C.A. – Criminal Law – Appeal from R.M. – appeal against sentence – Non-filing of grounds of appeal – Section 292 to 296 Judicature (Resident Magistrates) Act – Proviso to S 296(1) of Act – Power of Court of Appeal to hear appeal notwithstanding that grounds of appeal not filed in time. (2) Statute – Breaches of Customs Act – Whether sentences manifestly excessive – Whether quantum of sentence by Jury computed – S 210(1), 217, 219 of Act – Sentences quashed and varied. (3) Election by Commissioner – Comments by Court on need to amend Customs Act to give Court full power in sentencing without intervention of Commissioner of Customs. Case referred to p 13 (and)

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 32/94

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA
vs.
ROY GEORGE WILSON

Delroy Chuck for the appellant

Paula Llewellyn, Deputy Director of Public Prosecutions, for the Crown

October 18, 19 and November 23, 1994

WRIGHT, J.A.:

It is unthinkable that any counsel could expect to prosecute an appeal without having filed any grounds of appeal. But that is exactly what transpired in this case. The appellant pleaded guilty to three informations charging breaches of the Customs Act on March 29, 1994, and on April 8, 1994, counsel lodged Notices of Appeal. Thereafter nothing further was done to perfect the appeal even up to October 10, 1994, when the appeal was listed to be heard. Counsel attended court ready to proceed but all that was before the court were copies of the informations and one copy of the Notice of Appeal along with one page on which the guilty pleas and the sentences were recorded. It appears on that page that the facts were related to the court but none was recorded nor were the statements with the facts submitted for the information of this court.

The matter was taken out the list and set down for October 18 to afford counsel time to put his house in order. Promptly next day grounds of appeal were filed but nothing else was done because

up to the time when the matter was called on again on October 18 counsel was not aware of the need to do any more than he had done. It was only with the indulgence of the court that he was enabled to have this appeal properly before the court.

It ought to be trite learning but because of what occurred in this case it may be timely to draw attention to the provisions for appealing from decisions of a Resident Magistrate exercising criminal jurisdiction. Those provisions are to be found in sections 293-296 of the Judicature (Resident Magistrates) Act, which are as follows:

> "293. An appeal from any judgment of a Magistrate in any case tried by him on indictment or an information in virtue of a special statutory summary jurisdiction, shall lie to the Court of Appeal:
>
> Provided, that nothing herein shall be deemed to apply to any case adjudicated on by any Magistrate, whether associated with other Justices or not, which is within the cognizance of Justices in Petty Session, but an appeal may be had in any such case subject to the law regulating appeals from Justices in Petty Sessions.
>
> 294.--(1) Any person desiring to appeal from the judgment of a Magistrate in a case tried by him on indictment or on information in virtue of a special statutory summary jurisdiction, shall either during the sitting of the Court at which the judgment is delivered give verbal notice of appeal, or shall within fourteen days from the delivery of such judgment give a written notice of his intention to appeal, to the Clerk of the Courts of the parish.
>
> (2) Every written notice of appeal shall be sufficiently signed, if signed by or on behalf of the appellant either with his name or mark, or with the name of his solicitor, but if signed with his mark, such signature shall be attested by a subscribing witness.
>
> 295. If the appellant shall fail to give the notice of appeal as herein provided, his right to appeal shall cease and determine.
>
> 296.--(1) Notwithstanding anything contained in any law regulating appeals from the judgment of a

> "Magistrate in any case tried by him on indictment or on information by virtue of a special statutory summary jurisdiction the appellant shall within twenty-one days after the date of the judgment draw up and file with the Clerk of the Courts for transmission to the Court of Appeal the grounds of appeal, and on his failure to do so he shall be deemed to have abandoned the appeal:
>
> Provided always that the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the time hereinbefore prescribed.
>
> (2) The grounds of appeal shall set out concisely the facts and points of law (if any) on which the appellant intends to rely in support of his appeal and shall conclude with a statement of the relief prayed for by the appellant.
>
> (3) The Court of Appeal may dismiss without a hearing any appeal in which the grounds of appeal do not comply with the provisions of subsection (2)."

From the provisions of section 296(1) it is clear that since no ground of appeal had been filed as required as from April 20, that is, twenty-one days after the date of the judgment, the appeal was deemed to have been abandoned. This may account for the fact that the papers, such as there were, did not reach the Registrar of the Court of Appeal until August 8, 1994. It is obvious, therefore, that unless counsel could avail himself of the proviso to section 296(1) the appeal would remain in the limbo of being deemed to be abandoned and could not be heard.

The informations in respect of which the pleas of guilty had been entered are as follows:

> "7557/93: Appellant charged with being on 12.11.92 knowingly concerned in the fraudulent evasion of import duties of customs relating to the importation of a stove with intent to defraud Her Majesty of customs duty thereon.
>
> 7561/93: Appellant charged with being knowingly concerned on 9.7.93 in the fraudulent evasion of import duties of customs relating to the importation of a generator, 2 bales

" of pampers, a used truck engine, 2 televisions, 2 television stands and 2 sets of rims and tyres with intent etc.

7556/93: Appellant charged with being knowingly concerned on 14.9.93 in the fraudulent evasion of import duties of customs relating to the importation of:

1 Lacasse Concept 76

1 Executive desk

1 Lacasse Concept 86

1 File cabinet

1 Lacasse Concept 86

1 Credenza

1 IBM Wheelwriter ribbon

1 gross 2 Hunt Electric Pencil Sharpeners

2 Xerox photocopy paper

1 Global Hi-back executive chair

2 Maxell 3-½ DDHD Diskets

with intent etc.

2262/94: Appellant charged with being knowingly concerned between September 15 and 22 1993 in an attempt at a fraudulent evasion of import duties of customs relating to the importation of 2 Honda motorcycles, a quantity of tools, battery chargers, hosepipes, shelving, a floor safe and food with intent etc."

But for the industry of counsel for the crown in ferreting out the statements, the facts would not have been fully disclosed to this court. It must be stated that in an effort to fill the void, the appellant did on October 12 file an affidavit disclosing some facts.

The appellant was an employee of the Colombian Embassy since 1978 and in due course became responsible for importations by the Embassy. The Embassy enjoyed duty-free concessions. The appellant developed quite a rapport with the Customs Department over a period of years. He conceived the idea of making available

to importers for fees ranging from $5,000 to $11,000 the duty-free facility enjoyed by the Embassy. He would collect the goods at the wharf without any customs check and deliver them to the importer.

The discovery of his activities was quite accidental. He had been directing the importers, his companions in crime, to ship their goods by a certain shipping company in Miami and because the goods came addressed to the Ambassador by name this shipping company sought to preserve this line of business. To this end, a representative of the company came to Jamaica and made a call on the Ambassador to thank him for his patronage of their company and to ascertain whether he was satisfied with their services. The only response which the Ambassador could give was that this representative was mistaken since the Ambassador knew nothing of the criminal activities involved. But since the representative had proof he maintained his ground and advised the Ambassador that there was a shipment for him on the wharf. This was easily verified by a telephone call and the Police and the Revenue Protection Division (RPD) were called in. Those goods are the subject-matter of information 2263/94.

The appellant confessed and with his co-operation the other culprits were identified. But they were granted immunity from prosecution and allowed to pay the duty and retain the goods. This course was made possible by section 219 of the Customs Act which reads as follows:

> "219. Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) and notwithstanding anything contained in section 217, the Commissioner may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure."

It must be pointed out that the RPD had no option but to proceed under this section because without the grant of immunity the

importers were not prepared to say what had happened or to disclose the goods imported and the appellant who had not seen the goods could not offer any assistance in identifying the goods.

The charges against the appellant were preferred under section 210(1) of the Customs Act, which reads as follows:

> "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."
>
> [Emphasis supplied]

The point to be observed is that, whereas section 219 allows for the guilty party to retain possession of the goods where the section is resorted to before the commencement of proceedings in any court against any person, there is no such option under section 210(1). Under section 210(1) penalty is $5,000 or treble the value of the goods at the election of the Commissioner plus a mandatory forfeiture of the goods. Under this section the Commissioner has no power to elect not to forfeit the goods and neither has the court any option with regard to forfeiture.

Upon arraignment the appellant having pleaded guilty at the election of the Commissioner the following penalties were imposed on March 29, 1994:

Information 7557/93 - $ 73,507.74 or two years hard labour

" 7561/93 - $ 287,941.14 or two years hard labour

" 7556/93 - $ 545,379.75 or two years hard labour

" 2262/94 - $1,298,754.84 or two years hard labour.

Absent from these penalties is any order for forfeiture of the goods which is quite understandable since this appellant was never in possession of the goods with the exception of the time it took him to take delivery of them at the wharf and transport them to the various owners. Upon imposing these penalties the court ordered payment to be made as follows:

> $73,507.74 to be paid in 6 weeks and the balance at the rate of $50,000 per month until liquidated - 2 sureties to be provided.

Two grounds of appeal were filed but ground 2 was not countenanced and was soon abandoned. That ground would have the court construe the words "Every person" at the beginning of section 210(1) as meaning "All persons" with the consequence that the penalty imposed would be divided among all such persons thus relieving one person from having to pay the whole penalty. But even if such a strained construction were possible, and we do not say it is, it would not avail this appellant because the court could only deal with persons charged and the appellant was the only one charged.

The first ground complains that the sentence is manifestly excessive and unjust in support of which it was contended that:

> "(a) The appellant was not the principal importer of the goods. The appellant facilitated the importation and evasion of customs duties.
>
> (b) That, the Commissioner of Customs, by agreeing to collect the duties for the prohibited goods from the principal

" importers, made an election with regards to the goods.

(c) That possession of the goods, at no time, vested in the appellant and it is unfair and unjust for the fine to be so calculated.

(d) That the sentences imposed ought to be directed at all the parties involved in the evasion of customs duties, and to charge and fine the appellant alone is manifestly unfair."

A further contention was that the Commissioner having elected to proceed under section 219 and so collect the duty cannot make a further election to impose a penalty as part of the sentence of the court. The flaw in this latter submission is that when the Commissioner acts under section 219 he is not required to make an election; he is only dealing with the goods without reference to the guilty party concerned. Section 219 refers to section 217 which reads:

> "217. Where a penalty is prescribed for the commission of an offence under this Act or any regulations made thereunder such offence shall be punishable by a penalty not exceeding the penalty so prescribed; provided that where by reason of the commission of any offence the payment of any customs duty has or might have been evaded the penalty imposed shall, unless the court for special reasons thinks fit to order otherwise, and without prejudice to the power of the court to impose a greater penalty, be not less than treble the amount of duty payable."

This section makes it plain that it is the guilty party who is amenable to the penalty provided for thereunder. On the other hand, the only power given the Commissioner once proceedings have been commenced in any court is to elect which of the two penalties shall be imposed. The contention is that, since the Commissioner had so acted that the court is no longer able to pass the sentence provided for under section 210(1) which includes forfeiture of the goods, he has disenabled himself from making an election under that section.

The few lines recording the proceedings before the Resident Magistrate do not disclose any mention of the status of the goods

at the time that the case came before the court. To be able to impose a sentence under section 210(1), the court needed to hear what had become of the goods because if they had not yet been dealt with under section 219 it would now be too late for the Commissioner to attempt to do so. If a penalty is being imposed under section 210(1) it cannot be less than the penalty provided under that section. There is no statement that so far as this appellant is concerned the Commissioner had taken any steps under section 219 to "mitigate or remit any penalty or restore" the goods involved. Indeed, apart from the goods mentioned in information 2262/94, that is, the goods on the wharf when the matter came to light, it is not clear whether any of the goods in question were seized. So then the question is whether if there are no goods against which an order for forfeiture can be made it is competent for a penalty to be imposed based on the Commissioner's election. It is difficult to see how this could be so since the court has no discretion under section 210(1) and in a situation where the goods are not amenable to the order for forfeiture the court in imposing only the Commissioner's election would be imposing a penalty not provided for by law.

Section 217 makes it clear that for the commission of an offence under the Customs Act the maximum penalty that shall be imposed is that which has been prescribed but a minimum penalty is also provided based on the fact that the offence has or might have resulted in the evasion of duty. That minimum is treble the amount of duty payable with power reserved to the court to impose a greater penalty not exceeding that prescribed, in the circumstances, by section 210(1).

While the heinousness of the appellant's offence cannot be overlooked, there is this to his credit that he made frank admissions to the RPD and without the assistance which he gave to the RPD it would have been virtually impossible for that department to discover who were the importers of the goods involved. That was the statement from the RPD. But if our reasoning regarding

the non-availability of a sentence under section 210(1), because of the action taken by the Commissioner under section 219 is correct, then section 217 has to be invoked that being the only alternative left to the Resident Magistrate. It would follow that proper sentences have not been imposed on the appellant and accordingly they have to be quashed.

The duties related to the informations are as follows:

Information 7557/93 - $ 7,748.68

" 7561/93 - $ 24,246.37

" 7556/93 - $ 47,131.58

" 2262/94 - $125,065.28.

Taking into consideration the factors pertaining to the imposition of penalties under section 217, and bearing in mind the seriousness of the offences which justify condign punishment, we are of the opinion that penalties of five times the related duty be imposed with regard to each information. Accordingly, penalties are substituted as follows:

On Information 7557/93 - $ 38,743.40 or two years hard labour

" 7561/93 - $121,231.75 or two years hard labour

" 7556/93 - $235,657.90 or two years hard labour

" 2262/94 - $625,326.20 or two years hard labour.

The appellant is allowed time within which to pay as follows:

$38,743.40 in six weeks and the balance at the rate of $50,000 per month until liquidated - with one or two sureties.

**Election by the Commissioner**

The role of the Commissioner is so central to the matter before the court that, although no challenge has been mounted as to its constitutionality, we feel constrained to comment thereon. There are several offences listed in section 210(1) of the Customs Act and it is patent that so far as punishment for any of those offences is concerned, the Resident Magistrate who has to hear the evidence and determine the question of guilt ends up being

a mere agent of the Commissioner upon whom is conferred the power to elect whether the penalty shall be $5,000 or treble the value of the goods. It should not require much persuasion to conclude that there is here a denigration of the court to have to bow to the wishes of a non-judicial body.

We are well aware that as a pre-independence Act it was, as a matter of convenience, preserved by section 4(1) of the Jamaica (Constitution) Order in Council, 1962, which reads in part:

> "4(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on or after that day etc."

It is obvious that in so providing the Order in Council anticipated the necessity to amend or repeal any such laws in due course by the Parliament of an independent Jamaica. It is our contention that the time is long past when the court's subservience to a non-judicial body should be terminated.

Two Acts passed in post-independence Jamaica copied that same principle and both had to be changed, viz:

The Gun Court Act, 1974

The Betting, Gaming and Lotteries Act, 1965.

The challenge to the constitutionality of the principle first arose in **Hinds and others vs. The DPP** [1975] 24 W.I.R. 326. The problem concerned the competence of a Review Board, the majority of whose members were not entitled to exercise judicial powers, established under section 8(2) of the Act, which had the power to determine the length of a mandatory sentence of detention at hard labour during the Governor General's pleasure, for an offence under section 20 of the Firearms Act, 1967. The Privy Council held:

> "That Parliament of Jamaica cannot, consistently with the separation of powers, transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion

> "to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders; it followed that the provisions of the Act relating to the mandatory sentence of detention during the Governor General's pleasure and to the Review Board were a law made after the coming into force of the Constitution which was inconsistent with the provisions of the Constitution relating to the separation of powers and were void by virtue of section 2 of the Constitution."

This decision is, in our opinion, a strong authority for the view that there is something inherently wrong with the provision. Indeed, we think that the logic of upholding a legislative provision merely because of its pre-independence paternity when even the conception of such a provision cannot be tolerated in independent Jamaica is difficult to rationalize.

The Betting, Gaming and Lotteries Act, 1965, was earlier by nine years than the Gun Court Act, 1974, (The Act) but the flaw went undetected and was not corrected until 1978, that is, after the decision in the **Hinds** case. Section 20(4) of The Act provided:

> "(4) Any person who -
>
> ...
>
> (e) is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion, by him or any other person, of the pool betting duty,
>
> shall be guilty of an offence and shall be liable to a fine not exceeding two hundred pounds or treble the amount of the duty which is unpaid or payment of which is sought to be avoided, as the case may be, at the election of the Collector General and in default of payment thereof to imprisonment with or without hard labour for a term not exceeding twelve months."

Significantly, this provision was in pari materia with section 210(1) of the Customs Act in that both dealt with the question of being concerned with the fraudulent evasion of a duty. The discovery of the flaw was made without the intervention of litigation and the Act was amended by section 3 of the

Betting, Gaming and Lotteries (Amendment) Act, 1978, Act 20 of 1978. As amended, section 20(4) now reads:

> "...shall be guilty of an offence and shall be liable to a fine not exceeding twenty-five thousand dollars and in default of payment thereof to imprisonment with or without hard labour for a term not exceeding eighteen months."

The effect of the amendment was that the Collector General's election was swept away and the court entrusted to administer the law without the intervention of a non-judicial body. At the same time the opportunity was taken to increase the penalty to a meaningful amount. In like manner, if section 210(1) were amended not only should the power of the Commissioner be eliminated and the power to determine sentence conferred upon the Resident Magistrate who would hear evidence as to value and the amount of duties payable from the Commissioner but the penalty of $5,000, which is in present circumstances derisory, should be updated realistically. Under the Customs Consolidation Law of 1877 (section 160) the penalty was £100 and with the rapid devaluation of the Jamaican currency the present penalty of $5,000 represents an upward movement of less than ten times in 117 years.

The suggested amendments are calculated to fill what seems to us to be a jurisprudential lacuna and would, and this is our main concern, assert the primacy of the court.

Cases referred to

Hunds and others v The DPP [1975] 24 W.I.R 326.