Nmus

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO.1/2000

BEFORE: **THE HON.MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

DAVID CHIN
v
REGINA

Ian Ramsay, Q.C., Mrs. Jacqueline Samuels-Brown and Miss Deborah Martin for the appellant
Miss Paula Tyndale and Mrs. Ann-Marie Feurtado-Richards for the Crown

May 1, 2,3, 4, 5, 8, 2000 and July 31, 2001

PANTON, J.A:

The appellant was convicted in the Corporate Area Tax Court by His Honour Mr. Owen Parkin, Resident Magistrate, on August 31, 1998, after a trial that lasted over a period of twenty-one months, of nine offences of being knowingly concerned in the fraudulent evasion of import duties on edible oil, and of a further nine offences of being knowingly concerned in bringing into the island restricted goods, namely, edible oil, in a manner contrary to restrictions imposed by the Coconut Industry Aid Act. In relation to both sets of offences, the informations alleged that breaches of the Customs Act had occurred. Sentence was imposed on September 23, 1998, when the appellant was fined a total of $11,109,176.58 with an alternative of two years imprisonment. Of this amount, the learned Resident Magistrate ordered the appellant to pay $1,624,835.40 within six (6) weeks; thereafter, the balance was to be paid at a rate of $300,000 per month until

the amount was liquidated. The appellant gave verbal notice of appeal, and the learned Resident Magistrate "suspended" payment pending the outcome of the appeal. The record of the proceedings at the trial was filed at the Court of Appeal in January, 2000.

The case for the prosecution was that the appellant imported edible oil from Sunlight Foods Incorporated of Miami, United States of America. When the oil was to be cleared, he submitted false invoices and permits to his customs broker Mr. James Lue Shim. The invoices had undervalued statements of the prices of the goods. On the strength of the documents submitted by the appellant, Mr. Lue Shim's company prepared C78 forms which are necessary for clearing goods valued at US$1000 or more at the Customs Department. These documents were checked by Mr. Lue Shim for accuracy and he (Lue Shim) signed the C78 forms with a view to the goods being cleared. Duties were eventually paid on the basis of the undervalued prices and freight charges. There were nine instances of importation. The prosecution relied heavily on documentary evidence as well as on the oral evidence of the Vice President of Sunlight Foods Incorporated, several persons employed in the Customs and Revenue Protection Departments, several clerks employed to shipping companies and Leslie Dick, a member of the Forensic Science Society in the United Kingdom. The latter gave evidence as an "independent examiner of questionable documents".

The defence, at the trial as well as before us, vigorously challenged the admissibility of most of the documents that were admitted in evidence. The appellant, in an unsworn statement, declared his innocence and denied that he was an importer of goods at the time of the alleged offences. He charged the Revenue Protection Department with having malice towards him, and stated that the Vice President of Sunlight Foods Incorporated had a poor disposition towards him due to his (the appellant's) refusal to settle debts allegedly owed by his father to Sunlight Foods. He

denied giving the customs broker, Lue Shim, any instructions to prepare any entry for him. He also denied signing any document aimed at evading customs duties. Further, he said he had no connection with the importation of any goods that required a licence from the Coconut Industry Board.

In his undated "findings of facts" which reached the Court of Appeal on April 12, 2000, the learned Resident Magistrate found that the appellant dealt personally with the business of the company, "David Incorporated" of which he was a director, and that he placed orders and had frequent discussions with Mr. Francois Huttin, Vice President of Sunlight Foods Incorporated. He found that the appellant was an importer, using the names of other companies, namely, Dee Tee Marketing, Real Farms Ltd., and Sam Halls Enterprises. The appellant, he found, also used the services of the licensed custom broker, Mr. James Lue Shim whom he supplied with the relevant documents- invoices and bills of lading- for clearing the goods imported. The Customs Department collected duties on the basis of the values stated on the documents. The learned Resident Magistrate found that the invoices were false and did not originate from Sunlight Foods Incorporated. In relation to certain questioned writings, he accepted the evidence of Leslie Dick whom he found to be a competent handwriting expert.

The appellant has challenged his convictions by the filing of two grounds of appeal, and eight supplementary grounds of appeal. He also filed amendments in respect of ground two of the supplementary grounds. The amendments are recorded as 2 (a) and 2(b).

The **original grounds of appeal** read thus:

> "1. That the convictions recorded by the learned Resident Magistrate against the appellant were based, substantially, on inadmissible documentary evidence, and hence cannot stand in law.

2. That the sentences imposed by the learned Resident Magistrate were wrong in principle, and did not conform to the requirements of the amended Customs Act."

The **supplementary grounds as amended** read:

"1. That the learned Resident Magistrate erred in recording multiple convictions for essentially the same incident.

ALTERNATIVELY

2. That the learned Resident Magistrate erred in punishing the appellant twice for the same matter or thing: that is, in imposing double the penalty for what on the facts was one offence; or to put it another way, for offences that arose out of the same facts:

Wherefore it is submitted that the correct principle is that in circumstances such as the above only one substantial sentence should be imposed.

2.(a) Further and/or alternatively that the learned Resident Magistrate erred in convicting the appellant on nine informations charging fraudulent evasion of customs duties as duties are not lawfully exigible on goods prohibited from importation.

2. (b) Further and in addition that the learned Resident Magistrate erred in convicting the appellant on nine informations charging fraudulent importation of (restricted)/ prohibited goods in breach of both s.4 (1) of the Coconut Industry Aid Act and s. 210 (1) of the Customs Act.

3. That informations 11030/95, 11031/95, 11032/95, 11033/95, 11034/95, 11035/95, 11044/95 are bad for duplicity. That as will be seen on inspection each of the informations cited were amended to include more than one offence:

Wherefore it is submitted that the convictions cannot stand on what is in principle impermissible even without a showing of prejudice: that hence the convictions on the cited informations should be quashed.

4. That the learned Resident Magistrate erred in admitting and relying on inadmissible evidence.

5. That the attack by the defence on documentary inadmissibility was/ is deployed under four headings:

(a) S. 34 of the Evidence Act relating to Banker's Books

(b) S. 31 G of the Evidence (Amendment) Act relating to computer generated evidence; and

(c) S. 31 f (1) & 2 of the Evidence (Amendment) Act relating to the proper foundation to be laid in respect of certain statements in a document in a criminal proceedings.

(d) S. 253 of the Customs Act.

That the appellant contends that in each case the requirements of the existing statute are mandatory and were not complied with: that hence the documents tendered under those headings ought not to have been received: Further that the findings of the handwriting expert in so far as they were based on inadmissible documentation, cannot stand and ought not to be relied on.

Wherefore it is submitted that as the tendered documents go to the heart of the prosecution case, a holding that they ought not to have been admitted renders the convictions untenable.

6. That on the second page of his findings of fact the learned Resident Magistrate stated as follows: "After usual warning accepted evidence of Maxine Phillips of Island Cargo Ltd."

That it is respectfully submitted that in relation to special category evidence the Magistrate must state in what category he found the witness to fall, that is, for example whether as accomplice, or person with an interest to serve; and then set out the particular warning he gave himself as the warnings vary according to category; and that it is unacceptable to mask the issue by speaking of the "usual warning":

Further on the assumption that the learned Resident Magistrate found Maxine Phillips to be in the category of an accomplice vel non, then logically he should so have considered the position of the witnesses James Lue Shim and Francois Hutin, as to whether they fell into any of the special categories: That, from the premises, it clearly appears that the magistrate failed to make a finding of fact in respect to these witnesses, and thence to give himself the appropriate warnings if so required.

Wherefore it is submitted that the prosecution's case in so far as it rested on Maxine Phillips and ames Lue Shim and Francois Hutin failed in a vital respect.

7. That in arriving at the penalties he imposed, the learned Resident Magistrate apparently made no adjudication of his own, but simply noted in the record, "DUTY CALCULATED".

   Alternatively assuming this meant an acceptance of certain calculations done by the witness Hind, the evidence of this witness disclosed hearsay, speculation, and assumption of facts.

   Further and in any event there was no evidence that the duties payable were calculated as provided for by the governing statute, namely s. 19(2) of the Customs Act.

8. That in a customs case, a prosecution may only be instituted by an "officer": (See interpretation of word "officer" in the Customs Act). That the word "officer" is a term of art and refers for present purposes to officers of the Jamaica Constabulary Force: That by definition under s. (2) of the Jamaica Constabulary Force Act "officer" means a member of the Jamaica Constabulary Force above the rank of Inspector: That in the instant case the prosecution was instituted on the complaint of Inspector Winston Lawrence, who was not called to testify.

That accordingly, in the premises, the trial was a nullity which the Court has power to treat as an acquittal.

WHEREFORE THE APPELLANT HUMBLY PRAYS:-

1. That his convictions be quashed and his sentences set aside, and a verdict of acquittal entered.

2. Such further and other relief as this Honourable Court may deem just."

It is appropriate I think to deal with the last mentioned ground of appeal first as it challenges the validity of the trial on the basis that the informant, that is the individual who laid the informations, had no locus standi. Mrs. Samuels-Brown contended that an Inspector of Police has no authority to lay an information under the Customs Act. It will be noticed that all the informations allege a breach of section 210 of the Customs Act. Hence, according to her, the prosecution and subsequent trial amounted to a nullity.

These submissions were made before the learned Resident Magistrate who made no written comment on them. However, due to the fact that he proceeded to record convictions, it is safe to assume that the learned Resident Magistrate found no merit in the submissions. We agree with this finding.

Mrs. Samuels-Brown relied on sections 2 and 240 of the Customs Act and section 2 of the Constabulary Force Act for her submission. Section 2 of the Customs Act and section 2 of the Constabulary Force Act are definition sections.

Section 240 (1) of the Customs Act reads:

> "Subject to the express provisions of the customs laws, any offences under the customs laws may be prosecuted, and any penalty or forfeiture imposed by the customs laws may be sued for, prosecuted and recovered summarily, and all rents, charges, expenses and duties, and all other sums of money whatsoever payable under the customs laws may be recovered and enforced in a summary manner on the complaint of any **officer.**"

Section 2 of the Customs Act defines:

> "officer" as including "any person employed in the Department of Customs and Excise, the Revenue Protection Division of the Ministry of Finance and all **officers of the Constabulary Force**, as well as any person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed to be an officer acting in the execution of his office or duty."

These quoted provisions make it quite clear that any "officer" of the Jamaica Constabulary Force may lay an information under the Customs Act. In this sense, "officer" is synonymous with "member". It was not, and indeed could not have been, the intention of the Parliament of the land to make it a requirement for laying an information under the Customs Act that the informant has to be of the rank of Superintendent of Police and above, as contended by Mrs. Samuels-Brown. It would be very odd, indeed inane, that a Constable of the lowest rank may lay an information for murder but cannot lay one for the simplest breach of the Customs Act. It is a fact that section 2 of the

Constabulary Force Act defines "Officer" as meaning all members of the Jamaica Constabulary Force above the rank of Inspector. However, it is obvious that that definition is aimed at demarcating and preserving the distinction between and among the various ranks in the Force. It has no relevance whatsoever to the laying of an information under the Customs Act.

Mr. Ian Ramsay, Q.C., argued grounds 1, 2 and 3 of the supplementary grounds. The challenge to the convictions, as set out in these grounds may be summarized thus:

1. The learned Resident Magistrate recorded multiple convictions on the same facts.

2. Some informations were bad for duplicity.

3. Some informations erroneously charged a breach of two distinct Acts together.

4. The learned Resident Magistrate imposed double penalty for the same offence.

Multiple convictions

Based on the evidence presented and the findings of facts made by the learned Resident Magistrate, the appellant committed two sets of breaches. Firstly, he brought restricted goods, namely, edible oil, into the country without having obtained the necessary permits. Secondly, having imported the goods without the requisite authorization, he fraudulently evaded the payment of the appropriate customs duties. It is clear that the commission of one of these breaches does not necessarily result in the commission of the other. Importing without the necessary permit does not necessarily involve the evasion of customs duties; nor does the latter act involve or incorporate the former. The witness Mr. Christopher Hind, while being cross-examined by Mr. Ramsay (page 135 of the record), said that the import "permit must be obtained from the Coconut Industry Board prior to the goods entering the Jamaican waters". This is in keeping with the requirement of section 4 (1) of the Coconut Industry Aid Act which specifies that it is

unlawful to import edible oil into the country except under **a licence first obtained** from the Minister. It seems obvious therefore that the breach occurs at the moment of landing. In the case of the evasion of customs duties, it is equally obvious that the breach would occur at some time after the landing, at a point in time when the nature of the goods is known, their value declared, and short payment made. Consequently, on the basis of the circumstances of this case, we cannot say that on principle there was any error made in the simple fact of recording convictions for the two sets of breaches alleged.

Informations bad for duplicity

It was submitted that informations 11030 to 11035 and 11044 of 1995 were bad for duplicity which arose when they were amended to cover more than one "entry". An examination of one of these informations will provide an understanding of the complaint of the appellant. In its original form, information 11030 reads:

> "...was knowingly concerned in the fraudulent evasion of import duties of Customs payable on a quantity of edible oil imported vide Customs Entry # 92-11-021751 Contrary to section 210 (1) of the Customs Act."

This information was amended by deleting the word "Entry" and substituting "Entries", and adding after the digits above the following "and 92-11-021750". The result is that the information now covers two entry numbers, instead of one. Learned attorney-at-law for the Crown, Miss Tyndale, pointed out that the two entries on each of the amended informations were in respect of one shipment. In other words, the imports arrived on the same ship on the same date. The record of the trial indicates that on the first day of the trial, prior to opening the case for the Crown, Mr. Hugh Small, Q.C., applied to the Court for permission to make the amendments. The defence sought the Court's permission to defer any objection it (the defence) may have had until after hearing the opening. Mr. Small then proceeded to open the case for the prosecution. The defence applied for an adjournment "to study the application". The matter was then adjourned. On resumption

on November 29, 1996, the defence announced that it had no objection to the granting of the application to amend. (See pages 39 to 41 of the record). On the basis of that which transpired below, we do not think that the challenge at this stage is meant to be taken seriously. In any event, there is no discernible prejudice that the appellant has suffered by the inclusion of two entries from the same ship in one information. We think that such a procedure was most desirable to prevent the laying of unnecessary informations.

The charging of breaches of two separate Acts in the same information:

There are nine informations, the particulars of which read thus:

> "... was knowingly concerned in bringing into the island restricted goods, namely, a quantity of edible oil vide Entry #... in a manner contrary to restrictions imposed by section 4 (1) of the Coconut Industry Aid Act, Contrary to section 210 (1) of the Customs Act."

The nine informations are 11029, 11031, 11033, 11035, 11037, 11039, 11041, 11043, and 11045 of 1995.

Mr. Ramsay submitted that these informations should be dismissed as the wording is contrary to law in that the prosecution has sought to bring the restriction under two separate statutes. It will be observed that the informations refer to the importation of restricted goods in a manner contrary to restrictions imposed by section 4 (1) of the Coconut Industry Aid Act. And, there is a further allegation that the importation is contrary to section 210 (1) of the Customs Act.

Section 4 (1) of the Coconut Industry Aid Act reads:

> "It shall not be lawful to import any edible oil into this Island except under a licence first obtained for the purpose from the Board:
>
> Provided, however, that whenever it shall appear to the satisfaction of the Minister that it is no longer necessary in the interests of the edible oil manufacturing industry in this Island to continue such control of the importations of edible

> oil into this Island as aforesaid it shall be lawful for the Minister from time to time by order to be published in the Gazette to withdraw or modify such control and by like order at any time to vary or revoke such order previously made and to reimpose such control as aforesaid."

Section 6 of the said Act reads:

> "Every person who is concerned in importing any edible oil... contrary to the provisions of this Part or to any order made hereunder as aforesaid shall on conviction be liable to a penalty of two hundred dollars and in default of payment of the penalty imposed to imprisonment with or without hard labour for three months."

It is clear from the above sections that the Coconut Industry Aid Act provides its own regime for the importation of edible oil, and for the punishment of breaches. The Act further provides for the forfeiting of edible oil imported contrary to Part 1 of the Act. By section 8, such oil may be seized as though it were prohibited goods within the meaning of section 39 of the Customs Act, "and shall be forfeited and may be disposed of as the Minister may direct."

It is noticeable that section 40 of the Customs Act also prohibits the importation of edible oil, except under licence of the Minister, and section 210 (1) of the Customs Act provides for the incurring of a penalty of not less than treble the import duties payable on the goods nor more than treble the value of the goods where prohibited goods have been imported into the country.

It appears that the Crown sought to combine in the abovementioned informations the provisions of the Coconut Industry Aid Act and the Customs Act. This was clearly impermissible. The Crown had two choices—to prosecute under either the Coconut Industry Aid Act, or the Customs Act; certainly, not both. In the instant case, it is clear that the appellant was aware that he was being charged with importing edible oil without having first obtained a licence from the Minister. He was also aware that he was being

accused of breaching section 4(1) of the Coconut Industry Aid Act, as stated in the informations. However, an error was made by the prosecution in stating section 210 (1) of the Customs Act as the penal section, instead of section 6 of the Coconut Industry Aid Act. The situation is not unlike that which occurred in **DPP v. Herbert Stewart** (1982) 35 WIR 296. In that case, the first of two counts on which the appellant had been convicted had charged him with "conspiracy to contravene section 24, contrary to paragraph 1 (1) of Part 11 of Schedule 5 to the Exchange Control Act". This Court upheld the appellant's contention that the conspiracy alleged was not an offence under Part11 of Schedule 5, granted an amendment to the indictment, upheld the conviction on the count as amended, and substituted another sentence. The count was amended to read as follows: "Conspiracy to contravene the Customs Act as affected by section 24 and Part111 of Schedule 5 to the Exchange Control Act". The Privy Council approved the count in its amended form as correctly reflecting the legal position--see page 301e (supra).

The appropriate course in the instant case is not to dismiss the informations as requested on behalf of the appellant; but rather to amend the informations by deleting references to the Customs Act, and substituting section 6 of the Coconut Industry Aid Act as the penal section. The power to amend is provided for in section 302 of the Judicature (Resident Magistrates) Act, and is set out at page 301g of the **Stewart** judgment. The result therefore is that the fines imposed by the learned Resident Magistrate would be set aside and a fine of $200 or three months' imprisonment substituted on each information.

The documentary evidence

Most of the documents admitted in evidence were a source of contention between the prosecution and the defence. Miss Deborah Martin has led the charge

before us in advancing the view that the admission of these documents breached the rules of evidence. Although the learned Resident Magistrate was generally prompt in respect of his rulings on the objections by the defence, it is to be regretted that in no instance did he make a written note of his reason or reasons for overruling the objections. The documents formed the core of the prosecution's case; hence, it would have been expected that rulings in respect of them would have been complemented by a written note.

Due to the sustained challenge to the admission of the documents, it is necessary to look at how some of them were made exhibits. One of the prosecution's main witnesses was Clifton Cassie, Collector of Customs at Newport East, and acting Director of Operations at Customs House. Through him, the learned Resident Magistrate admitted into evidence the documentary exhibits numbered 2b, 3c, 4c, 5c, 6c, 7c, 8c, 9a, and 10a. These documents include cargo manifests, invoices, gate passes, customs releases, C78 forms, and Coffee Industry Board permits. The witness stated that he was not responsible for the clearance of any goods, the subject of the case. Prior to the date of his testimony, the documents had not been in his custody and he had never seen the originals (see page 81 of the record). Monica Allen, a Customs Officer who at the relevant time was a Collector at the Customs Department, gave evidence that she collected various sums of money as duties in respect of imports in the case. These duties were collected on the basis of the C78 documents and the invoices tendered to her. These documents, of course, had not been prepared by her and without them she had no way of knowing who the importer was. She was only able to say that they were tendered to her by the importer, customs broker or agent, and she collected the sums stated on them as due. The amounts to be collected are "worked out" by the invoice inspector. She (the witness) was not responsible for the computations. She would enter the amount stated on the invoice in the computer which would then do the rest. The

computer, she said, was programmed to do the calculations. This is what she said in part in relation to the computer: "It computes and states whether amount correct or not. Do not know who services machine if serviced"(page 108). (Incidentally, the law relating to computer evidence will be looked at separately). She would sign or initial the C78 to indicate that she had handled the document and that the duty stated thereon had been collected by her. By this route, exhibits 2a, 4a, 4b, 8a, 8b, and 37 were admitted in evidence. Exhibits 2a, 4a, and 8a are C78 forms, 4b and 8b are invoices and exhibit 37 is the daily payment record for the 18th December, 1992. The latter was admitted in evidence as indicating the amounts collected on that day by the witness.

Another witness, Nadine Shirley, gave evidence in a similar vein to that given by Monica Allen. In 1992, Miss Shirley was a revenue collecting officer. She identified her signature on several C78 forms, indicating that she had collected the duty charged in respect of the importation. The learned Resident Magistrate, through this witness, admitted in evidence exhibits 3a and 3b, 5a and 5b, 6a and 6b, 7a and 7b, as well as exhibit 11. The latter exhibit is a computer report which the witness stated was produced at the end of each day by the computer. Like Miss Allen, she did not have anything to do with the preparation of the C78 forms; nor did she calculate the duty.

Sharon Rose, another revenue collection officer, gave evidence of collecting customs duty in respect of two C78 forms which were admitted in evidence as exhibits 9 and 10. She had nothing to do with the preparation of these forms, and had no personal dealing with the importer.

Cecilia Jones, shipping manager with Trans Ocean Shipping Co. Ltd., which are agents for Ocean Express Lines, gave evidence that she would receive from their principals documents such as bills of lading and manifests. These provide details of

cargo arriving on the various vessels for which they are responsible. She described the process leading up to payment of the duty thus:

> "On receipt of documents we submit to customs as required. We prepare certain wharf related documents and notify customs of the expected freight. We generate documents called arrival notice. These constitute copy bill of lading with stamp from company. Arrival notice is sent to customs. The name of the company is on the arrival notice.
>
> Arrival notice is stamped on bill of lading. Vessel arrives and cargo discharged. Customs attends office to carry out process of valuation. Broker or agent may come in place of consignee. Consignee would present original bill of lading which indicates rightful owner of cargo. We have copy of manifest. A notation is made on copy of the date on which customs attended and present original bill of lading. Customs then presents an order of release which is given to consignee. Consignee's bill of lading must tally with shipment on manifest. Payment must be confirmed for cargo before release. Payment may be prepaid or collect. If original not presented status of freight has to be ascertained. After order of release is issued we are finished with consignee. We keep copies of documents and bill of lading sent to customs."

Now there is a document known as a C26. It is commonly called a "removal note". The witness Cecilia Jones was shown one of these forms during examination-in-chief. She said she was familiar with the form "in principle". The container number and the bill of lading number would appear on the C26 form which may be prepared before or after the consignee has attended her office. She was unable to say who had prepared the particular form that she was shown. However, she was permitted to give the bill of lading number on that form, and that bill of lading no. 01-1964-07-S was admitted in evidence as exhibit 16. Similarly, bill of lading no. 01-1965-30-S was admitted as exhibit 17, bill of lading no. 01-2125-23-S as exhibit 18, bill of lading no. 1964-04-S as exhibit 19, and bill of lading no. 01-1964-06-S as exhibit 20. Two other exhibits, namely 22 and 23, were admitted in evidence in the same manner as numbers 16 to 20. These were bill of lading no. CSJFCC203E51, and bill of lading no. CSJFCC209E61 respectively. The

numbers were had from a C26 form attached to exhibit 3c and shown to another witness, Nicholas Redwood, general manager of Green Co., maritime agent for Arawak shipping line that operates out of Miami. Exhibit 3c, it will be recalled, was admitted through the witness Clifton Cassie who had demonstrated no connection whatsoever with the document. Redwood, during cross-examination, said that he had not prepared any of the bills of lading. In addition, he said:

> "There is a master bill of lading kept at the origin port. These exhibits 22 and 23 are produced from the master. I have never seen the master for exhibits 22 and 23. Have never seen the shipment...have not checked master for information on exhibits 22 and 23. On occasion there has been wrong information on bill of lading."

The foregoing summary indicates that several important documents were admitted in evidence without there being established any link between the witnesses and the particular documents on the one hand and/or between the appellant and the documents on the other hand. The authorities have for a long time proclaimed that "oral or written statements made by persons other than the witness who is testifying are not receivable to prove the truth of the facts stated" (see Phipson's Manual of the Law of Evidence - 9th edition - page 139). In the instant case, it seems that the various documents such as the C78 forms, the invoices, and the bills of lading were admitted in evidence to prove the truth of their contents - that is, to the effect that the appellant imported edible oil in contravention of the stated legislation. However, to the extent that it was aimed at that objective, it was not possible to do so through witnesses who had no meaningful connection with the documents in question. If it were to transpire that the documents had no other source of admission into evidence, then the evidence contained therein would be wholly inadmissible and therefore unable to ground a conviction.

The documents and other witnesses

The learned Resident Magistrate accepted the evidence of Mr. Lue Shim, Mrs. Maxine Phillips-Clarke, Mr. Francois Huttin and Mr. Leslie Dick. These witnesses were of critical importance to the prosecution's case so far as the documents were concerned. In view of the challenge to the documentary evidence, it is therefore very important to consider the value of the evidence of these witnesses.

Mr. Lue Shim

In his capacity as a licensed custom broker, this witness, according to the prosecution, was responsible for clearing through customs the illegal imports on behalf of the appellant. Mr. Lue Shim told the magistrate that he "did business with defendant-customs business". He added: "Did business for defendant in business enterprise Sam Halls Enterprises, D.T. Marketing and Real Farms Limited. Cleared shortening, oils and milled corn." He said that the appellant would send him the invoice by his bearer Beenie. The C 78 forms were all prepared by his secretary Michelle Yee who then passed them to him for checking. So far as direct contact with the appellant was concerned, this witness recalled that the appellant came to his office, provided him with the invoice and bill of lading, and asked him to clear a particular shipment. On the face of it, this may seem to be valuable evidence for the prosecution. However, the transcript does not reveal which shipment this related to; so, in view of Mr. Shim's earlier evidence that he had cleared items other than edible oil for the appellant, the importance of this evidence withers into nothingness, in the context of the case. It ought not to be forgotten that the appellant faced charges that related to edible oil only.

Neither Michelle Yee nor Beenie gave evidence. Consequently, there was no real link between the appellant and the documents which Mr. Shim identified during his evidence. As it turned out, the appellant in his prepared unsworn statement said that he

had no bearer by the name of Beenie, nor did he know anyone by that name. Incidentally, the transcript seems to be devoid of any evidence of the real name of this character dubbed 'Beenie'.

Mrs. Maxine Phillips-Clarke

This witness was the office manager of Island Cargo Ltd., freight forwarders, whereas a Mr. Wavel True was the general manager. Island Cargo was the local agent for TCX International which operates in and out of New York with its main office, however, being in Miami. TCX is a consolidator of cargo; and consolidated cargo is containerized. Island Cargo would be responsible for making up the documentation necessary to remove the container from the wharf to a bonded warehouse for off-loading. TCX would be responsible for paying the freight charges. That company would send to Island Cargo by courier a package with the invoices, bills of lading and manifests in respect of each consignee involved in the consolidated cargo. Island Cargo then contacts the shipping agents who would advise of the arrival date of the vessel, container number and seal number. Island Cargo would prepare a removal notice which states the consignee, name of vessel, container number, seal number, bill of lading number, size of container and description of commodity. These documents would be used to process the imports through the various departments to secure the removal of the container. Island Cargo then pays the wharfage charges, notifies the consignee who eventually would receive a validation order which is necessary for clearance from the bonded warehouse.

Mrs. Phillips-Clarke, having given this evidence as to the system that was in operation, proceeded to say that the appellant had been doing business with Island Cargo since the nineteen eighties. He usually imported consolidated cargo. In 1992, she recalled him having a conversation with her to the effect that it was proving too

expensive for him to use the services of TCX International. He suggested a change in the system to which they were accustomed. The witness said: "He told me he would supply all the relevant information such as weight and measurement, name of consignees and commodities". Mrs. Phillips-Clarke advised him that on a matter of that nature, he would have to speak to the general manager, Mr. True. The appellant and Mr. True had private discussions in Mr. True's office; then there was a discussion involving the witness and them. It was at that time, apparently, that the general manager announced that Island Cargo would do business with the appellant in the manner suggested by the appellant.

Mrs. Phillips-Clarke gave evidence which implicated the appellant in relation to some of the documents. She positively linked the appellant in relation to bill of lading no. **F74090** in that it bears his signature (see page 95 of the record of appeal). This was admitted as **exhibit 26** without protest. Three manifests numbered **62-012, 62-009 and 62-456** were, according to the witness, prepared from information supplied by the appellant (see pages 97 and 98 of the record of appeal). These formed part of **exhibits 5b, 6b, and 10b** respectively. In view of this clear evidence from this witness, and the fact that she was found by the learned magistrate to have given evidence capable of acceptance by him, there can be no legitimate complaint against the admission of these exhibits into evidence. For completeness, it ought to be stated that the relevant informations in respect of these exhibits are **11038 and 9 of 1995, 11032 and 3 of 1995 and 11036 and 7 of 1995** respectively. Mrs. Phillips-Clarke's evidence went further in that she said that the appellant dealt with Island Cargo in respect of the entire container with a breakdown of the manifest. Notwithstanding the acceptance of her evidence by the magistrate, it has been noted that she referred to other employees of Island Cargo having been responsible for dealing with the appellant in relation to the other documents;

and these employees never gave evidence in order to satisfactorily establish the connection with the appellant, and to set out the circumstances surrounding the transactions. Consequently, it was clearly wrong for the learned magistrate to have found the appellant guilty on those charges.

Mr. Francois Huttin

This witness is the Vice-President of Sunlight Foods Incorporated, Miami, Florida, U.S.A. He knows the appellant and has had business dealings with him. Sunlight Foods operates an oil packaging plant, and is engaged "in commerce of basic food commodities in....twenty-five to thirty countries including Jamaica". The appellant had from time to time placed orders through this company. He conducted business, according to this witness, using names such as Dee Tee Marketing, Real Farm and David Incorporated. He was shown a number of documents which he did not recognize. The significance of his evidence is that he proved as false certain documents shown to him bearing his company's name. In other words, Sunlight Foods was not involved in the importation alleged. Exhibit 2a (an invoice) which was shown to the witness was confirmed by him as bearing the signature of a former employee of Sunlight Foods. That employee was Wanda Taylor. She did not give evidence. Hence, it is not possible for any adverse conclusions to be arrived at against the appellant, unless there is other evidence supporting such findings.

In cross-examination, the witness said that he did not recall his company sending any goods to the appellant or to David Incorporated in Jamaica. Indeed, he said that the probability is that his company did not ship any goods to such persons. Sunlight Foods does not do consolidated shipments, and has never prepared any consolidated shipment for any customer in Jamaica. This evidence has to be viewed in the light of the unsworn statement of the appellant that Sunlight Foods in 1994 did not deliver goods ordered and

paid for by Real Farms Ltd. When a refund was demanded, said the appellant, Sunlight Foods refused to pay citing the fact that the appellant's father owed them money. As a result, the appellant has filed suit in the United States of America against Sunlight Foods. The existence of the suit was confirmed by Mr. Huttin.

Mr. Leslie Dick

Between 1989 and 1993, this witness who is a forensic scientist was employed by a company called Network Security Ltd. solely for the examination of questionable documents. Since 1993, he has been employed independently to do similar work. He holds a diploma as a member of the Forensic Science Society in the United Kingdom. Having examined questionable documents that were given to him in this case, he concluded that it was **"highly likely"** that the signatures and dates on nine Sunlight Food invoices were written by the appellant. These invoices formed parts of exhibits **2b, 3b, 4b, 5b, 6b, 7b, 8b, 9 and 10.**

In cross-examination, Mr. Dick said, **"there are ranges of probabilities. There are instances when handwriting can be conclusive".** It is apparent that he was thereby informing the Court that his findings were not conclusive; rather, they were in the realm of probabilities.

The standard of proof in handwriting cases

Section 20 of the Evidence Act states:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute".

This provision in this piece of legislation which was first promulgated in Jamaica in 1843 is identical to section 8 of the Criminal Procedure Act 1865 , known as Denman's Act, in

England. In their interpretation of that section, Courts in England have held that in criminal cases the standard of proof to be applied is proof beyond reasonable doubt. It is necessary to mention only **R. v. Ewing** [1983] 2 All ER 645, a case of forgery. O'Connor LJ, in delivering the judgment of the English Court of Appeal, Criminal Division (O'Connor LJ, Parker and Staughton JJ), said at page 652 j:

> "In our judgment the words in s.8 of the 1865 Act 'any writing proved to the satisfaction of the judge to be genuine', do not say anything about the standard of proof to be used, but direct that it is the judge, and not the jury, who is to decide, and the standard of proof is governed by common law **(see the passage from Lord Pearce's speech in Blyth v Blyth). Blyth v Blyth** [1966] 1 All ER 524 . **It follows that when the section is applied in civil cases, the civil standard of proof is used, and when it is applied in criminal cases, the criminal standard should be used**. Were it otherwise, the situation created would be unacceptable, where conviction depends on proof that disputed handwriting is that of the accused person and where that proof depends on comparison of the disputed writing with samples alleged to be genuine writings of the accused; we cannot see how this case can be said to be proved beyond reasonable doubt, if the Crown only satisfy the judge, on a balance of probabilities, that the allegedly genuine samples were in fact genuine.The jury may be satisfied beyond a reasonable doubt that the crucial handwriting is by the same hand as the allegedly genuine writings, but if there is a reasonable doubt about the genuineness of such writings, then that must remain a reasonable doubt about the fact the disputed writing was that of the accused and the case is not proved".

Therefore, it is safe to say that Mr. Dick's evidence falls well short of the required standard of proof and cannot be used to support the convictions.

It is interesting to observe that in making the above statement of the law as they interpreted and understood it, their Lordships were in clear disagreement with an earlier judgment of the said Court. At page 653 c, O'Connor LJ expressed it thus:

> "It is with reluctance, and with all due respect, that we find ourselves unable to agree with the reasoning in the last paragraph of the judgment in **R v Angeli** [1978] 3 All ER 950, which we have quoted. In our judgment, that reasoning is contrary to the decision of the House of Lords

in **Blyth v Blyth** [1966] 1 All ER 524 and we are satisfied that it must have been reached per incuriam".

The computer evidence

Section 31G of the Evidence Act reads:

"A statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless-

(a) at all material times-

(i) the computer was operating properly;
(ii) the computer was not subject to any malfunction;
(iii) there was no alterations (sic) to its mechanism or processes that might reasonably be expected to have affected the validity or accuracy of the contents of the document;

(b) there is no reasonable cause to believe that-

(i) the accuracy or validity of the document has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer;

(ii) there was any error in the preparation of the data from which the document was produced;

(c) the computer was properly programmed;

(d) where two or more computers were involved in the production of the document or in the recording of the data from which the document was derived-

(i) the conditions specified in paragraphs (a) to (c) are satisfied in relation to each of the computers so used; and

(ii) it is established by or on behalf of the person tendering the document in evidence that the use of more than one computer did not introduce any factor that might reasonably be

> expected to have had any adverse effect on the validity or accuracy of the document."

From the above, it is clear that the production of a document by a computer does not transform hearsay into being admissible. The party seeking to make such a statement admissible as evidence has to prove certain prerequisites, in particular that the computer was properly programmed and was not subject to any malfunction, and that there had not been any error in the preparation of the data from which the document was produced.

These prerequisites also have to be satisfied for a statement to be admissible, where it is contained in a document produced by a computer even though that statement does not constitute hearsay (see section 31H of the Evidence Act). The computer evidence admitted at the trial did not satisfy the conditions specified in this Act. Accordingly, by itself, it could not properly form the basis for proof of guilt.

Warning in respect of special category evidence

The learned Resident Magistrate, as said earlier, accepted the evidence of Mr. James Lue Shim and Mrs. Maxine Phillips-Clarke. In relation to the latter, he stated, "After usual warning accepted evidence of Maxine Phillips of Island Cargo Ltd". Apparently, he did not give himself the "usual warning" in respect of the former witness. Even if it were necessary for him to have done so, the lapse would have had to be regarded as of no serious consequence in view of the earlier stated conclusion as to Mr. Lue Shim's evidence. It will be recalled that that evidence was imprecise so far as it was sought to link the appellant to the documents that have been admitted as exhibits.

Mrs. Samuels-Brown submitted that having regard to the evidence given by the witnesses together with the light thrown on their role by the witness Cassie, the learned Resident Magistrate ought in his findings of fact to have specifically considered whether

theirs was special category evidence requiring precautionary warning before acceptance thereof. In response, Miss Tyndale said that the warning administered by the Resident Magistrate to himself in respect of Mrs. Phillips-Clarke's evidence was a thorough one in keeping with the directions given in **Regina v. Fitzroy Craigie and Desmond Harvey** (unreported) (RMCA No. 9/93), delivered on July 29, 1993. In that case, Wolfe, J.A. (as he then was) said at page 10:

> "We wish to re-emphasize that Resident Magistrates hearing cases in which evidence of special category has to be considered must state in their findings of fact that they are aware of the necessity to warn themselves that caution is required in acting upon the evidence and further must demonstrate in such findings that the legal principles have been applied in resolving the factual issues which arise for determination. Failure to conform to these directives from this could be fatal to any convictions which are recorded in such circumstances".

The findings of fact show that the learned Resident Magistrate accepted that there was a conversation between the appellant and Mrs. Phillips-Clarke as to how Island Cargo would deal with goods to be imported by him. Further, there was the finding that the appellant supplied Island Cargo with the necessary documents to prepare the necessary breakdown in the names of the consignees stated by the appellant. In arriving at these findings, the learned Resident Magistrate would have had in mind the submissions made to him by Mrs. Samuels-Brown. These submissions form part of the record of appeal and so the findings of fact should not be viewed in isolation. In her submissions, Mrs. Samuels-Brown classified Mrs. Phillips-Clarke as an accomplice (see page 149). When, therefore, the findings of fact make reference to the "usual warning", that has to be taken to mean the warning given in respect of accomplices. In the context of this case, it cannot be said that the directives of **Craigie and Harvey** have been ignored.

The convictions

In accepting the evidence of Mrs. Maxine Phillips-Clarke, the learned Resident Magistrate would not have been in error in recording convictions so far as the manifests numbered **62-012, 62-009 and 62-456 (that is, exhibits 5b, 6b, and 10b respectively)** provided proof of the commission of the offences charged in the related informations. It will be recalled that the bill of lading **F74090 (Ex.26)** was admitted in evidence without objection. The manifest that is linked with it is numbered **62-033**. However, neither the bill of lading nor the manifest has been shown to have any bearing on any of the charges before the Resident Magistrate. It is not surprising therefore that there had been no objection by the defence to this evidence.

Manifest 62-012

The evidence links this manifest to invoice 8025, bill of lading F81999 and **entry no. 92-13-028932**. Ten pallets of soya bean oil weighing 14, 000 pounds were imported. The consignee was Dee Tee Marketing. The freight charges ought to have been over US$1,000; instead, they were stated as US$465. The relevant informations are **11038 and 9/ 1995.**

Manifest 62-009

Invoice 7091, bill of lading F87694 and **entry no. 92-13-028934** are the relevant documents so far as this manifest is concerned. Imported were 16 pallets of edible oil weighing 24, 000 pounds. The freight charges, if correctly stated, would have been approximately US$1,400. Instead, they were stated as being US$620. The relevant informations are **11032 and 3/ 1995.** The consignee was Dee Tee Marketing.

Manifest 62-456

This manifest is linked to invoice 9261 and shows the consignee as Sam Hawes Enterprises. The informations involved are nos. **11036 and 7/95.** These charges cannot be regarded as having been properly proven before the learned Resident Magistrate as

the manifest describes the imported cargo as **"bakery supplies".** The record of appeal does not disclose any reason advanced by the prosecution as to why "bakery supplies" should have been equated with "edible oil" as charged in the informations.

In the final analysis, for the reasons set out above, the convictions on all but four of the informations are quashed, and the sentences thereon set aside. So far as the informations numbered **11032, 11033, 11038 and 11039 of 1995** are concerned, the appeal is dismissed and the convictions are affirmed.

Sentence

As determined earlier in this judgment, the prosecution erred in relation to the penal section so far as breaches of the Coconut Industry Aid Act were concerned. The appropriate penalty is that provided in section 6 of that Act. Accordingly, in respect of informations **11033 and 9/ 1995**, the sentences are varied to a fine of $200.00 or three months' imprisonment on each.

In respect of informations **11032 and 8/1995**, the Customs charges, Mrs. Samuels-Brown submitted that the findings of fact by the Resident Magistrate make no mention of the penalties. She added that he made no findings or calculations of his own. Further, she said, the Commissioner of Customs had made no election as required under the penal section stated in the informations- See section 210 of the Customs Act. As a result, she said, the penalties imposed cannot stand. Even if Mrs. Samuels-Brown is correct, the most that the appellant could hope for in the circumstances is a remission of the matter to the Resident Magistrate for the Commissioner to be summoned to make her election. That the Commissioner of Customs was actively involved in the investigation and trial of this matter is without question. The co-operation of the Commissioner is clearly visible in the evidence given by the various Collectors of Customs and Revenue Officers. The evidence of Christopher Hind, who is assigned to

the Revenue Protection Department, is indication enough that the Commissioner of Customs has elected. There is nothing which requires the attendance of the Commissioner in person. Further, exhibits 51 and 52 were admitted in evidence without objection. They provide the values which ground the imposition of the penalties. These values are based on those documents which have been demonstrated as having been properly admitted as evidence.

Section 210 (1) of the Customs Act, at the time of the commission of the offences, provided for the incurring of a penalty of **treble the value of the goods.** The appellant was rather fortunate and should count his blessings in that the Commissioner provided calculations which resulted in the learned Resident Magistrate imposing penalties which were **treble the duty**. This was substantially less than what the law contemplated.

The order

The appeal is allowed in part. The convictions are quashed and sentences set aside in respect of all informations except **11032, 11033, 11038 and 11039/1995**. In respect of these, the appeal is dismissed. On informations **11032 and 11038/1995**, the sentences that is, the fines of **$667,188.09** or two years imprisonment and **$705,497.13** or two years imprisonment respectively, are affirmed. On informations **11033 and 11039/1995**, the sentences are varied to a fine of **$200.00** or three months imprisonment on each. The sentence of imprisonment on information **11038/95** is to run consecutive to that on information **11032/95** if the fines are not paid.