JAMAICA

IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL No. 147/78

BEFORE: The Hon. Mr. Justice Robinson, President
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.

R. v. DAVID LOWE

Mr. Frank Phipps, Q.C. for the appellant.

Mr. D. Wilcott for the Crown.

17th & 18th January, 1979

ROBINSON, P.:

On the 18th January, 1979, we allowed the appeal in this matter. As promised then, we now put our reasons in writing.

The appellant had been convicted in the Resident Magistrate's Court for the parish of St. James for a breach of Section 4 (1) of the Exchange Control Act.

Section 4 (1) provides as follows:

> " Every person in the Island who is entitled to sell, or to procure the sale of, any gold, or any foreign currency to which this section applies, and is not an authorized dealer, shall offer it, or cause it be offered, for sale to an authorized dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister. "

First to be observed is that this Section applies only to persons other than authorized dealers who are entitled to sell or procure the sale of gold or foreign currency. It was argued in this appeal that a person can only be "entitled to sell" if he has the permission of the appropriate Minister so to do. This argument is patently fallacious. The permission of the Minister is not

required to sell to an authorized dealer. In fact Section 3 of the Act provides that you must sell to an authorized dealer unless you get the permission of the Minister to do otherwise. Clearly, therefore, the Section applies to persons who by virtue of the circumstances of their possession are free to sell if they wish. For instance, if the gold or foreign currency is the unencumbered property of the possessor, then he is entitled to sell it. He does not need the permission of any other person to do so. If, on the other hand, he holds it merely as a bailee for some other person, then he would not be entitled to sell it or to procure its sale unless, of course, he had the permission of the owner so to do. And that is why Section 5 of the Act makes provision for persons such as bailees who are not entitled to sell because of the terms of the bailment. Our attention was directed to the Kenyan case of Chandulal v Republic (1971) East Africa Law Reports 465, which appears to decide otherwise but an examination of that case shows that the decision turned on a provision in the Kenyan Exchange Control Act which in effect provides that no transaction in foreign currency is legal, except with the express permission of the Minister for Finance, unless one of the parties thereto is an authorized dealer, and that the appellant in that case, who was a shopkeeper, did not have the permission of the Minister to accept foreign currency in payment for goods and services provided. It was argued therefore that as the appellant did not have permission to accept foreign currency, he was not entitled to sell it. That this argument prevailed seems a little surprising but we need say no more than that no such problem faces us here, and if it did, we doubt that we would have come to a similar conclusion.

Next to be observed is that although Section 4 is popularly referred to as the "hoarding Section", it is not only hoarders against whom the Section is aimed. Proof of hoarding is by no means the sine qua non of a conviction for a breach of this Section. If a person, lawfully or otherwise in possession of foreign currency were, without the permission of the Minister, to sell it or even to

offer it for sale to someone other than an authorized dealer, then he would be guilty of a breach of this Section even though he may have so sold it or offered it for sale within 5 minutes of having come into possession of it. So too, would a broker or selling agent who procured the illegal sale of foreign currency on behalf of a client without himself even handling the money.

We now come to the facts of this case. They were as follows: Armed with a search warrant, Police Officers from the Financial Intelligence Unit, including two Sergeants, Linval Stewart and Christopher Barnaby, visited the home of a certain gentleman, whom we shall call Mr. X, at about 3 p.m. on the 18th April, 1978. On arrival they saw two motor cars parked in the driveway, one belonging to Mr. X and the other to the appellant who was visiting Mr. X. Both vehicles were searched. Nothing was found in Mr. X's vehicle, but a plastic bag containing some $9,000.00 in foreign currency (Travellers' Cheques included) was found on the front seat of the appellant's car. The appellant's car had been locked and the appellant had used a key taken from his pocket to open the left-hand front door so as to enable the Police to enter the vehicle for purposes of the search. On seeing this foreign currency, the appellant was cautioned and then asked whose money it was. His reply was "I don't know." He was then asked if he had arrived at the premises alone in his car. He replied in the affirmative and further stated that he had arrived there about 5 minutes before the Police arrived. It does not appear that any further questions were then asked of the appellant. The Police appear to have assumed that his reply to the question "Whose money it was" was tantamount to saying that he did not know anything at all about the money. Indeed, that was how Sergeant Stewart "interpreted" the answer in his evidence-in-chief. It was only in cross-examination that he averred that what the appellant did in fact say was that he did not know whose money it was. That this was the answer he in fact gave was confirmed by Sergeant Barnaby who also testified at the trial and who stated that the appellant's actual answer was "I don't know."

Be that as it may, the fact is that no further questions regarding the money appear to have been asked of the appellant. He was not asked how the money got into his car - one would have thought this to be an obvious question seeing that the car was locked and the key safely secured in the pocket of the appellant. If that question had been asked the chances are that the appellant would have given some explanation which could have led to further enquiries which would have thrown further light on the matter and which may well have enabled a determination as to whether any and if so what precise offence had been committed by the appellant. But this was not done. Instead, premature conclusions were drawn, and the appellant arrested then and there on a charge of failing to offer the said currency for sale to an authorized dealer, i.e. for a breach of Section 4 (1) of the Exchange Control Act. And on this evidence and on this evidence alone the Court was asked to draw the inference that the appellant was guilty. Oddly enough the trial judge did draw this inference, but he based it partly on the erroneous finding that the appellant had denied "that he knew anything about the money found in his car." As previously indicated, the appellant had made no such denial. He was not asked and had he been asked it is doubtful whether he could have given what would obviously have been a stupid reply in the particular circumstances of this case.

The appellant gave evidence and it was simply to the effect that that very day a named gentleman had instructed him to collect some money from another named individual at one of the Hotels in Montego Bay and to lodge it to that gentleman's account in a named Bank, but that it was after 2 p.m. when he got the money and the Bank was then closed, so he would not have been able to take the money to the Bank until the following morning. Banks are authorized dealers and it is common knowledge that they close at 2 p.m. on weekdays. The 18th April, 1978, was a Tuesday. It was a perfect answer and the Police had by the premature termination of their inquiries precluded themselves from disproving it if it were not true.

It came out in the cross-examination of Sergeant Stewart that further interrogatories were administered to the appellant but not until 3 months after his arrest and that he had then given an account which did not seem materially inconsistent with the story he told in the witness-box.

The tragedy of this case from the prosecution's point of view stems from the unsatisfactory way in which the investigations were finalised. The law recognises that it is not always an easy task to prove offences against the Exchange Control Act and so it provides additional aids to the authorities for this purpose.

For one, Section 4 (6) of the Exchange Control Act provides that:

> "In any proceedings in respect of a failure to comply with the provisions of this section, it shall be presumed, until the contrary is shown, that the gold or currency in question has not been offered for sale to an authorized dealer."

This statutory presumption relieves the prosecution of the onerous task of tendering direct evidence that the foreign currency had not been offered for sale to any of the many authorized dealers - and these include every branch of the Commercial Banks scattered all over the Island. Implicit in the presumption that the gold or foreign currency has not been offered for sale to an authorized dealer and for the presumption to be sensibly and reasonably applied is that there was within reason opportunity to make an offer in accordance with the Act. For example, if a man came into possession of foreign currency on a day or at a time when the Banks were closed he could not be expected to offer it for sale on that day or at that time. He must be afforded a reasonable time to enable him to comply with the requirements of the law. The presumption is therefore rebuttable by evidence that (1) an offer was made or (2) there had been no reasonable opportunity to do so.

In cases of this nature rarely will the prosecution be able to adduce direct evidence of the time when the money came into the hands of the accused. Accordingly both the existence of the opportunity to make an offer and the failure to do so has to be based on presumptive evidence. In that regard consideration should be given to all the relevant circumstances including, the amount of currency, the person's station in life, his occupation, the place where the foreign currency was found and any explanation offered by the accused.

In considering whether or not the presumptive evidence in these cases is sufficiently probative of guilt a court should not be unmindful of the practical approach advocated in Archbold's 37th Edition paragraph 1142:-

> "And it is presumed the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or of proving facts inconsistent with it, if it really never occurred. "

In the instant case, however, even Crown Counsel, who had argued that it was a reasonable inference to draw from the evidence that the appellant was the owner of the foreign currency and had intentionally refrained from offering it for sale to an authorized dealer, was obliged to concede, with commendable candour, that an equally reasonable inference to be drawn from the evidence was that the appellant had received the money shortly before it was seen by the Police and that he had then had no opportunity to offer it for sale to an authorized dealer.

An even greater aid to the investigating of breaches of the Exchange Control Act, is the provision in the Fifth Schedule, paragraph 1(1) of Part I, which empowers the Minister to give to any person directions requiring him "within such time and in such manner as may be specified in the directions, to furnish to him, or to any person designated in the directions as a person authorized to require it, any information in his possession or control which the Minister or the person so authorized, as the case may be, may

require for the purpose of securing compliance with or detecting evasion of this Act. "

This provision is so far reaching in its effect that it even encroaches on the well-established principle of the common law that no person can be required to incriminate himself, for it empowers the Minister to require from a person information which may very well incriminate the person giving it. As Bridge J. said, in pronouncing on an identical provision in the Exchange Control Act of England:-

> "I think that any of us brought up in the tradition of English law almost instinctively reacts against a statutory provision which entrenches upon the well established principle of the common law that no person can be required to incriminate himself. However, as soon as one looks at the provisions of paragraph 1(1) of Part I of Schedule 5, it is quite clear that, as Mr. Meyer for the defendant frankly accepts, they are not susceptible of any construction which would hold that information sought in a direction given by the Treasury under this provision must stop short of requiring a man to incriminate himself. In the course of detecting evasion the Treasury may require information from a person who will have to disclose that he has been an evader. "

See D.P.P. v Ellis (1973) 1 W.L.R. 722 at p. 729.

And what is more, it is made an additional criminal offence to fail to give information, or produce documents when required so to do, and, if a person is convicted on indictment for such failure the Court may make an order requiring the convicted offender to comply with the requirements - (see para. 1 (4)). Failure to comply with such an order of the Court would, of course, involve liability to even further punishment for contempt of Court.

Officers engaged in investigating breaches of the Exchange Control Act would be well advised to be mindful of these helpful provisions. In the instant case, these powers, for some inexplicable reason, were not exercised in relation to this appellant until some 3 months after his arrest, by which time, if he had been in breach of Section 4, he would have been afforded more than ample opportunity to cover up his tracks.

In the result the prosecution failed to establish its case against the appellant. The appeal was therefore allowed, the conviction quashed and the sentence set aside.

It is interesting to note that what appears to have been a good prima facie case of hoarding did come to light in the course of the search of Mr. X's premises. In a bedroom in the house which Mr. X admitted was his room, in which were clothes belonging to Mr X, which was locked with a key kept by Mr. X and which he had to open with the key taken from his pocket to permit the police to enter therein, was found a quantity of foreign currency hidden under the mattress of the bed in the room. On this discovery by the police Mr. X exclaimed with an appropriate expletive "Kiss me ..... them find it."

Mr. X was arrested on a charge of hoarding foreign currency, i.e. for a breach of Section 4 (1), but, again for some inexplicable reason, he was not indicted for that offence. Instead he was indicted, jointly with the appellant for a number of other breaches which could not be established and he was acquitted of those charges on a no case submission at the close of the Crown's case.