

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 85/78

BEFORE: THE HON. MR. JUSTICE KERR, J.A. - PRESIDING.
THE HON. MR. JUSTICE MELVILLE, J.A.
THE HON. MR. JUSTICE ROBOTHAM, J.A.

REGINA

vs.

SHOBBA MIRCHANDANI

GHANCHAYAN TOLANI

Mr. F.M.G. Phipps, Q.C., and
Mr. Trevor Ho Lyn for the Appellants.

Mr. Henderson Downer, Deputy Director of Public
Prosecutions, and Mrs. S. Lewis for the Crown.

November 21 and 22, 1978; February 1, 1980.

KERR, J.A.

This was an appeal by each defendant from conviction and sentence in the Resident Magistrate's Court for the parish of Portland. The appellants were charged on an indictment for "conspiracy to export foreign currency in contravention of the requirement imposed by Section 24 (1) (a) and contrary to paragraph 1 (1) of Part II of the Fifth Schedule of the Exchange Control Act," for that they "on the 27th day of July, 1977, in the Island conspired together and with other persons unknown to export from the Island foreign currency amounting to U.S. \$2,500.00 without the permission of the Minister."

We allowed the appeals and quashed the convictions - and promised to put our reasons in writing.

On Monday, July 27, 1977, the cruise ship, 'Norodic Prince' arrived at Port Antonio with Tourists and docked at the Ken Wright Pier. Among the passengers were the appellant Mirchandani and her husband. They disembarked and went sightseeing in Port Antonio and its environs guided by the appellant Tolani, a family friend of many years and who had journeyed from Montego Bay for that purpose. Appellant Mirchandani returned by car to the Pier at about 5:00 p.m. In the car were Tolani, a Mr. Vaswani and her husband. On duty at the Pier were Sergeant DeCardova Hibbert, Sergeant Christopher Barnaby and Sergeant Stewart of the Financial Intelligence Unit.

Hibbert in evidence said while in the covered walkway which leads from the road to the main Terminal Building of the Pier he saw the car drove up with the appellants and two others including the driver, Tolani.

The driver came out and opened the back door for the appellant Mirchandani. Stewart and Barnaby were then by the car and he saw Stewart speaking to her. Appellant and others went from the car to the Immigration Section where Stewart asked to see what was in her handbag - she opened it and he took therefrom a bundle of U.S. Notes.

Barnaby's evidence was to the effect that he saw when the car driven by Tolani arrived. Appellant Mirchandani was sitting at the left rear. Tolani went around and opened the door and when she came out he handed her some money which she placed into a handbag she was carrying. He was then 6 - 7 yards away. Stewart was

nearer and asked her for the money which Tolani gave her. She denied receiving any money. On her opening the bag he saw a bundle of U.S. Notes. He admitted in cross-examination that Mirchandani maintained that the money was hers. Sergeant Linval Stewart in evidence said he saw when Tolani, the driver of the car came out and went and opened the left rear door for appellant Mirchandani and after she came out Tolani handed her a bundle of notes which she placed in her handbag - he was then about 4 yards away. Tolani got back in the car and "sped away." He spoke to female appellant in the Terminal Building as she was going towards the ship - he cautioned her and told her he had seen Tolani handed her U.S. Currency. She denied receiving any money. At his request she opened her handbag and in it he saw a bundle of U.S. Notes - which he tendered and were admitted in evidence. He arrested her for Breach of the Exchange Control Act. Mirchandani maintained that the money was hers and gave an accurate account of how the amount was "made up." On July 29, 1977, he arrested Tolani on a warrant.

The cross-examination of the Police was aimed at challenging their account as to the handing over of the money by Tolani. The appellant Tolani gave evidence of journeying from Montego Bay to meet his old friends the Mirchandanis - of showing them around Port Antonio and returning to the Pier with them. He drove up by entrance to Pier and after the passengers came out he drove the car and parked it in the parking lot, and went and shook hands with them and he then returned to the car and drove away. He left to buy gas. Fred Dawson, Gas Station Operator corroborated him

concerning the purchase of petrol at his station. One Lashu Vaswani was the other person in the car. Vaswani gave evidence to the same effect. Tolani denied giving Mirchandani any money, or of opening the door for her or jumping in the car, and driving away. The appellant Mirchandani in evidence said the money in her handbag was hers. She got no money from Tolani. In cross-examination she said she left Dubai on July 7, with U.S. \$5,000.00. She gave \$2,500.00 to her husband in London and kept the \$2,500.00 and that was the money the Police found in her handbag. In her tour which so far included New York, Montreal, Los Angeles, San Juan, The Virgin Islands and Martinique she spent no money.

Appellant's husband corroborated her - he said he had on him that day \$13,000.00 U.S.

The learned Resident Magistrate recorded the following "Findings":-

"I accept evidence of Sergeants that they saw -

- (1) Money handed over by Tolani to Mirchandani.
- (2) Reject completely the defence that any one could have \$2,500.00 U.S. in a handbag in that condition for 25 days.
- (3) Satisfied beyond doubt that policemen saw what they say they saw."

For each appellant, the following additional grounds were fully argued:-

- "1. The Indictment charged is Conspiracy to Export United States Currency Notes which is not the offence contemplated by Section 24 (1) (a) of the Exchange Control Act.
 - (a) It is submitted that Section 24 (1) (a) of the Exchange Control Act imposes a restriction on the exportation of the United Kingdom notes and not United States notes.

- (b) It is further submitted that there can be no Conspiracy to Export United States notes in contravention of Section 24 (1) (a) of the Exchange Control Act."

In relation to 1 (a) above, Mr. Phipps submitted that the ejusdem generis rule applied to the following words in Section 24 (1) (a):-

"In the United Kingdom or any part of the United Kingdom or in any other territory" and accordingly in "any other territory" was limited to the United Kingdom. In respect of (b) above, that in any event, a note is legal tender in a particular territory by the Law of that territory and in the instant case there was no evidence of the Foreign Law making U.S. dollar bills legal tender.

The Director of Public Prosecutions contended in reply that the ejusdem generis rule did not apply and that there was sufficient evidence from which the Resident Magistrate could hold that a U.S. dollar bill like those exhibited was legal tender not merely on the face of it but on the presumption that the U.S. Law in the absence of anything to the contrary was the same as Jamaican Law. In the alternative the bills fell under Section 24 (1) (iii) of the provisions restricting the export of foreign currency and a simple amendment to the indictment would regularise the pleadings.

Section 24 (1) provides:-

- "The exportation from the Island of -
- (a) any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory; and
- (b) any notes of a class which are or have at any time been legal tender in Jamaica; and
- (c)
- (d)
- (e) any of the following documents (including any such document which has been cancelled), that is to say -
 - (i)

- (ii)
- (iii) any bill of exchange or promissory note expressed in terms of a currency other than that of a scheduled territory and payable otherwise than within the scheduled territories; and

is hereby prohibited except with the permission of the Minister."

The Exchange Control Act like its English model and counterpart was the successor to provisions of similar tenor and effect in the Jamaica Defence Regulations 1939/1940.

In December 1954 when the original Act, Law 50 of 1954 came into effect, Jamaica was a Colony, the monetary denomination was L.S.D. and the Island was part of the Sterling Bloc and our rate of exchange was tied to the English £. Since then, in 1962 Jamaica became an Independent Country; in 1969 by the Decimal Currency Acts, 7 of 1969 and 25 of 1969, the denomination of the monies was changed to dollars and cents; and in 1974 by The Exchange Control (Amendment of First Schedule), Order 1974 made pursuant to Section 3 of the Exchange Control Act, Jamaica detached itself from Sterling and tied its rate of exchange to the U.S. dollar in accordance with the power to do so conferred by Section 11 of the Bank of Jamaica Act.

Accordingly, the protective purpose of the Act is now no longer aimed at Sterling but at the Jamaican Dollar and the Jamaican economy and it is against this existing background that the provisions of the Act should be interpreted. In our view on the face of it the words of the Section referred to in argument do not form a class, and the ejusdem generis rule does not apply. It was necessary to include the words or "any part of the United Kingdom"

because a note may be legal tender in one part of the United Kingdom and not in another: See Halsbury's 3rd. Edition Vol. 2 at p. 155. Accordingly, the words "in any other territory" - giving meaning and effect to "any" was clearly intended to apply the prohibition to notes which are legal tender in territories other than the United Kingdom. We are fortified in so holding by the fact that originally, the provisions designating for preferential treatment certain territories as "scheduled territories" included countries outside the United Kingdom and in the English Act (from which the wording was borrowed), "scheduled territories" included far-off Iceland. It is therefore not necessary for the purposes of this appeal to determine whether "United Kingdom" should be interpreted as limited by the Royal and Parliamentary Titles Act, 1927 to Great Britain and Northern Island or should include such places as The Channel Islands.

A note is given the status of legal tender by the Law of the particular place in contemplation. Jamaican Currency Notes are legal tender in Jamaica for any amount - Section 15 (1) (a) of the Bank of Jamaica Act. In our view whether or not a particular note is legal tender in any foreign territory has to be proved by admissible evidence - usually from some person whose knowledge and experience render him competent. However, Section 24 casts a wide net to bring within its fold notes and specie of many description. A 'note' inherently, manifestly and within the definition of Section 83 of the Bills of Exchange Act is a promissory note and a U.S. dollar bill would clearly fall under Sub-section (1) (e) (iii)

of the Section as a "promissory note expressed in terms of currency other than that of a scheduled territory and payable otherwise than within such territory." "Scheduled Territory" in the Act, (First Schedule) is now confined to Jamaica.

Although the various specie, design, class of currency or security are set out in the sub-section under lettered subheads and numerals, it clearly was not intended thereby to create separate offences since it is the act of exportation of all or any of the prohibited things that is the fulcrum of the offence. The parcel for exportation may contain different types or classes of things prohibited by the Section. It would be contrary to reason and good sense to hold that there should be a separate count for each type or class. Again, a thing may meet the description of more than one subhead. In our view the layout of the section is merely for convenience and ease of reference.

The U.S. notes were tendered and admitted in evidence and in the "particulars of offence" in the indictment were accurately described. The fact that in the "statement of offence" there was a wrong letter or numeral would be a false description that could do no harm.

Of more anxious concern is whether a conspiracy to export "foreign currency" is a conspiracy to contravene the Exchange Control Act.

The General Provisions as to Offences are contained in Part II of the Fifth Schedule to the Act:-

"1. (1) Any person in or resident in the Island who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement as aforesaid, shall be guilty of an offence punishable under this Part;

Provided that an offence punishable by virtue of Part III shall not be punishable under this Part."

PART III of the Schedule deals with "Import and Export"

thus:-

"1. (1) The enactments relating to customs shall, subject to such modifications, if any, as may be prescribed to adapt them to this Act, apply in relation to anything prohibited to be imported or exported by any of the provisions of Part IV of this Act except with the permission of the Minister and imported or exported without such permission as they apply in relation to goods prohibited to be imported or exported by or under any of the said enactments, and any reference in the said enactments to goods shall be construed as including a reference to anything prohibited to be imported or exported by any of the provisions of the said Part IV except with the permission of the Minister and imported or exported without such permission.

(2) Reference in this paragraph to the enactments relating to customs shall be taken as including references to the Customs Act and to the Post Office Act.

2.....

3. If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, or is brought to a quay or other place, or water-borne, for the purpose of being so exported, the exporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence to which section 210 of the Customs Act, applies."

Section 24 is within Part IV of the Exchange Control Act.

Accordingly, by express terms the exportation of the things prohibited by Section 24 are excluded from the general provisions of Part II of the Fifth Schedule, Section 1 (1) and equally in express terms by the provisions of Part III consigned to the Customs Act for liability and penalty. Sections 151 and 210 of the Customs

Act provide:-

"Section 151:

If any person shall.....
export any goods prohibited to be exported, or
any goods the exportation of which is
restricted, contrary to such restriction,
or attempt to perform or be knowingly
concerned in the performance of any of the
aforesaid acts, he shall (except as other-
wise provided in section 144) incur a
penalty of one thousand dollars, or treble
the value of such goods, at the election
of the Collector-General; and all such goods
shall be forfeited.

Section 210:

(1) Every person who shall.....
or shall be in any way knowingly 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."

Thus the substantive offences in relation to exporting
foreign currency are offences in breach of the Customs Act (Sections
151 and 210) and punishable thereunder and not offences punishable
under the provisions of the Exchange Control Act. See R. v. Goswani
(1968) 52 Cr. App. R. p. 197.

It follows therefore, that a conspiracy to export foreign
currency is a conspiracy to contravene the Customs Act. Had the
exportation of foreign currency not been expressly excluded by the
proviso to paragraph 1 (1) of Part II of the Fifth Schedule and
made an offence under the Customs Act then the common law principle
that "where a statute prohibits a matter of public grievance or
commands a matter of public convenience all acts or omissions

contrary to the prohibition or command are indictable misdemeanours" would apply - R. v. Hall 1891 1 Q.B. 747 - but this is only applicable when the statute is on the face of it a *lex imperfecta* in not providing procedure and remedy and since this Act provides that breaches of these prohibitions are to be dealt with under the Customs Act this general principle is inapplicable to the instant case. As was observed in R. v. Goswani (*supra*) at p. 202 - "It is a great pity that simplicity and clarity is so often sacrificed, as here, to a pernicious fetish - legislation by reference."

Accordingly jurisdictional competence of the Resident Magistrate to try the offence of conspiracy to export foreign currency lies neither in the Exchange Control Act because of the exclusionary provisions referred to above nor in the Customs Act because of an absence of specific provisions for conspiracy, but under Section 267 (1) (f) of the Judicature (Resident Magistrate's) Act as for an indictable misdemeanor at Common Law i.e. conspiracy to commit a statutory offence - See R. v. Connolly - 3 Cr. App. R. 27 - R. v. Blamires Transport Services Ltd. (1964) 1 Q.B. 278, and punishable accordingly. See ~~Sec.~~ 268 (2) of the Judicature (Resident Magistrate's) Act as amended by the Criminal Justice (Reform) Act 1978.

The substantive offence of Exporting Foreign Currency in breach of the Customs Act is triable summarily - Section 240 (1) of the Customs Act. On an information charging the substantive offence the accused may be convicted of an attempt - Section 50 of the Interpretation Act. However, there are specific provisions for attempt to export prohibited articles - See Section 151 of the Customs Act. An aider and abetter is liable to be convicted and punished in

the same manner as a principal offender - Section 6 of the Justices of the Peace Jurisdiction Act.

Henceforth it would seem prudent that where as in this case the adducable evidence would support the offence of attempting to export foreign currency in contravention of the Customs Act as indicated above, the accused should be so charged.

This would be in keeping with the course advocated in R. v. Russell (1970) 12 J.L.R. p. 92 - per Smith, J.A. at p. 97:-

"The result of these appeals demonstrates 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."

One final question, should the indictment be amended to charge the appellants with conspiracy to contravene the Customs Act? Technically this would be substituting one offence for the other and we would be unwilling to entertain such an application at this late stage especially in the particular circumstances of the case.

For these reasons the appeals were allowed. Because of our decision on this aspect of the case it seemed unnecessary to deal with the alternative ground that the verdict was unreasonable having regard to the evidence.

It is enough to say that the handing over of the money by Tolani to Mirchandani virtually in the face of the police who were in uniform seems inexplicably imprudent in view of the fact that this could have been done in the many hours the appellants were together sightseeing.