JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 66/92

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE WOLFE J A

R V SILBERT DALEY
also known as
SYLBOURNE BAILEY

Dr Diana Harrison for appellant

Hervin Smart for Crown

January 30 & February 13 1995

CAREY J A

On the completion of the hearing of this application for leave to appeal a conviction for murder in the Circuit Court Division of the Gun Court before Karl Harrison J (Ag) and a jury, which we treated as the hearing of the appeal itself, we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice, ordered a new trial. We intimated that we would put our reasons in writing and these now follow.

Having regard to our disposition of the appeal, the facts need only be stated in a summary form. The victim Neville Burnett a security guard was shot to death as he attempted to place a bag containing cancelled cheques and computer data into the night deposit vault at the Canadian Imperial Bank of Commerce in Twin Gates Plaza, Half Way Tree in St Andrew. The crime was observed by a witness who was then by a telephone booth in Lane Plaza which is across the road from Twin Gates Plaza. The appellant having shot the security guard, made off in a car with the bag and although the witness chased him, he eluded capture until nearly three years later. The witness, then thirty-five years of age testified that he knew the appellant from school days, a fact admitted by the appellant when he gave evidence in his defence.

The solitary ground of appeal argued by Dr Harrison was framed thus:

> "1. The attempt by the learned trial judge to define corroboration and identify the elements which, in his view, amounted to corroboration (p.115 line 6 of transcript) was pregnant with the possibilities of misleading and confusing the jury. As the concept of corroboration embraces implication of the accused, the direction on corroboration was fatal misdirection (R v Neville Stora SC. Cr. App. No. 95/1974."

She relied on **R v Morrison** (unreported) SCCA 71/91 delivered 9th March 1992 and **R v Stora** [1975] 24 WIR 300.

The impugned misdirection is to be found at pp. 114 - 115 when Crown Counsel at the request of the trial judge reminded him of his omitting to direct the jury on "corroboration in respect of the sworn evidence given by the different witnesses." He gave the following directions:

> " Miss Crown Counsel has reminded me of my responsibilities. She has mentioned the whole question of corroboration, i.e. whether or not there is evidence supporting what the witness says, namely Mr. Dias, as far as the whole issue of the identification of the accused man is concerned."

In these words the trial judge clearly shows that he is using corroboration in its legal sense as evidence implicating the appellant in the murder. He then continued:

> "And you have heard where he says that he knew the accused man very well. He is now thirty-five years of age and they have been seeing each other from school days, as far back as that. The accused man himself is corroborating that evidence to the extent where he says 'Yes, I know him too. I know him quite well.' So both are there supporting what the contentions are, that each one knows the other. That in law is known as corroboration. They have said things which support what the other is saying in terms of the person whom Mr. Dias said he saw. They knew each other. So it's a fact that you will have to bear in mind when you retire, as to whether or not there is corroboration."
> [Emphasis supplied]

It is in this passage that we detect the misdirection. The trial judge identifies the appellant's admission that he knows the witness as capable of amounting to corroboration for he explains that it implicates the appellant as being the assailant. There is no question that the appellant's admission that he knew the witness for a number of years did not in any way implicate the appellant as

the assailant. The jury would have withdrawn to the jury room with the judge's last words charging them to find that the solitary eye-witness had been corroborated.

This was a case where conviction depended entirely upon visual identification, a genre of evidence which a jury must approach with especial caution, the more so when it is uncorroborated. The learned judge had identifed as corroboration, evidence which was incapable of amounting to corroboration and in so doing, we agree with Dr Harrison, he eroded his correct direction on identification which he had given.

The circumstances of the instant case are in no way different from **R v Morrison** (supra) where the trial judge had erroneously identified as corroboration evidence which was not. We said this then:

> " This was a clear misdirection. In these words he was directing the jury that the applicant's statement that he was a mason and had worked for Mr. Williams, was capable of corroborating the witness' evidence that the applicant was in fact the assailant. The statement made by the applicant we would point out, was in no way an admission of guilt nor did it confirm in any particular that he had attacked Mr. Williams. The learned judge having erroneously pointed out to the jury evidence which was incapable of amounting to corroboration, we were of opinion that the conviction should not stand."

R v Stora (supra) deals with a somewhat different point but is helpful. There the danger of using corroboration interchangeably with "support," "strenghten" or "support" was highlighted. This court held:

> "that such terms as 'corroboration', 'support', 'strengthen' and 'confirm' may be used interchangeably in a trial judge's charge to a jury but whatever synonym was chosen it was imperative that the jury be made to understand that such synonym embraced the triple concept of intercourse, absence of consent and implication of the accused; if reference was intended to one factor only of this concept then this should be made absolutely clear as otherwise there was a real danger of the jury regarding evidence as corroboration when it was not; in this case it was left open to the jury to conclude that there was corroboration as defined after all,

> thus rendering the evidence of the complainant more credible and causing it to appear safe to convict.
>
> Appeal allowed. New trial ordered."

There can be little doubt that the effect of identifying evidence as corroboration, is to render the witness being corroborated more credible. It therefore presents an unfair picture of the strength of the prosecution case and is likely to induce a jury to have unwarranted confidence in convicting.

Learned counsel for the Crown essayed to support the conviction but on mature reflection conceded that the conviction could not stand. For the reasons we have given, his concession must be right.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 52/93

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA vs. ALFRED MITCHELL

Arthur Kitchin for the appellant

Dr. Diana Harrison for the Crown

January 30 and February 13, 1995

WOLFE, J.A.:

The appellant was indicted for the offences of carnal abuse, buggery and inflicting grievous bodily harm in the Home Circuit Court. On May 10, 1993, before Chester Orr, J., he pleaded guilty to the offence of carnal abuse and not guilty to the other two counts of the indictment. The court having accepted the plea of guilty to the count charging carnal abuse, the Crown offered no evidence in respect of counts 2 and 3 of the indictment.

The circumstances giving rise to the offence can best be described as outrageous. The appellant, a carrier of the AIDS virus, commonly referred to as HIV, in May 1991 sexually assaulted J.R., a girl ten years of age, resulting in her contracting HIV. The appellant at the time of the incident knew that he was a carrier of this deadly virus as he was being treated at the Comprehensive Health Clinic in Kingston.

In passing sentence Orr, J. said:

> "I don't know what could have got in your mind to have intercourse with a little girl, and on top of that you have given her an incurable disease. What you have given her is a death sentence. I am quite sure that there is no known cure

> "for AIDS, and that persons who show HIV positive usually develop AIDS. There is nothing I nor you can do to help this poor girl.
>
> I take into account the fact that you have pleaded guilty, but there is only one sentence I can pass on you, Imprisonment for life at Hard Labour. That is the sentence of the court, Imprisonment for Life at Hard Labour."

The complaint in this appeal is that the sentence was manifestly excessive.

The legislature in its wisdom has decreed that any man who is found guilty of carnal abuse of a girl under the age of twelve years is liable to be imprisoned for life. This indicates clearly the society's abhorrence of such a despicable act. That abhorrence is multiplied a thousand fold where a man who knows he is suffering from the deadly AIDS virus preys upon an innocent virgin and contaminates her with the virus or to put it as Orr, J. did, "sentence her to death." In circumstances such as this, the court has a duty to impose a sentence of retribution and deterrence. In **R. v. Sergeant** (1975) 60 Cr. App. R. 74 at page 77, Lawton, L.J. said:

> "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand, the courts must not disregard it."

The sentence imposed by Orr, J. was most appropriate. This man is undoubtedly a threat to the health of the nation. To suggest that it is manifestly excessive is wholly misconceived.

For these reasons, we dismissed the appeal and affirmed the sentence imposed by the court below.

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 34/94

COR: THE HON MR JUSTICE CAREY P (AG)
THE HON MR JUSTICE GORDON J A
THE HON MR JUSTICE WOLFE J A

R v RICHARD SIMMONDS
GEORGE LUESINGH

Frank Phipps QC & Dennis Daly QC for Simmonds

Miss Christine Hudson for Luesingh

Miss Paula Llewllyn for the Crown

December 5, 6, 1994 & February 13, 1995

GORDON J A

The appellants were convicted in the Resident Magistrate's Court in St. Andrew on two separate informations each charging a breach of section 210 of the Customs Act viz:

> "Knowingly harbouring restricted goods to wit: one Honda Accord motor car and one Nissan Path Finder motor vehicle. Contrary to section 210(1) of the Customs Act."

Each appealed against conviction and sentence which was a penalty determined by the Collector General and amounting to $5043,174.51 in default three years imprisonment at hard labour.

The Crown's case against the appellants and Robert Fraser, who was convicted (but has not appealed) of bringing into the island the restricted goods referred to above, is this:

J.D. Manufacturing Co Ltd of 84A Hanover Street, Kingston was engaged in manufacturing garments under the 807 Caribbean Basin Initiative Programme for export to the United States of America and Canada. The raw materials used in Manufacture and accessories were imported from a supplier David Peyser Sports Wear Incorporation of Long Island, New York. By virtue of the 807 programme the raw materials enjoyed a duty free status under the Export Industry Encouragement Act. Robert Fraser was employed by J.D. Manufacturing as its customs broker to attend to clearance of goods and materials imported by J.D. Manufacturing

Co Ltd. Materials were shipped in containers to Jamaica and invariably, once the documents verified the contents as 807 exempt goods, the containers would be released from the piers by Customs, unchecked. They would then be transported to the Company's factory and there opened and the contents removed. If Customs indicated a desire to examine the contents of any container, it would be examined at the Company's premises

Between September and October 1991 a container purportedly with 807 materials from David Patterson Sports Wear of 10 Spence Street Bay Shore, New York consigned to J.D. Manufacturing Co Ltd came into the Island and was cleared by Fraser on documentation that were falsely prepared. J.D. Manufacturing Co Ltd however had no knowledge of this transaction. The container was deposited at premises 25 Mannings Hill Road. These premises were occupied by Luesingh and another person as lessees and on the 29th October 1991 the container was opened and the motor vehicles the subject of the charges were removed therefrom in the presence of the appellant Luesingh. At about 11.00 a.m. Simmonds went to these premises and collected and signed the bill for unloading the vehicles from the trailer driver. At 2.00 p.m. on the said day Det. Cpl. Elwing Cameron who had witnessed the unloading operation earlier went to premises 183 Border Avenue, Havendale, St. Andrew owned and occupied by the appellant Simmonds. At the rear of these premises, he saw both vehicles and four men including the appellant Simmonds. The Honda Accord then bore a registration plate 5674 AT.

In our view, what really falls to be determined on this appeal is the construction of section 210 of the Customs Act with particular reference to these charges. This section provides:

> "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 five thousand dollars, or treble the value of the goods, at the election of the Commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited."

The appellants contended that the informations were incurably defective in that they failed to detail the mens rea to wit: the specific intent that is required to complete the offence. They submitted that the information should state that the offence was committed "with intent to defraud Her Majesty of any duties due thereon or to evade any restriction of or applicable to such goods," failure to so stipulate, rendered the informations bad and the convictions therefore should be set aside.

In these submissions, the appellants relied on the decision of the Divisional Court in **Frailey v Charlton** [1920] 1 K B 147. In that case the captain of a ship was charged with "knowingly harbouring prohibited goods" thus contravening section 186 of

the English Customs Consolidation Act 1876 (39 & 40 vict c. 36). This enactment is in pari materia with section 210 of the Customs Act. The Divisional Court held that the Magistrate was right in holding that the intent contained in a succeeding segment of the section applied to all offences created by the section and must be specifically charged in the information. Failure so to do in this instance rendered the information bad and the charge was dismissed by the magistrate and the dismissal affirmed by the Divisional Court. The cases of **R. v. Franks** [1950] 2 All E R 1172; **R. v. Cohen** [1951] 1 K B 505, **Dasilva v. Abrams** [1969] 14 W I R 315 (Guyana) followed and applied **Frailey v. Charlton**.

Section 210 of the Customs Act provides for a number of offences and they are conveniently classed in the clauses of the section. Thus classified, it would read:

> "Every person who:
>
> (1) '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
>
> (2) 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
>
> (3) 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
>
> (4) shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any way 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'..."

In clauses 1 and 2 above no word importing mens rea is used. In clauses 3, 4 and 5 the words "knowingly", "intent to defraud ... or to evade any prohibition or restriction" are included, thus indicating the varied mens rea required to be proved by the prosecution.

In **R v George Barber** [1973] 21 W I R 343 B was charged that he "imported into the island certain prohibited goods ... contrary to section 205(1) of Chapter 89." This section is now 210(1) of the Act. The appellant B was convicted. On appeal it was argued that the information was bad in that it omitted to charge an intention on the part of the appellant B to evade the prohibition applicable to the goods:

> "Held: (i) that the offence with which the appellant was charged in the first information and which was described in the first part of s. 205(1) of Cap. 89 was an offence involving strict liability and was in no way qualified by the requirement as to an intent to evade the prohibition dealt with in the latter part of the subsection and which intent related to a separate and distinct offence."

The Court (Luckhoo P (Ag.) Fox and Edun JJA) construed section 205(1) in a comprehensive and detailed judgment which examined 28 cases including those above mentioned. Fox J A speaking for this Court divided the section into four clauses demonstrating distinct and separate offences. In so doing he accepted clauses 1, 2 and 3 as indicated above and joined clause 5 to 4. In examining the clauses he said at page 356F:

> "The third and fourth clauses are introduced by the word 'knowingly'. This is one respect in which they differ from the first two clauses where the word is absent. In many cases the difference has been considered important."

He then proceeded to examine the cases of Cundy vs Le Cocq [1884] All E R Rep 412; **Hobbs v. Winchester Corporation [1910] 2 K B** 471; **Sherras v De Rutzen** [1895-99] All E R Rep. 1167; **Harding v Price** [1948] 1 All E R 283; **Roper v Taylor's Garage** [1951] 2 T L R 284 in which the word "knowingly" fell to be construed.

He continued at page 357A:

> "The highest significance which may therefore be given to the use of the word 'knowingly' in one section of an act and not in another is that a strong but not a conclusive implication is raised up that proof by the prosecution of mens rea is required in the first case and not in the second. Where the difference occurs not in two separate sections, but in the same section, the implication receives added force.
> ...
> Applying the considerations which have been discussed so far to the provisions of s. 205(1) it would be permissible to think that by the use of the word 'knowingly' in clauses three and four, and by its omission in clauses one and two, the legislature intended to impose a strict liability with respect to the activities described in the first part of the section, but that the offences created in clauses three and four required proof of some form of guilty knowledge. The text of the clauses reinforces this conclusion. Clause three contemplates persons who '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. ...

> "When words of such significant import as those appearing in clauses three and four to which reference has been made are further enlarged by the adverb 'knowingly', the inference is distinct that in relation to the offences contemplated in clauses three and four the prosecution must prove mens rea, but that in clauses one and two where the words are omitted, strict liability was intended to be created."

Frailey vs Charlton falls in the third clause. Similarly this case now being considered falls in the third clause. The court in **Barber** disapproved of the decision in **Frailey vs Charlton**. In this regard Fox J A said at page 358I:

> "...apart from the notice taken by the Earl of Reading, C.J., that the section appeared in a series of sections designed for the prevention of smuggling, there is no recognition of its significance as a part of the machinery for collecting revenue and enforcing control of the economy. In addition, such analysis of the language of the section as the judgments undertook was inadequate in that no effect was allowed the discriminate use of the word 'knowingly' and the other words importing mens rea in the offences in clauses three and four, and the absence of these words in clauses one and two ... Quite apart from the inadequacy of the reasoning of the judgments in **Frailey v Charlton**, there is a further consideration which makes that decision an unsafe guide in construing the provisions of s. 205(1). This consideration arises out of the concluding words of the section that 'all goods in respect of which any such offence shall be committed shall be forfeited.' These words do not appear in s. 186 of the Customs Consolidation Act 1876. Their significance was not considered in **Frailey v Charlton.** In Jamaica, on the other hand, the power to forfeit is directly linked to the commission of an offence in s. 205(1).

"In the light of these considerations relating to the decision in **Frailey v Charlton I am** obliged further to regard as unsatisfactory guides to the construction of s. 205(1) the decisions of the Divisional Court in **R. v. Franks** and **R v Cohen** and of the Guyana Court of Appeal in **Da Silva v Abrams. In these** cases **Frailey v Charlton** was treated as a case of undoubted authority and was uncritically followed. The decision of our former Court of Appeal in **R v Aschendorf** is an equally unsatisfactory guide to the interpretation of s. 205(1) but for different reasons. In **Aschendorf** the appellant was convicted on an information charging that he unlawfully did knowingly keep certain goods with intent to defraud His Majesty of duties thereon contrary to s. 205(1). This is an offence contemplated in the third clause of the section. In delivering the judgment of the court, Savary, C.J. (Ag.) observed that s. 205(1) created a number of offences, and continued ((1947), 5 J.L.R. at page 75):
'It is a reproduction of section 186 of the English Customs Consolidation Act of 1876, but the punctuation of the English section, semi-colons, leaves no doubt that the words 'with intent to defraud His Majesty of any duties thereon' have no relation to the words 'shall knowingly keep any prohibited, restricted or uncustomed goods.' The local section has commas instead of semi-colons but even with the local punctuation an analysis of the section produces the same result, so that the words 'with intent to defraud His Majesty of any duties thereon' have no place in the **information.**

Aschendorf is an unsatisfactory guide to the interpretation of s. 205(1) because **Frailey v Charlton** was not considered and because the analysis of the language and of the objects of the section were inadequate. The decision is of importance however because it makes a judicial pronouncement on the meaning of s. 205(1) which directly conflicts with the authority of **Frailey v Charlton.**

> "In this respect, the position in Jamaica at the present time is altogether different from the position in Guyana in 1969 when **DaSilva v Abrams** was decided. In three previous decisions ranging over the years 1931 to 1966 Full Courts in Guyana had made positive judicial pronouncements in accordance with the authority of Frailey v Charlton. The Guyana Court of Appeal held that there was no inconsistency in these previous decisions of the Full Court. They had settled the interpretation of the relevant ordinance, and were therefore binding on the Full Court in 1969. No similar fetter on the judgment of this court exists in Jamaica at the present time. It may also be relevant to admit that **Frailey v Charlton, R v Franks** and **R v Cohen**, being the decisions of courts of appellate criminal jurisdiction in England, are of the highest persuasive value in Jamaica. Very rarely has this court considered itself in a position to be convinced otherwise than in accordance with the decisions of the English courts. They are not binding however on this court, and where, as here, their guidance seems inadequate, this court is free to follow the course dictated by its own judgment.
>
> Having regard to the view which I hold that no decided case to which we have been referred provides a compelling guide to the construction of s 205(1) it is necessary to resort to first principles for this purpose."

We have quoted extensively from the judgment of **Barber** (supra) which we accept as authoritative and particularly apposite. The learned judge concluded his examination of first principles with four propositions which must be carefully noted. Only two of these are relevant:

> "(1) There is no burden upon the prosecution to call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make his act innocent. It is for the accused to give that evidence because only he knows on what belief he acted and, on what ground the belief, if mistaken, was held. Then and only then would it become the duty of the prosecution to rebut that evidence by other evidence which enabled the jury to feel sure either that the belief was not held, or that there were no reasonable grounds upon which it could have been held: **Woolmington v D.P.P.**
> (2) The standard of care required of a person in informing himself of facts which would make his conduct unlawful varies with the subject matter of the legislation and ranges from the common law duty of care applicable to the conduct of ordinary citizens in the course of their every day life, to an obligation to ensure prevention of the prohibited act 'without regard to those considerations of cost and business practicability' which are relevant in determining the common law duty of care."

Fox J A then continued with an analysis of the objects of section 205(1):

> "In the light of these first principles, the difficulties in the interpretation of the provisions of s. 205(1) 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. To varying degrees, all forms of conduct prohibited in s. 205(1) are potentially dangerous to both functions and prima facie, therefore, attract that higher standard of care which is the

"genesis of strict liability. The legislature has recognised the variation in the degrees of danger not only by stipulating the nature and the extent of the guilty knowledge which must accompany the prohibited conduct to make it an offence, but also, by providing for shifts in the evidential burden of proving mens rea so that the objects of the section may be achieved without injustice to the accused. To take clauses one and two. The words which define the prohibited conduct in these clauses bear no connotation as to any particular state of mind on the part of the actor. To import, to bring, to be **concerned** in importing or bringing to unload, or to assist in unloading, are unconditional descriptions of conduct. The effective control of importation would break down if the provisions in clauses one and two are interpreted in a way which made it necessary to show that an accused had knowledge of the nature of the goods imported, or worse still, that he intended to defraud or evade. The liability imposed by clauses one and two is therefore strict. But an accused could avoid that liability by successfully invoking the principle of mistaken belief (the innocent merchant in **Frailey v Charlton** but not the owner or his agent who is fixed with the responsibility of handling goods by s. 224.) An accused could also escape by showing that he is within a class of persons whose conduct could not in any way affect the observance of the law (the innocent labourer in **Frailey v. Charlton.**) In clause three the scope of the prohibitions is widened to embrace uncustomed as well as prohibited and restricted goods. At the same time an onus of proving a mental element in the commission of an offence described in that clause is cast upon the prosecution by the use of the word 'knowingly'. The prosecution must show that an accused knew the nature of the goods with which he was dealing." [Emphasis added]

With these principles fully in consideration we find the complaint that the learned Resident Magistrate failed to find the "specific intent in the appellant which was a necessary ingredient of the offence" not maintainable. The prosecution's case was that the container was opened and the vehicles removed therefrom at 25 Mannings Hill Road in the presence of the appellant Luesingh. That Mr. Harriot Rowe went first to 183 Border Avenue and from that address he was directed to 25 Mannings Hill Road where he unloaded the vehicles from the container. Mr. Rowe gave his bill for this exercise to the appellant Simmonds at 25 Mannings Hill Road, who promised to pay later. The vehicles were later removed to premises 183 Border Avenue where they were seen by the investigators. The Honda then bore registration plates indicating that it had been registered under the provisions for motor vehicle registration. The appellant Simmonds was present then. Thus far we have shown that "knowingly harbouring restricted goods" charged under the third clause of section 210(1) of the Act is a complete offence. The mens rea lies in the knowledge that the restricted goods are possessed. Defences to this charge are:

(a) lack of possession

(b) lack of knowledge of possession

(c) the restriction on the goods has been removed by a valid licence issued for their importation and compliance with the requirements of the licence.

An intent to defraud Her Majesty of the duties due thereon or to evade the restriction is a necessary ingredient of a charge brought under the fourth clause. In that clause the "intent" relates to "any goods," a generic term, whereas in clause three the goods involved must be "restricted goods". The prosecution in clause three offences must prove that the articles are "restricted goods." This they did by the production of the Gazette.

Mr. Phipps submitted that the evidence supported a finding of both intents viz (a) intent to defraud Her Majesty of any duties due thereon or (b) to evade any restriction of or applicable to such goods and the trial judge should have asked which intent was being pursued.

Neither intent was a necessary ingredient of the charge and the evidence in this regard led by the prosecution was part of the body of evidence which traced the goods from the pier to where they were harboured. It is unnecessary for the information to be framed as Mr. Phipps suggested that it should be charging an "intent to evade any restriction applicable to such goods." The Clerk of the Courts in preparing the informations followed the law.

The evidence, accepted by the learned Resident Magistrate in his findings, established for the prosecution that the appellants knowingly harboured the goods classified as restricted by the Customs Act. The burden of proof then shifted on the defence to show that the vehicles had been imported in accordance with a licence issued by the Trade Board. This they failed to do. In answer to the charges, each denied any involvement with the vehicles. Luesingh said he knew nothing of them: Simmonds, that he went home shortly before the investigators came and saw the vehicles there.

The viva voce evidence of the prosecution witnesses supported by the shipping documents and the Jamaica Gazette was overwhelming. We therefore find for these reasons that the informations were not defective and hold the conviction of the appellants unassailable. The appeals are accordingly dismissed, the convictions and sentences affirmed.