

gaol or to send him to the custody of the gaoler, and that as the prisoner's commitment was not lawful his escape was not unlawful. No person can be imprisoned and kept to hard labour except in a place legally constituted a prison by the Legislature. The Governor has power under the Prisons Ordinance 1884 to do this by proclamation, but this had not been done in the case of Namosau at the time of the prisoner's escape therefrom, and he was therefore not in lawful custody and must be acquitted on the present indictment.

RECEIVER-GENERAL *ats.* BRODZIAK & COMPANY.

[Appellate Jurisdiction (Berkeley, C.J.) November 22, 1894.]

Forfeiture of dutiable goods—Customs Ordinance 1881 ss. 90, 100—whether the magistrate has a discretion as to ordering forfeiture.

In a prosecution for an offence against s. 90 of the Customs Ordinance, 1881,¹ the prosecution applied for an order for forfeiture of the goods concerned. The Chief Police Magistrate at Suva refused the order, setting out his reasons in the following stated case :—

"In this case, the defendants, A. M. Brodziak & Co., are charged with that they did on the 12th day of May last, unlawfully import certain quantities of tobacco in a package containing other goods contrary to the provisions of s. 90¹ of Ordinance XVI of 1881, and the Receiver-General, in whose name the prosecution is brought, now asks this Court to make an order forfeiting the goods in question. There is no dispute as to the facts in this case. It is proved and admitted that the tobacco, some 80 lbs in weight, was brought to this Colony in a case containing other goods in contravention of the provisions of s. 90¹ of the Customs Ordinance. The learned counsel for the prosecution argues that, the facts being proved, the Court has no discretionary power to make any order other than one for forfeiture under s. 90¹ sub-s. 4 and s. 100² and in support of this contention argues that the goods enumerated in s. 90¹ are prohibited by law to be imported."

"For the defence it is urged—(1) That there being no proof of fraud or attempted fraud, nor even an insinuation or suggestion of fraud, nor any attempt to evade the duties on the part of the defendants, they cannot be made *particeps criminis* and punished for the fault of the firm in Calcutta who shipped the Tobacco without orders. (2) That under s. 100 the Court has power to make such an order as the circumstances require. That the order of forfeiture is not compulsory but discretionary, and should be made to meet the ends of justice, and in accordance with the merits of the case and, in support, quotes the judgment of his Honour Chief Justice Berkeley in the appeal case of *A. M. Brodziak & Co.*, appellants, and the *Receiver-General*, respondent, decided in the Supreme Court on 14th June, 1887.

"The question I have to decide is whether, under s. 90 sub-s. 4¹ and s. 100,² I am compelled to order the forfeiture of the goods or whether I can make such order as the circumstances require.

"I do not agree with the counsel for the prosecution that tobacco comes under one of the prohibitions described by s. 90¹. The sections reads, 'The goods enumerated and described in the following table of prohibitions and restrictions.' As I read the section tobacco is not one of the class of goods prohibited to be imported like counterfeit coin, or obscene books or prints, but tobacco may be imported under certain restrictions. (1) that it must be more than 40 lbs. in weight. (2) that it must be packed by itself and not with other goods. In this case the weight imported is in excess of the minimum required by law; thus the only restriction evaded is that the tobacco was packed in the same case with other goods, and to me appears to be similar to an evasion of the restriction required by s. 77³ which also carries forfeiture of the goods.

"After reading the judgment of his Honour the Chief Justice in the case of *A. M. Brodziak & Co.*, appellants, and the *Receiver-General*, respondent, as to the legal interpretation of s. 100, I am clearly of opinion that I have the power and I am required by law to make such an order as will, in my opinion (based on the facts elicited by the evidence), meet the circumstances of the case.

"In this case I do not think there are any grounds for believing there was any intention on the part of the defendants to defraud the Customs, no attempt was made to prove such intent, in fact the learned counsel for the prosecution stated that he made no suggestion of

¹ *Vide Customs Ordinance (Cap. 147) s. 117 (Revised Edition, Vol. II, p. 1530).*

² *Vide Customs Ordinance (Cap. 147) s. 147 (Revised Edition, Vol. II, p. 1540).*

³ *Vide Customs Ordinance (Cap. 147), s. 104 (Revised Edition, Vol. II, p. 1526).*

"fraud on the part of the defendants. The case of *Budenburg*, appellant, and *Roberts*, respondent (L.R.I.C.P. 575) quoted during the hearing, supports the judgment of his Honour the Chief Justice as to the necessity of 'guilty intent' on the part of an importer being a condition requisite for a conviction, which in this case would be an order for forfeiture. Holding this opinion I must refuse to make an order for the forfeiture of the goods. I therefore order that the goods be delivered to the defendants on the payment of all duties and of other legal charges."

HELD.—The magistrate has a discretion whether to order forfeiture of goods under s. 90 of the Customs Ordinance, 1881.

[**EDITORIAL NOTE.**—According to this decision forfeiture is discretionary under s. 117 of the Customs Ordinance (Cap. 147) (Revised Edition Vol. II p. 1530). See also *Brodziak & Co. ats. Receiver-General* [1887] 1 Fiji L.R.—as to the discretion under s. 104. Portions of the argument and the judgment relating solely to a question of the right of appeal under the repealed, Appeals Ordinance of 1876 are omitted from the report.]

Cases referred to :—

- (1) *Budenberg v. Roberts* [1866] L.R. 1 C.P. 575 ; 35 L.J.M.C. 235 ; 15 L.T. 387 ; 39 Dig. 228.
- (2) *Brodziak & Co. ats. Receiver-General* [1887] 1 Fiji L.R.
- (3) *Attorney-General v. Key* [1830] 1 Cr. O. & J. 159 ; 148 E.R. 1375.

APPEAL by way of case stated from a decision of the Chief Police Magistrate at Suva.

The Attorney-General, *J. S. Udal*, for the appellant contended that on the facts admitted in the case the Chief Police Magistrate was wrong in making the order he did, viz., to return the tobacco to Messrs. *Broadziak & Co.*, as the goods in question were prohibited to be imported into the Colony under s. 90, and the Chief Police Magistrate accordingly had no jurisdiction to make any other order than one of forfeiture, as that was the only order "which the circumstances required" under s. 100, and that he had no discretion to order the return of the forfeited goods to the importer, even though he was not guilty of any fraudulent intention. Such a discretion might well exist in cases coming under s. 77, where the Receiver-General has the option given him by that section as to whether he shall forfeit or not, but that option is not allowed him in cases coming within s. 90. On this ground he distinguished the present case from that of the *Receiver-General v. Brodziak & Co.* decided by his Honour in June, 1887.

He also referred to the *Attorney-General v. Key* decided under the old Revenue Act of 6 Geo. IV c. 107 to which statute he referred at some length, and contended that the words of s. 90 of the present Customs Ordinance (XVI, of 1881) were on all fours with the old Act ; and that the tobacco in question not coming within the restrictions as to importation allowed under s. 90 was to be treated as being "absolutely prohibited," and was therefore properly forfeited.

J. H. Garrick, for the Respondents, was not called upon.

BERKELEY, C. J.—The question before me to consider is whether tobacco imported into the Colony in packages with other things should have been forfeited by the stipendiary magistrate, or whether he had any discretion to make the order he did. The answer to that question would depend upon the construction to be placed upon s. 90 of the Customs Ordinance, 1881.

(His Honour referred to s. 90 and the table of goods "prohibited and restricted," and read sub-s. 4 under which the present proceedings were taken.)

It is taken admitted that the goods were found on board ship. Section 90 prohibits the importation of goods mentioned in sub-s. 4 "save as thereby excepted." Therefore tobacco is prohibited in packages containing other goods, but otherwise may be imported. It was carefully considered by the stipendiary magistrate whether the prohibition of such tobacco was absolute and gave him no discretion but to forfeit, or whether it was a prohibition *sub modo*, and would allow him a discretion to inquire as to the *mens rea* of the importer and to make an order according to the surrounding circumstances.

The stipendiary magistrate thought he had such a discretion, and, reading ss. 90 and 100 together, as he thought must be done when, as in this case, the prohibition is *sub modo* only and not absolute, I agree with him in that opinion. I regard s. 90 as amounting only to a prohibition *sub modo*—that is to say, only in particular circumstances or in a particular way. Does that section then confer upon the stipendiary magistrate a discretionary power? The stipendiary magistrate came to the conclusion that he had that power, and I consider he is right in that opinion. Assuming therefore that the goods were prohibited only *sub modo* they were liable to forfeiture, and the stipendiary magistrate had it in his power to order that forfeiture; for the order to be forfeited they must come before him under s. 100 which in express terms confers upon the stipendiary magistrate the power to order forfeiture, or to "make such order as the circumstances require."

These goods then not being absolutely prohibited the stipendiary magistrate was right in taking the view he did as to making what order he considered the circumstances required; and there being no intention to defraud he had the right to make the order he did and to require the tobacco to be given up to the importer on payment of duty. The burden of proof lay on the importer, but if there was no fraud it was only right he should be acquitted and that there should be allowed such a discretion to the stipendiary magistrate.

The decision must therefore be affirmed, and the respondents be allowed their costs of the appeal.

Appeal dismissed with costs.

REG. v. NAU TAUNEBO.

[Criminal Jurisdiction (Berkeley, C.J.) February 28, 1895.]

Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, s. 6—Pacific Order in Council, 1893: Arts. 15, 35, 66—Removal for trial—Prisoner inadvertently committed for trial to High Commissioner's Court—whether order might be amended.

A Deputy Commissioner of the Gilbert Group having ordered the removal of a native charged with murder for the purpose of being tried in Fiji, through inadvertence directed in the warrant of removal that such trial should take place "before the Court of the High Commissioner."