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COMPTROLLER OF CUSTOMS

v.

JOITABHAI

[SUPREME COURT,* 1964 (Knox-Mawer Ag. P.J.), 7th February,
B 26th March, 10th, 13th April]

Appellate Jurisdiction

Criminal law—evidence—importation of goods—markings on containers—whether admissible in evidence as to place of origin—Customs Ordinance (Cap. 166) s.116.

Interpretation—Ordinance—words "concerning the place whence such goods were
C *brought"—whether apt to include place of origin of goods—Customs Ordinance (Cap. 166) s. 152.*

Criminal law—mens rea—false customs entry—whether mens rea essential ingredient of offence—"false" equivalent to "erroneous"—Customs Ordinance (Cap. 166) s. 116—Customs Act 1901-1947 (Australia) s.224D.

The respondent was charged in a Magistrate's Court with making
D a false declaration in a customs entry form in respect of five bags of corriander seed. The country of origin of the seed was declared to be India whereas it was found that the bags in which it was contained were marked "Produce of Morocco". The magistrate held that the appellant had not discharged the onus of proving that the country of origin of the seeds was Morocco and it could not be held that the declaration in the entry form was false. The respondent was
E therefore acquitted. On appeal by way of case stated a number of questions were propounded for decision by the Supreme Court.

Held: 1. The magistrate did not err in law by admitting as *prima facie* evidence of the origin of the corriander seeds the "legend" or "Marking" appearing on the bags.

F 2. Section 152 of the Customs Ordinance, which places the onus of proof upon the defendant where any dispute arises (inter alia) "concerning the place whence such goods were brought" applied to the facts of the instant case.

3. The burden of proof upon the defendant under section 152 was "on the balance of probabilities".

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* The appeal from this judgment to the Privy Council is reported sub. nom. **Patel v. Comptroller of Customs** in [1965] 3 All E.R.593. Their Lordships allowed the appeal, upholding the finding set out in the headnote above under number 4 and reversing the findings under numbers 1 and 2.

Customs Ordinance s.116 (in part): Should any person make any false entry in any form declaration, entry ..... required by or produced to any officer of customs ..... or should any person make a false declaration to any officer of customs ..... such person shall on conviction for every such offence ..... be liable to a fine not exceeding two hundred pounds nor less than fifty pounds and in default of payment to imprisonment...

4. The meaning to be assigned to the word "false" in section 116 of the Customs Ordinance is "erroneous" and the offence in question was one of absolute or strict liability.

5. The respondent had not discharged the burden of proof which lay upon him and the magistrate erred in law in acquitting him. A

Cases referred to : *Yafesi Kinsambwe Lutalo v. R.* [1962] E.A. 52: *Emmanuel Mutakayana v. R.* [1961] E.A. 276: *Commissioner of Customs and Excise v. Shah Karamshi Panachand & Co.* [1961] E.A. 303 : *Comptroller of Customs v. Western Electric Co. Ltd.* (Lautoka Criminal Case No. 780 of 1963 — unreported) : *Comptroller of Customs v. Bhanubhai* (Suva Criminal Case No. 3093 of 1963 — unreported) : *Harikisundas Moti Ram and another v. Comptroller of Customs* (1961) 7 F.L.R.96: *C. J. Patel v. Police* (1937) 3 F.L.R. 202: *Attorney-General v. Gyani Das* (1956) 4 F.L.R. 202 : *D'Audney v. Marketing Services (N.Z.) Ltd.* [1962] N.Z.L.R.51: *R. v. Tolson* (1889) 23 Q.B.D.168; 60 L.T.899 : *R. v. Ewart* (1905) 25 N.Z.L.R. 709 : *R. v. St. Margaret's Trust Ltd.* [1958] 2 All E.R.289; 42 Cr. App.R.183 : *Sternberg v. The Queen* (1953) 88 C.L.R.646. B C

Appeal by case stated from a judgment of a Magistrate's Court.

J. Lewis, Attorney-General, *B. Palmer* and K. C. Gajadhar for the appellant.

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A. D. Patel and *C. L. Jamnadas* for the respondent.

The facts sufficiently appear from the judgment.

KNOX-MAWER Ag. P. J. : [18th March, 1964]—

This is a case stated by the Magistrate's Court of the First Class, Suva. The respondent was charged before the Court below with an offence contrary to section 116 of the Customs Ordinance, the particulars of which read as follows : — E

Particulars of Offence

> "*JOITABHAI* f/n Khodabhai Patel, trading as J. K. PATEL & SONS of Toorak Road, Suva, in the Colony of Fiji, did on 26th day of August, 1963, at Suva aforesaid, make a false declaration in the Customs Import Entry Form A, and produced the said form to an Officer of Customs in and for the Colony of Fiji, in respect of 5 bags corriander seed imported by the ship "HOUTMAN" which arrived at Suva, on 25th August, 1963, in that instead of declaring the origin of the said corriander seed to be MOROCCO he declared it to be INDIA." F G

It is common ground that the respondent had declared in the relevant Customs Import Entry Form A that the country of origin of the bags of corriander seed was India. It should be observed that the advantage to the respondent of stating the country of origin as India would be that the goods would thereby attract for duty purposes only the lesser (preferential) tariff as against the larger (general) tariff applicable to goods from Morocco, a non-Preference Territory. H

The bags, having arrived in the Colony, were duly inspected by a Customs Officer. Upon opening same, the Customs Officer discovered that the seed was in fact contained in an inner bag. The inner bag was marked "Produce of Morocco".

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In his judgment the learned Magistrate held that the appellant had not discharged the onus of proof of establishing that the country of origin of the seeds was Morocco, and hence it could not be held that the declaration on the Import Entry Form was false. The respondent was therefore acquitted.

B The first question stated for the opinion of the Supreme Court is :

> "Whether this Court has erred in law in admitting as evidence of the origin of the corriander seed, the legend appearing on the bag (Exhibit E) containing the seed."

The learned trial Magistrate held that the marking or "legend" — "Produce of Morocco" — established a *prima facie* case against the C respondent. The question as to whether he was right in so doing is an exceedingly difficult one. I have not been able to discover any direct authority upon the point. The cases mentioned in *Phipson on Evidence* 9th Ed. at p.557, to which learned Crown Counsel referred me, are of little assistance. I would, however, make reference to certain East African cases which I have consulted, viz. *Yafesi Kinsambwe Lutalo* v. R. [1962] E.A. 52, *Emmanuel Mutakayana* v. R. D [1961] E.A. 276, and *The Commissioner of Customs and Excise* v. *Shah Karamshi Panachand & Co.* [1961] E.A. 303.

In *Commissioner of Customs and Excise* v. *Shah Karamshi Panachand & Co.* (supra) at p.306, the learned Vice-President of the East African Court of Appeal stated :—

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> "In certain circumstances the shipping marks might be receivable as evidence in the nature of an admission against an importer, but I do not see how otherwise they can be of any value to establish the origin of goods."

If the marking on the bags is to be regarded simply as "documentary" evidence, I think it might be receivable as evidence against the F respondent upon this basis. On the other hand learned Crown Counsel has urged that the marking, as an exhibit before the Court is, *per se*, something from which the Court can draw certain inferences; if that is done, the considerations relating to "documentary" evidence, are not, he admits, relevant. The *prima facie* inferences which the Court may draw therefrom, says learned Crown Counsel, are that the bag originates from Morocco, and by a further necessary inference, G so do its contents. To my mind this is a common-sensical view and one which the Courts should adopt if legally permissible. And since I am not persuaded that the law expressly forbids such a view, it is the one which I shall adopt.

Before passing on to the next question, I should mention that I have read in this connection two recent judgments of the Magistrates' Courts. In *Comptroller of Customs* v. *Western Electric Company* H *Limited*, (Lautoka Criminal Case No. 780 of 1963) the Lautoka Court held that the foreign markings on the goods exhibited before the

Court were prima facie evidence of their origin. In *Comptroller of Customs* v. *Bhanubhai,* (Suva Criminal Case No. 3093 of 1963), on the other hand, the Suva Court held the other way. In this latter case, the learned trial Magistrate observed :

> "the only evidence purporting to show where the material was manufactured is the markings on it indicating manufacture in Japan. No evidence was adduced, however, to prove that material from Japan is customarily so marked. In my view markings cannot be evidence of the nature, authenticity and general practice with regard to such markings. To hold otherwise would be to admit what is in effect hearsay evidence."

While appreciating the argument in support of this latter opinion, I have decided to adopt, with respect, an opposite view.

My answer to Question 1 is that the Court below has not erred in law in admitting as *prima facie* evidence of the origin of the coriander seeds, the "legend" or "marking" appearing on the bag containing the seeds.

The second question is :

> "Whether section 152 of the Customs Ordinance Cap. 166 applied to the facts of the instant case?"

Section 152 of the Customs Ordinance (Cap. 166) is as follows :—

> "If, in any prosecution in respect of any goods seized for non-payment of duties or any other cause of forfeiture or for the recovery of any penalty or penalties under this Ordinance, any dispute arises whether the duties of customs have been paid in respect of such goods or whether the same have been lawfully imported into the Colony or lawfully unshipped, or concerning the place whence such goods were brought, then and in every such case the proof thereof shall lie on the defendant in such prosecution, and the defendant shall be competent and compellable to give evidence; and any goods of a description admissible to duty seized under any provision of this Ordinance by any customs officer on any vessel or at any place whatsoever in the Colony or within the waters of the Colony shall, in any proceeding before a magistrate for the forfeiture of such goods or for the infliction of any penalty incurred in respect thereof or on the hearing on appeal of any such case before the Supreme Court, be deemed and taken to be goods liable to and unshipped without payment of duties unless the contrary be proved, and the evidence that any person acting as an officer of customs in any proceeding relating to customs or undertaken under this Ordinance was duly authorised shall be presumed until the contrary is proved."

In my view, the vital issue here is whether a dispute has arisen concerning "the place whence such goods were brought."

In both of the cases before the Magistrates' Courts to which I have already referred, consideration was given to this question. *In Comptroller of Customs* v. *Bhanubhai* (supra) the learned Magistrate stated :—

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> ". . . . as this section (section 152) places on an accused person a burden which he would not other wise have to bear, it must be construed strictly and its terms not extended beyond their normal meaning. I consider, therefore, that the phrase "the place whence the goods were brought" cannot properly be construed to mean more than its obvious meaning, i.e. the place whence the importer brought them. This place is not necessarily the place where they originated."

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In *Comptroller of Customs v. Western Electric Company Limited* (supra) the learned Senior Magistrate also held that no onus of proof was cast upon the defendant in that case by Section 152.

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> "Any provision" he observed in his judgment, "negativing the ordinary rule (as to onus of proof) must be strictly construed. The nearest matter giving specific reference to what has to be proved in this prosecution is "concerning the place whence such goods were brought". No doubt this ordinance was passed before preferential tariffs were in existence. Whatever may have been the need to prove the place where such goods were brought it can not be extended to mean what was the country of origin, without amendment to the ordinance."

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Again, this issue is not an easy one. It is certainly arguable that, as presently drafted, the section does not shift the burden of proof on to the respondent in these circumstances. On the other hand, the Interpretation and General Clauses Ordinance (Cap. 1) provides that words in the singular include the plural. Accordingly, the words "concerning the place whence such goods were brought" can be read : "concerning the places whence such goods were brought". It is the appellant's contention that the goods were brought first of all from

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Morocco to Singapore and thence from Singapore to Fiji. The dispute which has arisen concerns the first of these two "places whence" (the appellant alleges) "these goods were brought". Thus, he contends, section 152 applies. I think this contention is sound. In answer to Question 2 I would hold that section 152 of the Ordinance did apply to the facts of the instant case.

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Question 3 reads :

> "If it did apply what was the nature and extent of the burden of proof which lay on the Respondent i.e. evidentiary burden, or burden of proof on balance of probabilities or burden of proof beyond reasonable doubt?"

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In my opinion the burden of proof which lay on the respondent was "on the balance of probabilities."

Question 4 reads :

> "Has the Respondent discharged such burden if any as lay upon him?"

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In my opinion the respondent has not discharged such burden of proof as lay upon him.

Question 5 reads :

> "What meaning is to be assigned to the word "false" in section 116 of the Customs Ordinance, Cap. 166?"

I have already held in *Harikisundas Moti Ram and Anor. v. Comptroller of Customs* 7 F.L.R. p.96, at p.99, that the word "false" means nothing more than erroneous. I am supported in my view that the Legislature has here created an offence of absolute or strict liability by two other decisions of this Court, namely *C. J. Patel v. Police* 3 F.L.R. p.202 and *The Attorney-General v. Gyanidas* 4 F.L.R. p.202.

While my answer to this question will be the same as that given in my earlier decision upon the point, certain other authorities have been cited to me at the hearing of this appeal to which reference should be made.

In *D'Audney v. Marketing Services (New Zealand) Limited* [1962] N.Z.L.R. 51, the Supreme Court of New Zealand observed that the provision of a minimum fine in a Statute creating an offence is a compelling consideration strongly favouring the view that the Legislature cannot have intended the offence to be independent altogether of mens rea. Certainly the penalty provided for the offence in question is a matter which must be taken into consideration in deciding whether the offence is one of strict liability. *(R. v. Tolson* (1889) 23 Q.B.D. 168, p.174). In *R. v. Ewart* (1905) 25 N.Z.L.R. 709, the New Zealand Court of Appeal stated that statutory offences may be divided into three classes :

> "(1) those in which, following the common-law rule, a guilty mind must either be necessarily inferred from the nature of the act done, or must be established by independent evidence; (2) those in which, either from the language or the scope and object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence; (3) those in which, although, from the omission from the statute of the word 'knowingly' or 'wilfully', it is not necessary to aver in the indictment that the offence charged was 'knowingly' or 'wilfully' committed, or to prove a guilty mind, and the commission of the act in itself prima facie imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the "tribunal which tries him that in fact he had not a guilty mind."

In *St. Margaret's Trust Limited v. R.* 42 Cr. App. R. 183, p.191, the English Court of Criminal Appeal considered that the Legislature intended the offence under consideration to be one of absolute prohibition "leaving the Court to use its powers to inflict nominal punishment or none at all in appropriate cases." Where, as in the instant case, a substantial minimum penalty is provided, the Fiji Courts cannot of course impose such nominal punishment. Be that as it may, the penalty provided by the section is only one of the considerations of which account must be taken in deciding whether the

offence is one of strict liability. I have no doubt that the Fiji Legislature has here provided that an importer must make absolutely certain that every material entry upon Form A is entirely accurate before he (or a person for whose false entry he is criminally responsible) makes it. A minimum penalty of £50 must be imposed by the Fiji Courts regardless of the circumstances, if an entry is discovered to be "erroneous". "Erroneous", it may be remarked, was the meaning given to the word "false" in section 224D of the Australian Customs Act 1901/1947 in *Sternberg v. The Queen* (1953) 88 C.L.R. at p.646. Further support for my view is afforded by references to other parts of section 116 of the Fiji Customs Ordinance. For example, there is the specific use of the word "wilfully" in respect of another offence created by section 116 (wilfully using a falsified document) where, in considered contradistinction to the offence under consideration, the Legislature *has* made "mens rea" an ingredient.

The answer to Question 5 is that the meaning to be assigned to the word "false" is erroneous.

Question 6 reads :

> "Whether this Court has erred in law in acquitting the Respondent, in all the circumstances and facts of the case."

Having regard to my findings set out above it follows that the lower Court has erred in law in acquitting the respondent. The verdict of the lower Court is set aside. The respondent is convicted of the offence charged and fined £50 or in default of payment, two months' imprisonment.

Cost to Appellant.

Appeal allowed. Conviction entered.