no remedy at the criminal bar. He went on to say that as far as the provisions of section 59 are concerned the power of Customs which is the decision to forfeit, is not a judicial one, but rather administration.

So the proceedings as an appeal have a hybrid element. They have elements in common with a judicial review of administrative action. It is to be noted that our appeal process differs from that which obtains in England, and also in Barbados. A case from Barbados, to which I shall refer in a moment, was brought to my attention. As far as England is concerned the procedure can be seen from the following passage in the headnote of Customs and Excise Commissioners v Air Canada (Supra).

> "The Airline then gave notice under para 3 of Sch 3 claiming that the aircraft was not liable to forfeiture. The commissioners began proceedings for condemnation of the aircraft under para 6 of Sch 3 (which by para 8 were deemed to be civil proceedings) or for alternatively an order that there were reasonable grounds for seizing the aircraft.".

At that stage the matter went against the Commissioners and they successfully appealed to the Court of Appeal, Civil Division.

The case from Barbados is Clarke v Customs Comptroller (1987) 39 WIR 29 . In accordance with the procedure under the schedule of the Customs Act of Barbados, following seizure of a vessel, the owner of the vessel gave notice of his claim to the Comptroller and the

Comptroller applied to the court for an order for forfeiture. The burden of proof became crucial, since the Comptroller relied on the evidential provisions of paragraph 12 of the schedule to the Act which read as follows-

> "In proceedings arising out of the seizure of anything the fact form and manner of the seizure shall be taken to have been as set forth in the process without further evidence thereof, unless the contrary is proved.".

Neither the Comptroller nor the claimant led any evidence and it was held that the effect of paragraph 12 of the schedule was merely to shift the burden of proving the fact form and manner of the seizure on to the claimants, and the onus remained on the Comptroller to satisfy the court by calling evidence, or by invoking the appropriate provisions of the Act, that the vessel was liable to forfeiture. On that basis the appeal was allowed and the order condemning the ship as forfeited set aside.

In the light of the draconian provisions of the forfeiture provisions of the Custom Law I would have preferred to see provisions on the lines of those in England or Barbados. But I cannot escape the situation that I do not, and I find no fault with the way in which the magistrate addressed the burden and standard of proof. It is to be noted that the rigours of the law are to some extent mitigated by the administrative powers of the Governor in Council under S. 70 and the Comptroller under S. 64 (8) of the law, and the power of redemption under S. 59 (5). So, having reviewed all four grounds of appeal I find that each of them fail and the appeal must be dismissed.

G. E. Harre
Chief Justice

7th October 1994.