

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 52/84

BEFORE: THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE WHITE, J.A.  
THE HON. MR. JUSTICE ROSS, J.A.

BETWEEN: THE ATTORNEY GENERAL - DEFENDANT/APPELLANT

AND : JAMAICA GINGER EXPORT COMPANY LTD. - PLAINTIFF/  
RESPONDENT

Mr. A.C. Langrin for the Appellant

Mr. Carl Rattray, Q.C., for the Respondent

April 29 & October 30, 1985

KERR, J.A.:

This was an appeal from a decision of Panvon, J. (Acting) made in August 1984 granting the following Declarations:

- (i) No application need be made to the Minister of Industry and Commerce or to the Trade Board for a licence to export pimento from Jamaica as there is no provision in the Law for such an application.
- (ii) The Minister of Agriculture is empowered to make regulations prohibiting the export of pimento.
- (iii) The Agricultural Produce (Pimento Regulations, 1951) gave the Commissioner of Commerce and Industries the sole authority to export pimento from Jamaica.
- (iv) The post of Commissioner of Commerce and Industries was abolished in 1953 and its powers and duties transferred to the Marketing Administrator, which does not now exist and Regulation 6

has therefore been rightly omitted by the Statute Law 'Commissioners' in exercise of their powers under Section 11 (1) (k) of the Law Revision Act.

The Declarations were made pursuant to an Originating Summons brought by the plaintiff naming as respondents, in addition to the Attorney General, the Minister of Agriculture and the Minister of Commerce and Industry.

The questions of law raised on appeal are common to all three respondents in the Summons and therefore the appeal by the Attorney General may be considered as representative.

We dismissed the appeal and affirmed the decision of Panton, J. (Ag.). In keeping with the promise then made I set out herein my reasons for concurring.

The respondent, a Jamaican Company, as its name suggests, originally had as its primary and specific object "To grow, reap, purchase, process and package ginger for export from Jamaica".

In December 1982, the scope of its operations was extended to include the dealing in and the exportation of pimento to the United States of America, the United Kingdom and certain countries of Western Europe.

Pursuant to an agreement with an American Firm, the Respondent Company purchased from local growers ten tons of pimento for export to the United States of America. The Respondent's application to the Trade Administrator for the relevant export licence was refused on the grounds that the Ministry of Agriculture had the exclusive rights to export pimento. Conferences and correspondence with Officers of the Ministry of Agriculture resulted in (i) firm concurrence with the opinion expressed by the Trade Administrator's Department and (ii) a tentative agreement by the Ministry of Agriculture to take over the exportation of the pimento.

However, the Chief Inspector of Produce, examined the pimento and found it of such poor quality that he refused to recommend its inclusion in the Ministry's stock. The respondent had to sell the pimento locally at a loss.

Because of this ruling by the Ministries concerned, the respondent company was unable to meet subsequent orders from abroad. The Originating Summons was brought seeking answers to the following questions:

- "(i) That on a correct interpretation of Section 23 of the Agricultural Produce Act and Section 8 of the Trade Act of the Laws of Jamaica and the Regulations made thereunder, the Ministry of Agriculture and/or the Minister of Industry and Commerce and/or the Board of Trade has no power to refuse the applicant a licence to export pimento from Jamaica to the United States of America or any other country on the grounds that The Minister of Agriculture has the sole and exclusive rights to do so.
- (ii) A Declaration that on a correct interpretation of Section 23 of the the Agricultural Produce Act and Section 8 of the Trade Act of the Laws of Jamaica and the Regulations made thereunder, the action of the Minister of Agriculture and/or the Minister of Industry and Commerce, and/or The Board of Trade in refusing the applicant a licence to export pimento from Jamaica to the United States of America in February to April 1983 on the grounds that The Minister of Agriculture has the sole and exclusive rights to do so is ultra vires, null and void".

Accordingly, the pivotal question on appeal may be stated thus:

"Whether or not there are regulations extant governing the export of pimento".

This concise formulation is deceptive. In pursuit of an answer we had to consider the effect of amendments in relevant legislation and subsidiary legislation in response to changes in the structure of Government and consequential reorganisation of Departments.

On February 12, 1951, the acting Governor in exercise of power conferred by Section 23 of the Agricultural Produce Law (then Cap. 339) made the Agricultural Produce (Pimento) Regulations 1951 (see Jamaica Gazette Supplement, February 15, 1951 p. 133) [hereinafter referred to as the 'Pimento Regulations'].

Regulations 1 and 2 are concerned with the Title of the Regulations and definition of Pimento. Regulations 3, 4 and 5 prohibit the sale or offer for sale of pimento not properly cured, containing foreign matter or dried upon the ground. Regulation 6 with which this appeal is concerned reads:

"No pimento shall be exported from Jamaica except by the Commissioner of Commerce and Industries".

Since then Jamaica has progressed from Crown Colony to full internal self-government and finally to nationhood in 1962 - ministerial responsibility for assigned Departments having been introduced in 1953 by The Jamaica (Constitution) Order in Council of 30th April, 1953.

#### RELEVANT CHANGES IN LEGISLATION

By Law 50 of 1953, Section 2, the Office of Commissioner of Commerce and Industries was abolished and by Section 3(1) (a) and (b), the "rights, powers, privileges, immunities and duties" were transferred to the Marketing Administrator.

Section 3(2) excludes from the operation of Section 3(1) (a) and (b), inter alia, any reference to the Commissioner of Commerce and Industries in any Law regulation, appointment or retirement enacted, made or issued after 31st March, 1953. In my view neither these nor any of the other exclusionary provisions of the

subsection are relevant to or in any way affect the Pimento Regulations 1951.

The Agricultural Produce Law was amended (LN #68/61) to transfer the delegated power to make regulations from the Governor to the Minister (Agriculture) and the relevant provision now reads:

"Section 23

It shall be lawful for the Minister from time to time

- .....
- (k) to make regulations prohibiting or governing the buying, selling or exportation of any Agricultural Produce in Classes 1 and 2 of the First Schedule and in the Fourth Schedule".

Pimento is in the Fourth Schedule.

It is agreed by all that no Pimento Regulations have been enacted since those of February 1951.

On 1st May, 1955, The Trade Law, Law 4 of 1955 came into operation. Section 5 empowered the Minister by Order to control imports, exports and prices of goods and Section 8 made provisions for the granting of licences. However, subsection 3 of that section excluded from the operation of Section 5 goods regulated under certain specified Laws, including the Agricultural Produce Law.

The Trade Law was clearly intended to succeed and did in fact succeed Regulation 50 of the Jamaica Defence Regulations, which as far as it affected Jamaica, was rescinded on that same 1st May by the Jamaica Defence (Amendment) Order, 1955. By an Order effective the same date certain instruments of appointment were rescinded including:

"The instrument ..... appointing the Marketing Administrator Competent Authority for the purpose of regulating or prohibiting

"the importation of articles of any description and for regulating or prohibiting any negotiation in connection with or related to such exportation".

The Trade Law (now the Trade Act) has been subject to extensive updating amendments but all within the ambit of the original scheme and purpose. In particular, the powers conferred on the Minister (Industry and Commerce) for control of imports and exports are subject to similar exclusionary provisions thus:

Section 8(2)

"Nothing in subsection (1) shall be deemed to authorize the Minister to make any order under that subsection regulating the exportation, distribution, purchase, sale or price of any goods the exportation, distribution, purchase, sale or price (as the case may be) of which is, or may be, regulated under or by virtue of the provisions of any of the following Acts, that is to say -

- (a) .....
- (b) the Agricultural Produce Act;
- (c) the Agricultural Marketing Act;"

It is worthy of note that the subject matter of the Laws referred to in this subsection are all concerned with Agriculture or Agro-Industry.

Regulation 6 of the Pimento Regulations was omitted by the Commissioners from the current Revised (1969) Edition of Subsidiary Legislation.

THE ARGUMENTS OF COUNSEL

With an awareness of these changes the Attorneys on either side presented their arguments with energy and enthusiasm.

Mr. Langrin for the appellant observed that at the trial in the Court below, it was there conceded that the Order of 1955 abolished the post of Marketing Administrator.

In that regard he was of the view that that concession was wider than the provisions of the rescinding Order demanded, but he would make no issue of it because as far as he knew the post of Marketing Administrator was in fact no longer in existence and there are no transitional provisions transferring his powers and duties to any other officer or authority. Although the Trade Law, 1955, created a Trade Board, there was no link therein between the members and the Marketing Administrator and therefore he concedes there is a lacuna. Notwithstanding, he urged that the office of Marketing Administrator should be considered as absorbed by the Trade Administrator. The absence of a link between the Marketing Administrator and the Trade Administrator for whose Department the Minister of Industry and Commerce holds responsibility does not derogate from the general powers of the Minister to control exports. Further, he submitted that in the absence of any person within the exception created by Regulation 6, the result is an absolute prohibition against the exportation of pimento. With respect to the omission of Regulation 6 from the Revised Edition on Subsidiary Legislation, that per se does not amount to a repeal. The omission is explicable on the basis that the Regulation is in the course of amendment.

In his concise reply, Mr. Rattray submitted in effect that in Jamaica a person may do any act or engage in any business not prohibited by Law. Regulation 6 originally created a monopoly in favour of the Commissioner of Commerce and Industries who was later succeeded by the Marketing Administrator. When the post of Marketing Administrator was abolished, there was no holder of the monopoly, and from then the monopoly ended and the freedom

to engage in the lawful business of exporting pimento returned. Accordingly Regulation 6 was properly omitted by the Law Revision Commissioners under Section 11(1) (a) (i) of the Law Revision Act as being either repealed by necessary implication or expired or become spent. It is for the Minister of Agriculture to make the appropriate Regulation governing the export of pimento. As no such Regulations exist the respondent was free to engage in the export of pimento subject to the requirements of Regulations 3, 4 and 5 of the Pimento Regulations.

REASONS FOR JUDGMENT

Mr. Langrin's arguments though attractively presented nevertheless suffered from inherent weakness that rendered his reasoning incapable of supporting the conclusions which he urged.

At the outset I agree with him that the mere omission of Regulation 6 from the Revised Edition of Subsidiary Legislation is not conclusive of its repeal. As expressly stated in Section 12(1) of the Law Revision Act, the powers conferred on the Commissioners "shall not be taken to imply any power in them to make any alteration or amendment in the matter of substance of any Law or part thereof". It follows therefore that they cannot by simple omission create a repeal.

Where, however, I find myself in disagreement with him, is in his suggested reason for the omission of Regulation 6. Apart from his saying so, he has been unable to advert attention to any word or deed indicative that any amendment was in contemplation.

With respect to his astute argument that in the absence of any person or authority to fit the exception in



Regulation 6, there is a partial repeal of the Regulation resulting in an absolute prohibition against anyone exporting pimento. I am of the opinion that neither in Law, logic nor common sense, is it maintainable. Though couched in prohibitory language, Regulation 6, in my view, created in effect a monopoly in favour of the Commissioner of Commerce and Industries. It is unthinkable that legislation would be enacted to absolutely prohibit the exportation of this crop, produced mainly for the export trade. The obvious intent of the Regulation was to place control of exports in relation to pimento exclusively in the hands of a named or designated competent authority. Further, Regulation 6 is incapable of the severance proposed by Mr. Langrin. The accepted approach to severance is as stated in the Privy Council Case - Attorney General for Alberta v. Attorney General for Canada [1947] A.C. at p. 518:

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or as it has sometimes been put, whether on a fair view of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all".

An absolute prohibition was clearly not in contemplation in Regulation 6. The Regulation conferred on the Commissioner of Commerce and Industries and on his successor, the Marketing Administrator, the exclusive right to engage in the particular business of exporting pimento. Implicit in the Regulation and incidentally inescapable is a restraint of trade against other persons. Thereby others are prohibited from gainful engagement in that particular business.

Accordingly, a Court should lean against monopolies and general restraints. Therefore, unless the legislation expressly or by necessary implication creates such a wide and general restraint the Court should be unwilling to recognize the existence of any such restraint. I am fortified in so holding by the fact that the House of Commons in 1964 resolved that, "unless prohibited by Parliament, all subjects have an equal right of trading with the King's Dominions". (Wade and Phillips Constitutional Law - 8th Edition p. 138).

By analogy this freedom to trade would be applicable to trade with foreign countries unless there are statutory provisions restricting or prohibiting trade generally or in relation to a particular product.

In the instant case, I am firmly of the opinion that upon the abolition of the post of Marketing Administrator, the monopoly created by Regulation 6 of the Pimento Regulations ended and there was a return of the freedom to trade in pimento, subject to the requirements of the Pimento Regulations 1-5.

Accordingly, Regulation 6 was rightly omitted by the Law Revision Commissioner under powers conferred by Section 11(1) (a)(1) as being repealed by implication or spent.

Pimento, being an Agricultural Produce in the Fourth Schedule of the Agricultural Produce Act, it is expressly excluded from the control of the Minister of Industry and Commerce by Section 8(2) of the Trade Act. On the other hand, the power to make regulations governing the export of pimento is expressly conferred on the Minister of Agriculture by Section 23(k) of the Agricultural Produce Act.

-11-

This case illustrates the necessity to have some person or authority to supervise and be Quality Controller in respect of this valuable export product. It seems that in the many changes and reorganization of Departments which occurred in that period of constitutional changes (1953-62), through an oversight, there was an omission to make the usual transitional provisions in relation to the powers and duties of the Marketing Administrator. It is an omission that ought to be expeditiously remedied by enacting Regulations of similar effect and purpose as the defunct Regulation 6.

Accordingly, for the reasons contained herein, I agreed that the appeal should be dismissed and the Declarations of Panton, J. (Ag.) be affirmed.

WHITE, J.A.:

I concur.

ROSS, J.A.:

I concur.