J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 59/1973

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.) Presiding
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

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R. v. ROY WONG

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Dr. L. Barnett and Dr. A. Edwards for the appellant.

J.S. Kerr, Q.C., Director of Public Prosecutions and H. Downer for the Crown.

June 24 - 27; October 11, 1974

LUCKHOO, P. (Ag.):

This is an appeal from conviction and penalty imposed on the appellant Roy Wong by the learned resident magistrate for the parish of Kingston on October 4, 1972 upon an information charging that the appellant on February 13, 1970 knowingly harboured certain restricted goods, namely, a quantity of cutlery which had been imported without a licence, contrary to a restriction imposed by Order made pursuant to s. 8 of the Trade Law, 1955 and published in the Jamaica Gazette Supplement dated August 8, 1968, with intent to defraud Her Majesty of duties due thereon, contrary to s. 205 of the Customs Law, Cap. 89. Michael Shadeed who had been charged on informations alleging that he had been concerned in the evasion of customs duties in relation to the same goods was tried jointly with the appellant.

At the end of the case for the prosecution, as one Samuels whom the prosecution considered to be a vital witness in the case against Shadeed did not appear, no further evidence was offered against Shadeed who was accordingly discharged.

The case for the prosecution was to the following effect. The appellant and one Charles Chin were carrying on a general harberdashery business at premises situate at 56 Princess Street in the parish of Kingston. On February 13, 1970 Messrs. Hendricks and Williams price inspectors attached to the Trade Administrator's Office went to the appellant's business premises for the purpose of checking on price controlled commodities and on goods the importation of which was restricted under the provisions of the Trade Law, 1955. They disclosed to the appellant the purpose of their visit. Hendricks observed some wooden cartons and cases in front of a counter which had spoons and forks of the type the imporation of which had been restricted since 1968. Restricted goods may only be lawfully imported into the Island under a licence issued the importer by the Trade Administrator. Hendricks thought that the packages containing the spoons and forks looked new and came to the conclusion that they had recently come into the Island. He asked the appellant if he had imported them lately. The appellant said "No" and that he had them a long time ago. Hendricks asked the appellant to be shown the invoices for the importation of the goods and the appellant said they were with his accountant Mr. Carbado. The appellant went to a telephone and said that he had telephoned Carbado's office but that Carbado was then out of town. Hendricks telephoned his office and later surveyors of customs in the Collector General's Department, Campbell and Hunter came to the appellant's premises where they spoke with Hendricks. As a result Hunter procured a search warrant to be issued under the provisions of s. 198 of the Customs Law, Cap. 89 in respect to the appellant's business premises authorising him to search for restricted goods. Hunter told the appellant that he had information that he had certain restricted goods including cutlery in his possession which he would have to account for.

Hunter asked the appellant if he had any of those goods. He informed the appellant that he had a search warrant in his hand and asked him if he would like him to read it. The appellant said no. He told Hunter that he had no restricted goods and that Hunter was free to search the premises. Hunter asked the appellant to show him where he stored goods. The appellant indicated a part of the premises where Hunter found among other goods stored there packages which on being opened were seen to contain knives, forks and spoons. The packages bore marks which included the letters "ES". There were 88 packages with cutlery bearing those letters. A list was made in the appellant's presence by Hunter of the numbers and marks appearing on each of those packages. Hunter asked the appellant to account for the goods in the packages. The appellant said that he had his documents in relation to those packages but that they were with his accountant Carbado. The 88 packages were then taken away to the Queen's Warehouse pending the production by the appellant of documentary evidence of their lawful importation. There a list was made of the numbers on each package as well as of the contents and quantity of the goods found therein. That list showed that the packages contained a total of 100 gross and 15 pieces of spoons, knives and forks. The customs duty thereon was then assessed. The mark on each package commenced with the letters "ES" followed by the numbers "948". Each of the 88 packages then bore an additional number which ranged between "4" and "300". Hunter who as a surveyor of customs in the Collector General's Department had access to documents - including the importer's C 21 form required to be deposited with the Collector General by the importer in relation to restricted goods delivered to him - was unable to discover the existence of any document or of any import licence relating to the contents of the 88 packages removed from the appellant's premises. Search of the records kept by Trade Administrator of import licences issued in the period 1969-70 revealed that no licences were issued to either the appellant or to M. Shadeed and further that no licence was ever issued in relation to an importation of over 1000 gross of cutlery.

It was discovered that packages bearing identical marks and numbers as contained in the list of 88 packages made by Hunter came on the "S.S. Neptunus" which arrived in the Island from Amsterdam on February 10, 1970 and discharged cargo including the packages with those marks and numbers on the same day. Actually packages with marks and numbers ES 948/1-312, that is 312 packages in that series consigned to M. Shadeed were unloaded from that vessel at No. 1 Berth at Western Terminals Ltd. Joslyn Thomas, warehouse clerk employed to Western Terminals Ltd., whose duties were to receive cargo from ships unloading and to deliver the same to consignees or their agents, discovered that one of those packages was broken when it fell during unloading from the "Neptunus". In that broken package Thomas said he saw spoons which looked like silver spoons. He sent the broken package to the warehouse to be repaired. He delivered 291 of the packages to two men on a truck on the same day and the remaining 21 packages (including that which had been broken) he delivered on February 12, 1970. Courtney McKoy, a clerk employed to Western Terminals Ltd., testified that when a package unloaded is in a damaged condition it is sent to be repaired at a place he referred to as the Locker and a record is made of that fact on a list called the Bad Order List. A Bad Order List made by McKoy in relation to damaged packages unloaded from the Neptunus on February 10, 1970 tendered in evidence showed that the damaged packages included the following -

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B/L	MARKS AND NOS.	REMARKS
28	ES 948	1 Case Glass Marbles landed broken, containing 14 bundles of 5 boxes each and 2 bundles of 2 boxes each.
	ES	Cartons contents unknown landed palletized torn. Damage report to follow.
28	ES	1 case pocket knives landed broken damage to contents unknown. Report to follow."

B/L refers to the bill of lading number. An annotation at the end of the first and third of the above entries indicates that delivery of the packages in question was made on February 12, 1970 to the consignee. No entry was made as to date of delivery in relation to the second item, the contents of which package were stated to be unknown. Evidence was adduced to show that the 312 cases marked ES 948/1-312 which came to the Island by the "Neptunus" were taken from Western Terminals Ltd. wharf by truck, 291 on February 10 and 21 on February 12, 1970, to the appellant's premises and there delivered to the appellant. Evidence was also adduced to show that in the normal course those goods would have been examined at No. 1 Berth where unloaded by Alfred Martin, a surveyor of customs who for the period January - March 1970 was the only officer assigned for that purpose to No. 1 Berth but that those goods were never in fact examined by him. Further what purports to be a signature at the back of the import entry in certification of such an examination of the goods was not in fact written by Martin. It was sought to be shown that the duties payable on the goods so imported exceeded the duties actually paid in respect thereof. It was also sought to be shown that samples taken from those goods were taken to Jamaica Electroplating Company for examination by Peter Davis, General Manager of that company as to whether they were of base metal and so restricted goods within the provisions of the relevant Order made under the Trade Law, 1955 and still in force and that they were found by Davis to be made of mild steel chrome plated and so made of base metal. The appellant's accountant Carbado testified that while he had posted invoices in relation to the appellant's purchase of cutlery he last did so in 1966. The records of his office including those relating to cutlery belonging to the appellant perished in a fire at his office in 1969.

In short the case for the prosecution was to the effect that goods assigned to Shadeed arrived in the Island from Amsterdam by the "Neptunus" on February 10, 1970 and by a subterfuge were never examined at the wharf where they were discharged; that among those goods were cutlery of a description which could not be lawfully imported into the Island without a specific licence granted by the Trade Administrator; that those goods were taken to the appellant from the wharf and then placed by him in his stock at his business premises; that in so doing he was well aware that among the goods were restricted goods which had been imported into the Island without the necessary licence; and that he harboured those restricted goods with intent to defraud Her Majesty of duties payable thereon.

The case for the defence was to the following effect. The appellant was established in the wholesale harberdashery business since 1961 and took over as stock in trade from an existing business goods which included cutlery. In addition from time to time prior to 1968 he would make large purchases of cutlery. One such purchase was made in 1967 when he bought 170 cases of spoons, forks and knives from Chas. Chung Soong & Co. Since cutlery was placed on the list of restricted goods in 1968 he had made no further purchases of such goods. The 88 cases of cutlery taken away by Hunter from his premises on February 13, 1970 formed part of his earlier purchases all made before 1968. A few days before February 10, 1970 Shadeed came to him and showed him some documents relating to the importation of some goods which did not include cutlery. Shadeed told him that there was a shipment of figurines, marbles, scissors, cigarette lighters at the wharf and showed him a copy of an invoice and bill of lading which contained a list of goods and the quantity of those goods. Shadeed asked him if he wanted to buy the goods as he was urgently in need of money. Agreement was reached between them that he would pay for the goods listed on the invoice and bill of lading at the landed cost plus handling charges. As a result Shadeed was paid $3,400 by his partner Chin. No receipt for that payment was

given him. He did not know in what form the payment was made. Two days later a truck brought the goods which he placed in his stock. Before the arrival of Hunter on February 13, 1970 he had sold either one half or more of the cases of those goods to Tenn's Enterprises for over $1000. That sale was made without the cases being opened except for some which contained figurines, marbles, scissors and horns. One of the cases had been delivered in a broken state and it contained pocket knives. Marks on cases meant nothing to him. He admitted however that importation of restricted goods could only be lawfully made if a licence were obtained in that regard. None of the cases sold by Shadeed contained cutlery.

The learned resident magistrate found that the 88 cases of cutlery taken by Hunter from the appellant's premises formed part of the shipment of goods with marks ES 948/1-312 which arrived on the Neptunus on February 10, 1970 and which were delivered from the Western Terminals Ltd. Wharf to the appellant's premises on February 10 and 12, 1970; that the cutlery was of the type and nature listed in the Schedule to the relevant Open General Licence 1968 and thus restricted goods; and that the cutlery was harboured by the appellant with intent to defraud Her Majesty of the duty payable thereon. The findings of the learned resident magistrate have been challenged on a number of grounds.

It was submitted on the part of the appellant that there was no sufficient proof that the 88 packages of cutlery removed by Hunter from the appellant's premisses on February 13, 1970 formed part of the goods consigned to Shadeed which came off the "Neptunus" on February 10, 1970 or which had been purchased from Shadeed by the appellant some days before they were delivered to him. In support of that submission it was urged that as it was common ground that the mark "ES" had appeared on packages imported into Jamaica on previous occasions and that as such marks put on

presumably by the shippers abroad were not shown to be part of a system of marking of packages whereby those markings did not recur in the course of making of shipments it could not be said that any inference might reasonably be drawn from the markings on the 88 packages taken from the appellant's premises that these packages formed part of the 312 packages which arrived on the "Neptunus" consigned to Shadeed. It was further urged that the customs officers concerned in checking their records for shipments of cutlery did not specifically check for this mark nor were their searches extended beyond the period immediately preceeding the shipment in respect of which they were conducting their investigations. It will be seen from the narrative of the case for the prosecution that not only did the 88 packages bear the mark ES but they also immediately thereafter bore the figures "948" followed by another number within the range of 4 to 300 and that the 312 packages arriving by the Neptunus on February 10, 1970 bore the same mark and numbers ES 948 followed by numbers in the sequence 1 to 312. Further there was the evidence of Joslyn Thomas that one of the latter broke in being unloaded disclosing to his view spoons looking like silver spoons. His testimony was not discredited by the contents of the Bad Order List in relation to damaged packages from that shipment for the possibility still remained that the package marked ES and described as "cartons contents unknown landed palletized torn. Damage report to follow" could refer to the contents of such a package as described by Thomas. It would be passing strange if there existed an earlier shipment or shipments of goods including cutlery bearing marks and figures in the same sequence as did the 88 packages taken from the appellant's premises. In our view the appellant's submission on this ground fails. Before leaving that ground it might be well to refer to certain contentions made on behalf of the appellant in the supplementary grounds of appeal filed on February 20, 1974. The first is that the learned resident magistrate wrongly admitted the bill of lading, Exhibit 5, the ship's manifest, Exhibit 7 and the import duty form No. 6634, Exhibit 11. These contentions were

convincingly answered by the learned Director of Public Prosecutions who submitted in respect of Exhibits 5 and 7 that they were tendered and admitted in evidence under the following heads and/or for the following purposes -

(i) as memoranda to assist the witnesses who compared the numbers on the documents with the numbers on and the number of packages, that is each of the witnesses who dealt with the packages from ship by way of wharf, by way of trucks to the defendant's premises;

(ii) as evidence of compliance with a system then obtaining with respect to the delivery of imported goods to consignee and with respect to how each document as it reached the particular individual witness influenced his conduct and what additions or contributions whether by signature or otherwise he made to the completion of the documents exhibited in court;

(iii) as evidence by visual inspection and comparison of numbers on the packages delivered to the truckman and of the method by which they could have been identified.

The learned Director submitted in respect of Exhibit 11 that this document had been introduced in the evidence of Alfred Martin whose duty it was to do the physical examination of the contents of packages unloaded. His evidence was of a negative nature - that his signature was not on Exhibit 11. It purported to be signed by him but was a false document as it had not been signed by him. In addition Errol Sherwood, invoice inspector at Western Terminals Ltd. put exhibit 11 in evidence as regards checking of the invoice for the purpose of assessing duty and then he was cross-examined on the document which in fact was evidence of the nature referred to at (ii) above (dealing with the admissibility of Exhibits 5 and 7).

It was also contended on the part of the appellant that the learned resident magistrate wrongly excluded -

(a) an invoice and import duty form C 21 tendered by the appellant for the purpose of showing that the lettering ES had been used on other occasions;

(b) a bill of lading tendered by the appellant for the purpose of establishing that in the course of his business he had previously imported cutlery;

(c) evidence as to statements in the ship's manifest as to the nature of the cargo while admitting statements in the same document as to the identity of ship and its arrival.

As the learned Director observed there was no issue as to the fact that the letters ES had been used in earlier shipments from abroad. Further there was no issue as to the fact that the appellant had made earlier importations of cutlery. In relation to the use of the ship's manifest the prosecution did not rely on that document to prove the identity of the ship or the date of its arrival. Those facts were proved by Roale Cooke the boarding clerk aliunde. Statements in the manifest as to the nature of the cargo were clearly inadmissible in the absence of evidence that the contents were examined in relation to the entries on the manifest and there was no such evidence in this case. The 88 packages taken from the appellant premises having been shown to form part of the importation by Shadeed it was necessary for the prosecution to show that they contained goods of a description the importation of which was prohibited except under specific licence. It was not contended that such a licence had been obtained in respect of any of the goods the appellant purchased from Shadeed in February, 1970. The prosecution's contention was that the cutlery found on the appellant's premises were of the kitchen or table type and of base metal and that cutlery of that type and make were prohibited from importation without a specific licence by virtue of the provisions of paragraph 3 of the Import Restriction Order, 1958 (P.R.R. 1958 No. 142) made on 22nd July, 1958 under s. 5 of the Trade Laws, 1955, and Open General Licence (Imports) (granted pursuant to s. 8 of the Trade Law, 1955 on 8th August, 1968) (P.R.R. No. 310) paragraphs 1, 2 and item 41 in the Schedule thereto. It was submitted on the part of the appellant that -

(i) it was not shown that the articles examined by Peter Davis came from any of the 88 packages taken from the appellant's premises;

(ii) Davis did not perform any test which revealed that the articles he did examine were of base metal;

(iii) it was not shown that the spoons, knives and forks in the 88 packages were of the type described as kitchen and table;

(iv) it was not shown that the cutlery exhibited in evidence (Exhibit 5) came from the 88 packages.

As to (i) Hunter said that he took specimen from a couple of the packages and "took some samples to the Jamaica Electroplating Company, 2 Ashenheim Road." Peter Davis, General Manager, Jamaica Electroplating Company, 2 Ashenheim Road, Kingston 11 said that he knew Hunter, Inspector of Customs who on a few occasions had brought articles to him. He brought knives, forks and spoons which he examined and found that they were of plated mild steel. There was in our view sufficient evidence from which it might reasonably be concluded that the knives, spoons and forks Davis examined were from some of the 88 packages taken from the appellant's premises. As to (ii) Davis said that he possessed no qualification as a metallurgist but had 5 years' experience in respect of the finishing process to imported cutlery knives, forks and spoons. He used a magnet to see if it would pick up cutlery brought to him by Hunter. It did and he concluded that the cutlery had a steel base and was only made of mild steel chrome plated. The magnet test performed by Davis indicates that the articles of cutlery so tested were in part comprised of iron. Iron is a base metal. As to (iii) Hunter said that the fork and spoon Exhibit 3 are similar to those he extracted from the packages taken from the appellant's premises. On visual examination it does appear that the fork and spoon Exhibit 3 may fairly be described as a table fork and a table knife. As to (iv) the fact that Exhibit 3 was not proved to have come from any of the 88 packages is of little moment.

The importance of that exhibit is that coupled with Hunter's evidence that the fork and spoon therein were similar to those extracted from the packages taken from the packages removed from the appellant's premises it assists in the proof that the latter contained cutlery of the table type a fact necessary to be established in proof that the importation of the cutlery could only be lawfully made under a specific licence.

The submission under these heads fails.

It was also submitted that the learned resident magistrate erred in holding that since the appellant was admittedly a regular importer of goods from abroad he should have enquired as to whether duty had been paid on the goods or not. It was urged that the only evidence relating to the appellant's acquisition of the goods purchased from Shadeed was that it was on the basis of payments to Shadeed of the landed cost and handling charges and that the goods would be delivered to him on payment of the purchase price, the appellant having nothing to do with the clearance of the goods or with any declaration of the goods or with the payment of duties. It was also urged that since the appellant was a regular importer of goods, as the learned resident magistrate found, the only reasonable assumption for the appellant to have made was that the normal practice would obtain, namely, that the importer would discharge his legal liability to obtain any licence which might be necessary and to pay duty that may be payable. Now, as the learned Director of Public Prosecutions observed, at the time the goods were found the explanation offered by the appellant was that they were pre-1968 acquired goods. In the context of the appellant's conduct during the course of the search at his premises it was not an unreasonable finding by the learned resident magistrate that the appellant deliberately lied as to the manner of his acquisition of the goods and that he did so because he knew that those goods had been imported wihout the necessary licence and that he harboured them well knowing that the proper duties thereon had not

been paid. In the context of the learned resident magistrate's finding in this regard which was criticised reference might be made to the provisions of s. 247(1) of the Customs Law, Cap. 89 which provides that in any prosecution under the customs laws, the proof that the proper duties have been paid in respect of any goods, or that the same shall have been lawfully imported shall be on the defendant. A similar provision has obtained in England - s. 259 of the Customs (Consolidation) Act, 1876, and in that respect see R. v. Cohen (1951) 1 All E.R 203 - a case of knowingly harbouring uncustomed goods. In our view there was ample ground for the learned resident magistrate's finding of an intent to defraud Her Majesty of duties due on the goods imported.

As to the amount of the penalty $14,926.44 imposed on the appellant at the election of the Collector General the learned resident magistrate proceeded to ascertain that sum in accordance with s. 249 of the Customs Law which provides as follows -

s.249 of Cap.89 -

(1) " In all cases where any penalty the amount of which is to be determined by the value of any goods is sued for under the customs laws, such values shall, as regards proceedings in any Court, be estimated and taken according to the rate and price for which goods of the like kind but of the best quality upon which the duties of importation shall have been paid, were sold at or about the time of the offence, or according to the rate and price for which the like kind of goods were sold in bond at or about the time of the offence with the duties due thereon added to such rate or price in bond.

(2) A certificate under the hand of the Collector-General of the value of such goods shall be accepted by the Court as prima facie evidence of the value thereof."

During the course of the case for the prosecution Hunter purported to testify as to the value of the goods taken from the appellant's premises as ascertained by him from a price list he consulted but which was not produced in evidence. He was cross-examined on his evidence in this regard. After verdict a certificate under the hand of the Collector-General of the value of such goods was

produced to the learned resident magistrate for the purpose of assessing the penalty. This certificate, by reason of the provisions of s. 249(2) of Cap. 89 was prima facie evidence of the value of the goods. No evidence contra was sought to be adduced. The learned resident magistrate accepted the value as stated in the certificate and assessed the penalty accordingly. That certificate as produced after conviction was in keeping with the usual practice in cases of this kind and no objection can properly be taken thereto. It accords not only with the established practice but also with reason and common sense that the certificate should not be produced until after conviction. The appellant's contention that the penalty imposed was not properly assessed and should be set aside is accordingly rejected.

Lastly it was submitted by way of a belated application for leave to urge as an additional ground of appeal that the information discloses no offence and/or is defective in law in that the goods mentioned therein are not restricted by the Order published in the Gazette Supplement dated 8th August, 1968 as charged. The information indeed alleges that the restriction was "imposed by Order pursuant to section 8 of the Trade Law, 1955 and published in the Jamaica Gazette supplement dated 8th August, 1968". The correct reference should have been to the Order pursuant to section 5 of the Trade Law, 1955 and published in the Jamaica Gazette Supplement dated 22nd July, 1958. By that Order - the Import Restrictions Order, 1958 - paragraph 3 provides so far as is relevant to this matter -

> "Save as in hereinafter provided, no person shall import any article except under the authority and in accordance with the terms of a licence for the purpose granted in accordance with the provisions of this Order."

Actually Open General Licence No. 4 granted on the same day under the provisions of s. 8 of the Trade Law, 1955 permitted goods of the type in this case to be imported from Amsterdam under such a licence. But by Open General Licence (Imports) granted on 8th August, 1968 pursuant to s. 8 of the Trade Law, such goods could

only be lawfully imported from Amsterdam under specific licence. See paragraphs 1, 2 and item 41 in the Schedule thereto. The Gazette containing a copy of that licence, referred to in the information, was tendered and admitted in evidence.

It was submitted that the information was erroneous and misleading in a material particular and that the allegation therein to the restriction having been imposed by an Order made in 1968 renders the information defective in law so that the offence it recites is non-existent, alternatively, the ingredients of the offences as alleged are inaccurate. While the information so framed is inaccurate it cannot be said that the appellant was in any way deceived or misled. His whole stand was that he appreciated that the importation of cutlery of the type referred to in the Schedule to the Open General Licence (Imports) granted in 1968 was subject to licence, that he was aware of that fact even in 1968 and that the 88 packages taken from his premises were purchased by him before 1968. In these circumstances had the point been taken before the learned resident magistrate the information could have been amended in the way indicated above under the provisions of s. 190 of the Judicature (Resident Magistrates) Law, Cap. 179. This Court can effect the necessary amendment. See R. v. Mrs. Jack Ashenheim R.M.C.A. No. 76/1972 decided by this Court on 9th March, 1973.

In the result the appealis dismissed. The conviction and penalty are affirmed. The information is amended as indicated above.