

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 34 OF 2005

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE KARL HARRISON, J.A.
THE HON. MRS. JUSTICE HAZEL HARRIS, J.A.**

**GASSAN ELIAS AZAN
BASHCO TRADING CO.**

V.

REGINA

**R.N.A. Henriques, Q.C., Ransford Braham and S. Hanson, instructed by
Livingston Alexander and Levy for the appellants.**

Miss Opal Smith for the Crown.

March 14, 15, 2006 and June 15, 2007

PANTON, J.A.

1. The convictions herein were recorded as long ago as August 27, 2001, by His Hon. Mr. Owen Parkin, Resident Magistrate for the Corporate Area. The trial lasted from March 6, 2000 until June 15, 2001. The verdicts were scheduled for delivery on July 10, 2001, but had to be postponed due to what is described in

the record as "disturbance" in the Corporate Area. For completeness, it should be mentioned that the record of appeal did not reach the Court of Appeal until September 28, 2005. This means that it took the particular Court's office more than four years to dispatch the record of appeal to the Court of Appeal. Notwithstanding the fact that the Courts may be stretched in respect of their capacity to deal on a timely basis with matters of this nature, this lengthy delay in dispatching the record is inexcusable and unacceptable, and requires the taking of immediate corrective measures by those in charge of the conduct and operation of that particular Court's office.

2. The two appellants were charged together on two informations for importing prohibited goods, namely, shoes, and three informations for harbouring the said goods. The offences were allegedly committed in January, 1999. In respect of information no.1497/99 for importing, each appellant incurred a penalty of \$4,146,525.00 and in respect of information 1501/99 also for importing, each incurred a penalty of \$4,081,977.00. On the charges for harbouring, the penalty incurred by each appellant, on each information was as follows:

Information No.	1498/99	-	\$149,715.00;
Information No.	1499/99	-	\$2,386,635.00;
Information No.	1500/99	-	\$59,196.00.

The penalties against the company were ordered recoverable, if there was default in payment, by distress on the goods of the company. The alternative in respect of the male appellant was twelve months imprisonment on each information.

3. The goods that were imported were made in China. The port of lading was Shekou, and the shipper was Domex International Co. of Hong Kong. At the time of the incorporation of the appellant company in May, 1990, the subscribers to the memorandum of association were the appellant Azan and another individual, both of them being the directors. The other individual was replaced as a director on January 8, 1996, by Juan Machado who was jointly charged and tried with the appellants. However, Machado was acquitted.

4. The prosecution's case was that shipping agents presented manifests in respect of two shipments of goods, imported by the appellant company, to the representatives of the Customs Department. Shortly after, the Revenue Protection Department placed restrictions on the delivery of the shipments, and served notices of seizure of the goods. Investigators from the Revenue Protection Department then searched three premises in Kingston that were under the control of the appellant company. At one location 28 – 30 Orange Street, the director Juan Machado showed investigators around an "administrative area" where shoes were displayed. The shoes at the various

locations were subsequently examined and found to be counterfeit. The record of appeal does not disclose any contact or communication between the investigators and the appellant Azan. The evidence presented by the prosecution did not implicate Azan personally.

5. It is fair to say that at the end of the case for the prosecution, the evidence amounted to this:

- a) the company had imported prohibited goods;
- b) Machado and Azan were directors of the company; and
- c) the goods were found on premises under the control of the company.

6. The appellant Azan gave evidence that:

- a) he had been buying goods on behalf of the company from China for about fourteen to fifteen years, having been invited to trade shows there;
- b) the shoes were bought at a trade show;
- c) he had no knowledge that the shoes were not genuine;
- d) the shipping documents had been made available to the Customs Department prior to the arrival of the shipments; and
- e) the company tried to cater to the more inexpensive level of the market.

Machado did not give evidence. He made an unsworn statement that he was a director, but he had no shares in the company. He said he had nothing to do with importing, storing or harbouring the goods. According to him, he performed administrative duties only. However, he did not specify what those duties were.

7. The learned Resident Magistrate found that the company imported the shoes, and accepted the evidence of the representatives of Nike, Adidas and Caterpillar that the shoes were not genuine. He found that there were inconsistencies and discrepancies in the evidence of Azan, and concluded that he was not entirely truthful. However, he accepted that Azan did all the buying of the merchandise for the company whereas Machado did not. The learned Resident Magistrate further stated:

"Defendant (meaning Azan) stated he was not aware NIKE, Adidas and Caterpillar prides selves and in special features. This knowledge is known by almost every man in the street as it is so widely publicized.... I accepted the valuation and find that azan [sic] did not take all reasonable precaution and knew that the shoes were not genuine. He did not act innocently".

8. The inconsistencies and discrepancies referred to by the learned Resident Magistrate were not spelt out by him. It seems reasonable to say that he convicted the appellant Azan because he was an active director, whereas Machado was acquitted on the basis of his unsworn statement that he did not participate in this area of the company's operations.

9. The appellants' original ground of appeal challenges the verdicts recorded against them on the basis that they are unreasonable and cannot be supported by the evidence. Supplemental grounds were filed attacking the informations on the basis that there were no specific particulars, and also that Azan was wrongfully charged as a principal and should not have been charged at all.

The particulars set out in the informations

10. The informations charging both importing and harbouring the prohibited goods refer to the prohibition being by virtue of section 40 of the Customs Act, and contrary to section 210 of the said Act. A look at section 40 reveals that there are twenty-two numbered paragraphs listing the goods that are prohibited. The contention of the appellants is that the failure of the prosecution to make specific reference in the informations to the particular paragraph that covers this case, is fatal to the convictions. The response of the Crown is that this is merely a matter of form, not substance, and the appellants knew what charges and allegations they were facing and were not prejudiced in any way – even if there was an omission.

11. It is useful to look at the relevant provisions of the Customs Act and the Merchandise Marks Act.

Section 40 of the Customs Act, so far as is obviously relevant to the case, reads:

"Until revoked by order under section 39 the following goods are prohibited to be imported –

(i)...;

(ii) all goods which if sold would be liable to forfeiture under the Merchandise Marks Act...".

It is clear that given the evidence presented by the prosecution, the case revolved around the fact that the shoes had false trade marks, in that they pretended to be "Nike", "Caterpillar" and "Adidas" brands, when they were not.

Section 3 (2) of the Merchandise Marks Act reads:

"Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves either –

(a) that, having taken all reasonable precautions against committing an offence against this Act, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description, and that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(b) that otherwise he had acted innocently,

be guilty of an offence against this Act".

Section 3 (3) of the Merchandise Marks Act provides for the forfeiture of goods in respect of convictions under this Act. Section 11(1) of the said Act also provides

for the issuing of a search warrant by a Justice of the Peace to whom information has been given as to the commission of an offence under the Act. On the issue of such warrant, a constable may seize and take away the goods involved and such goods:

“shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are not liable to forfeiture under this Act”.

12. The appellants were clearly of the view that the accusation against them was that they had imported goods with forged trade marks. The entire case was conducted on that basis, and the very experienced attorneys-at-law appearing for them at the trial were under no delusion in that respect, given the nature of the cross-examination that took place over the fourteen trial dates lasting over a period of fifteen months. In the circumstances, the claim at this late stage that there was a lack of specificity which should result in the quashing of the convictions is absolutely unmeritorious.

The liability of the director to criminal prosecution

13. It was submitted that the appellant Azan should not have been charged as a principal offender as he was acting as a mere agent of the company, and not on his own behalf. Further, the Merchandise Marks Act exempts from prosecution or punishment “any servant of a master...who bona fide acts in obedience to the instructions of such master”. It was also submitted that the

goods were imported by the company, and were at all times in the possession of the company. The only offence, according to the submission, that could have been laid against the appellant Azan would have been one of aiding and abetting. In any event, it was submitted, the goods being in the possession of the company, he ought not to have been charged with the offence of harbouring. In support of their position, the appellants relied on the cases **Salomon v Salomon** [1897] A.C.22, **Ferguson v Wilson** [1866] 2 Ch. App. 77 and **Spires v Smith** [1956] 2 All ER 277.

Miss Opal Smith, for the Crown, responded that Mr. Azan was the brain and will of the company. He was not a figurehead. He attended trade shows and ordered for the company. His will was the company's. Miss Smith prayed in aid the cases **Tesco Ltd. v Nattrass** [1972] A.C. 153 and **Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.** [1915] A.C.705

14. The following passage from the judgment of Cairns, L.J. in **Ferguson v. Wilson** (supra) was relied on as being supportive of the point being advanced on behalf of the appellant Azan. It reads:

"They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be

maintained that an agent can be brought into this Court, or into any other Court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In the state of things, not the agent, but the principal, would be the person liable". (p. 89 and 90)

However, for completeness, it should be noted that **Ferguson v. Wilson** was a suit seeking specific performance of a contract to allot shares, and the reference was to the directors of a public company. The instant case involves a private company, in which there are two subscribers to the memorandum of association, one of whom is the appellant Azan, and these subscribers are the directors on record on May 30, 1990.

In **Spires v Smith**, a conductor was charged with the breach of a regulation for carrying excess passengers in a public service vehicle. The Queen's Bench Division (Lord Goddard, C.J., Jones and McNair, JJ.) held that the charge was misconceived as it was the "carrier" who was bound by the regulation. The conductor was not failing to comply with the regulation, because it was not he who was carrying the excess passengers. What the conductor was doing was aiding and abetting the commission of an offence by the company. It was on this basis that Mr. Henriques contended that the highest that the case against Azan could have been put was as an aider and abettor.

15. In her written submissions, Miss Smith, for the Crown, said that the effect of incorporation was to make the company separate from the individual members

of the company. Notwithstanding this, she said, there are some instances in which the Court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person/s who control that company. This will be done in circumstances of fraud or improper conduct, where the character of the company, or the nature of the persons who control it is a relevant feature. In such cases the Court will go behind the mere status of the company as a separate legal entity and will consider who are the persons directing and controlling the activities of the company. She continued by saying that:

"Mr. Azan as director was and is one of those persons who controlled the activities of the company at the time the various offences were committed and as such is liable because his action is the very action of the company itself".

16. It is difficult to appreciate why, in the circumstances of the instant case, it is thought that justice would be done by finding not only the company guilty, but also Azan, while at the same time excluding Machado from culpability although he too wore the mantle and had the responsibilities and privileges of the office of director. Miss Smith's submission that Mr. Azan was 'one of those persons who controlled the activities of the company' gives the impression that the prosecution is aware of the 'other persons', but chose not to highlight their role in the case, preferring to bring its selective weight down on Mr. Azan against whom there was no specific evidence at the end of the prosecution's case.

17. Miss Smith relied heavily on the case **Tesco Ltd. v Natrass** (supra). In that case, the appellants were charged with a breach of the Trade Descriptions Act 1968, in that they had sold the respondent certain goods at a price higher than advertised. The statute provided a defence to a person charged, where the commission of the offence was due to the act or default of another person, and the person charged had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control. The magistrates found that the goods had indeed been sold in breach of the statute, and that the appellants had exercised all due diligence in devising a system to prevent a sale in the circumstances charged. Notwithstanding the finding that all due diligence had been exercised, the Magistrates convicted the appellants. On appeal, the Divisional Court, (Lord Parker C.J., Cooke and Fisher JJ.) dismissed the appeal. However, on further appeal to the House of Lords, the decision of the Divisional Court was reversed.

18. The Trade Descriptions Act 1968, under which the prosecution in the **Tesco** case was brought, provided in section 20 (1) as follows:

“Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, ... any director, manager, secretary or other similar officer of the body corporate, ... he as well as the body corporate shall be guilty of that offence ...”.

It should be noted that, notwithstanding this clear provision for the prosecution of individuals, only the body corporate which owned the supermarket stores was charged. It must have been in the contemplation of the legislature when the Customs Act was passed that corporate bodies might import or harbour prohibited goods. If it was the intention that not only the corporate body but also its directors or shareholders were to be criminally liable for the breach, the legislature would have so stated, especially when the heavy penalties for breach are taken into consideration. It is interesting to note that section 49 (2) of the Interpretation Act provides for the prosecution of a director, general manager, secretary or other similar officer of "a body corporate, the liability of whose members is limited" where that body corporate has committed an offence under any Act passed after the 1st April, 1968. This does not apply to the instant case as the Customs Act precedes the 1st April, 1968. Nor do the recent changes in the law governing companies in Jamaica so far as they affect the criminal liability of directors, seeing that the occurrences were prior to the new legislation. Given the fact that the importation was done by the company, in the name of the company, through the services of another company based in Hong Kong, and there was no evidence of Azan acting other than as an agent of the company, it was neither fair nor just to affix him with personal criminal liability while at the same time excusing the other director. In the circumstances of this case, it is clear that the offender was the company and it was rightly convicted. There was no evidence of Azan having any personal connection with the goods and their

location at the premises where they were stored; hence, his conviction for harbouring is also unsustainable.

19. The Crown took refuge in a passage from Lord Reid's judgment at page 170 E-G which read thus:

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability".

In the instant case, Azan was clearly in the category of a servant, agent or representative of the company. He was not acting in a personal capacity, and did nothing which would saddle him with personal criminal liability. This case is a far cry from **Nagrani et al. v. Regina** R.M.C.A No. 11/2001 (delivered

18.2.2004) in which there was clear evidence of the individual **Nagrani** indulging in fraudulent activity by under-invoicing.

Is the verdict unreasonable and unsupportable by the evidence?

20. The submission that the verdict is unreasonable and unsupported by the evidence must have been made with tongue in cheek so far as the appellant company is concerned. The evidence is overwhelming that shoes that falsely bore certain brand names on them were imported into the country. The only point of dispute was whether they were imported by the company alone, or by both appellants. In **R. v. Barbar** (1973) 12 JLR 1127, this Court held that liability for the importation of prohibited goods under the Customs Act is strict.

Barbar was approved by the Privy Council in **Simmonds v The Queen** (1997) Privy Council Appeal No. 30 of 1996 (see para. 45). In the circumstances there was really no basis for the learned Resident Magistrate to find other than that the company was guilty of importing prohibited goods. So far as the appellant Azan is concerned, given the fact that he was acting for the company, and there was no evidence against him personally at the end of the Crown's case, the convictions recorded against him ought to be quashed and the sentences set aside.

Sentence

21. It was submitted that the sentences imposed on the company are harsh and manifestly excessive, and that the fact that the offences arose out of one dealing or one set of facts should have been taken into consideration as a mitigating factor. **R. v. Ruddock** (1963) 5 W.I.R. 523 was relied on. In that case, the appellant pleaded guilty to the offence of driving a motor vehicle without a policy of third-party insurance. He was fined £30 or three months imprisonment at hard labour and disqualified for holding or obtaining a driver's licence for two years. In the event of this fine not being paid, the sentence of imprisonment was made consecutive to another sentence imposed on him earlier that day for driving the said vehicle without a driver's licence. At the hearing of the appeal, counsel abandoned the appeal against conviction but submitted that the sentence was manifestly excessive. Lewis, J.A., in delivering the judgment of the Court, said at page 524 A-B:

"In circumstances such as this, where one act is committed and that act constitutes an offence, and the legal result of that offence is that another offence is committed, this court considers that separate punishments ought not to be imposed".

At page 524 F-G, he concluded thus:

"Now in this case I suppose it would not be technically correct to say that one offence merged in the other. Certainly, one was the legal result of the other, and the court thinks that the same principle must apply. The usual practice in the past in dealing with these cases has been that after the cases have been tried the more serious charge is dealt with and an appropriate punishment inflicted in respect of that

charge, and the court thinks that this is a good practice.

In this case the court considers that only a nominal punishment should have been inflicted. The sentence will, therefore, be set aside and in lieu the court imposes a fine of £1, and in default of payment seven days' imprisonment at hard labour, the sentences to be concurrent. The court will make no order with respect to the disqualification of the appellant".

It should be noted that although the conviction was not disturbed, the Court did not make any order as to disqualification in a situation where the legislation made disqualification mandatory.

22. Mr. Henriques submitted that where one offence has led to another the Court ought not to impose two substantial penalties. If a penalty is imposed for the principal offence, there should be a minimal penalty for the other offence. He submitted that the principle in **Ruddock** "should be applied in reducing the substantial sentences which have been imposed for both the act of importation and the act of harbouring".

Apart from the case of **Ruddock** there are two other cases deserving of mention in this respect – **Kenny v. R.** (1930) 21 Crim.A.R. 78 and **R. v. Brickligge** (1964) 8 J.L.R. 496. In **Kenny** the appellant pleaded guilty to pavilion breaking and larceny, and also to committing malicious damage. He was sentenced to three years' penal servitude in respect of the pavilion breaking and larceny, and to twelve months' imprisonment with hard labour in respect of the malicious

damage, the sentences to run concurrently. In delivering the decision on appeal, Hewart, L.C.J., said:

“The malicious damage in this case was an incident of the breaking in, It is obvious that there should not be concurrent sentences for two aspects of the same matter, and accordingly this Court will quash the conviction for malicious damage...”. (p. 79)

In **Brickligge**, the appellant was seen smoking a cigar which, on analysis, was found to contain ganja. He was convicted of possession of ganja and smoking ganja, and sentenced to concurrent terms of imprisonment. At that time there was a mandatory sentence of at least eighteen months imprisonment for possession of ganja. The appellant was also sentenced to six months' imprisonment for smoking the said ganja. Lewis, J.A., in delivering the judgment of the Court said:

“The Court thinks that in the circumstances of this case the appellant ought not to have been convicted and sentenced in respect of both possession and smoking. The circumstances point to the offence of smoking, the possession being merely incident, a necessary incident to smoking and really another aspect, in this case an immaterial aspect of the offence of smoking. The court will therefore quash the conviction for possession and set aside the sentence. The conviction for smoking and the sentence imposed with stand.”

Mr. Henriques is clearly right so far as this submission in relation to penalties is concerned.

23. In the circumstances, the appeal of Azan ought to be allowed and the convictions quashed and sentences set aside. In respect of the appellant Bashco Trading Co. Ltd., the appeal against the convictions ought to be dismissed. So far as the sentences are concerned, the appeal against the sentences for importation ought to be dismissed but in respect of the sentences for harbouring, the penalties ought to be disturbed. The sentence substituted by this Court in **Ruddock** (supra) veered from the mandatory sentence provided by the legislation. There, a reduced fine was imposed and no order was made in respect of the required mandatory disqualification for holding or obtaining a driver's licence. In **Nagrani** (supra), the Court admonished and discharged the appellant in circumstances where a penalty similar to that in the instant case had been imposed. In view of the fact that **Nagrani** also involved a breach of the Customs Act, it is appropriate to follow it in this respect.

HARRISON, J.A:

Introduction

1. This is an appeal by the Appellants Gassan Azan and Bascho Trading Company Ltd., who were convicted in the Corporate Area Tax Court by His Honour Mr. Owen Parkin, Resident Magistrate, on August 27, 2001 for the offences of importing prohibited goods, namely, a quantity of shoes marked "Cat" and/or "caterpillar", "Nike" and "Adidas" and for knowingly harbouring prohibited goods, namely, shoes marked "Cat" and/or "caterpillar" prohibited by

virtue of section 40 of the Customs Act and contrary to section 210 of the Customs Act. They were sentenced by the learned Resident Magistrate on August 27, 2001 as set out hereunder:

1. Information No. 1497/99 charging imported prohibited goods – Gassan Azan fined \$4,146,525 or 12 months imprisonment at hard labour; Bascho Trading Co. ordered to pay a penalty of \$4,146,525 recoverable by distress.
2. Information 1498/99 charging harbouring prohibited goods – Gassan Azan fined \$149,715.00 or 12 months imprisonment at hard labour; Bascho Trading Co. ordered to pay a penalty of \$149,715.00 recoverable by distress.
3. Information No. 1499/99 charging harbouring prohibited goods – Gassan Azan fined \$2,386,635.00 or 12 months imprisonment at hard labour; Bascho Trading Co. ordered to pay a penalty of \$2,386,635.00 recoverable by distress.
4. Information No. 1500/99 charging harbouring prohibited goods – Gassan Azan \$59,196.00 or 12 months imprisonment at hard labour; Bascho Trading Co. ordered to pay a penalty of \$59,196.00 recoverable by distress.
5. Information No. 1501/99 charging imported prohibited goods – Gassan Azan fined \$4,081,977.00 or 12 months imprisonment at hard labour; Bascho Trading Co. ordered to pay a penalty of \$4,081,977.00 recoverable by distress.

The background to the appeal

2. Bashco Trading Company Ltd. (the company) formerly known as "Costco Trading Company", is a company duly incorporated in the Island of Jamaica and is engaged inter alia, in the importation of a variety of goods including men's shoes. Gassan Azan and Juan Machado are both directors of the company.
3. During 1999, the company conducted business at premises 28-30 Orange Street, Kingston and 89 Princess Street, Kingston. It also stored goods at a warehouse situate at the Garmex Freezone, Kingston and Kingston Terminal, Newport West, Kingston.
4. In January 1999, Revenue Investigator, Carol Johnson, went to Berth 2, Kingston Terminal where she examined the Manifest for the containers "Zim Italia" and "Zim Canada" in respect of goods consigned to Costco Trading Company Ltd. As a consequence, Detention Notices were prepared in respect of men's shoes that were shipped in the containers. The containers were stripped and a quantity of Nike, Caterpillar and Adidas footwear were found in them. Domex International had supplied the goods to the company.
5. A warehouse belonging to the company at the Garmex Freezone, Kingston was also searched and three hundred and ninety-two cases comprising 7,054 pairs of Caterpillar footwear were found. The goods were seized and a seizure notice was prepared and signed by Cecil Harrison. The Notice (Exhibit 22) was addressed to Costco Trading Co. Ltd. c/o Edson Anderson and it reads inter alia:

"In accordance with section 215 of the Customs Act, I have to inform you that the under noted goods have this day been seized on the grounds that:- they are suspected to be counterfeit brand names."

The goods were described as

"392 cases said to contain CAT brand footwear (sic)."

6. The Revenue Protection Department Officers ("the RPD") also went to the appellants' business premises located at 28-30 Orange Street, Kingston and searched for prohibited footwear. One hundred and seventy-five (175) pairs of "Caterpillar" brand shoes were found at this location. They were gathered, counted, boxed and seized. A seizure notice was prepared and signed by Paul Davis, Deputy Commissioner of Internal Investigations of the RPD. This notice was taken to Machado for his signature but he referred the officers to the Warehousing Officer who affixed her signature to the document. The Notice (Exhibit 13) was addressed to Costco Trading Co. Ltd. 28-30 Orange Street and reads inter alia:

"In accordance with section 215 of the Customs Act, I have to inform you that the under noted goods this day been seized on the grounds that:- they are suspected to be counterfeit".

The goods were described as:

"175 pr 'CAT' shoes".

7. The appellants' premises, located at 89 Princess Street, was also searched. A number of shoes were seized and taken to the Queen's Warehouse

for safekeeping. A seizure and detention Notice was admitted as Exhibit 20 at the trial.

8. The records of the Registrar of Companies revealed that Costco Trading Company had changed its name to "Bascho Trading". The Directors of the company were originally Gassan Azan and Peter Azan. Peter Azan ceased to be a Director of the company however on January 8, 1996 and Juan Machado was appointed in lieu of Peter Azan as of that date.

9. Aldith Hylton, an Attorney-at-Law and Intellectual Property Manager at the Registrar of Companies, was responsible for the examination and registration of trademarks and designs in Jamaica. She testified at the trial that the official period for the validity of trademarks registered in Jamaica was seven (7) years and that this period was renewable thereafter every fourteen (14) years. She said that the trademarks for Caterpillar, Nike and Adidas footwear (Exhibits 9 – 11A respectively) were current at the time when the goods were seized.

10. Lorna Rhoden, Assistant Commissioner of Valuations in the Customs Department, gave evidence in relation to the acceptance and verification of the value in invoices with regard to imported goods. She said that when imported goods are valued, freight and other charges would be borne by the seller and that in arriving at the normal price one would use the price list from the seller's

brochure. Checks with overseas suppliers and other factors would also be taken into consideration.

11. Daniel Ten-Cate, a Director and Sales Manager of Wolvernie Worldwide, Redford Michigan, U.S.A., testified that his company was the dealer for the "Caterpillar" footwear brand which had responsibility for sales and merchandise, and to ensure that there was proper usage of brand and logos in advertisements. He was very familiar with the "Caterpillar" brand. He also testified that this brand was distributed by Jetset International, Panama which had exclusive rights to decide who retailed the product in the Caribbean.

12. Ten-Cate also testified that there were about 250 patterns for the "Caterpillar" brand and that he was able to distinguish between the genuine caterpillar manufactured by Wolvernie and the counterfeit brand. In May 1999 he came to Jamaica and examined a number of shoes bearing the label "Caterpillar". He said that the genuine "Caterpillar" brand had a label which was generally affixed to the tongue in the shoe which provided the licence product of Caterpillar Inc. with three distinguished rings circling the logo. One pair of the shoes shown to him by Simon Benjamin of the RPD was cut open in order to look for internal identification marks. These marks were absent in the shoes shown to him and he concluded that these shoes were counterfeit brands.

13. Ten-Cate went to The Queen's Warehouse along with Customs Officer Cecil Harrison and was shown several cartons containing shoes marked with the

word "Caterpillar". He examined one hundred pairs and concluded that all of the shoes were counterfeit brands. These shoes had the names "Rushmove" and "Seaside" stamped on them. He said that the genuine brand of "Rushmove" coming out of China between November-December 1998, would be sold at US\$16.19 FOB per pair. The "Seaside" brand he said was sold at US\$16.55 FOB per pair.

14. Arturo Del Gusto, a Product-line Manager at Northbay, Panama City testified that his company is the distributor of the NIKE footwear in Central America and the Caribbean. He said that the appellant company was not a customer of Northbay. He was shown a number of shoes by officers of the RPD bearing the name "Nike". The shoes bearing the name "Nike" were in poly bags and he found this to be unusual since genuine "Nike" shoes were packaged in boxes. On examination of the shoes shown to him he concluded that they were all counterfeit. He had checked them against the genuine brands and observed where a number of features were absent. There was one in particular that had two different inner sole tongues – one a "Nike" and the other an "Adidas". There was also one exhibit which had a flexible filon which should have been rigid.

15. Del-Gusto was also taken to the Queen's Warehouse where he was shown two piles of shoes in carton boxes. He conducted an examination of the shoes that had the "Nike" markings and concluded that they were also counterfeit products. The shoes he saw and examined had the brand names "Airmax Trias",

"Air Saunder Mid" and "Air Terra Fire" written on them. The genuine "Airmax Trias" he said, was sold at US\$15-\$20 per pair in 1998/1999. Children shoes would have been 10% less. The "Air Mid" he said was sold between US\$20 - \$25 per pair and the "Air Fire" brand was also sold for US\$20-\$25 per pair.

16. Othilla Macharaviaya is the Footwear Product Manager employed to Adidas Latin America. The "Adidas" shoe is manufactured in China, Taiwan, Vietnam, Indonesia, Germany and Italy and it was she who did purchases of the product for Central America and the Caribbean. Her company has exclusive distributorship for the Caribbean and Central America. She had traveled to Jamaica on August 3, 2000 and was taken by Cecil Harrison to the Queen's Warehouse where she was shown cartons containing shoes marked "Adidas". She examined these shoes and concluded that they were not genuine Adidas products.

17. Macharaviaya was also taken to the office of the RPD and was shown four pairs of shoes with Adidas markings on them. She also concluded that they were counterfeit shoes. She said that the cost of the genuine Adidas coming out of China would be between US\$13-\$17 per pair.

18. Bascho Trading Company, Gazan Azan and Juan Machado were subsequently charged for breaches of the Customs Act and brought before The Corporate Area Tax Court. The defence, at the trial as well as before us, vigorously challenged the case presented by the Prosecution.

19. The appellant Azan testified he purchased all merchandise on behalf of the company. He had previously been buying goods from China for about 14-15 years. He said he was invited to trade shows held in several countries abroad. The promoters of these trade shows displayed clothing, footwear and a number of other products that were made in China. Goods were purchased either from samples exhibited or from catalogues. The company's agent was Domex International, and it operated out of Hong Kong.

20. Azan further testified that all documents pertaining to the shipment of the goods in question were made available to the Customs Revenue Protection Department, prior to the arrival of the goods in Jamaica. The invoices with respect to the footwear, the subject matter of the charges, showed that China was the country of origin for the goods. He said he did not know that anything was wrong with the goods and that he did not know that they were not genuine brands. He said that the prices quoted were same as prices paid for similar goods that were ordered and delivered previously to the company.

21. Under cross-examination, Azan testified that as part of the business practice he would check on prices of similar goods sold by other business places. He was not aware however, that his company was selling Nike, Adidas and Caterpillar brand shoes at a cheaper price than those sold in the market. He disagreed that these brand of shoes were normally more expensive than other footwear.

22. Azan also testified under cross-examination, that the prices for the goods that were bought by him were not stated in the catalogue. He said he did not contact the agent's head office in Hong Kong to enquire if the company had the authority to sell Nike, Adidas and Caterpillar products. He said that the general wholesale price for the brand of shoes seized ranged between \$300-\$350 per pair for adults. The cost of children shoes was between \$200-\$250 per pair. He disagreed with the suggestion put to him by the Deputy Director of Public Prosecutions that he knew that the goods that were seized were counterfeit and not genuine.

23. Machado made an unsworn statement from the dock. He said inter alia:

"... I have no shares in company. My job is in an administrative capacity. I do not purchase price or negotiate orders on behalf of the company. Have nothing to do with importing, storing or harbouring of goods. Innocent of any of charges brought against me."

24. The Company and Azan were convicted for the offences charged but Machado was dismissed of the charges.

The findings of fact by the Resident Magistrate

25. The learned Resident Magistrate in his undated "finding of facts" accepted the evidence of the representatives from Nike, Adidas and Caterpillar that the shoes that were seized were not genuine Nike, Adidas or Caterpillar brands. He also accepted the evidence of the prosecution witnesses that the genuine brands

were more expensive than the shoes bearing the brand names sold by the Appellants.

26. The learned Resident Magistrate made the following findings:

"The demeanour and the inconsistencies/ discrepancies in the evidence of the Defendant Gazan (sic) Azan, in particular under cross-examination. I find that he was not entirely truthful.

I accept he does all the buying of the merchandise for the Company and Machado does not. He has been importing shoes for approximately twelve years and traded in name brand 1988/99. (sic)

Could not reconcile the following evidence of the Defendant:

(1) Did not cater to the more expensive marker (sic), catered to the more inexpensive level. Disagree brand name denotes extra quality but more expensive. Disagree NIKE, Adidas and Caterpillar more expensive.

(2) Inexpensive does not suggest a lower quality but would say cheap suggest a lower quality.

(3) Particular business practice would be to check prices other business places sell but had no idea prices other retailer sell.

Defendant stated he was not aware NIKE, Adidas and Caterpillar prides (sic) selves and in special features. This knowledge is known by almost every man in the street as it is so widely publicized.

He was not aware that these brand names are marketed through exclusive distributorship, yet his witness a businessman similar years, with experience of only one shipment shoes, is fully aware. Although his witness know (sic) Azan never heard of counterfeit referred to shoes.

I accepted the valuation and find that azan (sic) did not take all reasonable precaution and knew that the shoes were not genuine. He did not act innocently.”

The grounds of appeal

27. The appellants have challenged their convictions and have filed three supplementary grounds of appeal. They also rely on the two original grounds of appeal.

The original grounds of appeal read thus:

- “1. That the verdict is unreasonable and cannot be supported by the evidence.
2. That the sentence is harsh and excessive, and/or wrong in law.”

The supplementary grounds read:

- “1) The informations failed to specify the particulars of the offences charged and the trial judge should not have convicted the Defendants on the informations as laid.
- 2) The First Defendant, Gassan Elias Azan, was wrongfully charged as a principal offender and should not have been charged at all.
- 3) The learned judge erred in law in that he came to the conclusion that the first defendant was not statutorily exempt from prosecution, pursuant to Section 20(3) of the Merchandise Marks Act, and should not have been charged at all with the Second Defendant.

The issues

28. Four major issues arise for consideration in this appeal. They are:
1. Whether the Prosecution failed to properly particularize the offences charged in the informations upon which the appellants were convicted;
 2. Whether a director can be criminally liable where he acts on behalf of the company;
 3. Whether the verdict is unreasonable having regard to the evidence and;
 4. Whether the sentence is manifestly excessive.

Ground 1

The informations failed to specify the particulars of the offences charged and the trial judge should not have convicted the defendants on the informations as laid.

29. The informations on which the Appellants were charged referred to the offences of importing prohibited goods and harbouring of goods which were prohibited by virtue of section 40 of the Customs Act and contrary to section 210 of the Customs Act.

30. Section 40 of the Customs Act is comprised of 22 subsections creating different offences and the section so far as is relevant reads inter alia:

"40. Until revoked by order under section 39 the following goods are prohibited to be imported -

....

(ii) all goods which if sold would be liable to forfeiture under the Merchandise Marks Act, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be a name or trade mark of any manufacturer, dealer or trader in the Commonwealth unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced. ..."

31. Mr. Henriques, Q.C, on behalf of the Appellants, submitted that the Appellants were prejudiced at the trial because the specific subsection under section 40 of the Customs Act was not included in the informations. He contended that the Appellants would not know what case they had to answer and relied on the cases of **R v Gray** (1965) 8 WIR 272, **Hunter v Coombs** [1962] 1 All E.R 904 and **R v McFarlane** (1993) 3 JLR 154 in support of his submission. These cases have decided that where the information fails to specify which of the offences under a section that creates more than one offence an appellant is charged with, then the information is bad.

32. Miss Smith, Crown Counsel, submitted however, that the informations were not incurably bad if they failed to specify which of the offences under section 40 of the Customs Act the matters concerned. She submitted that section 210 of the Customs Act created the substantive offence and stood by itself. Section 40, she said, merely points out how the prohibition is created and that it did not affect the offence created.

33. Miss Smith argued that the informations as drafted satisfied the requirement of the common law. They had in fact specified where and when each offence was committed, that the goods that were "prohibited" and "knowingly harboured" were shoes marked "Adidas", "Cat" or "Caterpillar" and "Nike." She submitted that the word "marked" was the operative word and that of the twenty-two (22) subsections mentioned under section 40, it was only section 40(ii) which specifically spoke of "trade marks". See section 40(ii) (supra.)

34. Miss Smith further submitted that the Appellants would have been well aware that they were charged with the importation of prohibited goods which were liable to forfeiture under the Merchandise Marks Act. Furthermore, they would also have been aware that they were in breach of section 210 of the Customs Act. She argued that the omission or failure to mention subsection (ii) in the information would not make the information bad for vagueness. Counsel submitted that the Appellants could not say that they were prejudiced and as such there was no miscarriage of justice. She contended that even at this stage of the proceedings, the Court could entertain an application to amend the informations pursuant to section 302 of the Judicature (Resident Magistrates) Act which states:

"302. It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to

amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit".

She also relied on section 303 which states:

"303. No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial, or the Court is of opinion that such error or defect has caused or may have caused or may cause injustice to the person convicted".

35. The issue as I see it, is this, does the omission of subsection (ii) make the information bad for vagueness? In my judgment, section 210 of the Customs Act creates the substantive offence. Section 64 of the Justices of the Peace Jurisdiction Act, which deals with the sufficiency of particulars in an information provides as follows:

"64 (1) Every information ... issued or made ... in connection with any proceedings before ... a Court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence ... together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) The statement of the offence shall describe the offence shortly ... without necessarily stating all the essential elements of the offence ..."

36. I am of the view that there could be no confusion as to the nature of the offences for which the appellants were charged. Seizure Notices were prepared and served on the defendants' representatives at the premises where the searches were carried out and the prohibited goods seized. They were also informed that the seized footwear were suspected counterfeit goods.

37. There are five informations, 1497/99, 1498/99, 1499/99, 1500/99 and 1501/99. Informations 1497/99 and 1501/99 respectively charge the Appellants with the offences of importing prohibited goods. The particulars are all similar so I will just refer to one. Information 1497/99 states inter alia:

"... **Costco Trading Company Limited** Gassan Elias Azan and Juan Machado of the said parish of Kingston with force at Newport West and within the jurisdiction of this court imported into the island prohibited goods vide (sic) container # ZCSU2172518 being: a quantity of shoes marked "Cat" and/ or "Caterpillar", a quantity of shoes marked "Adidas", and a quantity of shoes marked "Nike" which goods are prohibited by virtue of section 40 of the Customs Act, contrary to section 210 of the Customs Act".

38. Informations 1498/99, 1499/99 and 1500/99 charge the Appellants respectively, with the offences of "knowingly harboured prohibited goods". I will refer to Information 1498/99 as the other two are similarly worded. It states inter alia:

"... **Costco Trading Company Limited** Gassan Elias Azan and Juan Machado of the said parish of Kingston with force at 89 Princess Street and within the jurisdiction of this court knowingly harboured prohibited goods to wit: a quantity of shoes marked "Cat" and/ or "Caterpillar" which goods are prohibited by virtue of section 40 of the Customs Act contrary to section 210 of the Customs Act".

39. I do agree with the submissions made by Miss Smith that the informations as drafted have satisfied the requirement of the law. They have specified where and when each offence was committed, that the goods were "prohibited" and

"knowingly harboured" and that they relate to shoes marked "Adidas", "Cat" or "Caterpillar" and "Nike" respectively.

40. I also agree with the submission by Crown Counsel that the word "marked" referred to in the particulars of the offence was the operative word and that of the twenty-two (22) subsections mentioned under section 40, it was only section 40(ii) which specifically spoke of "trade marks".

41. The cases of *Hunter v Coombs* (supra), *R v Gray* (supra) and *R v McFarlane* (supra) are all distinguishable from the instant case. In the *Hunter* case, one offence was charged on the information and a different one found in the conviction. The lack of proper particulars on the information rendered it incomprehensible so it was not possible for the appellant to ascertain the nature of the offence with which he had been charged. In *Gray's* case the information did not disclose any offence known to law. The appellant had been convicted on an information which charged that he was found by night without lawful excuse in a certain enclosed premises and is deemed to be a rogue and vagabond, contrary to Cap. 404 s. 6 (3) and section 7 of Cap. 404. Section 6 (3) lists by name the various categories of places in or upon which any person found by night without lawful excuse is deemed to be a rogue and vagabond. The information did not specify which of these places the appellant was found in or upon. It simply stated that he was found "in a certain enclosed premises" and it did not go on to state whether it was an enclosed garden, yard, or area as it

should have done. The Court was of the view that the word "premises" used in the information was far too wide as this would include a garden or a yard or an area.

42. Learned counsel for the Crown had conceded in *Gray's* case that the information was bad and applied to the court to amend under the provisions of Cap 179, s 302. Duffus P, stated at page 273:

"... we are being asked to amend the information so that it will now charge an offence where no offence was charged. This we cannot do."

43. I turn next to the *McFarlane* case. The headnote states as follows:

"The appellant was charged in a sworn information with failing to comply with a notice to provide a garbage receptacle for certain premises belonging to him "contrary to s. 24 (2) of the Public Health Law (18/1925)."

The offence did not come under s. 24 (2) but under regulations made under the same law. Further the offence was not accurately described.

At the conclusion of the case for the prosecution, the defendant's solicitor pointed out that the wrong section was mentioned in the information but no amendment was made and the defendant was convicted upon the information as laid.

HELD that, in the circumstances, to amend the information would be to transform it and that, even if the Court of Appeal had power to make such an amendment under s. 304 of the Resident Magistrates Law (39/1927), it would not exercise it."

That case is also distinguishable with the instant matter.

44. In my judgment, the Appellants in the instant case would have been quite aware of the nature of the offences that they had committed. They would have known that they were being charged with the importation of prohibited goods which were liable to forfeiture under the Merchandise Marks Act. Furthermore, they would have been aware also that they were in breach of section 210 of the Customs Act. The omission or failure to mention subsection (ii) after the figure 40 in the information would not make the information bad for vagueness. Furthermore, if there was any uncertainty as to which of the subsections under section 40 the charges related to, the Appellants could have requested further particulars at the commencement of the trial and this they failed to do.

45. In *R v George McFarlane* ([1939] 3 JLR 154) at p 157, Sherlock, Acting Chief Justice said:

“ Now to “amend” amend means to correct an error, it does not mean to substitute one thing for another and to change the entire meaning of a legal document, ...”

The situation in the instant case is not intended to transform the information. The amendment is essentially technical in nature. The particulars of the offences had given full and correct notice to the Appellants of the facts alleged; accordingly, this Court would be entitled in all the circumstances to conclude that the amendment of the information to insert the numerals “(ii)”, albeit after the completion of the trial, would cause no injustice to the Appellants.

Supplemental ground 1 therefore fails in my view.

Ground 2

The first defendant, Gassan Elias Azan, was wrongfully charged as a principal offender and should not have been charged at all.

Ground 3

Whether the learned judge erred in law in that he came to the conclusion that the first defendant was not statutorily exempt from prosecution, pursuant to section 20(3) of the Merchandise Marks Act and should not have been charged at all with the second defendant

46. These two grounds of appeal can be dealt with conveniently together. Mr. Henriques, Q.C, submitted that the informations improperly joined Gassan Azan as a principal offender alongside the company. He argued that it was the company that imported the goods in question at all relevant times and that it was the company that was in possession of the goods. He therefore submitted that Gassan Azan if charged should only have been charged for aiding and abetting the company as at all relevant times he was merely acting as an agent of the company and not on his own behalf.

47. With regard to the charges of knowingly harbouring the said goods, Mr. Henriques also submitted that since the goods were in fact in the possession of

the company and at no time in Mr. Azan's possession he was incapable of harbouring the said goods. He submitted that at all relevant times the goods would have been harboured by the company, and that Mr. Azan acted as the mere agent of the company.

48. Miss Smith submitted in response that Azan who was a director of the company had controlled the activities of the company at the time the various offences were committed and would be liable because his action was the very action of the company itself. She referred to and relied upon the case of ***Tesco Ltd. v Natrass*** (1972) A.C. p. 153. In that case their Lordships in determining whether the actions of one the managers, at one of the Tesco stores, were to be seen as the actions of the company adopted the words of Lord Parker C.J in ***Magna Plant v Mitchell*** (unreported) April 27, 1966 who said:

"knowledge of a servant cannot be imputed to the company unless he is a servant for whose actions the company are criminally responsible, and as the cases show, that only arises in the case of a company where one is considering the acts of responsible officers forming the brain, or in the case of an individual, a person to whom delegation in the true sense of the delegation of management has been passed."

49. Queen's Counsel also submitted that since the goods in question were prohibited by virtue of their classification under the Merchandise Marks Act, section 20(3) of that Act precluded any servant from being liable to any prosecution or punishment where that servant acts in bona fide obedience to the instructions of his master. The section states as follows:

"Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident, in this Island, who bona fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master."

50. He submitted that Azan was at all relevant times the agent of Bashco Ltd. and that he would qualify under section 20(3) of the Merchandise Marks Act as a servant and as such was exempt from prosecution where he had acted bona fide in the obedience to the instructions of his master. He submitted that Azan was wrongfully joined as a defendant in the circumstances and that only Bashco Ltd. should have been charged with the said offences.

51. Miss Smith submitted that although the company was named as the importer on all of the documents, the company could not have carried out the transactions without Mr. Azan. Mr. Azan's role in the company she said, was most crucial. She argued that it was not disputed that he was the director who traveled and attended trade shows and did all the purchasing on behalf of the company. One could not pretend, she said, that the company was acting on its own. Rather you had to look at Mr. Gassan Azan, he was the one using the company.

52. Miss Smith also submitted that since the company is a legal fiction and cannot form the necessary *mens rea* to commit a crime one would need to examine Mr. Azan's "actions and transgressions" which could be imputed to the

company as he represented the directing mind and will. She referred to ***Lennard's Carrying Company Ltd. v Asiatic Petroleum Company Ltd*** (1915) AC 705, where Viscount Haldane at p. 713 said:

"For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself ..."

53. The ***Tesco*** case (*supra*) appears to be the first in which the House of Lords had examined the nature of the criminal liability of a corporation and has constituted the leading authority on the subject. The company is criminally liable for the acts of "the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company": per Lord Reid; for the acts of those who "constitute the directing mind and will" of the company: per Lord Dilhorne; or for the acts of those "who may for some purposes be identified with it, as being or having its directing mind and will, its centre and ego, and its brains": per Lord Pearson. Lord Diplock thought that the question:

"What natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."

54. The conventional view on the one hand therefore, is that a company will have imputed to it the acts and state of mind of those of its directors and managers who represent its "directing mind and will".

55. However, there are cases on the other hand, in which directors of the company were held criminally liable for the acts of the company: See ***Regina v Norman H. Reittie, Royden Reittie and Century Corporation Ltd.*** (1990) 27 JLR 110 and ***Heinz Simonitch v R*** (1985) 22 JLR 145. In ***Regina v Ram Nagrani & N Limited*** RMCA 11 of 2001 (unreported) delivered February 18, 2004 both the company and director were convicted in the Resident Magistrate's Court for the Corporate Area (Tax Court). Each appellant was convicted on informations for breaches under section 210(1) of the Customs Act of being knowingly concerned in the fraudulent evasion of import duties on soya oil imported into Jamaica with intent to defraud and each sentenced to pay a penalty. The appeal in respect of the conviction of both parties was dismissed. The appeal against sentence in respect of the company was however allowed and sentence set aside. In substitution, the company was admonished and discharged on each information.

56. The evidence presented in the instant matter clearly established that Azan knew the material facts which constituted the offence committed by the company. It could be said that he had agreed to the conduct of the business on the basis of those facts. He was the director who traveled abroad on the

company's business. He made the contacts, visited the trade shows and did purchases on behalf of the company. He admitted under cross-examination that the prices for the shoes, the subject matter of the charges were not quoted in the catalogues that he ordered the goods from. He did not contact his agent's head office in Hong Kong to enquire if Domex International had the authority to sell Nike, Adidas and Caterpillar footwear. He also said that he would check on prices of similar goods sold by other business places in order to determine his prices. I am therefore of the view that the learned Resident Magistrate was correct when he found inter alia that Azan did not take all reasonable precaution and did not act innocently.

57. In my judgment, Azan did not exercise all reasonable diligence as he ought in the circumstances to have exercised to prevent the offences since he was the Director who was responsible for purchasing the goods in question on behalf of the Company. There is no evidence that he had acted in the manner he did because of a decision taken at a board meeting.

58. A company as a legal entity can only act through its officers and here the evidence disclosed that Azan acted as agent of the company. He knew the material facts which constituted the offences committed by the company. In my view he had aided, abetted, counseled and procured the breaches charged in the informations. He, by his action fell squarely in the provisions of section 6 of the Justices of the Peace (Jurisdiction) Act which states:

"6. Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the parish where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed."

59. Azan in my view, is therefore liable as such to the same punishment applicable to the company as a principal offender. In the circumstances, both appellants would have been properly charged and convicted. There is really no merit in these grounds of appeal.

Ground 4

The verdict is unreasonable and cannot be supported by the evidence.

60. Mr. Henriques, Q. C., submitted that the verdict was unreasonable and cannot be supported having regard to the evidence. This he said was due to the fact that some of the witnesses from the parent companies which own the trademarks in the products had to cut open the shoes in order to determine their authenticity or lack thereof. He submitted that since the appellants bought the shoes from a catalogue they could not reasonably have known that the said goods they were purchasing were counterfeit and in breach of any trademarks. The appellants, he said, would not have reasonably known the nature of the

goods until at least they were in their possession and as such there would have been no *mens rea* present. He submitted that the appellants were in fact the victims in that what they thought was a good business deal turned out to have been a failed investment and ought not to have been found guilty on account of such tenuous evidence.

61. As to the findings of fact by the learned Resident Magistrate, he submitted that when the evidence is reviewed it does not support the Magistrate's findings. He argued that what the Magistrate has done was to compare the evidence and that that did not mean that the Appellant Azan was untruthful. He submitted that the Magistrate failed to determine the critical issue that is, knowledge of the goods being counterfeit and not genuine. He also submitted that the evidence presented by the prosecution did not support the conclusion arrived at by the Magistrate and argued that Azan had acted above board and had paid the duties when he brought in the goods.

62. Miss Smith submitted however, that the offence of "importing prohibited goods" is one of strict liability therefore a person who is involved in bringing prohibited goods into Jamaica would be guilty of the offence without proof of intention to evade prohibition. The Crown would be obliged, she said, to establish by evidence that the Appellants had imported the goods in question, that the goods were counterfeit and that they were prohibited pursuant to the Customs Act and the Merchandise Act. She submitted that once it was proved

that the Appellants had imported the prohibited goods then it was for them to show that the requirements of section 3(2) of the Merchandise Act had been met.

63. With respect to the offence of "knowingly harbouring" she submitted that the Crown had proved these offences.

64. Finally, Miss Smith submitted that the Crown's case had been proved and that the learned Resident Magistrate had properly concluded that the Appellants were guilty of the offences charged.

65. I turn first to some general principles of law. In ***R v George Barbar*** (1973) 21 WIR 343 at page 355 of the judgment, Fox J.A. stated:

"It is a general principle of the criminal law that if a matter is made a criminal offence, proof of something in the nature of *mens rea* is essential. The prosecution must establish not only that the conduct of the accused was forbidden and punishable by law, but as well, and accompanying such conduct, the prosecution must prove the existence of a particular state of mind in the accused which has been severally described, but which may at this stage be conveniently but imprecisely labelled an evil or a guilty intent. With the rare exceptions noticed in Smith and Hogan, CRIMINAL LAW (2nd ed), at pp 59, 60, criminal liability at common law requires proof of this mental element in an accused. The position is altogether different with statutory offences".

He continued:

"It may appear to be unjust that a person should become exposed to the rigours of the criminal law for activity which, unknown to him, constituted an

offence. The courts have found a moral justification for this uncomfortable position by holding that the activity was forbidden by the statute in the public interest, and by inferring that the legislature intended that such activity should be carried out under conditions of strict liability which subordinated the interest of the individual to the welfare of the community. These considerations have been well stated by LORD EVERSHED in delivering the judgment of the Privy Council in *Lim Chin Aik v R* (18 [1963] AC at p 174):

The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*”.

66. In *Barbar's* case (supra) it was held that the offence of importing prohibited goods contrary to section 205 (1) of Chapter 89 of the Customs Law was an offence involving strict liability and was in no way qualified by the requirement as to an intent to evade the prohibition dealt with in the latter part of the subsection. The section as it then was provided inter alia:

“Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour or conceal, or knowingly permit or suffer, or cause or procure to be harboured kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing,

depositing, concealing, or in any manner dealing with any goods with intent to ... evade any prohibition or restriction of or applicable to such goods ... shall for each such offence incur a penalty ..."

67. With these general observations, I turn now to examine the language of s 210 of the Customs Act, and the subject matter with which it deals to ascertain if and to what extent offences of strict liability may have been created or whether the prosecution must in the final result discharge the burden of proving *mens rea*.

68. So far as is material, section 210 provides as follows:

" 210 – (1) Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, **or shall knowingly harbour,** keep or conceal ... with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition . . . shall for each such offence incur a penalty of not less than treble the import duties payable on the goods nor more than treble the value of the goods; and all goods in respect of which any such offence shall be committed shall be forfeited."

(emphasis supplied)

69. As is plain, the section creates a varied number of offences, each of which makes the offender liable to incur a penalty which is to be determined by the Collector General in his discretion.

70. Of significance is the use of the word "knowingly" in one section of the Act and not in another. A strong presumption is raised up that proof by the prosecution of *mens rea* is required in the first case and not in the second. In my judgment, by the omission of the word 'knowingly' in section 210 as it relates to "importing or bringing into the Island any prohibited goods" the legislature intended to impose a strict liability with respect to those activities. The offences created in section 210 with respect to "knowingly harbour or conceal" would require proof of some form of guilty knowledge.

71. One further observation has to be made. Section 3(2) of the Merchandise Marks Act states that:

"Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves either -

(a) that, having taken all reasonable precautions against committing an offence against this Act, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description, and that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(b) that otherwise he had acted innocently, be guilty of an offence against this Act."

72. In my judgment, having regard to the evidence adduced in the case, the appellant Azan had failed to discharge the burden placed upon him under section 3(2) of the Merchandise Marks Act. He also failed in my view to establish that he did not know that the goods he imported were prohibited. There was also sufficient evidence in my view, which established that the goods were in the appellants' possession. They were prohibited goods under their control and were harboured at premises to the knowledge of Azan.

73. It is therefore clear from the evidence before the Learned Resident Magistrate that the verdict was reasonable and was supported having regard to the evidence. I am not persuaded as to the validity of the arguments presented by Counsel for the appellant on this ground and it accordingly fails.

Ground 5

The sentence is harsh and excessive, and/or wrong in law

74. Mr. Henriques, Q.C., submitted that the sentences were harsh and excessive, and/or wrong in law. He referred us to the cases of *R v Ruddock* (1963) 5 WIR 523 and *R v Phang* (1936) 3 JLR 22 and submitted that the sentences are manifestly excessive for the following reasons:

“(i) They punish each appellant separately with substantial fines. Fining both Bashco and Mr. Azan on each offence where the offences arise out of each other and are inextricably linked in that they involve the same sets of goods and arise out of the same facts.

(ii) The reason why there were five informations was because the goods which are the subject of the various informations were stored in different locations from which Baschco (sic) operates, and were found in different containers a distinct situation from one in which there were five separate and distinct unconnected breaches of the law”.

He submitted that where one offence leads to another you should not impose two substantial penalties and that there should be a minimal penalty on the offence that arose from the principal. He argued that the principal offence in the instant case was the importation of prohibited goods. He submitted that where the parties are the same persons who imported the prohibited goods there ought not to be a substantial fine for the harbouring offence. He argued that the fact that all the offences arose out of one course of dealing or one set of facts is to be taken into consideration as a mitigating factor, and should be used to reduce the harsh and excessive nature of the penalties.

75. In my judgment, the imposition of substantial fines is not legally incorrect since each information upon which the appellant is charged, attracts a separate fine. Based on the evidence presented and the finding of facts made by the learned Resident Magistrate, the appellants had committed two sets of breaches.

Firstly, there was the importation of prohibited goods. Secondly, having imported the goods they were harboured by the appellants. Consequently, on the basis of the circumstances of this case, I cannot say that in principle there was any error made in the simple fact of recording convictions for the two sets of

breaches alleged. I am also not persuaded by the arguments that there ought to have been minimal fines in relation to the harbouring offences.

76. I would dismiss the appeal against conviction in respect of the company but allow the appeal however, in respect of sentence. The sentence on each information should be set aside and in substitution, I would admonish and discharge the company on each information. I would dismiss the appeal by Azan thereby affirming both conviction and sentence in respect of him.

HARRIS, J.A.

I have read the judgment of Panton, J.A. I agree with his reasoning and conclusion and have nothing further to add.

PANTON, J.A.

ORDER

GASSAN AZAN

By majority, Harrison, J.A. dissenting, appeal allowed. The convictions are quashed and the sentences set aside.

BASHCO TRADING CO. LTD.

Appeal against convictions dismissed. Appeal against sentences on informations 1498/99, 1499/99 and 1500/99 for harbouring prohibited goods allowed. The sentences are set aside and "admonished and discharged substituted".

By a majority, Harrison, J.A. dissenting, appeal against sentences on informations 1497/99 and 1501/99 for importing prohibited goods dismissed. The penalties on both informations are to be paid forthwith.

