IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Judgment Book

IN FULL COURT

SUIT NO. M. 33 of 1992

Before: THE HON. MR. JUSTICE BINGHAM
THE HON. MR. JUSTICE CLARKE
THE HON. MR. JUSTICE COURTNEY ORR

R. v. Commissioner of Customs and Excise, The Minister of Finance and The Resident Magistrate for the Parish of St. Andrew, Ex parte Machines & Allied Traders Limited AND Richard Khouri

Applications for Orders of Certiorari, Mandamus and Prohibition

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Enos Grant for the applicants instructed by Raymond Clough of Clough, Long & Co.

Douglas Leys and Andrew Irving for the respondents instructed by the Director of State Proceedings

November 30, 1992, December 1, 2, 3, 4, 1992 and February 5, 1993

CLARKE J.

Machine and Allied Traders Limited, the first applicant, of which the second applicant, Richard Khouri is a director, imports and deals in goods including photographic equipment, paper, chemicals and accessories. Between 1989 and 1991 fifteen import transactions engaged in by the first applicant and allegedly by the second applicant, led to them being charged in March 1992 under the Customs Act (the Act) for fraudulent evasion of customs duty totalling some $310,000.00.

In relation to each transaction customs duty as assessed by the proper customs officer had been paid and the particular goods delivered, that is, released from the customs area. The duty had been assessed in each case, excepting one cleared by a bill of sight, on the basis of (a) invoices provided by the importer, (b) declarations as to value made on behalf of the importer and (c) customs entries reflecting the values stated in the invoices or increased by the proper customs officer.

The Commissioner of Customs and Excise (the Commissioner) subsequently had Mr. Lawrence May of the Revenue Protection Division of the Ministry of Finance (RPD)

carry out investigations in respect of the said transactions. Mr. May advised him of his findings concluding that due to fraudulent conduct on the part of the applicants proper customs duties had not been paid. The Commissioner thereupon authorised Mr. May to explore with the applicants, and only to explore with them, the possibility of a mitigated penalty. The exploration bore no fruit as the parties failed to agree.

The Commissioner said that having reviewed the information he had received from Mr. May, he believed that the applicants had committed breaches of the Act. He said that in the exercise of his discretion he advised the police that the applicants ought to be charged under the Act. The police obliged. The applicants were charged on fifteen Informations each, for being knowingly concerned in the fraudulent evasion of import duties of customs, contrary to section 210(1) of the Act and the second applicant was arrested in connection with the charges.

Unless this Court orders otherwise, the applicants will be required to appear before the Resident Magistrate for St. Andrew for trial on the said Informations. They have applied to this Court to quash the Informations, all of which are expressed to have been laid by Assistant Superintendent of Police Arthur McLeish, an officer within the meaning of section 2(1) of the Act.

That circumstance led Mr. Leys to submit at the threshold that as the Informations were not laid by the Commissioner, himself, but by the police under the enabling provisions of section 240(1) of the Act, there would be no record emanating from the Commissioner to quash by certiorari in the terms applied for by the applicants. The submission failed. The Revenue Administration Act vests in the Commissioner the administration of the Customs and Excise Department. As he has deposed, he is responsible for ensuring that the proper customs duties are paid on goods imported into (and exported from) Jamaica. And he it was who directed or advised the police to charge the applicants. So on the basis of that evidence the officers act in laying the Informations is deemed to be the Commissioner's by virtue of section 4(1) of the Act **(infra)**.

The Commissioner is the respository of a statutory discretion, the proper exercise of which, may lead him to institute court proceedings against any person whom he reasonably believes on the material before him has committed an offence against the Act. Before initiating court proceedings under section 210(1), for instance, he may where the importer admits liability mitigate or remit the penalty that would be incurred under that subsection: see section 219. Whenever he exercises this discretion he performs, in my opinion, an essentially administrative function

which is an integral part of the execution of a wider administrative responsibility with which he is invested by the Revenue Administration Act and the Customs Act. And when he decided to institute charges against the applicants he was only making a preliminary decision without binding and conclusive or final legal effect, there being as yet no determination in court of the ensuing summary proceedings.

Whilst the Commissioner's decision to bring the charges ought not, therefore, to be characterized for constitutional purposes as an exercise of judicial or quasi-judicial power, I am unable to agree with Mr. Leys that for that reason this court should decline jurisdiction and refuse to review the Commissioner's decision. It is true that in Jayawardane v. Silva [1970] 1 W.L.R. 1365 the Privy Council held that as the functions of the collector of customs under a Ceylonese Customs Ordinance were non-judicial, certiorari could not lie to quash his preliminary decision made under that enactment. There, the Board on the facts declined to interfere, once they categorised in constitutional terms the collector's decision as non-judicial.

The better view comes from a number of other cases including another Privy Council decision from Ceylon (now Sri Lanka) that a (statutory) delegate exercising administrative functions is not necessarily exempt from a duty to "act judicially" in accordance with the appropriate natural justice principles, nor is he immune from control by the prerogative orders of certiorari and prohibition: see Ramaweera v. Wickramasinghe [1970] A.C. 951, 962; Associated Provincial Picture House Ltd. v. Wednesbury Corporation [1947] 1 All. E.R. 498 and C.C.S.U. v. Minister for the Civil Service [1943] 3 All. E.R. 935.

Indeed, adopting Lord Diplock's comprehensive classification in the C.C.S.U. case of the grounds on which administrative action is subject to control by judicial review, the applicants contend that certiorari, mandamus and prohibition should go on the grounds of "illegality", "irrationality or unreasonableness" and "procedural impropriety", all of which they set out in their notice of motion with great particularity. Apart from moving the Court to pronounce, in effect, that on the Informations laid the Resident Magistrate for St. Andrew has no jurisdiction competence to try them, they have, in essence, moved the Court to review what they assert is the wrongful exercise of the Commissioner's discretion to commence criminal proceedings against them in the first place. It is therefore necessary to examine this impugned exercise of the discretion in the light of the grounds of attack mounted by the applicants.

Question of illegality in the exercise of discretion

The investigative functions of determining whether the proper customs duties had been paid were delegated by the Commissioner to the R.P.D. Those functions were carried out by Lawrence May who was at all material times a field investigator employed to the R.P.D. We are told by the Commissioner that based on the results of Mr. May's investigations he advised the police to charge the applicants for breaches of the Act. The applicants say, however, that the delegation by the Commissioner of his investigative functions to the R.P.D. was **ultra vires**, illegal and void and conduced to the wrongful exercise of his statutory discretion.

Mr. Grant ultimately conceded, and I think rightly so, that an employee of the R.P.D. is an officer for the purposes of the Act: see section 2(1) as amended by section 2 of the Customs (Amendment) Act 1991; and section 4 of the Customs Act. The latter section provides:

> "Every act matter or thing required by the customs laws to be done ... by the Commissioner, if done or performed by ... any officer assigned by the Commissioner for such purpose shall be deemed to be done ... by ... the Commissioner; and every person employed on any duty or service relating to the customs by the orders or with concurrence of the Commissioner ... shall be deemed to be the officer for that duty or service ...".

The section is really enacted commonsense as it recognises that the Commissioner cannot personally attend to all the manifold functions delegated to him by statute. The maximum **delegatus non potest delegare**, even if rendered literally, gives way to the express language of the section which enables the Commissioner to delegate certain acts including his investigative functions to officers he assigns for such purpose, be they officers of his Department, the R.P.D. or the Jamaica Constabulary Force. And assuming without deciding that when Assistant Superintendent McLeish arrested the second applicant he was acting at the direction of the Commissioner then the arrest would not, contrary to Mr. Grant's submission, be **ultra vires** the Commissioner, for section 210(2) by necessary implication sanctions the arrest of a person charged under section 210(1).

That latter provision so far as is relevent reads:

> "Every person who ... shall be in any way knowingly concerned in any fraudulent evasion ... of any import duties of customs ... shall for ... such offence incur a penalty of five thousand dollars, or treble the value of the goods, at the election of the Commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited".

Before court proceedings are commenced thereunder the Commissioner may on the

authority of section 219 mitigate or remit the penalty incurred by any person for an offence under the subsection. This statutory discretion reposed on the Commissioner is characterised, therefore, by his power to choose either to initiate at once criminal proceedings under, say, section 210(1) if it is reasonable to do so on the material before him, or, before instituting such proceedings, to mitigate or remit the penalty that would be incurred under the subsection. He may choose the latter course where, for instance, the importer admits liability and consents to pay the proper customs duty.

Although Mr. Grant submitted to the contrary, the exercise of the discretion does not involve a choice of proceeding under section 210(1) or under sections 15 or 17. These latter sections do not in my judgment offer the Commissioner alternative courses of action. They require compliance once the conditions for their operation are met.

Section 15 speaks of the importer's obligation to pay all duties of customs which may become legally payable by him including any duty short levied on his goods upon the Commissioner demanding payment of same.

Section 17 provides that if any dispute shall arise as to the duty payable a certain course must be pursued before the goods are delivered from customs charge. On the importer depositing, as he is required to do, the duty demanded by the Commissioner and on the passing of a proper entry the Commissioner must then effect delivery: section 17(1) and (6). The importer may within three months of the date of the payment require the Commissioner to review the assessment. If he is dissatisfied with the Commissioner's decision he may under section 18 appeal to the Revenue Court. Although again Mr. Grant submitted to the contrary, the mandatory procedure prescribed by section 17(1) and (6) clearly does not apply where, as in the instant case, the goods were delivered from customs charge before any question of a dispute as to the duty payable arose.

As well as to facilitate business and to give the revenue an advantage Parliament enacted those provisions to grant relief to importers by enabling them to have their goods released which would otherwise be "unprofitably locked up pending the settlement of their disputes" with Customs as to the duties payable: see Sargood v. The Queen; M'Arthur v. The Queen [1878] V.L.R. 389 where essentially identical provisions of the Victorian Customs Act 1875 were declared to have been enacted to achieve the aforementioned purposes.

The provisions are, in addition, predicated on an absence of misrepresentation,

fraud or concealment which are areas of conduct treated by the Act as essential ingredients, respectively, of specific offences under sections 209, 210(1) and 211. The principle has been recognised by the House of Lords as a feature of the English Customs and Excise Act 1952: See Commissioner of Customs and Excise v. Tan and (Another) [1977] 2 W.L.R. 181 on which Mr. Grant placed much reliance.

There, their Lordships held that under the said 1952 Act payment of duty demanded by a customs officer followed by the authorised removal of the goods in question discharged the importer's liability in the absence of concealment, misrepresentation or fraud. So, if in the instant case the Commissioner reasonably believes that on the material before him a prima facie case exists against the applicant for fraudulent evasion of customs duties he may where appropriate invoke his powers of mitigation under section 219 or proceed in court under section 210(1), sections 15, 17 and 18 being wholly irrelevant. If that is the context in which he acted there would be no substance to the contention, which he refutes in any case, that he used the threat of criminal prosecution in an effort to compel payment of a civil debt collectable under sections 15 and 17.

Illegality apart, the applicants also contend that no reasonable Commissioner would exercise his discretion to prosecute the applicants under section 210(1) in the face of the evidence or lack of it.

Question of unreasonable exercise of discretion

Now, every administrative authority which has to decide whether to prosecute or raise proceedings should first decide whether there is a prima facie case. In general, if on the material before him he so decides and commences proceedings, the person or persons affected will not be without recourse, for they will be able in due course to state, if necessary, their defence at the ensuing trial: see Wiseman v. Boardman [1971] A.C. 297, at 308 and 317. Here, the prosecution of the applicants having thus been launched, they would have the right to defend at the trial.

Yet, although we can interfere in matters of this sort our power to do so is circumscribed. Our power to interfere with the Commissioner's decision is not that of an appellate body to override his decision. As a court of review we are concerned only to see that he has not contravened the law by acting in excess of his statutory powers. Accordingly, on examining the affidavit evidence bearing upon his action we must determine whether he has taken into account irrelevant matters or has refused to take into account relevant matters. Even if he has so complied we can interfere if no reasonable authority could have decided to prosecute on the material

he had before him: see Associated Provincial Picture House Ltd. V. Wednesbury Corporation **(supra)**.

The material he had before him comprised information resulting from investigations conducted by Mr. Lawrence May of the R.P.D. and that material is embodied in Mr. May's two affidavits sworn to on 13th October, 1992 and one sworn to on 3rd December, 1992. The burden of the affidavit evidence in support of the charge is borne by one of the two affidavits sworn to on 13th October, 1992. It contains relevant matters within the deponents own knowledge and in other cases it contains relevant information given to him mainly by the United States Customs Department and the suppliers of the goods in question.

Mr. Grant had submitted in **limine** that the affidavit should be struck out on the ground that it contains much hearsay evidence as well as irrelevant and scandalous matters. We overruled that submission. These proceedings have been brought for the purpose of quashing the aforesaid Informations and it is the Commissioner's decision to institute the charges that the applicants impugn. We are therefore concerned to see whether that decision accords with **Wednesbury** principles **(supra)**. We are not concerned to determine whether the affidavit evidence is true. That is a function of the trial court before which the prosecution has the onus of proving the charges beyond reasonable doubt.

Not only does that affidavit evidence contain only relevant material, but in the instances where Mr. May has not deposed to matters within his own knowledge, he has largely identified his sources of information and has exhibited a list of documents emanating from those sources. He said that he examined the invoices and declarations as to value provided by the first applicant in relation to which Customs entries had been submitted by its custom broker. From the information given to him by the United States Customs Department he indicated that the first applicant falsley represented to Customs that certain of the goods in question had been shipped by the suppliers named in the invoices presented to Customs in respect of those goods. He also said that from the information he obtained from the suppliers as well as from the United States Customs Department the values of the goods indicated on the submitted invoices and declarations were significantly less than the stated values of the self-same or similar goods imported on invoices from the suppliers. None of these suppliers' invoices was, he said, submitted to the Customs of this country by or on behalf of the first applicant. He has exhibited copies of the invoices from the suppliers, two of which, as also a number of blank

invoices from one supplier, were allegedly found during the course of the investigations on premises occupied by one of the first applicant's directors, namely, the second applicant.

Mr. May said that while the investigations were proceeding, the second applicant who was also a director of Colour World Ltd., a company associated with the first applicant, had some of the goods in question shipped in the name of an entirely unrelated company, International Stationery Ltd., instead of in the name of the first applicant or that of Colour World Ltd. In support of those assertions he has produced **inter alia** written statements from the Managing Director of International Stationery Ltd., and from the first applicant's custom broker as well as an orginal invoice to Colour World Ltd., allegedly found in a garbage bin on the premises of Colour World Ltd. He said that that invoice, a copy of which was supplied to him by the U.S. Customs Department, was never declared to the Customs in Jamaica.

The R.P.D. investigator signified that the contrast in the values stated in the doucments submitted to Customs with the values set out in the unsubmitted invoices from the suppliers showed that the correct values of the goods in question had not been declared. Had that been done, he said, the duties would have been considerably higher than what had been assessed and paid.

When you add all that material to the evidence, though challenged, that the applicants offered to settle the matter by way of mitigated penalty (an offer which, if made, the Commissioner would have been entitled to accept or reject) then clearly there is no scope for the Court to intervene on the grounds established in the **Wednesbury** case.

Question of procedural impropriety

Except, therefore, it can be shown that the Commissioner failed in his duty to act fairly his decision is not open to judicial review.

I do not agree with the applicant's contention that procedural impropriety occurred in connection with a reference list maintained by the Customs Department. Such a list was used by that Department as a guide to minimum prices and not as a guide to the general public. The reference list was inapplicable where, as in this case, proper purchase prices could be ascertained from genuine invoices. Accordingly, although they contend otherwise, the applicants had no legitimate expectation that the Commissioner would act upon the prices stated in the said list.

In my view he acted within the four corners of the statute. He had properly delegated under section 4 to Mr. Lawrence May the task of investigating the aforesaid import transactions involving goods that had already been cleared from the Customs area. Based on the report he received from Mr. May he acted reasonably in opting to explore with the applicants the possibility of a mitigated penalty under section 219. They failed to agree. He then reviewed the information and, in my opinion properly exercised his discretion to commence proceedings against the applicants under section 210(1).

As the ground of procedural impropriety also fails the applicants may be tried on the charges by the Resident Magistrate for St. Andrew unless this Court grants prohibition on the ground of lack of jurisdiction.

Question of jurisdiction of the Resident Magistrate

The applicants contend that the Resident Magistrate for St. Andrew misinterpreted his jurisdiction in setting down the said Informations for trial as on their face they allege that the offences charged were committed in the parish of Kingston.

It is to be observed, however, that it was at the Half Way Tree Police Station, St. Andrew that both applicants were charged for the offences, the second applicant having been arrested there as well.

Section 245 of the act provides:

> "Every offence under the Customs Laws shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which it actually was committed or arose, or in any place on land where the offender or person prosecuted may be or be brought.

The section is framed in the alternative, thus enabling the prosecution to choose the jurisdiction it relies on when framing the charges. The Informations in this case show that the prosecution had elected to found jurisdiction in the place on land where the alleged offenders were brought. As Mr. Leys submitted, it will be up to the prosecution, consistent with its election, to prove that the Resident Magistrate for St. Andrew has jurisdiction, and such proof can only be attempted when a trial is embarked on: see Fedna Stoll v. J.D'Ollivieira [1968] 13 W.I.R. 204 at 209.

The application for an order of prohibition directed to the Resident Magistrate prohibiting him from trying the applicants on the said Informations therefore fails.

For the reasons given I would refuse the applications.

Bingham J.

I agree

Courtney Orr J.

I agree

Costs to the respondents to be agreed or taxed.