IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 8 OF 1990

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A.

JOHN W. MARGESON VS. REGINA

MRS. P. LEVERS and MR. G. HAMPSON FOR APPELLANT

MR. IVOR ARCHIE FOR THE CROWN

DECEMBER 3, 5, 1990 AND MARCH 22 1991

ZACCA, P. :

On December 5, 1990, we dismissed the appeal against conviction but allowed the appeal against sentence in that the order made by the learned Magistrate recommending deportation was vacated. We promised to put our reasons into writing and this we now do.

The appellant is an American citizen having a 40 per cent partnership in a business in the Cayman Islands, known as Two Johns Limited.

Two Johns Limited was the importer of certain items of furniture. The appellant was responsible for clearing the items imported through the Customs. It was alleged that the appellant presented invoices on which duty was to be paid and that the invoices were false as they did not accurately represent the dutiable value of the goods. The goods were released on the basis of the invoices submitted.

Subsequently, the apartment of the appellant was searched and invoices similar to the ones submitted to Customs were found in the apartment. These invoices indicated a higher

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price than the price declared to Customs.

The appellant was charged under five Informations with breaches of s. 54 of the Customs Law.

In the Summary Court two of these charges were withdrawn and at the end of the Crown's case, a third charge was dismissed on the basis of a no case submission on behalf of the appellant.

The appellant was convicted of the two remaining charges. On each information he was fined $2,000 or six months imprisonment. The Magistrate also recommended deportation.

On an appeal to the Grand Court, the convictions and sentences were upheld. The appellant appealed to this Court against his convictions and sentences.

Mrs. Levers, on behalf of the appellant, argued four grounds of appeal as follows :

1. That the Learned Appellate Judge erred in Law in holding that the evidence, namely the documents signed by the Appellant and the subsequent documents found, was evidence sufficient to justify a finding of misrepresentation under Section 54 of the Customs Law.

2. That the Learned Appellate Judge erred in Law in holding that the Learned Magistrate directed himself adequately and/or if at all on the burden of proof required to :

   (a) Discharge the onus cast on the Prosecution AND/OR

   (b) Discharge the onus cast on the Defence as to the question of knowledge.

3. That the Learned Appellate Judge misdirected himself in the most crucial aspect of the Defence case and erred in coming to the finding that there was ample proof of guilty knowledge.

4. That the Learned Magistrate erred in Law in that he exercised his discretion wrongfully in making the deportation order against the Appellant.

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S. 54 of the Customs Law, 1990 reads :

> "Whoever directly or indirectly by any misrepresentation, act, omission or device evades or attempts to evade payment of the whole or any part of the duty or package tax payable on any goods or who wrongfully obtains or attempts to obtain drawbacks thereon is (except in the absence of guilty knowledge, proof of which is upon such person) guilty of evading customs duty. "

Under the Act, "Importer" is defined thus :

> "'Importer' includes any owner or other person for the time being having a right to possession of or being beneficially interested in any imported goods with effect from the time of the import of such goods until the same have been duly customed. "

Mrs. Levers contended that the Crown had failed to prove that the actual open market price was not that which was stated on the invoice presented to the Customs.

The Customs Law, 1990, makes reference to "a sale in the open market".

S. 41 provides as follows :

> "1. The value of any imported goods shall be taken to be the normal price, that is to say, the price that they would fetch, at the time when they entered for home use (or, if they are not so entered, at the time of importation), on a sale in the open market between a buyer and seller independent of each other
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> 2. The normal price of any imported goods shall be determined on the following assumptions -
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> (a) that the goods are treated as having been delivered to the buyer at the port or place of importation ;
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> (b) that the seller will bear freight, insurance, commission and all other costs, charges and expenses incidental to the sale and the delivery of the goods at the port or place, except buying commission not exceeding five per centum of the total value which is shown to the satisfaction of the Customs to have been paid to agents; and

(c) that the buyer will bear any duty or tax payable in the Islands and other post-importation charges.

3. A sale in the open market between buyer and seller independent of each other pre-supposes -

(a) that the price is the whole consideration ;

(b) that the price is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller (or any person associated in business with him) and the buyer (or any person associated in business with him) other than the relationship created by the sale of the goods in question ; and

(c) that no part of the proceeds of the subsequent re-sale or disposal of the goods will accrue either directly or indirectly to the seller or any person associated in business with him. "

In his reasons for judgment, the Grand Court Judge stated :

"To prove an evasion of duty, the Crown had to prove the dutiable value of the goods (i.e. the open market price) so that the Learned Magistrate could compare with that value, the value attributed to the goods in the documents submitted by the Appellant to the Customs. To that end, the Crown tendered in evidence invoices found in the Appellant's apartment that were identical to the invoices presented to the Customs, save that in every instance the price for each of the goods listed therein is higher than the price on the corresponding invoice presented to the Customs. The documents found in the Appellant's apartment also included documents of the retailers of the goods specified in the invoices. Their prices were identical with those of the invoices found in the Appellant's apartment. From that fact, the reasonable inference is that the prices on the invoices found in the Appellant's apartment are the open market prices of the goods customed. That finding in conjunction with the difference in the prices of the two sets of invoices gives rise in turn to the inference that the Appellant knew that the invoices he presented to the Customs were false. An inference that is

> strengthened by the fact that he was responsible for the importation of the goods. "

In our view the findings of the Learned Judge can be supported by the evidence in the case and we hold that the grounds of appeal with respect of the convictions must fail.

On the matter of sentence, Mrs. Levers argued that the order for deportation was a part of the sentence and therefore an appeal against that part of the sentence was sustainable. She also contended that the Learned Magistrate wrongly exercised his discretion in making the deportation order.

Learned Counsel for the Crown, Mr. Archie, submitted that the recommendation for deportation was not a part of the sentence and therefore no appeal could lie against the order.

A deportation order can be made under s. 59 of the Cayman Protection Law. The section provides :

> "59. (1) No deportation order shall be made under this Law, otherwise than in the case of a convicted and deportable person or of a person who has been convicted of an offence contrary to section 56(1)(c) or of a person who has been sentenced in the Islands to imprisonment for a term of not less than six months unless a magistrate shall have reported on the case and the Governor, having had regard to the findings of fact, any conclusions of law and any recommendation contained in such report, is satisfied that such order may fitly be made.
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> (2) Where it is intended to take proceedings against any person for the purpose of obtaining a report under subsection (1) a notice shall be served upon such person, giving him reasonable information as to the nature of the facts alleged against him and the grounds upon which it is alleged that a deportation order should be made and requiring him to show cause why such order should not be made and naming the time and place for his appearance before a summary court in that behalf. If such person should fail to appear at the time and place so named the court may issue a warrant for his arrest.
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> (3) In every proceeding under subsection (2) the court shall take such evidence on oath of the parties (who may be represented by counsel) and their witnesses as may be

> "tendered in chief and upon cross-examination and re-examination and after considering the evidence adduced before him and making any further investigations which he may consider to be desirable, shall report to the Governor setting out his findings of fact, conclusions of law, if any, and making such recommendation as he thinks fit. During the proceedings and pending the decision of the Governor, the court may order the person subject of the report to be detained in legal custody or released on bail at his discretion. "

In Section 2 of the Law "convicted and deportable person" was defined as follows :

> "Convicted and deportable person means a person in respect of whom any Court certifies to the Governor that he had been convicted by that Court or by an inferior Court from which his case has been brought by way of appeal of any offence punishable with imprisonment, otherwise than only in default of payment of a fine and recommends that a deportation order should be made in his case either in addition to or in lieu of sentence. "

It was agreed that the appellant is "a convicted and deportable person". The issue for decision is whether an appeal lies against the deportation order and if it does, was the discretion of the Judge incorrectly exercised.

The right of an appeal from a Summary Court is contained in s. 156(1) of the Criminal Procedure Code Law 13 of 75.

S. 156(1) states :

> "Save as hereafter in this Code provided, any person who is dissatisfied with any judgment, sentence or Order of the Summary Court in any criminal cause or matter to which he is a party may appeal to the Grand Court against such judgment, sentence or Order either by motion on matters of law or fact (or both) or by way of case stated on a point of law only as hereinafter provided :
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> Provided that in no case shall the complainant appeal from a decision dismissing a complaint except by way of a stated case or a point of law. "

The Court of Appeal Law 9/75 defines sentence as follows :

> " Sentence includes any Order of any Court made consequent upon or in connection with a conviction which is subject to the jurisdiction of the Court. "

In England there are specific provisions in the Immigration Act 1971 s.6(5) and the Criminal Appeal Act 1968 s.50(1) enabling a convicted person appealing against an order recommending deportation.

Similarly the Court of Appeal Law of Jamaica defines sentence as follows :

> "'Judgment' or 'sentence' includes any Order of a Court made on conviction with reference to the person convicted or his children, and any recommendation of a Court as to the making of a deportation order in the case of a person convicted, and the power of the Court of Appeal to pass a sentence includes a power to make any such Order of a Court or recommendation, and a recommendation so made by the Court of Appeal shall have the same effect for the purposes of s.15 of the Aliens Act, as the Certificate and recommendation of the convicting Court."

It is to be observed that in the definition of sentence in the Jamaican Law, the words, "or in connection with a conviction", do not appear. However, as pointed out above, the Jamaican Act includes in the definition of sentence, "any recommendation of a Court as to the making of a deportation order in the case of a person convicted".

In Tatum v. Regina, 1986 C.I.L.R. 38, Summerfield, C.J. held that the recommendation for deportation was not a judgment, sentence or order for the purpose of s. 156(1) of the Criminal Procedure Code. The judgment does not indicate what arguments were presented to the Court on behalf of the appellant.

At p. 39 in a short judgment, Summerfield, C.J. stated :

> "In my view the recommendation for deportation is not a judgment, sentence or order for the purpose of s. 156(1) of the Criminal Procedure Code to enable an appellate court to review that recommendation. In the United Kingdom and in other territories it is specifically provided by legislation that such a recommendation is to be treated as part of the sentence for the purpose of an appeal. No such provision exists here. I suggest that consideration be given to introducing such a provision.
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> It can be important because, before such a recommendation should be made, there should be some enquiry as to the suitability of the recommendation. On the face of the record there has been no such enquiry. The record does not even reflect the wishes of the Crown on the matter. Further, the principles set out in R. v. Nazari (1) should be taken into account and applied as appropriate.
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> As it is I do not have jurisdiction to entertain this appeal against the recommendation and do not propose to snatch at jurisdiction. Accordingly the appeal must be dismissed. "

In Michael Power v. Regina, S.C.A. 63 of 1990, Schofield, J. following Tatum case, held that he had no jurisdiction to entertain an appeal against an order made recommending deportation. He, however, expressed views as to the circumstances under which such an order was to be made by a Judge.

In our view the words "in connection with a conviction" in the definition of 'sentence' must connote some meaning. We are satisfied that an order made recommending deportation is an order made in connection with a conviction. Without the conviction, the order could not have been made. We hold that the appellant was entitled to appeal against the order recommending deportation. The order is therefore part of the sentence.

The next question for the decision of the Court is as to whether the order was properly made. In his reasons for sentence, the learned Magistrate stated :

"You have been convicted of what is in the eyes of the Law a very serious offence. The penalty provided bears this out. The Customs acting on suspicion searched the home of the accused. It is interesting to note that the figures used when translated from U.S. to C.I. bears an exact relation. This Court has a duty to the Community, one which survives on the payment of this type of taxation to deter anyone whether in business or private who may be inclined to devise such means to evade Customs. The accused being in position of authority as both the exporter and the importer was in a very favourable position to carry out such false misrepresentation.

In sentencing him I cannot go along with learned Counsel. Mr. Hampson did invoke Section 35 of the Penal Code. I will, however, take his age and health into account as far as the question of incarceration goes.

I repeat the penalty provided by Sect. 61 of this Law is severe, I hope my sentence will reflect both mercy and the view of the Legislators. As far as this Court is concerned, accused can afford to pay.

SENTENCE

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| 3198/88 | $2,000.00 or 6 months and a sum 3 times amount | = $655.58 |
| 3199/88 | $2,000.00 or 6 months 3 x $328.89 | |
| | Rec. Deportation. " | |

In his reasons for judgment in R. v. Tatum (above) Summerfield, C.J. recommended that the principles set out in R. v. Nazari 1980, 71 CR. APP. R.87 should be taken into account prior to the making of an order recommending deportation.

In R. v. Caird et al 1970 54 CR. APP. R. 499, fifteen defendants including one Miguel Bodea, were charged for unlawful assembly. During this unlawful assembly, violence was used and police officers assaulted by some of the defendants.

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Bodea was convicted and sentenced to 9 months imprisonment. An order recommending deportation was also made. In quashing the order recommending deportation, Sachs, L.J. stated at p. 510 :

> "So far as Bodea, however, is concerned there was also a recommendation for deportation. In a case such as is under consideration, the question for the Court is whether the potential detriment to this Country of Bodea remaining here has been shown to be such as to justify the recommendation.
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> This Court is of the clear opinion that upon that basis the recommendation based on this particular isolated offence cannot be supported and should be cancelled.
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> It desires to emphasize that the Courts, when considering a recommendation for deportation, are normally concerned simply with the crime committed and the individual's past record and the question as to what is their effect on the question of potential detriment just mentioned. "

In R. v. Nazari and others 1980, 71 CR. APP. R. 87 the Court of Appeal laid down certain guidelines for the consideration of Judges when an order recommending deportation is being contemplated.

Lawton, L.J. in giving the judgment of the Court said at p. 94 :

> " We now indicate some guidelines which Courts should keep in mind when considering whether to make an order recommending deportation. But we stress that these are guidelines, not rigid rules. There may well be considerations which take a particular case out of the guidelines; that is a matter which will depend on the evidence.
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> First, the Court must consider, as was said by Sachs, L.J. in Caird's case (supra), whether the accused's continued presence in the United Kingdom is to its detriment. This country has no use for criminals of other nationalities, particularly if they have committed serious crimes or have long criminal records.
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> That is self-evident. The more serious the crime and the longer the record the more obvious it is that there should be an order recommending deportation. On the other hand, a minor offence would not merit an

"order recommending deportation. In the Greater London area, for example, shoplifting is an offence which is frequently committed by visitors to this country. Normally an arrest for shoplifting followed by conviction, even if there were more than one offence being dealt with, would not merit a recommendation for deportation. But a series of shoplifting offences on different occasions may justify a recommendation for deportation. Even a first offence of shoplifting might merit a recommendation if the offender were a member of a gang carrying out a planned raid on a departmental store.

Secondly, the Courts are not concerned with the political systems which operate in other countries. They may be harsh; they may be soft; they may be oppressive; they may be the quintessence of democracy. The Court has no knowledge of those matters over and above that which is common knowledge; and that may be wrong. In our judgment it would be undesirable for this Court or any other Court to express views about regimes which exist outside the United Kingdom of Great Britain and Northern Ireland. It is for the Home Secretary to decide in each case whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh. The Home Secretary has opportunities of informing himself about what is happening in other countries which the Courts do not have. The sort of argument which was put up in this case is one which we did not find attractive. It may well be that the regime in Iran at the present time is likely to be unfavourable from the point of view of the applicant. Whether and how long it will continue to be so we do not know. Whether it will be so by the end of this man's sentence of imprisonment must be a matter of speculation. When the time comes for him to be released from prison the Home Secretary, we are sure, will bear in mind the very matters which we have been urged to consider, namely, whether it would be unduly harsh to send him back to his country of origin.

The next matter to which we invite attention by way of guidelines is the effect that an order recommending deportation will have upon others who are not before the Court and who are innocent persons. "

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On the face of the record in the instant case, the learned Magistrate made no enquiry. The record does not reflect any application being made by the Crown or any wishes of the Crown in the matter. Counsel for the defence was not given any opportunity to be heard prior to the making of the order. It is clear that the learned Magistrate failed to consider the guidelines set out in R. v. Nazari (above).

These guidelines should be kept in mind when Courts are considering the making of an order recommending deportation.

In our judgment there should be a full enquiry into a case before any order recommending deportation is made. A person who is likely to be the subject of the order should be given notice of what may happen to him. The object of that is to give him the opportunity to prepare his answer to a suggestion that he should be recommended for deportation. It follows that no Court should make an order recommending deportation without full enquiry into all the circumstances. It should not be done, as has sometimes happened, by adding a sentence as if by an afterthought, at the end of observations about any sentence of imprisonment or fine. It would be advisable for Judges to invite Counsel to address them specifically on the possibility of a recommendation for deportation to be made.

We have considered the case for the appellant in the light of the considerations enunciated in R. v. Nazari and have come to the conclusion that the order recommending deportation should be quashed.