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Supreme Court

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 40/81

BEFORE: The Hon. President,
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A.

R. v. DONOVAN ALEXANDER & ALBERT LEE

F.M.G. Phipps Q.C. and Carl Von Cork for Alexander

Earl DeLisser for Lee

F. Smith and P. Sutherland for Crown

April 29; September 23, 1981 &
March 26, 1982

CAREY J.A.

The appellants were convicted in the Resident Magistrate's Court at Half-Way-Tree on an information which alleged that "on 6th November, 1979 they did knowingly harbour uncustomed goods at premises 10 Tangerine Place, St. Andrew to wit:

601 pieces stretch Nylon Tights
405 Polyster Dresses
499 Polyster Wrap Dresses
2006 Leotards
322 Polyster Knit Blouses
439 Hand Bags
360 Ladies T-Shirts

contrary to Section 210 of the Customs Act." Each was sentenced to pay a penalty on the election of the Collector General, of $161,512.50 and in default of payment, imprisonment at hard labour for 9 months.

The charge was the sequel to a raid mounted by police and customs officers and carried out on these premises which the appellant Alexander acknowledged to be his. On the eve of this operation, a senior customs officer called at the private residence of the appellant Alexander but did not find him in. He did, however, observe the other appellant, Lee, come by in a car which having stopped momentarily by the premises, drove on. Much later, at about midnight, Alexander employed a trucker and his assistants to help him remove goods stored at Tangerine Place.

The truck was parked during the loading operations in an unlit area on these premises. In the midst of those proceedings, the police and customs officers descended. A search warrant was read to Alexander who was actually giving orders in regard to the loading of the truck. In the room in which Alexander was found, there was to be a seen a number of drums which were empty sundry garments on hangers, and a number of cartons. In an adjoining room, other articles were found. All these articles Alexander informed the officers were Lee's. He did acknowledge that he did occupy the room in which he was and also that the business of manufacturing garments was carried on there. As to his presence on the building he explained that he owned the premises and had come along to allow Lee access to his goods.

It appears from the evidence that at some time in the course of that early morning the other appellant Lee was on the premises assisting in the loading operations of goods onto the truck, and also giving directions in this regard. But upon the arrival of the police and the customs officers on the scene, he decamped. Subsequently at the police station, one of the trucker's assistants pointed him out as a person who had run off when the police came on the premises. Lee made no comment when this was said.

The articles removed from the premises at 10 Tangerine Place together with the goods loaded onto the truck and which are enumerated in the information were duly admitted in evidence against both appellants.

The appellant Donovan Alexander in his defence said not only that he had purchased all the goods from a George Freeman, the trucker who at the trial gave evidence for the prosecution, but had been assured that the documentation was in order. Indeed he had inspected some of the documents produced by George Freeman and he was satisfied that the goods had not been stolen. As to the other appellant, he gave an unsworn statement in which he recited that he had been requested to allow a truck to use his premises to enable goods from Florio Ltd. to be loaded onto it. While on the premises he had seen the arrival of men armed with guns; they were policemen. He left the scene.

Before us two aspects of the matter were canvassed, one factual, the other as to the jurisdiction of the learned resident magistrate to determine the matter in the exercise of his special statutory jurisdiction as opposed to hearing the matter as two Justices of the Peace sitting in Petty Sessions.

With respect to the first, counsel for the appellants argued that the verdict was unreasonable and could not be supported having regard to the evidence. In our view there was abundant evidence on which the learned resident magistrate could have arrived at a decision adverse to these appellants. As to the first appellant, there was evidence that the premises on which the goods were found, belonged to him, that he told lies with regard to the goods in that at the time of their finding he intimated that they belonged to the other appellant but at trial he gave evidence that he had bought the goods legitimately. The customs declaration forms tendered before the learned resident magistrate did not demonstrate that duty had been paid on the goods set out in the information. The onus was of course on him to show that the appropriate duty had been paid or waived.

As regard the other appellant there was evidence of his presence on the premises described by learned counsel for the crown as his non-accidental presence at a rather odd hour of the morning, that he had provided special access for the truck, that he had given directions and had assisted in the loading operations and his sudden disappearance from the scene was inconsistent with the actions of a man who was innocent of any wrong doing.

The main thrust of the appeal however related to the question of jurisdiction. The ground was put in this way:

> "that the Resident Magistrate's court had no jurisdiction to hear and determine this matter and to impose any penalty"

It is because we understand that there is no authority in point, that we have decided to put our reasons in writing, for holding that the learned Resident Magistrate sitting at the trial of the appellants had statutory authority to hear and determine the information in the exercise of special statutory jurisdiction.

We begin with the section under which the appellants were charged viz: section 210 of the Customs Act. So far as is material, it provides as follows:

> "Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload or assist or be otherwise concerned in unloading any goods which are prohibited or any goods which are restricted and imported contrary to such restriction or shall knowingly harbour or conceal.....with intent to defraud Her Majesty of any duties thereon or to evade any prohibition..... shall for each such offence incur a penalty of two hundred dollars or treble the value of goods at the election of the Collector General; and all goods in respect of which any such offence shall be committed shall be forfeited."

As is plain the section creates a varied number of offences, each of which makes the offender liable to incur a penalty which is to be determined by the Collector General in his discretion. From that section we can now turn to section 240 which prescribes the method of recovering the penalty which is referred to in Section 210. It is in the following form:

> "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 law may be recovered and enforced in a summary manner on the complaint of any officer."

The important words here are "recovered summarily". By natural progression, we refer to the Interpretation Act which defines "summarily". Section 3 states:-

> "Summarily", "in a summary manner" or "on summary conviction" means respectively before a court of summary jurisdiction, and "court of summary jurisdiction" means:
> (a) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting either alone or with other justices in a court of Petty Sessions;
> (b) a Resident Magistrate exercising special statutory summary jurisdiction:"

A court of summary jurisdiction in this country thus presents something of a dichotomy. From the point of view of the Resident Magistrate, he may thus sit as two Justices of the Peace or he may sit to exercise his special statutory summary jurisdiction. What is tolerably clear is that he is quite unable to exercise both jurisdictions simultaneously. In Rex ats Livingston v. Rickerby 4 J.L.R. 4, Savary J. held that this was quite permissible but the former Court of Appeal in Hart v. Black 7 J.L.R. 56 expressly over-ruled that decision. Their Lordships expressed themselves thus:-

> "In our opinion in order to confer a special statutory summary jurisdiction on a Resident Magistrate the statute must clearly and distinctly say so. When the jurisdiction to try an offence summarily is given only to a Resident Magistrate's Court no difficulty arises; but when the law confers jurisdiction on a Resident Magistrate or Justices whether or not "Petty Sessions" is mentioned, the jurisdiction of the Resident Magistrate is only exerciseable in Petty Sessions."

R. v. Alexander (1961) 4 W.I.R. 102 is to like effect.

The effect of this judgment seems therefore to be that where an Act says "summarily", what is to be understood is a Petty Sessions jurisdiction that is (a) two Justices of the Peace or (b) The Resident Magistrate sitting either alone or with Justices of the Peace.

There are two reported cases under Section 210 of the Customs Act which are worth mentioning. The first is R. v. Lawford Green (1963) Gl.L.R. 445 where the precise point was taken but was abandoned, counsel for the appellant accepting the Court's view that the matter was concluded by Section 65 of the Judicature (Resident Magistrate's) Law, Cap. 179 and thus triable by the learned resident magistrate in his special statutory jurisdiction. In R. v. Louis Chen 9 J.L.R. 290 the learned resident magistrate stated a case for the opinion of this Court, thus assuming a Petty Sessions jurisdiction. It must be assumed that he had tried the case in Petty Sessions and consequently adopted that method for review on appeal.

Although the cases referred to earlier and in particular Hart v. Black show that by "summarily" is meant a Petty Sessions jurisdiction, this situation is altered where some Act confers the other summary jurisdiction mentioned in the Interpretation Act. Section 65 of the Judicature (Resident Magistrate's) Act sets out the extent of the jurisdiction of a Resident Magistrate qua Resident Magistrate: It provides as follows:

> S. 65: "Each Magistrate shall preside in the Resident Magistrate's Court of the parish, and shall there, to the amounts, and to the extent, and in the manner hereinafter provided, have and exercise the civil and criminal jurisdiction hereinafter assigned to the said Court, and shall also have and exercise a jurisdiction in all cases in bankruptcy under the provisions of bankruptcy Act and in the recovery of all penalties, or forfeitures to the Crown, and of fines in the nature of penalties, under all Statutes now or hereafter to be in force relating to the public revenue, and in cases under the Affiliation Act, and in all such causes, enquiries and matters civil or criminal in which by any law any special jurisdiction, duty or power is given to or imposed on any Judge of a District Court, the Magistrate shall, within his parish, have, exercise and performs such jurisdiction, duty, or power;"

The sanction for the offences set out in Section 210 of the Customs Act is liability to a "penalty". There can be no question here but that the "penalty" under this Act relates to the public revenue. Section 65 of the Resident Magistrate's Act refers to "penalties and to fines in the nature of penalties." It appears to us immaterial whether the pecuinary imposition be a penalty or a fine in the nature of a penalty. Doubtless a penalty of treble the value of the goods would amount to a fine in the nature of a penalty.

We can derive some assistance with respect to the term "recovering of a penalty" from Morris v. Duncan (1899) 1 Q.B. 4 where Wills J. said this:

> "As applied to a sum of money a penalty or a debt, "recovery" is perfectly well understood to mean the obtaining of a judgment of the Court, upon which the sum penalty or debt becomes payable."

This dicta, we think, is expansive enough to meet the situation in this case. It is the commission of the particular offence which makes the penalty payable and thus its recovery is to be pursued before the Resident Magistrate on whom the exclusive jurisdiction to recover penalties relating to the public revenue has been conferred. That construction is, we think, consistent with the definition of "summarily" mentioned in the Interpretation Act, that is, the Resident Magistrate exercising his special statutory summary jurisdiction, and with the formulation in Hart v. Black to which we have previously adverted.

Another case which we consider helpful is Andrew and Anor. v. Blaize (1968) 12 W.I.R. 305. The statute which agitated the court was the Trade and Revenue Ordinance of Antigua which provided in Section 53 as follows:

> "All penalties under this Ordinance shall be recoverable before a magistrate under the provisions of the Magistrate's Code of Procedure Act and proceedings for the recovery of any such penalty may be commenced at any time within two years after the commission of the offence by reason whereof such penalty has been incurred, and in default of payment of any such penalty the offender shall be liable to be imprisoned with or without hard labour for any period not exceeding one year....."

The argument urged on the High Court of Antigua - West Indies Associated States, was that the magistrate in that case was not entitled to make an order for imprisonment but should have invoked the provisions of another Ordinance which provided other less stringent sanctions than imprisonment. Lewis C.J. who delivered the judgment of the court, said this:

> "Thus the reference in this section to the Magistrate's Code of Procedure Act is a reference to the procedure to be adopted, and that procedure has been followed in this case. The argument which was advanced, it seems to us, failed to distinguished between a fine which is the normal penalty for some criminal offences and a penalty which is recoverable under the Trade and Revenue Act. If the police believe that an offence has been committed under that Act, then they believe that the penalty has been incurred, and the procedure for recovering that penalty is to bring proceedings using the procedure under the Magistrate's Code of Procedure Act by way of criminal proceedings for charging the offence and seeking to recover the penalty. If the party is convicted, the magistrate makes his order, and under Section 53, nothing intervenes between the order for payment of the penalty and the order for imprisonment in default.
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> (emphasis added)

This view of the learned Chief Justice related to legislation that is similar to that under review in this appeal, and is in our view applicable as well to these circumstances. The offence with which that appellant was charged was that he was concerned with smuggling, a section which included the offence of habouring what amounts to uncustomed goods.

In the instant case if the police believe that the appellants harboured uncustomed goods, then they believe that a penalty has been

incurred and the procedure for recovering that penalty which is provided in Section 65 of the Judicature (Resident Magistrate's) Act, is to bring proceedings by virtue of that section. The Resident Magistrate pursuant to the section is empowered to exercise a criminal jurisdiction in the recovery of all penalties or forfeiture to the Crown and of fines in the nature of penalties under all statutes relating to public revenue. Where power is given to the Resident Magistrate exclusively and not contemporaneously with Justices of the Peace, then the clear and manifest intention of the legislature is that the magistrate is exercising his special statutory summary jurisdiction. At all events we did not understand Mr. Phipps to be advancing any argument to suggest that Section 65 did other than confer a summary jurisdiction on a Resident Magistrate. The burden of his contention was that Section 240 of the Customs Act which provided for a trial "summarily" was conclusive of the matter. He contended that both by precedent and on principle, "summarily" meant trial before a Petty Sessional tribunal whether of Justices or a Resident Magistrate. As is clear from the reasons we have given we were not persuaded as to the validity of that argument. The appeals were therefore dismissed and convictions and sentences affirmed.