

Makihele v Police

10 Supreme Court, Nuku'alofa
Ward CJ
Criminal Appeal No.608/94

9, 30 September, 1994

Customs - uncustomed goods - burden of proof
Criminal law - burden of proof - shifting onus

20 The Appellant was convicted of harbouring uncustomed goods.

Held:

1. The magistrate had properly held there was a burden placed on the appellant to prove the goods were customed.
2. But before that burden shifted to the appellant the prosecution had to prove that the goods were liable to duty and were in the possession of the appellant with the necessary state of mind.
- 30 3. On the facts here the prosecution therefore had to prove that these goods were part of the duty free exemption which was for the personal use of the importer only. That it had not done.
4. The appeal must be allowed.

Cases referred to : R v Cohen [1951] 1 All ER 203
R v Berry [1969] 1 All ER 689

40 Statute considered : Customs & Excise Act, ss.210, 254

Counsel for Appellant : Mr Veikoso
Counsel for Respondent : Ms Weigall

Judgment

The appellant appeared before the Magistrates Court on 1 March 1994 charged with one offence of harbouring uncustomed goods contrary to section 210(1)(c) of the Customs and Excise Act. The uncustomed goods were 10 cartons of Winfield cigarettes.

The case was that the appellant had gone to a shop owned by the Deputy Controller of Customs and offered to sell him cigarettes. When he saw who was the owner, he ran away.⁵ The only dispute in the evidence was over that point, the appellant saying he was told the shopkeeper did not want any cigarettes and walked away. The appellant is a taxi driver and he told the court that he had obtained these cartons from passengers coming off the flight at Fua'amotu; two were from the day flight and eight from the night flight. He said he had no idea the goods were duty free or uncustomed.

He added -

"I usually ask the passengers to buy me cartons of cigarettes and sometimes I ask the passengers not to pay taxi with money but only pay it with cigarette carton".

The magistrate's conclusion were as follows:

"But the court considers his evidence as follows:-

1. The accused did not directly point out the passengers and where did he take them to so that they could be called to prove that his fare was a Winfield carton.
2. He did not state how many runs that he did on this day when he obtained 2 cartons on the day flight and 8 cartons on the night flight.
3. It is the duty of the accused to prove that the 10 Winfield cartons were customed and were lawfully obtained by him.

In the evidence of the prosecution and his party, Sione Likiliki stated that he knew that the goods advertised to him by the accused were uncustomed. They stated that the duty free goods are only allowed by the passengers leaving and arriving in the Kingdom. Therefore the Court finds the accused guilty".

There are two grounds of appeal which can be summarised;

1. That the magistrate erred in requiring the appellant to prove the goods were not uncustomed thus shifting the burden of proof.
2. The goods were lawfully purchased by passengers at the duty free shop and therefore they were not uncustomed.

Section 210(1)(c) of the Customs and Excise Act provides -

*(1) Every person who -

- (c) knowingly harbours, keeps or conceals, or knowingly permits or suffers or causes or procures to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods;
- shall be guilty of an offence".

That paragraph creates a number of offences but this appellant was charged only with knowingly harbouring uncustomed goods.

Uncustomed goods are defined in section 2 as including:

"goods liable to duty on which the full duties due have not been paid or secured, and any goods, whether liable to duty or not, which are imported or exported or in any way dealt with contrary to the customs laws".

The first ground of appeal may be dealt with shortly.

Section 254 provides that,

"In any prosecution under the customs laws, relating to smuggling the proof that the proper duties have been paid in respect of any goods, or that the same have been lawfully imported shall be on the defendant".

The magistrate was correct to place the burden on the appellant of proving that the goods were customed and that grounds fails. However, it will be necessary to consider this further in relation to the second ground of appeal.

100 Mr Veikoso for the appellant argues that there was no evidence these goods were uncustomed. Passengers arriving from abroad at Fua'amotu Airport are entitled to import, inter alia, a quantity of cigarettes exempt from duty. When passengers come out of the customs hall, the appellant is entitled to assume the cigarettes are part of the exempted allowance and are therefore customed.

Miss Weigall for the respondent points out that exemption 5(1)(d) of Part II of Schedule 1 refers to -

"(d) manufactured tobacco (for the personal use of the passenger) including
110 cigarettes imported by a person above the age of 16 years".

110 Even if these goods are customed when imported, the breach by the passenger of the restriction to his own personal use, renders the duty due so they are uncustomed.

She sought also to seek support from section 1(5) of the English Customs & Excise Management Act 1979 which deals with selling tobacco as part of his business without an excise licence. There was evidence the appellant was attempting to sell the cigarettes but there was no charge relating to that and the English Act in any event does not apply in Tonga. Many of the recent authorities in England arise from that Act and the Customs and Excise Act, 1952, the wording of which are substantially different from our Act.

120 Section 210 of the Tongan Act follows the wording of section 186 of the English Customs Consolidation Act, 1876, although the English section differs by requiring proof of an intent to defraud in addition to be requirement found in section 210.

Under section 210(c) the prosecution must prove the appellant knowingly harboured uncustomed goods. In *R v Cohen* [1951] 1 All ER 203, Lord Goddard CJ at 205 pointed out, in relation to section 186;

130 ".... the offence consists in knowingly harbouring uncustomed goods, and, in our opinion, that means that the accused knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused Once it is proved that he knowingly harboured goods subject to duty, section 259 throws on him the onus of proving the goods are, in fact, customed. To do this he would have to prove that the duties had actually been paid, or at least, that they had been declared and that the customs officers in the exercise of a discretion which they are allowed, had permitted the goods to enter".

140 The position in this case is slightly different. These goods were imported not under a discretionary permission but under a statutory exemption subject to the personal qualification. However the shifting of the burden is the same and Lord Goddard goes on to refer to the difficulty that may be faced by a person who is required to prove payment of duty where he may have no way of contacting the importer again. He continues:

"Though the powers of customs officers are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in this possession, to show that duty had been paid. If the person challenged cannot prove payment, it does not follow that he must be taken to have committed the offence of what for convenience we will call unlawful harbouring. He will not be guilty unless he knew the duty had not been paid. The prosecution having proved the accused was in possession of dutiable goods in such circumstances as would entitle a court to find that he was consciously in possession of them and the accused having failed to prove that the duty had in fact been paid, there is then, in the opinion of the Court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid".

Similar comments and a summary of the authorities are found in the judgment of Milmo J in R v Berry; R v Stewart [1969] 1 All ER 689.

In the present case, the prosecution needed to prove the goods were liable to duty and in the possession of the appellant. Having done so, the burden shifted to the appellant to prove they may be customed.

His evidence was that these were given to him by incoming passengers. That suggests they could be customed goods if one can assume goods brought through the normal channels have been properly imported. Cigarettes may be imported either as part of the exempt allowance or as duty paid imports. When he receives them from passengers, the appellant will need to know to which category they belong. If the latter they are lawfully imported and remain so. If the former, the breach of the condition of personal use renders them liable to duty.

The prosecution and prosecution witnesses in the Magistrates Court referred to their assumption these cigarettes were part of the duty free allowance but there was no proof of that matter and the court is not entitled to assume it in favour of the prosecution.

Thus, the appellant having raised the suggestion these were lawfully imported, the magistrate must consider whether that may be true. The appellant has only to raise a reasonable doubt. How can the magistrate be satisfied to the criminal standard that the appellant was harbouring uncustomed goods unless and until he is satisfied they were capable of becoming uncustomed? In order to reach that conclusion it must be proved these were part of the duty free exemption. If the magistrate is satisfied of that he must still move on to consider the accused's state of mind in terms of "knowingly" committing the offence.

There is no evidence on the record the magistrate considered whether the goods were customed before convicting the appellant. The burden on the appellant was to raise a reasonable doubt whether the goods were uncustomed. Having raised the defence of belief the goods were customed the magistrate should have considered that defence and included it in his judgment before convicting him.

In those circumstances, the appeal is allowed and the conviction is quashed.