C.A. CRIMINAL LAW - Breach S 13(4) Trade Act - Aiding and abetting failure to comply with conditions subject to which a licence was granted for importation of a motor car - car sold, transferred - Whether verdict unreasonable and cannot be supported having regard to the evidence - whether onus on Crown to prove a negative averment or matters peculiarly within knowledge of accused S. 13 Justices of the Peace Jurisdiction Act.

Sentence - imprisonment at hard labour and forfeiture of car hasler and - whether fine of $1,000 or 6 months excessive. (Amulant no previous conviction)

Appeal dismissed - conviction and sentence affirmed.

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO. 30/88

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

!! Amended Submissions unworthy of Counsel) at p 3 ✓comp

REGINA

VS.

FRAUD

Cases referred to

R v Lloyd Elliott R.M.CA. 27/87 (unreported) dated 25.6.87 abridging

R v Edwards (1974) 2 ALLER 1085 and

LOUIS WILLIAMS

Mr. A. Pearson for appellant

Miss M. Harrison for the Crown

R v Hunt (1986) 3 W.L.R 1115.

June 22 and July 21, 1988

WRIGHT, J.A.:

This is an appeal against conviction and sentence in the Resident Magistrate's Court for the parish of St. Andrew for a breach of Section 13(4) of the Trade Act. The charge reads:

> "Louis Williams on the 18th day of May, 1985 in the parish of St. Andrew was a person who aided and abetted the failure to comply with the condition subject to which a licence was granted for the importation of one 1983 Volks Waggon Golf Motor Car, Chassis No. 17EW062217 such import licence being conditioned that the motor vehicle mentioned in the licence shall not be sold, pledged, transferred or otherwise disposed of without the prior permission of the Trade Administrator and shall be re-exported at the expiration of the contract, from the island."

This licence had been granted to one Detlef Bell, a German national, who was employed to the Americana Hotel while the appellant was employed at the Couples Hotel, St. Mary.

> "any exemption, exception, proviso or condition in the enactment on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same."

It is clear, therefore, beyond the shadow of a doubt that no such burden lies on the prosecution as was contended for by Mr. Pearson.

The appellant had sought refuge in ignorance of the condition subject to which the licence was granted, the breach of which gave rise to the charge. But no Court could be expected to accept that as true in the face of the fact that the condition is stated clearly on the front and back of the licence form. Indeed, in addition to that, there is clearly written on the face of the licence that the vehicle is to be exported -

> "If the applicant does not get a Work Permit renewal beyond 15/8/84 (Permit now is 750/83) or if he leaves Ja. before 3 years residency
>
> Signed ..?.....
>
> 12/1/84."

It is abundantly clear, therefore, that it was only by means of a fraud practised on the authorities that the car was landed, licensed and transferred because Bell was not in Jamaica at the time when the car was landed nor when it was licensed and transferred - all done in his name by the appellant who had set the whole train of events in motion. But quite apart from not being able to hide behind ignorance he did not and could not produce a waiver of the condition imposed for, not only is he a stranger to the licence, and so could not obtain such a waiver, but on the totality of the evidence no such waiver could ever exist.

Section 13 of the Trade Act, so far as is relevant reads:

"Any person who -

(1)(a) contravenes or fails to comply with any term, condition, or restriction of, or subject to which, any licence is granted under section 11;

shall be guilty of an offence and on summary conviction thereof before a Resident Magistrate shall be liable to a fine not exceeding three thousand dollars and in default of payment to imprisonment with or without hard labour for a term not exceeding twelve months.

(2) .....

(3) Where a person has been convicted of any such offence or breach the court before whom he is convicted may make such order as to the forfeiture or disposal of any goods in relation to which the offence or breach was committed as the court thinks fit.

(4) Any person who attempts to commit, or conspires with any other person to commit, or does any act preparatory to, or in any way aids and abets the commission of an offence under subsection (1)(a), shall be guilty of an offence punishable in like manner as the said offence and the provisions of subsection (3) shall apply in the case of an offence under this subsection as it applies in the case of an offence under subsection (1)(a)."

It is plain from reading the section that the admitted acts of the appellant are squarely within the acts which the section is designed to punish. Indeed, here is a clear revelation of the manner in which the provisions of the Licensing System about which there is so much hue and cry, and quite rightly so, are circumvented. We saw no reason for interfering with the conviction.

Ground 2 complained that:

"The sentence imposed by the learned Resident Magistrate is harsh and excessive having regard to all the circumstances including the fact that the appellant had no previous convictions."

The appellant disclosed in a caution statement admitted into evidence and which he confirmed is correct that Bell expressed a wish to import a car for his personal use and he advised Bell to buy a VW Golf and he would purchase it from him at the end of Bell's contract. Bell received the licence either late January or early February, 1984 but Bell lost his job before the arrival of the car and decided to leave the island. The appellant paid Bell $50,000 for the car and undertook to pay the relevant duties whereupon Bell gave him "all the documents for the car". The car arrived in the island in early March, 1984 by which time Bell had already departed. The appellant had a broker clear the car and paid duties amounting to $12,000 on 12th March, 1984. The appellant had the car licensed at the Kingston Collectorate and received registration plates NG 9100. After keeping the car for about one month the appellant sold it to one Errol Anderson for $79,750. The police seized the car from Mr. Anderson on June 19, 1984.

Mr. Anderson testified that on May 18, 1984 at the Collectorate, Kingston he signed The Transfer Form presented there by the appellant. That form did not have the appellant's signature but that of D. Bell and thus the car was transferred to him.

In his defence the appellant adopted the statement which he had given to the Police relating the facts set out above. Under cross-examination, he agreed with Mr. Anderson's evidence of the transfer of the vehicle by means of a Transfer Form with the name and signature of Detlef Bell. But before the defence was heard the learned Resident Magistrate had to over-rule a submission by Mr. Pearson of no case to answer, on the ground that there was no evidence of aiding and abetting.

The appellant was convicted and fined $1,000 with alternative of six months imprisonment at hard labour and the car was forfeited.

The ground of appeal on which the conviction is challenged reads:

> "The verdict was unreasonable and cannot be supported having regard to the evidence."

In Mr. Pearson's endeavour to support this ground of appeal this Court was treated to submissions which are unworthy of any counsel in such a forum. Even the merest law student should know that whereas the burden of proving the charge lies on the prosecution that burden does not include proving a negative averment or matters peculiarly within the knowledge of the accused. It is for the accused to prove on a balance of probabilities any exception, proviso exception etc. upon which he relies for a defence. See R v Lloyd Elliott R.M.C.A. No. 27/87 (unreported) dated 25.6.87 applying R v Edwards [1974] 2 All E.R. 1085 and R v Hunt [1986] 3 W.L.R. 1115.

In R v Lloyd Elliott, the appellant was charged for breaches of the Opticians Act in that not being registered under the Opticians Act,as required by Section 7 of the Act,he had on three occasions held himself out to be so registered in contravention of Section 15(b) of the Act.

In this Court, as before the Resident Magistrate, it was contended that the onus of proving that the appellant was not registered fell on the prosecution. This submission was rejected by the Court which held, citing R v Edwards and R v Hunt (supra) in which the principle was considered and re-stated, that it was not for the prosecution but the defence to prove any negative averment on which it placed reliance.

Furthermore, inasmuch as the charge is a summary offence the Court drew attention to the statutory provision, which is apposite to this case, i.e. the proviso to Section 13 of the Justice of the Peace Jurisdiction Act which reads:

> "Provided always, that if the information or complaint in any such case shall negative

It was submitted that the Resident Magistrate could have imposed the maximum fine without ordering forfeiture, which is discretionary, and that in ordering forfeiture the Resident Magistrate sought to visit upon the appellant a punishment beyond the nature of the offence. Forfeiture, it was submitted, is much more serious than the offence committed. Such a submission glosses over the seriousness of the offence committed and betrays and pays but little respect to the intendment of the Act.

It must, indeed, be difficult to imagine a more deliberate scheme to render the restrictions imposed via the licensing system nugatory. What was clear is that Mr. Pearson's real object was to secure the return of the car. But to acceed to such entreaty would make this Court a principal in the mischief because the Court would thus legitimize the criminal acts of the appellant, deliberately perpetrated in open defiance of the law, and by which he had enriched himself to the tune of $17,750. Even if the maximum fine were substituted and the forfeiture removed the appellant would suffer no real punishment. His gain on the venture would only be reduced to $15,750 - more than five times the maximum fine! We saw no good reason for interfering with the sentence.

In the result we dismissed the appeal and affirmed both the conviction and the sentence.