Privy Council Appeal No. 36 of 1981

The Director of Public Prosecutions – – – – *Appellant*

v.

Herbert Stewart – – – – – – – *Respondent*

(and Cross-Appeal)

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY 1982

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN

[*Delivered by* LORD FRASER OF TULLYBELTON]

This appeal raises a question of construction of the (Jamaican) Exchange Control Act passed in 1954. That Act is in terms almost identical with the (United Kingdom) Exchange Control Act 1947 and shares with it the defect of obscurity, as regards the creation and punishment of offences connected with the exportation of currency.

The respondent was convicted by a resident magistrate on two counts. The appeal is concerned only with the first count, and with the question which has been certified by the Court of Appeal in relation to that count. There is a cross-appeal, which is concerned with the way in which the Court of Appeal disposed of the appeal. The first count was as follows: —

" STATEMENT OF OFFENCE

Conspiracy to contravene section 24, contrary to paragraph 1(1) of Part II of the Fifth Schedule of the Exchange Control Act.

PARTICULARS OF OFFENCE

Herbert Stewart, between the 16th and the 18th of May 1979, being a person in the Island, conspired with other persons unknown to export foreign currency amounting to US (notes) $13,176·00, US (Travellers cheques) $1,410·00, US (money order) $1,570·00, Canadian (notes) $67·00, (money order) $241·00."

The resident magistrate having convicted the respondent on this count imposed a fine of $30,000 or six months' imprisonment at hard labour. The respondent appealed to the Court of Appeal of Jamaica on several grounds, of which the only one now before this Board is that the first count, according to the respondent, disclosed no offence known to the law because a conspiracy to export foreign notes was not an offence falling under paragraph 1(1) of Part II of the Fifth Schedule to the Exchange Control Act, but was an offence against the Customs Act. The Court of Appeal upheld his contention that the conspiracy alleged was not an offence under Part II of the Fifth Schedule, but they granted an amendment to the indictment, upheld the conviction on the count as amended, and substituted another sentence.

In order to make the argument intelligible it is necessary to refer to the scheme of the Exchange Control Act, and to the provisions of some of its sections and of the Fifth Schedule. The Act is divided into six parts. Parts I to III inclusive impose various prohibitions and restrictions on dealing with gold and foreign currency (" foreign " meaning other than Jamaican—see section 3(4)(*a*) and First Schedule as amended). The details of these parts need not be considered here. They do not relate to imports or exports. Then comes Part IV which deals with import and export. Part IV consists of three sections. Section 23 prohibits the importation into the Island of " (*a*) any notes of a class which are or have at any time been legal tender " in certain territories (hereinafter referred to for short as " currency notes ") and other things, except with the permission of the minister. Section 24, the contravention of which is the basis of count 1, similarly prohibits the exportation from the island of currency notes and other things, except with the permission of the minister. Section 25 prohibits the exportation of goods except with the permission of the minister, unless certain conditions as to payment are satisfied. The provisions of section 24, so far as directly material, are as follows:—

> " 24(1). The exportation from the Island of—
>
> (*a*) any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory; and
>
> . . . . .
>
> (*e*) any of the following documents (including any such document which has been cancelled), that is to say . . . . . .
>
> (iii) any bill of exchange or promissory note expressed in terms of a currency other than that of a scheduled territory and payable otherwise than within the scheduled territories; . . . .
>
> is hereby prohibited except with the permission of the Minister."

" The scheduled territories " now means Jamaica—see First Schedule, as amended.

None of the sections in Part IV provides that contravention of the prohibition which it imposes shall be an offence. But section 37(1) provides that the provisions of the Fifth Schedule shall have effect for the purpose of enforcement of the Act. The Fifth Schedule is in three parts. Part I deals with matters that do not arise in this appeal. Part II makes general provision as to offences; paragraph 1(1) of Part II is as follows:—

> " 1.(1) Any person in or resident in the Island who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or

requirements as aforesaid, shall be guilty of an offence punishable under this Part:

Provided that an offence punishable by virtue of Part III shall not be punishable under this Part."

Part III of the Schedule deals with import and export. The relevant provisions are as follows:—

" 1.(1) The enactments relating to customs shall, subject to such modifications, if any, as may be prescribed to adapt them to this Act, apply in relation to anything prohibited to be imported or exported by any of the provisions of Part IV of this Act except with the permission of the Minister and imported or exported without such permission as they apply in relation to goods prohibited to be imported or exported by or under any of the said enactments, and any reference in the said enactments to goods shall be construed as including a reference to anything prohibited to be imported or exported by any of the provisions of the said Part IV except with the permission of the Minister and imported or exported without such permission.

. . . . . .

3. If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, ... the exporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence to which section 210 of the Customs Act applies."

Section 210 of the Customs Act is a long section dealing with importing and exporting goods.

So far as relevant it provides:—

" 210.—(1) Every person who . . . . shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion . . . . of the laws and restrictions of the customs relating to the . . . . . exportation of goods, shall for each such offence incur a penalty . . . . . "

The effect of these sections is that currency notes, and the other things the import or export of which is prohibited or restricted by Part IV of the Act, are to be treated as " goods " under the Customs Act, and that actual exportation or attempted exportation of them is punishable under section 210 of the Customs Act. That was decided in *Reg. v. Goswami* [1969] 1 Q.B. 453 which was a prosecution under the (United Kingdom) Exchange Control Act 1947 and the Customs and Excise Act 1952 for being knowingly concerned in the attempted exportation of goods with intent to evade the prohibition. It is common ground between the parties to this appeal that *Goswami* was correctly decided, but the appellant seeks to distinguish it on the ground that the charge in that case was an *attempted* exportation, whereas the charge in the present case is one of *conspiracy* to export.

The argument for the appellant derives its force from two factors. The first is that neither Part III of the Fifth Schedule to the Exchange Control Act nor section 210 of the Customs Act expressly mentions a conspiracy. The second is that paragraph 1(1) of Part II of the Fifth Schedule to the Exchange Control Act does expressly include any person who " *conspires* or attempts " etc. to contravene " *any* restriction or requirement imposed by or under this Act ". Accordingly it is said that any

conspiracy must be prosecuted under Part II, and that the respondent was properly charged under paragraph 1(1) of Part II of the Schedule with having conspired to contravene the prohibition imposed by section 24 of the Act, notwithstanding that section 24 is in Part IV of the Act.

That argument was rejected by the Court of Appeal and in their Lordships' view it was rightly rejected. Part III of the Fifth Schedule applies the customs legislation to anything prohibited to be imported or exported by Part IV of the Act, and their Lordships are of opinion that it provides a complete code for enforcement of the prohibitions under Part IV. The scheme of Part III of the Schedule is to treat Part IV of the Act as if it were part of the Customs Act for the purpose of punishment. Section 210 of the Customs Act creates the offence of attempting to evade the restrictions against exportation of goods, including currency notes, and also prescribes the penalty for the offence. If a conspiracy to export currency had to be prosecuted under Part II of the Schedule that would be inconsistent with the scheme of the Schedule as a whole. There is nothing in Part II which requires such a departure from the scheme. The proviso to paragraph 1(1) of Part II is that "an offence punishable *by virtue of* Part III" shall not be punishable under Part II. Those words are apt to include not only offences actually created by Part III, or by the Customs Act as applied by Part III, but also offences which come into existence because of, or by virtue of, Part III. The offence of conspiracy to contravene section 24 is such an offence. If actual contravention of section 24 had not been made an offence by section 210 of the Customs Act, as applied by Part III of the Fifth Schedule of the Exchange Control Act, a conspiracy to contravene section 24 would not be an offence. Certainly it would not be the offence charged in count 1, although it is just possible that it might have been prosecuted as a common law offence to effect a public mischief, by contravening a statutory prohibition. It is not necessary to consider that possibility as the count does not charge the offence as a conspiracy to effect a public mischief.

Their Lordships accordingly agree with the Court of Appeal that the first count, as it originally stood, was defective because it charged the offence of conspiracy under Part II of the Schedule. The question certified by the Court of Appeal was as follows:—

> "Whether a conspiracy to export foreign currency in contravention of the restriction imposed by Section 24 of the Exchange Control Act is punishable by virtue of Part II of the Fifth Schedule of the Act."

For the reasons that have been explained their Lordships would answer that question in the negative. The true position is that a conspiracy to contravene the restrictions on export imposed by section 24 is an offence at common law because it is a conspiracy to commit an offence, namely the offence created by section 210 of the Customs Act and made punishable by virtue of Part III of the Schedule.

The Court of Appeal, having held that count 1 referred to the wrong part of the Fifth Schedule, proceeded to amend count 1 to make it read as follows:—

> "Conspiracy to contravene the Customs Act as affected by Section 24 and Part III of the Fifth Schedule of the Exchange Control Act."

The count in its amended form correctly reflects the legal position. The cross-appeal raises the question whether the Court of Appeal had power to amend count 1 after the trial had been concluded and the respondent had been convicted. Their Lordships, having regard to the evident absence of any doubt in the Court of Appeal as to their power in

that respect, consider that the power is to be found in section 302 of the Judicature (Resident Magistrates) Act, which provides as follows:—

> "302. It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit."

Counsel for the respondent and cross-appellant argued that count 1 in its original form was not merely defective but was a nullity on the ground that it disclosed no offence known to the law, and he referred to the case of *McVitie* (1960) 44 Cr. App. R. 201, 209. Their Lordships are not satisfied that this count could properly be described as a nullity as it referred to the correct section imposing the prohibition which was alleged to have been disobeyed. In any event, they consider that the power vested in the Court of Appeal by the comprehensive words of section 302 ("all defects and errors") extends to amending the count. The power to amend an indictment after conviction can of course only be properly exercised provided that no injustice is caused to the person convicted. Section 302 was only brought to the attention of their Lordships after they had specifically enquired whether there was any statutory provision on this subject, and they regret that it had not been referred to by counsel on either side at an earlier stage of the argument.

In the present case the Court of Appeal stated that, having regard to the evidence for the prosecution and the nature and conduct of the defence, they considered that there would be no miscarriage of justice in substituting the appropriate penalty for the common law offence of conspiracy. Their Lordships read that as meaning that amendment would cause no injustice to the respondent. The Court of Appeal was clearly entitled to take that view as the defect in count 1 was of an essentially technical nature, and the particulars of the offence gave full and correct notice to the respondent of the facts alleged against him. Their Lordships see no reason therefore to interfere with the decision of the Court of Appeal to amend count 1.

The sentence imposed by the resident magistrate on count 1 in its original form was a fine of $30,000 or six months' imprisonment at hard labour. The resident magistrate also imposed an identical sentence in respect of the conviction on count 2 which charged the respondent with failing to offer the foreign currency to an authorised dealer as required by section 4(1) of the Exchange Control Act. The Court of Appeal, having convicted the respondent on the amended count 1, reduced the sentence on that count to a nominal fine of $100 on the ground that both counts arose out of the same facts. Counsel for the respondent and cross-appellant argued that the Court of Appeal had erred in imposing the substantial penalty on count 2 which was the less serious offence. Their Lordships do not accept that the offence charged in count 2 is by its nature necessarily less serious than that charged under count 1 but in any event the important point is that only one substantial sentence should be imposed. The Court of Appeal correctly stated the principle in the following words:—

> "Accordingly although it was quite proper for the prosecution to plead as they did, in the circumstances of this case it will be manifestly excessive to impose substantial penalties on both counts."

With that opinion their Lordships are in entire agreement.

For these reasons their Lordships will humbly advise Her Majesty that the certified question should be answered in the negative and that the appeal and cross-appeal should be dismissed. There should be no order as to costs.

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In the Privy Council

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

HERBERT STEWART

(and Cross-Appeal)

DELIVERED BY
LORD FRASER OF TULLYBELTON

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