

IN THE SUPREME COURT

THE FULL COURT

BEFORE: SMITH, C.J., MORGAN AND DOWNER JJ.

SUIT NO. M55 OF 1983.

R V. COLLECTOR GENERAL

EX PARTE PETER THOMPSON

David Muirhead Q.C. and Donovan Jackson for the Applicant.
Rance Langrin Snr. Assistant Attorney General, and Wendell Wilkins
Crown Counsel for the Respondent.

1984 - 14, 15, 16, 17 February

DOWNER J

The Facts

On the 21st or 22nd December, 1982, a consignment of motor vehicle parts which arrived in Jamaica on 17th December, 1982, was intercepted at the gates of Western Terminals by officers of the Revenue Investigative Division of the Collector General's Department. On a detailed examination of the goods, at Up Park Camp, in the presence of the applicant Peter Thompson and others, it was detected that there was one Honda generator plant not entered on the prescribed form C21 for goods liable to duty, three used Mercedes Benz and one used BMW in 'knock down form' which if assembled would form complete units, and new motor vehicle spare parts together with used parts, although the form C21 was made up only for used parts.

In his affidavit, Kenneth Hunter, head of the investigative division, has stated that the applicant was informed that in view of the articles in the consignment, he Thompson had been in breach of Sections 209, 210, and 211 of the Customs Act. Furthermore, that the import licence number 232189 used for clearing the goods was not valid as it had expired on November 30 and that in any event, the 'knocked down motor cars', the Honda generator plant, and new parts were not covered by a licence at all. In those circumstances, Hunter advised the applicant to secure from the consignor proper invoices of the new spare parts.

The next important step was that on 30th December, 1982 the applicant was informed by a customs officer that the breaches would be referred to the court or in the alternative if it were the applicant's

desire they would be referred to the Collector General for him to exercise his powers of mitigation if the applicant admitted to the breaches. The applicant's affidavit disclosed that he admitted the breaches and signed four consent forms on 19th January, 1983 although he subsequently complained that he was induced to do so. He was told that there was likely to be a 20% mitigation in the penalty imposed and that those goods covered by the expired licence would probably be restored if the Trade Administrator granted him an extension so as to make that licence valid.

In the light of the applicant's complaint that he was induced to sign the consent forms, it is significant to note that during the period from the 19th January to the end of February 1983 he made no representation to the Customs, but on the 1st March he appeared at the hearing before the Collector General and on the same day he retained Mr. David Muirhead, Q.C., in connection with this matter. Additionally, the applicant has told us that Mr. Kenneth Hunter had informed him that the Collector General had imposed a fine of \$159,777.60. It was at this point Mr. Muirhead commenced making representations to the Trade Administrator whose powers are derived from the Trade Act and the Collector General whose statutory powers emanate from the Customs Act. Mr. Muirhead's first recorded representation was dated the 8th March, 1983 and letters were addressed to both officers. The Collector General in his reply on the 16th March indicated that no penalty had been imposed at that time. It seems that there was a lack of communication between Collector General and his Investigative division by the applicant's own affidavit, he had been informed by Mr. Hunter of the penalty imposed and Mr. Hunter was entitled to give this information as pursuant to Section 4 of the Customs Act, the acts of Collector's officers are deemed to be that of the Collector General. However, be that as it may, the Collector General expressed his wish to see Mr. Thompson so that the matter could be concluded speedily. From the applicant's point of view, the letter from the Trade Administrator was more depressing. That officer informed the applicant that as the request to extend the licence was not made before, the licence was presented to the customs to clear the goods, he would not exercise his discretion in favour of the applicant for an extension. Much turns on the

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Trade Administrator's refusal to grant the extension sought, yet with considerable prudence the applicant has not sought to challenge the Trade Administrator's decision in that regard.

It is against the background of the Trade Administrator's refusal to extend the licence that the applicant and his legal advisors on the 1st of June requested the Collector General to permit the applicant to withdraw the consent forms that he had signed as far back as on the 19th of January. In fact, the Collector General refused to accede to that request and in a letter dated the 20th July, the applicant was informed in writing by an officer of the Investigative Division that the mitigated penalty imposed was \$159,857.60 and that the goods were forfeited to the crown and it was this decision which has prompted Mr. Muirhead to move this court to have the decision brought up and quashed by an order of certiorari.

It may be asked how did these goods arrive in Jamaica and the applicant has supplied the details in his affidavit. He told the court that in September, 1982 he went to England and got in touch with T.T.C. (Motor Spares) Ltd. and the goods were forwarded on the MV/Montego Bay Bill of Lading K76. When they arrived in Jamaica, the applicant retained the applicant retained the services of Mrs. Marjorie Lawla, a licenced customs broker to effect clearance from the customs. Because of her status, she was empowered to sign customs documents and clear the goods on behalf of the applicant. In fact, her status is recognised in law, by the Customs Amendment Regulations 1976, Proclamations, Rules and Regulations dated 4th March, 1976 which defines her position thus in paragraph 2:

"customs broker" means a person, other than a ship's agent, licensed under these Regulations to transact on behalf of a client customs business with the Customs including the entering of goods of all descriptions under the customs laws".

The applicant further told us in his affidavit that he gave her the bill of lading and other relevant documents and also instructed her to apply to the Trade Administrator for the licence, and for this purpose the ordinary agency relationship obtained as she had no status which was recognised under the Trade Act. Be it noted that the Collector General's contention that the 'knock down units' ought properly to have been classified as complete units for duty was never challenged by the applicant although

it was open to him to do so pursuant to section 17 of the Customs Act. And it would be absurd if an importer were to be allowed to import motor vehicles by this device and so defraud the revenue.

The Applicant's Case

Mr. Muirhead ascribed a significant role to Mrs. Lawla in the hearings before the Collector General and before this court. His contention was that as Mrs. Lawla was licensed by the Collector General and she was an "importer" defined by the Act, the primary responsibility for the breaches under section 210 of the Customs Act must lie on her. As for the breaches under section 209, it is common ground that it was Mrs. Lawla who signed the relevant customs declaration form. In those circumstances, Mr. Muirhead contended that the Collector General acted ultra vires in pinning responsibility on the applicant and that as he could not succeed in the criminal courts against him, he had no jurisdiction to impose a mitigated penalty of \$800 in respect of Sec. 209. He further contends that the proper course to take was to institute proceedings against Mrs. Lawla and permit the applicant to withdraw the consent forms and restore the consignment to him. These were serious submissions well researched and cogently argued and bring into focus the scope and limits of the Collector General's powers in administering with fairness, important provisions of the Customs Act.

Was the mitigated penalty of \$800 imposed in respect of Section 209 of the Customs Act intra vires?

In order to answer this question, one must first construe Section 219 of the Customs Act as it is that section which determines the Collector General's powers. It reads as follows:

"Subject to the approval of the Minister (which approval may be signified by general directions to the Collector General) and notwithstanding anything contained in Section 217, the Collector General may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure."

There are four features worthy to note. The section deals with the Collector General's power to mitigate or remit any penalty or restore anything seized before the commencement of proceedings in court or before the

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condemnation of any seizure. In the instant proceedings, we note from Mr. Hunter's affidavit when it was indicated that there might have been mitigation of around 20% of the penalty and a partial resotation of the goods seized, the applicant readily admitted to offences against the Customs Act and signed four consent forms which were placed before this court. It is fair to say that the applicant in his affidavit made no complaint at that time, although he subsequently complained of an inducement, which we rejected. To understand the significance of this admission, it is best to set out one of the consent forms in detail -

CONSENT FORM A

COLLECTOR GENERAL

KINGSTON

I admit that I have contravened the provisions of Sec. 209 of the Customs Act by importing a quantity of New Motor Vehicle Spares and declarating (declaring) same to be used motor vehicle spares for the payment of Customs Duties.

and I consent to the Collector General mitigating the penalty to which I am liable, or restoring the articles seized, under that Law.

PETER THOMPSON & COMPANY

Signature of Person

Date 19/1/83.

Penalty imposed: A sum equivalent to of the import duty payable.

Articles restored: On payment of the import duty together with other charges.

.....
Collector General

.....
Date

It was Mr. Muirhead's contention that as it was not disputed that Mrs. Lawla made and subscribed the false declaration on the customs form C21 entry number 18599 indicating that only used motor vehicle parts were imported instead of specifying that there were new parts in the consignment that it was she who should have been prosecuted. He relied on Patel v. Comptroller of Customs 1965 3 All E. R. 593 where the appellant made

and subscribed to the Customs declaration form. In that case, Sec. 116 of the Fiji Customs Act was construed and both our Sec. 209 and Sec. 116 of the Fiji Act owe their origin to Sections 168 of the United Kingdom Customs Consolidation Act of 1876, but be it noted that while our Act includes the words "or caused to be made and subscribed" no such phrase appears in the comparable section of Fiji legislation. Section 209 reads as follows:

"If any person shall in any matter relating to the customs, or under the control or management of the Collector-General, make and subscribe, or cause to be made and subscribed, any false declaration, or make or sign, or cause to be made or signed any declaration, certificate or other instrument, required to be verified by signature only, the same being false in any particular, or if any person shall make or sign any declaration made for the consideration of the Collector General, on any application presented to him, the same being untrue in any particular or if any person required by the customs laws to answer questions put to him by an officer shall refuse to answer such questions, or if any person shall answer untruly any questions put to him by any officer acting in the execution of his duty, or if any person shall counterfeit, falsify or wilfully use when counterfeited or falsified any document required by the customs laws, or by or under the directions of the Collector General, or any instrument used in the transaction of any business or matter relating to the customs, or shall alter any document or instrument after the same has been officially issued, or counterfeit the seal, signature, initials or other mark of or used by any officer for the verification of any such document or instrument, or for the security of goods, or any other purpose in the conduct of business relating to the customs or under the control or management of the Collector General, or shall on any document or instrument required for the purposes of the customs laws counterfeit or imitate the seal, signature, initials or other mark of or made use of by any other person whatsoever, whether with or without the consent of such person, every person so offending shall incur a penalty of one thousand dollars."

When this section is closely examined, it does not seem that the applicant's contention that he could never be prosecuted under Sec. 209 is altogether correct. The matter to be determined is whether in view of the applicant's admission, the Collector General's acceptance of it is a matter which ought properly to be quashed by this court. It must be noted that the applicant admitted that he had handed over the relevant Bill of Lading to Mrs. Lawla and other documents and among these documents there must have been an invoice. It was patent that there was evidence which entitled the Collector General to infer that the applicant 'caused or made' the false

declaration to be made, this enabling him to prefer a criminal charge against the applicant. Furthermore, it was brought home to the applicant by the terms of the consent form, that the false declaration was to his benefit as it enabled him to pay lesser duties for used parts than for new parts and it was falsehood in this particular that mattered. Was the Collector General's acceptance of the admission reasonable? The answer to that was yes, because by signing the consent form he signified that he had given prior approval to Mrs. Lawla to subscribe to the false declaration. One must also take into consideration that if the information had been laid the Collector General as a responsible officer would have had evidence amounting to a prima facie case and it is not for this court to substitute its judgment for that of the Collector General. In coming to this conclusion, one must bear in mind that in certiorari proceedings, this is a court of review, not of appeal. What was important was that the Collector General kept within the four corners of Sec. 219 and this court held that he so did in respect of the offence in contravention of Section 209.

Was the mitigated penalty of \$159,057.60 imposed for breaches under provision of 210 of the Customs Act justified?

Mr. Muirhead's submissions in respect of the penalties imposed for the breaches of Section 210 in summary ran thus: He said that the term 'Importer' which is defined in Sec. 2 of the Customs Act includes Mrs. Lawla as she was the person who signed the document relating to the imported goods and moreover, she cleared the goods from customs. His further submission was that in those circumstances, the Collector General should have elected to institute proceedings against Mrs. Lawla rather than the applicant, and in proceeding against the applicant, it was a wrong exercise of the Collector General's discretion. Additionally, he submitted that once that was pointed out to the Collector General he should have permitted the applicant to withdraw his consent and since he failed to do his duty in that regard, this court should quash his decision. In support of this last contention, he cites numerous authorities culminating in S (an infant) by Parsons (his next friend) vs. Recorder of Manchester and others 1970 2 W.L.R. page 21 which decided that it was open to a court to

permit the appellant to withdraw his plea of guilty at any time before conviction. To assess the merits of these submissions, one must examine Sec. 210 of the Customs Act and the definition of 'Importer' as set out in Sec. 2 of the said Act. These sections read 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, 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 defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty of two hundred dollars, or treble the value of the goods at the election of the Collector General; and all goods in respect of which any such offence shall be committed shall be forfeited."

(2) "import" means to bring or cause to be brought within the Island or the waters thereof;

"importer" includes the owner or any other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the officers, and also any person who signs any document relating to any imported goods required by the customs laws to be signed by an importer."

Section 210 was authoritatively construed in R v. George Barbar 21 W.I.R. p. 343 and the unanimous decision of the court was that the offence to import prohibited goods was one of strict liability. The applicant's affidavit shows that he went up to England to arrange for the purchase of the consignment that he was sent the shipment dates and was forwarded bills

of lading and other important commercial documents pertinent to the consignment. It was he who did import the consignment to Jamaica. All that Mrs. Lawla did was to clear the goods after they had arrived. It is true that in so doing, she fell within the definition of 'Importer' but that definition does not in fact make her the person who imports. Then again, it was stressed by the applicant that Mrs. Lawla was his agent to apply for the licence. In that regard, since the licence was expired and therefore invalid, it is necessary to look at provisions of the Trade Act concerning the application for a licence. Sec. 11 reads:

11 (1) "Where an order made by the Minister under the provisions of section 8 prohibits the importation or exportation of any goods except under the authority of a licence granted by the Minister, the Minister may, subject to the provisions of this section, grant or withhold licences for the importation or, as the case may be, exportation of such goods".

- (2) "A licence granted under this section -
 - (a) may be either general or limited to a specified person; and
 - (b) may be absolute or conditional; and
 - (c) may be limited so as to expire on a specified date unless renewed; and
 - (d) shall be revoked by the Minister whenever it appears to him that it is in the public interest that such licence should be revoked".

Applying these provisions to the licence in question, licence no. 232189 we will see that the licence was issued to a specified person, Peter Thompson the applicant, that it was a Conditional Licence, that the conditions were that the holder of the licence should advise the consigner of the date of the expiry of the licence and also it was to be certified that all the goods covered by the licence were invoiced according to the terms of the licence. These were responsibilities placed on the importer, not on someone he may have made his agent. One should note that Sec. 13 of the Trade Act provides for offences and that stiff penalties are imposed on anyone who contravenes or fails to comply with terms, conditions, or restrictions in a licence and that it is open to the courts to forfeit goods under this section although it is permissive rather than mandatory as in Sec. 210 of the Customs Act. There is yet another section which is pertinent to note that is Sec. 10(2)

of the Trade Act which reads as follows:

"Where under any such order the importation of goods or of any class or description of goods, from any country is prohibited except under the authority of a licence granted by the Minister, any goods imported in breach of such prohibition shall be deemed to be prohibited goods within the meaning of the Customs Act, which have been imported contrary to the prohibition against their importation, and the provisions of section 210 of the said Act shall apply accordingly."

When we apply these provisions, to what happened in the instant case, we see the Collector General had a licence before him which because it had expired, was invalid. Additionally, no licence was issued for the new motor vehicle spare parts or the Honda generator. Even more significant, there was no licence for importing four motor vehicles in 'knock down form'. To the Collector General, the evidence that the applicant had imported 'prohibited goods' was overwhelming and at the point where he had to decide whether charges could be preferred in a criminal court, all he need have done is to decide whether a prima facie case could be made out. The contention therefore, that the Collector General should have preferred the charges against Mrs. Lawla was untenable as was the contention that the applicant's request for withdrawal should be acceded to. One must bear in mind that Sec. 219 of the Customs Act permitted the Collector General in his administrative capacity to impose a penalty as part of his executive functions and provided he acted fairly and within his jurisdiction, there was no good reason to quash his decision. An instance comparable to the present case is Ranaweera v. Wickramasinghi 1970 2 W.L.R. page 491 where the Privy Council held that comparable powers exercised by the Commissioner of Inland Revenue in Ceylon would not be quashed in Certiorari proceedings. Moreover, we would point out at this stage that the analogy of a person pleading guilty and withdrawing his plea was not appropriate in this instance. What the statute does is to provide the alternative means to criminal proceedings to recover penalties and the classic authority of Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation 1948 1 K.B. 223 would have been an appropriate citation. There at page 228 Lord Green M.R. said as follows:

"The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority. What then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law."

"When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."

Nowhere in his submissions did Mr. Muirhead successfully make out a case that the Collector General had exceeded or abused his powers or that he exercised his discretion on wrong principles.

Was the forfeiture legally justified?

Although forfeiture follows conviction for breaches of sec. 210 of the Customs Act, there was no conviction in this case and the question arises as to whether forfeiture was permissible by virtue of the detention and seizure of the consignment coupled with the Collector General's exercises of his power pursuant to sec. 219. In order to determine these powers, one must examine provision of Sec. 214 of the Customs Act which reads as follows:

"Subject to the provisions of section 195, all aircraft, ships and carriages, together with all animals and things made use of in the importation, attempted importation, landing, removal, conveyance, exportation or attempted exportation of any uncustomed, prohibited or restricted goods, or any goods liable to forfeiture under the customs laws shall be forfeited; and all aircraft, ships, carriages and goods together with all animals and things liable to forfeiture, and all persons liable to be detained for any offence under the customs laws or under any law whereby officers are authorized to make seizures or detentions, shall or may be seized or detained in any place either upon land or water, by any person duly employed for the prevention of smuggling, or by any person having authority from the Collector General to seize or detain the same, and all aircraft, ships, carriages, and goods together with all animals and things so seized, shall forthwith be delivered into the care of the Collector General; and the forfeiture of any

aircraft, ship, carriage, animal or thing shall be deemed to include the tackle, apparel and forfeiture of any goods shall be deemed to include the package in which the same are found and all the contents thereof."

It is clear that the entire consignment being prohibited goods imported without a licence were goods liable to forfeiture within the intendment of Sec. 214 and section 215 given further powers to the Collector General as to how to forfeit that which was liable to forfeiture. Section 215(1) reads as follows:

"Whenever any seizure shall be made, unless in the possession of or in the presence of the offender, Master or owner, as forfeited under the customs laws, or under any law by which officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and the grounds, thereof to the master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering the same to him personally, or by letter addressed to him, and transmitted by post to, or delivered at his usual place of abode or business, if known; and all seizures made under the customs laws or under any law by which officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Minister may direct, unless the person from whom such seizure shall have been made or the Master or owner thereof, or some person authorized by him shall within one calendar month from the day of seizure give notice in writing to the Collector General that he claims the same, whereupon proceedings shall be taken for the forfeiture and condemnation thereof; provided that if animals or perishable goods are seized, they may by direction of the Collector General be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof."

When the applicant accompanied the members of the Investigative Division to Up Park Camp, the goods were seized in his presence; therefore by virtue of Sec. 215 the consignment was deemed to be taken and condemned. In the light of these provisions, how can it be said that the Collector General exceeded his power or abused them in the face of the admitted importation of prohibited goods without a licence? In fact, the manner in which the Honda generator plant, the new spare parts and the 'knock down vehicles' was imported, could have given the impression of dishonesty and it was perhaps that impression which prompted Mr. Hunter to indicate from the outset that the only goods which were likely to be restored were those covered by the expired licence, on condition that the Trade Administrator granted an extension. Moreover a fact which must have

created a strong and infavourable impression on the Collector General was that incorrect duties wer. paid - and were it not for the astutness of the members of the Investigative Division in **intercepting** the consignment, the revenue would have been defrauded.

Conclusion

The penal clause of the Customs Act provide stringent penalties for those who resort to smuggling. Additionally, modern governments resort to the Customs Act and Trade Act not only for the collection of revenue but also to control the economy.

In Barbar, 21 W.I.R. at page 362, Fox J.A. put it thus:

"In the light of these first principles, the difficulties in the interpretation of the provisions of S. 205 (1) (now Sec. 210) are revealed to be more apparent than real. The objects of the section are obvious. They are to regulate and prevent importation, and to ensure collection of duties of customs which are payable. The section is an important part of the machinery established by government to effect two of its fundamental functions, namely collection of revenue, and control of the economy. Without revenue, a government is impotent. Without control of the economy a government is powerless to plan for the financial stability of the country".

The applicant recognised that he had breached ~~Secs.~~ 209 and 210 and by his admission empowered the Collector General to impose penalties appropriate to Sec. 219. When he realised how much his fingers were burnt, because of the Trade Administrator's refusal to extend the licence, he sought to resile from his admission. But this is not a sufficient ground for invoking the jurisdiction of this court for an order of certiorari to issue to quash the Collector General's decision, and it is for the reasons we have stated above that we determined unanimously in a decision on 17th February to dismiss the motion. Additionally, it was ordered that the applicant should pay the Collector General's agreed or taxed costs of these proceedings.