

IN THE COURT OF APPEAL

R. M. C. A. NO. 15 of 1964

BEFORE: Duffus, P.,
Henriques & Waddington, JJ.A.

R. v. L O U I S C H E N for
Breach of the Customs Law

Mr. Dudley Thompson, Q. C., for the Defendant
Mr. R. C. C. White for the Crown.

October, 19, 20, 21, 22, 1965
and January 13, 1966

Case Stated by the Acting Resident Magistrate
for Kingston sitting in Petty Sessions

DUFFUS, P.,

This matter comes before the Court of Appeal by way of a case stated for the opinion of the Court, pursuant to the provisions of the Justices of the Peace (Appeals) Law, Cap. 187, section 49. The case stated by the learned Acting Resident Magistrate for the parish of Kingston, exercising jurisdiction in Petty Sessions, is as follows:-

"An Information No. 5645/63 was preferred at the instance of Detective Sergeant C. G. Weir against Louis Chen for a breach of section 205(1) of Chapter 89 of the Revised Laws of Jamaica, to wit:-

That the said Louis Chen unlawfully did knowingly harbour certain uncustomed goods to wit:- three cartons of Pall Mall cigarettes, three cartons of Winston cigarettes, nine packs of Winston cigarettes and two cartons of Chesterfield cigarettes with intent to defraud Her Majesty of the duties thereon.

To the charge stated above in information 5645/63 the special pleas of autrefois convict and autrefois acquit were raised.

The facts adduced and supported by the records of the Court are:-

- (1) That on Information 1282/62 on the 24th April, 1962, the defendant pleaded guilty to a breach of the Customs Law under section 205(1) of Cap. 89 and on the Information is endorsed -

Plea:)
 Guilty
 Verdict:)

The matter was postponed for sentence on 24/4/62.

The records show further dates for mention - 29/5/62, 12/6/62, 26/6/62. Apparently on the last date it was adjourned sine die. The penalty at the election of the Collector General dated 6/2/62 appears among the records. Sentence on this Information was never passed.

- (2) That Nolle Prosequi dated 28/1/63 was entered by the Director of Public Prosecutions in Information 1282/62 under section 4 of Cap. 83 with note:

"This Nolle Prosequi is entered solely so that the proceedings against the accused on the charge of Breach of the Customs Duty Law may be commenced de novo."

- (3) That on 1/2/63 Information 1183/63 was issued against Defendant on the same charge in respect of the same offence. This information is endorsed "Withdrawn" on 18/2/63.
- (4) That on 27/5/63 Information 5645/63 was issued against Defendant on the same charge in respect of the same offence. This is the Information now before this Court and to which charge the special plea of autrefois convict and autrefois acquit is raised.
- (5) The charges in respect of which the three Informations (Information 1282/62, 1183/63, 5645/63) are laid arise out of one and the same offence.

The opinion of the Court of Appeal is required on the following points:-

- (a) Whether a plea of guilty has the effect of an immediate conviction.
- (b) The effect, if any, on criminal proceedings of nolle prosequi entered after plea of guilty and/or conviction.

With reference to (b) above, section 94(3)(c) of the

Jamaica (Constitution) Order in Council 1962 provides

"The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do:-

To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

This power appears to be exercisable at a stage beyond a finding or verdict but before judgment or sentence."

The first matter on which the opinion of the Court of

Appeal is sought is -

- (a) Whether a plea of guilty has the effect of an immediate conviction.

The answer to this is dependent on the meaning of the word "conviction".

It was stated by Tindal, C.J., in *Burgess v. Boetfeur*, 7 Man. & G. 431 at p. 503 (135 English Reports, 193; at p. 202) -

"The word 'conviction' is undoubtedly *verbum aequivocum*.

It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the court. In the passages cited from Blackstone's Commentaries, the term seems to be used in both senses. The question is, in which sense is it used in the statute ---- under consideration."

In *Harris v. Cooke* (1919) 88 Law Journal Reports (K.B.D.) 253, at p. 253, Darling, J., said -

"The word 'conviction' is sometimes used as meaning the finding guilty; at other times it means that finding together with the judgment or sentence of the Court."

And Avery, J., also at p. 253, said -

"The meaning of the word 'conviction' must be determined by the object and purpose of the Statute or Regulation in which it occurs ..."

It will be seen, therefore, in view of the different meanings which the word 'conviction' may have, that it is necessary

to look at the statute in which it occurs in order to ascertain the particular meaning to be ascribed to it. In the instant case, the offence is charged under section 205(1) of the Customs Law, Cap. 89, which reads as follows:-

205.-(1) "Every person who shall import or bring, or be concerned in importing or bring 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 one hundred pounds, 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."

It is to be observed that this section uses the words "shall for each such offence incur a penalty" and does not use the word "conviction", Section 237 provides the machinery for the prosecution of offences and this section is as follows -

237. "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."

The words "summarily" and "in a summary manner" are defined thus in the Interpretation Law, Cap. 165, section 3 -

"summarily", "in a summary manner" or "on summary conviction" mean 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 Law 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.

In the instant case, the learned Resident Magistrate for Kingston was sitting alone in a Court of Petty Sessions; therefore, it is necessary to examine the Justices of the Peace Jurisdiction Law, Cap. 188, section 13 whereof makes statutory provision for the proceedings at the hearing of complaints or informations.

Section 13 provides as follows -

13. "Where such defendant shall be present at such hearing, the substance of the information or complaint shall be stated to him, and he shall be asked if he have any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be; and if he thereupon admit the truth of such information or complaint, and show no cause, or no sufficient cause, why he should not be convicted, or why an order should not be made against him, as the case may be, then the justice or Justices present at the said hearing, shall convict him, or make an order against him accordingly; but

if he do not admit the truth of such information or complaint as aforesaid, then the said Justice or Justices shall proceed to hear the prosecutor or complainant, and such witnesses as he may examine, and such other evidence as he may adduce in support of his information or complaint respectively, and also to hear the defendant and such witnesses as he may examine and such other evidence as he may adduce in his defence, and also to hear such witnesses as the prosecutor or complainant may examine in reply, if such defendant shall have examined any witnesses, or given any evidence other than as to his, the defendant's, general character; but the prosecutor or complainant shall not be entitled to make any observations in reply upon the evidence given by the defendant, nor shall the defendant be entitled to make any observations in reply upon the evidence given by the prosecutor or complainant in reply as aforesaid; and the said Justice or Justices, having "heard what each party shall have to say as aforesaid, and the witnesses and evidence so adduced, shall consider the whole matter, and determine the same, and shall convict, or make an order upon, the defendant, or dismiss the information or complaint, as the case may be; and if he or they convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid; and the conviction (in the Form (7) (a), (7) (b), or (7) (c) of the Schedule hereto; or order, in the Form (8) (a), (8) (b), or (8) (c) of the Schedule hereto, as the case may be), shall afterwards be drawn up by the said Justice or Justices in proper form, under his or their hand or hands; and he or they shall cause the same to be lodged with the Clerk of the Courts to be by him filed among the records of the Court ..."

From the language of section 13; it seems to be clear that the taking of a plea of guilty, even if the plea is entered on the record, does

not amount to a conviction. Likewise, the pronouncement of a verdict of guilty is not a conviction. The words "if he thereupon admit the truth of such information or complaint, and show no cause, or no sufficient cause, why he should not be convicted, or why an order should not be made against him, as the case may be ..." indicate that there are two conditions which must precede the conviction, viz:

- (i) an admission of the truth of the information, and
- (ii) a failure to show cause or sufficient cause, why there should be no conviction or order;

and it is only after these two conditions precedent that the justice or justices shall convict or make an order. The section then directs that having convicted or made an order against the defendant, the conviction or order "shall afterwards be drawn up by the Justice or Justices" in one of the proper forms contained in the Schedule to the Law. There are three forms set out in the Schedule, the language of which indicates quite clearly that the sentence of the Court is an essential part of the conviction, hence if there has been no sentence or order there is no conviction.

The question whether a plea of guilty must be recorded, and having been recorded, recorded as a conviction, was considered recently by the Court of Criminal Appeal in England in the case of Regina v. Cole (1965) 2 All.E.R. 29. In that case, it was submitted on behalf of the appellant that:-

" ... a plea of guilty must be recorded, that, once recorded, it ranks as a conviction, indeed the highest possible conviction, that the learned judge had no power to direct that that plea should be altered and entered as one of not guilty, and on the basis that the plea of guilty remained, that being a conviction, it was not possible for the prosecution to proceed further and have the appellant tried for armed robbery."

In delivering the judgment of the Court, Lord Parker, C. J., had this to say with regard to the submission -

"This court is satisfied that this argument really fails in limine, in that a plea of guilty, once recorded, does

not rank as a conviction at all; it only ranks as a conviction when the offender is in fact sentenced."

The learned Chief Justice then examined the matter in some detail, quoting from Hale's Pleas of the Crown and Hawkins' Pleas of the Crown, and proceeded -

"It is, however, unnecessary to go into that matter further because it is quite clear that, while no doubt a confession of guilt is the highest conviction, nowhere is it stated either in Hale or Hawkins when the conviction occurred. It is quite clear that it does not occur at the time of the recording, because otherwise it would be impossible for a judge to allow a plea to be changed, as it is recognised is perfectly possible up to sentence, and, indeed, in one of the cases a verdict of a jury itself was set aside before sentence. In these circumstances, as it seems to this court, this approach is, to say the least, in accordance with commonsense; it would surprise every one if, on the facts of this case, the appellant could prevent his being prosecuted for this very serious charge of armed robbery merely by pleading guilty to receiving ..."

In our view, therefore, the answer to the first question, whether a plea of guilty has the effect of an immediate conviction, is that a plea of guilty is not a conviction.

The second question as to the effect, if any, on criminal proceedings of a nolle prosequi entered after a plea of guilty, may be answered shortly.

Section 94(3)(c) of the Constitution of Jamaica provides:-
 "The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do ... to discontinue at any stage before judgment is delivered, criminal proceedings instituted or undertaken by himself or any other person or authority."

The language of this section is clear and the Court agrees with the opinion of the learned Resident Magistrate that the power vested in

the Director of Public Prosecutions by the Constitution to discontinue criminal proceedings may be exercised by him before the delivery of judgment, and that on the facts in the instant case, the Director of Public Prosecutions acted within his constitutional powers when he entered a nolle prosequi to the first information numbered 1282/62 against the defendant, and that the effect of this nolle prosequi was to terminate the proceedings on this information.

Sgd. Sir. M. Duffus.

P.