JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 19/70

BEFORE: The Hon. The President
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Smith (Ag)

R. v. ROBERT RUSSELL
PETER RUSSELL

Mr. D. Coore, Q.C. for Robert Russell
Mr. C. Hines for Peter Russell
Mr. M. Wright for the Crown

1970 - May 7 & 8 ...15...

SMITH J.A. (Ag):

The appellants were convicted in the Resident Magistrate's Court for Saint Andrew on 23rd January, 1970, on an indictment which charged them with Conspiracy to contravene section 205 of the Customs Law, Cap. 89. They were each sentenced to be imprisoned for four months with hard labour and have appealed against their conviction and sentence.

The particulars of the charge are that the appellants, on divers days between the 26th May and the 3rd September, 1969, in the parish of Saint Andrew, "conspired together and with other persons unknown to deal with 10 coin-operated amusement machines with intent to evade the prohibition of importation of such machines without a licence by the use of false documents and the unlawful removal of the said machines from the wharf at Newport West." At the trial the appellants put the prosecution to proof of the charge. At the end of the prosecution's case Robert Russell elected to say nothing and called no witnesses. After a submission that there was no case to answer was made on behalf of Peter Russell and overruled he, also, said nothing and called no witnesses.

As the charge indicates, the case was concerned with the importation into the Country of 10 coin-operated amusement machines, commonly called "one-armed bandits." A specific licence issued under the Trade Law, 1955 is required for the importation of these machines. On 28th August,

1969 the ship Terukawa Maru arrived in the port of Kingston and docked at the Newport West wharf at berth 7. The ship's manifest, which was tendered in evidence, disclosed that part of the cargo consisted of 10 cases containing amusement machines. They were shipped from Sydney, Australia, by Ainsworth Exports Pty. Ltd. and in the manifest under the column "Consignees" appeared the following: "Order: Perma-Lite Ltd., 40½ Half Way Tree Road, Kingston, Jamaica. Notify: Mr. Peter K. Russell, Telephone Kingston 68509." The cases, according to the manifest, were marked: "PERMA-LITE KINGSTON WEST INDIES." Sometime between 28th and 30th August the cases, with other cargo, were unloaded and placed in shed 7 at berth 7.

Before an importer can, properly, obtain delivery of imported goods he is required to prepare an import entry (with necessary copies) and present this with copies of the invoice for the goods at the Customs House for checking. After checking, numbering and payment of import duty (if any), the original entry is returned to the importer who must take it to the manifest branch of the Customs department to have the goods marked off the manifest. He then takes the original entry and a copy of the invoice to the Customs official in charge of the berth where the goods are stored, who examines the goods to see that they correspond with the goods described on the invoice. If satisfied, the Customs official passes the goods for delivery. Before final delivery is made, however, the importer must take the bill of lading to the agent for the shipping line and have it validated authorising delivery. The bill of lading is then presented to a delivery clerk employed to the owners of the wharf, who checks the goods against the bill of lading and issues a gate pass. The goods are then taken to the gate of the wharf where another delivery clerk checks the cases against the gate pass and a Customs clerk checks to see that the goods have been released by Customs. Finally, a copy of the gate pass is handed to the watchman or guard at the gate who checks the number of the vehicle shown on the pass before allowing the goods through the gate.

On 1st September, 1969 the appellants removed the 10 cases with amusement machines from the wharf and had them taken on a hired truck to No. 32, Trafalgar Road, St. Andrew, where the machines were removed

from the cases. On 2nd September, Mr. Joseph Johnston, the Customs official in charge of berth 7, missed the 10 cases from the wharf and reported the matter to Mr. Huntley Deans, the Customs officer in charge of the manifest branch at the Newport West wharf. The assistant wharfinger, Mr. Antonio Bruce, was asked to account for the missing cases but could not find them nor could he find any documents authorising their delivery. On the same day an import entry and an invoice, with the necessary copies, purporting to be in respect of the 10 cases, were presented to the Customs department for checking. The contents of the cases were falsely described on these documents as "Cutting machines and Spares," on which no import duty was payable. On 3rd September a report was made to the police and, after investigation, the machines and cases were recovered by Det. Sgt. Leonard Campbell at No. 32 Trafalgar Road and taken to the Half Way Tree police station, where the appellants were subsequently charged.

Before us, Mr. Hines argued the appeal of Peter Russell against his conviction. Mr. Coore, on behalf of Robert Russell, adopted Mr. Hines' arguments in respect of conviction and argued the appeals against sentence. A number of grounds of appeal were filed on behalf of Peter Russell. Some were abandoned. Of those argued it is necessary to deal with three only, the rest being without merit.

It was argued, firstly, that the verdict is unreasonable and cannot be supported having regard to the evidence as it was the Crown's case that the goods were imported in the name of Perma-Lite Ltd. and the importance of the identity of the importer was such that it was obligatory on the prosecution to adduce evidence to show that no company of that name was registered in Jamaica and this was not done. It was said that as Perma-Lite Ltd. appears on the documents as the importer of the machines, that company would be required to be in possession of the licence to import them. So, it was argued, it was obligatory on the prosecution to show that this was a fictitious company in order that the Resident Magistrate could feel sure that no licence had in fact been granted. The learned Resident Magistrate had before her the evidence of the Deputy Trade Administrator, Mr. Horace Myers, who said that he checked the records in the Trade Administrator's department, where import licences are granted, and that from those records no licence was granted to Perma-Lite Ltd. or either of

the appellants for the importation of the machines. He said that coin-operated amusement machines are importable into the Country but that the importation of machines of the type contained in the 10 cases is absolutely prohibited. In addition there was the evidence of Mr. Ray Brennan, a used car dealer of No. 40½ Half Way Tree Road, the effect of which was that since October, 1968 no company by the name of Perma-Lite Ltd. has operated at No. 40½ Half Way Tree Road. This is the address of the company stated on the manifest. In our view, this was ample evidence on which to base a finding that no import licence had been granted.

Secondly, it was contended that the indictment is bad for duplicity in that in one single count it charged conspiracy at common law to commit two separate offences created under section 205 of the Customs Law, Cap.89, namely: (a) to deal with the goods specified with intent to evade the prohibition on the importation of the said goods without a licence and (b) to unlawfully remove the goods specified from the wharf at Newport West. Being knowingly concerned in removing goods and being knowingly concerned in dealing with goods with intent, in either case, to evade the prohibition or restriction of or applicable to such goods are, indeed, two separate offences. But the complaint made in this ground of appeal is based on a misconception of the charge. Careful reading of the particulars reveals that the offence under section 205 which it is alleged the appellants conspired to contravene is: dealing with the machines with intent to evade the prohibition of importation thereof without a licence. The "unlawful removal" of the machines is merely one of the overt acts of the conspiracy stated in the charge. We hold that this criticism of the indictment is not valid.

Lastly, it was contended that the conviction of the appellants for conspiracy as charged in the indictment is wrong in law because before a person can be convicted of conspiracy to commit an offence there is a burden on the prosecution to show that the conspirator at least knew the essential matters which constitute the offence; that the mens rea must be the intention of each conspirator to be a party to an agreement to do an unlawful act, in this case to deal with the specified goods with intent to evade the prohibition of their importation without a licence; that in respect of Robert Russell there was absolutely

no evidence on which the learned Resident Magistrate could properly impute to him knowledge that no licence was granted in respect of the goods. It was submitted that the facts must be such that when the Resident Magistrate looks at them she can say that there is evidence that the intent was to evade the prohibition on importation, that on the facts proved in this case it cannot fairly be said that the acts done by Robert Russell were done with a view to evading the prohibition on importation, that they could have been done with a view to evading the payment of duty; and that when facts can be explained on grounds other than those alleged in the indictment then the prosecution has not proven its case. Reference was made to Sweeney v. Coote, (1907) A.C. 221, an action for conspiracy, in which Lord Loreburn, L.C. said, at p.222:

> "It is an action for conspiracy .....
> In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them."

It was said that the facts here admit of two inferences: (a) an intention to evade the prohibition of importation without a licence and (b) an intention to evade payment of import duty. We do not understand Lord Loreburn's statement to mean that the facts must be such that it is not possible to draw any other inference. We think that it means no more than that the facts must be such that no other reasonable inference can be drawn from them.

On the question of intention, the learned Resident Magistrate had the following facts and circumstances to consider: First of all, there was the very important fact that no licences were being issued for the importation of the type of amusement machine with which the case is concerned. The words used by the Deputy Trade Administrator in evidence were that this type of machine is absolutely prohibited. It is difficult to believe that

anyone interested in the importation of this type of machine would not know that a licence could not be obtained for their importation. Next, there was the anxiety shown by the appellant Robert Russell to have the cases removed from the wharf. On Saturday 30th August, the day the unloading of cargo from the Terukawa Maru was completed, he went, with the other appellant, to berth 7 and told Mr. Bruce, the wharfinger, that he was there to clear the cases and wanted them moved from the shed where they were stored to the baggage room. There is no evidence that any documents had yet been presented to the Customs for their clearance. On the same day he offered a bribe of £100 to Donald Richards, a delivery clerk employed at the wharf, "to help him get the cases out of the wharf." By 2.30 p.m. on Monday 1st September the appellants had succeeded in getting the cases out of the wharf without any document except a false gate pass. The anxiety to have the cases removed was no doubt due to the fact that, as Mr. Deans, the Customs official, said in evidence, the machines would have been destroyed if it had been discovered that they were imported without a licence. The appellant Robert Russell, who worked previously at the wharf as a clerk issuing gate passes, would probably have known this. If the purpose was merely to evade the payment of import duty it would hardly have been necessary to act with such urgency. The goods could have remained at the wharf up to 14 days without interference, when they would be removed to the Queen's Warehouse until the duty was paid or it was shown that they were entitled to entry free of duty. Then, there was the false gate pass that was used to get the cases through the gate. The evidence is that these passes are usually prepared in quintuplicates, each copy in a different colour. The gate pass used in this case was taken from the back of a book which was then in use for goods sent to the Queen's Warehouse. The only copy taken from the book was the blue copy, which is required to be given to the watchman or guard at the gate. It was proved to have been signed by the appellant Robert Russell as delivery clerk, though he had ceased working at the wharf since February, 1968. The goods were stated on the pass to have been delivered to the Queen's Warehouse. The name of the ship was given as "Mare Artico," which had arrived in port on 1st July, 1969. The number of the bill of lading was stated to be 42 and was in respect of goods (vegetables) which, apparently, had arrived on the Mare Artico.

And the goods were described on the gate pass as "machine parts." It seems clear that the gate pass was prepared with a view not only to conceal the true nature of the goods in the 10 cases but to make it as difficult as possible to trace them. There is the further fact that when Det. Sgt. Campbell and others went to No. 32 Trafalgar Road they found that the 10 cases from which the machines had been removed then contained pieces of iron and had either been nailed up again or were being nailed up.

It appears that the basis of the argument that the acts of Robert Russell could have been done in order to evade the payment of import duty is the fact that the import entry and the invoice were in respect of duty free goods, namely, cutting machines. These documents were, however, produced to the Customs department on the day after the goods had been removed from the wharf. Their production at that time could only have been for the purpose of having documents on record in the Customs department to account for the 10 cases that had arrived on the Terukawa Maru and thus avoid inquiry. It is significant that the goods were not described on the gate pass as cutting machines as one would have expected, for the sake of consistency, had the purpose been to get the machines in free of duty.

In our judgment, the learned Resident Magistrate could quite properly conclude from the above facts, looked at together, that the only reasonable inference to be drawn is that the intention of the appellants was to evade the prohibition of importation of the machines without a licence. This ground of appeal, therefore, also fails. The appeals against conviction are, accordingly, dismissed.

As regards sentence, reference was made to Verrier v. D.P.P., (1966) 50 Cr. App. R. 315; (1966) 3 All E.R. 568, the headnote of which reads in part as follows:-

> "It is lawful for a court to pass a greater sentence for conspiracy to commit an offence than the maximum sentence which could be passed for the substantive offence where there are grounds for treating the conspiracy as an offence different from and more serious than the substantive offence, but normally it is not right to do so and the greater sentence can be justified only in very exceptional cases."

In this case it is sufficient to say that, in our view, there are no grounds for treating the conspiracy as an offence different from and more serious than the substantive offence. And we agree entirely with the submission that there is nothing in the case to make it an exceptional one.

Section 205 of the Customs Law, Cap. 89 provides for a fixed penalty for offences committed under the section. It is a penalty of $200.00 or treble the value of the goods, at the election of the Collector General. A sentence of direct imprisonment may be imposed only if the offender has previously been convicted for an offence against the customs laws (see section 240). A court has no power to impose a penalty for a first offence different from that fixed by section 205. (see R. v. Seebalack, 5 J.L.R. 245). The penalty provided for the common law offence of conspiracy is imprisonment with hard labour for any term not exceeding two years (see section 18 of the Criminal Justice (Administration) Law, Cap. 83). The powers of a Resident Magistrate are, however, restricted by section 268(1) of the Judicature (Resident Magistrates) Law, Cap. 179 to a penalty of one year's imprisonment or a fine not exceeding $100.00.

Following Verrier's case (supra), and in view of what has been said above about the offence in this case and the penalties provided in the Customs Law, we hold that it was wrong to impose penalties of direct imprisonment on the appellants. We have no doubt that had Verrier's case (supra) been brought to the attention of the learned Resident Magistrate she would not have imposed those penalties. The appeals against sentence are, therefore, allowed and the sentences quashed. In all the circumstances, we substitute a sentence of $100.00 or, in default of payment, three months' imprisonment with hard labour in each case.

The result of these appeals demonstrate that it seldom serves any useful purpose to charge a conspiracy to commit an offence where, as in this case, a charge for the substantive offence can be proved without difficulty. In this case the needless exercise of charging and proving a conspiracy has only worked to the advantage of the appellants.