
O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

HERBERT STEWART Respondent

AND BETWEEN :

10 HERBERT STEWART Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CASE FOR THE DIRECTOR OF PUBLIC PROSECUTIONS
APPELLANT'S CASE

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20 1. This is an appeal from the judgment of the Court of Appeal sitting as a Full Court of five (Zacca (P) acting, Kerr, Carberry, Rowe J.J.A. & Carey J.A. acting) which in part reversed the decision of the Resident Magistrate for Saint James the Hon. Mr. Kipling Douglas.

2. The Court of Appeal after 'anxious reconsideration' affirmed their decision in R. v. Mirchandani & Tolani unreported Resident Magistrate's Criminal Appeal No. 85 of 1978 and confirmed that a conspiracy to export foreign currency is exclusively an offence at common law and is punishable as such as there was no provision under the Exchange Control Act for the enforcement of such an offence.

30 3. In order to appreciate the importance of the legal issues involved, and the necessity for convening a Full

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Court of Appeal, Your Appellant must refer to the decision of Mirchandani and the application for a further appeal to Your Lordships' Board in that case.

4. Mirchandani was a case where the Resident Magistrate for Portland, Her Honour Miss Joyce Bennett convicted Mirchandani and Tolani under the provisions of the Exchange Control Act and the Court of Appeal in a reserved judgment on 1st February, 1980 set aside the conviction and sentence on the ground that such an offence was only punishable at common law and as a result of that decision, Your Appellant sought leave to appeal to the Privy Council. Your Appellant did so because of the importance of the point of law involved and further because there were previous and pending cases where the indictments were similarly drafted involving considerable foreign exchange.

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5. At the hearing of the application for leave to appeal to the Privy Council, the Court of Appeal decided to adjourn that hearing sine die and to reconsider the point of law involved before a Full Court of five in the instant case as Count 1 of R. v. Herbert Stewart involved the identical issues of law which fell to be determined in Mirchandani.

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6. The point of law certified by the Court of Appeal reads thus :-

p. 38
ll. 28-32

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.

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7. Your Appellant contends that without adverting to the facts of the case at this stage, the determination of the legal issues is based on a true construction of the relevant provisions of the Exchange Control Act.

8. The first relevant provision is Section 37 which reads :-

37. (1) The provisions of the Fifth Schedule shall have effect for the purpose of enforcement of this Act.

When we turn to Part II of the Fifth Schedule it reads as follows :-

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Part II General Provision as to Offences

1(1) Any person in or resident in the Island who contravenes any restriction or requirement 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 requirement as aforesaid, shall be guilty of an offence punishable under this part

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

9. Your Appellant poses the question as to where are the restrictions imposed? The answer, it is submitted, is to be found by referring to Section 24 of the Exchange Control Act which reads :-

Section 24 (1) -

The exportation from the Island of

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(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

(b) any notes of a class which are or have at any time been legal tender in Jamaica and

(c)

(d)

(e) any of the following documents (including any such document which has been cancelled) that is to say -

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(i) - - - - -

(ii) - - - - -

(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 and - - - - -

is hereby prohibited except with the permission of the Minister.

10. Your Appellant respectfully submits that the

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enforcement section stipulated in paragraph 1(1) of the Fifth Schedule covers persons in or resident in the Island as contemplated by Section 24. Further the said paragraph deals with the full offence of contravention in the words :

Any person in or resident in the Island who contravenes any restrictions or requirement imposed by or under this Act shall - - - - be guilty of an offence punishable under this Part.

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The inchoate offences are dealt with by the words :

Any such person who conspires or attempts - - - - to contravene any such restriction or requirement as aforesaid shall be guilty of an offence punishable under this Part.

The secondary participants are dealt with thus -

Any such person who - - - - aids, abets, counsels or procures - - - - any such restriction or requirement as aforesaid shall be guilty of an offence punishable under this Part.

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11. Your Appellant respectfully submits that the General Provision of the criminal law pertaining to attempts and those who aid, abet, counsel or procure is also provided for by Sections 15(1) and 41 of the Criminal Justice Administration Act.

Section 15(1) reads thus -

15. (1) If, on the trial of any person charged with any felony or misdemeanour, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour

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charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried.

Section 41 reads thus -

10 41. Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law, or by virtue of any Statute passed or to be passed, shall be liable to be tried, indicted, and punished as a principle offender.

12. In the light of these provisions Your Appellant contends that since the respondent was charged with conspiracy to contravene Section 24 of the Exchange Control Act unless there are any exclusionary provisions applicable, conspiracy to contravene Section 24 is punishable by virtue of paragraph 1(3) of the Part II of the Fifth Schedule and triable in the Resident Magistrate's Court by virtue of paragraph 2(2) of the said part - See D.P.P. v. Sanchez-Burke 23 W.I.R. 319 or (1977) 1 W.L.R. 908, P.C. It is only if the proviso in Part II applies that it is necessary to resort to Part III and in Your Appellant's respectful submission it is not necessary to resort to the common law where statute provides for the offence.

p.1
11. 23-25

13. So contending it is necessary in Your Appellant's submission to ascertain firstly whether Part III of the Fifth Schedule applies and secondly, if there is a gap in the statutory provisions which entitled the Court of Appeal to resort to provisions of the common law.

14. As to the applicability of Part III that depends on its true construction. The relevant paragraphs of this Part read -

40 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 enactment, 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.

(2) References in this paragraph to the enactments relating to customs shall be taken as including references to the Customs Act and to the Post Office Act. 10

(3) If anything prohibited to be exported by any provision of the said Part IV is exported in contravention thereof, or is brought to a quay or other place, or water-borne, for the purpose of being so exported, 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. 20

The critical words which define the scope of the reference are 'apply in relation to anything prohibited to be imported or exported by any of the provisions of Part IV of this Act - - - as they apply in relation to goods prohibited to be imported or exported by or under any of the said enactments.' The object of the reference is to treat foreign currency as defined in 3(4)(a) of the Act on the same basis as goods in the Customs Act so that for any export or attempted export of foreign currency the mandatory provision of Section 210 of the Customs Act would apply. What the legal system lost in simplicity it gained in consistency. 30

15. Your Appellant reiterates that the provisions of the Customs Act must be examined to determine if they apply to the offence of conspiracy and when the relevant Sections 151 and 210(1) are read, they apply to export, attempted export and do not cover a conspiracy to export. For emphasis we quote from the two sections.

Section 151 of the Customs Act reads -

If any person shall put on board any aircraft or ship, or put off or put into any vessel to be water-borne to any aircraft or ship for exportation or 40

use as stores, or bring to any aerodrome, Customs area, quay, wharf or any place whatever in the Island for exportation or use as stores, or export any goods prohibited to be exported, or any goods the exportation of which is restricted, contrary to such restriction, or attempt to perform or to be knowingly concerned in the performance of any of the aforesaid acts, he shall (except as otherwise provided in section 144) incur a penalty of one thousand dollars, or treble the value of such goods, at the election of the Collector-General; and all such goods shall be forfeited.

Section 210(1) of the Customs Act reads -

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 custom, 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 two hundred dollars, or treble the value of the goods, at the election of the Collector-General; and all goods in respect of which any such offence shall be committed shall be forfeited.

16. Your Appellant submits that it was the failure to

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construe the provisions of Part III together with a failure to distinguish Goswani (1968) 52 Cr. App. Report at page 197 or (1969) 1 Q. B. 453 which was correctly decided that made the Court construe the reference incorrectly as applying even in the case of conspiracy to contravene Section 24 of the Exchange Control Act where there is no provision in the Customs Act for that offence. The reference only applies to goods imported or exported. Because of this failure, the Court of Appeal decided as the offence was not covered by either Part II or Part III of the Fifth Schedule the gap left must be covered by the common law. In contrast, Your Appellant submits that the offence is covered by Part II of the Fifth Schedule and there is no need to resort to the Customs Act or the common law.

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17. Your Appellant contends that the Court of Appeal fell into error because instead of interpreting the reference restrictively as its terms indicate to cover import and export of goods as they apply in the Customs Act, they applied the reference even where there were no apt words to cover the situation where there was a conspiracy to contravene the provisions of Section 24 of the Exchange Control Act. As this conspiracy was not in the reference, the foreign currency referred to in Section 24 remains within the four corners of the Exchange Control Act and does not become part of the Customs Act. The Court of Appeal described this line of reasoning as simplistic and their ratio decidendi is contained in the following passage which reads as follows :-

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p. 35
11. 20-30

The simplistic approach advocated by him overlooks the fact that despite its inelegant wording the sub-paragraph is clearly an offence creating provision and the proviso if interpreted accordingly excludes from the scope of its creation all restrictions and requirements falling under Part IV of the Act. It is only after the removal of those requirements and restrictions that the other remaining requirements and restrictions fall to be considered as offences either substantively or inchoately under paragraph 1(1) of Part II of the Fifth Schedule.

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p. 35
11. 13-18

Further the illustration advanced by the Court of Appeal as to how counselling is to be treated as an offence is erroneous. Offences under the Customs Act are summary - See the combined effect of Section 65 of the

Judicature Resident Magistrates Act and Section 240 of the Customs Act and covered by Section 6 of the Justice of the Peace Jurisdiction Act which reads as follows :-

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Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offence, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the parish where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed.

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It is this statutory enactment of the common law that makes it true that counselling comes within the Customs Act.

18. Your Appellant must now turn to the pleadings and the facts which support them in the instant case. The count in issue, Count 1, reads as follows :-

STATEMENT OF OFFENCE - FIRST COUNT

p.1
ll. 22-25

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

p.1
l. 26
p.2
l. 3

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Herbert Stewart, between the 16th and 18th of May, 1979, being 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; Canadian (money order) \$241.00.

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19. On this count the Resident Magistrate imposed a fine of \$30,000.00 or six (6) months imprisonment. It is admitted since both the conspiracy count and the count pertaining to the failure to offer the foreign currency for sale to an authorised dealer relate to the same subject matter, that the sentence on Count I is

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open to reduction, but it is submitted that the method used by the Court of Appeal i. e. to define the offence as one at common law, is erroneous. Your Appellant would therefore ask that the matter be remitted to the Court of Appeal on the basis that the indictment as preferred should be upheld and the conviction be sustained on that basis. An appropriate sentence could be imposed by the Court of Appeal.

20. Your Appellant would also stress that the importance of this case as a test case lay not just in a difference of sentence but on other factors namely :- 10

- (a) That forfeiture cannot be imposed under the Common Law.
- (b) That the important provisions for interrogation set out in Part I of the Fifth Schedule cannot be resorted to under proceedings at common law.

21. Additionally Your Appellant would respectfully submit that quite apart from pending cases, there are claims against the Crown for the return of fine and forfeitures on the basis that Mirchandani and Stewart are correct in law. Some of these cases as Mirchandani involve non residents. 20

22. Your Appellant contends that it is necessary to advert very briefly to the facts of the case which are admirably set out in the judgment of Kerr J.A. They are as follows :-

That the Respondent was a police officer and was caught red handed with a bag containing foreign currency at the Montego Bay International Airport. That he was in company with a lady who later boarded an aircraft and the police officers, members of the Financial Intelligence Unit and Immigration officers kept the pair under surveillance. That the Respondent was seen to place the bag in which the foreign currency was found in the lady's hand-bag and that later he removed it. As part of the evidence he claimed ownership of the bag which had some \$16,464 of foreign currency. 30 40

As the learned Resident Magistrate found the Respondent

guilty on both counts as charged the inference must be that he firstly found a conspiracy between Stewart and another unknown and secondly that Stewart was in possession of foreign currency which he did not offer for sale to an authorised dealer.

23. It is respectfully submitted that Your Appellant's case can be summarised thus -

- 10 (1) On a true construction of paragraph 1(1) of Part II of the Fifth Schedule of the Exchange Control Act and section 24 of the aforesaid Act, a conspiracy to export foreign currency is punishable by virtue of the provision of the enforcement section of that Act. .
- 20 (2) On a true construction of Part III of the Fifth Schedule of the Exchange Control Act, the reference to the Customs Act does not include the offence of conspiracy to contravene a restriction imposed by section 24 of the Exchange Control Act.
- (3) It is a basic principle of construction that where statute covers an offence which did not exist before then, no resort need be had to the common law.
- 30 (4) The error of the Court of Appeal becomes manifest when it is realised that a conspiracy to contravene any other provision of the Exchange Control Act is punishable under the Act, yet on the basis of the reasoning of the Court of Appeal no such provision is made for conspiracy to export foreign currency by the plain words of the Act.

RESPONDENT'S REPLY TO CROSS APPEAL

40 24. Your Respondent contends that if Your Lordships' Board does not accede to the submission that a conspiracy to export foreign currency is a breach of the provisions of the Exchange Control Act and punishable as such, then having regard to the particulars of offence, the evidence led by the Crown, and the conduct of the defence, it was appropriate to amend the statement of offence on the

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general principle that a common law offence was committed See R. v. Newland (1954) 1 Q.B. 158. The appropriate punishment for a common law conspiracy imposed by the Court of Appeal was therefore well founded.

25. Additionally Your Respondent would submit that the return of a verdict by the learned Resident Magistrate of guilty on both counts as charged was logical on the basis of a conspiracy between the accused, Stewart and others unknown for export of foreign currency and that there was a further failure to offer the foreign currency for sale.

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26. There are two passages from the judgment of the Court of Appeal in connection with this contention which we would respectfully ask be approved by Your Lordships' Board. They are as follows :-

p. 37
ll. 42
p. 38
l. 4

It is clear from the evidence that what transpired at the Airport and which amounted to an offence against the Exchange Control Act was an attempt to carry out the unlawful purpose of the conspiracy alleged in Count 1. There is no evidence that the ramifications of the conspiracy extended to cover or had in contemplation any other transaction in foreign currency. Accordingly although it was quite proper for the prosecution to plead as they did, in the circumstances of this case it would manifestly be excessive to impose substantial penalties on both counts.

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p. 37
ll. 19-28

From the evidence it is inescapable that the learned Resident Magistrate found that the appellant was in physical possession of the bag of money. It was open to him to prefer the appellant's earliest admission in the presence of Dulcie McLean that the bag was his. From this evidence and giving effect to the purposeful presumption in Section 4(6) of the Exchange Control Act, it was open to the Magistrate to hold that he was entitled to sell and that his conduct was incompatible with any intention to sell to an authorised dealer.

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27. In the circumstances of this case Your Appellant submits that the conviction on Count 1 by the Resident

Magistrate be restored as being correct in law and that the matter be remitted to the Court of Appeal to impose the sentence as is just in the circumstances or alternatively if this contention be incorrect the answer to the Cross Petition is that the decision of the Court of Appeal on both counts of the indictment be affirmed, for the following among other

R E A S O N S

- 10 (i) BECAUSE on a true construction of Section 24 and Parts II and III of the Fifth Schedule of the Exchange Control Act, a conspiracy to export foreign currency is punishable under the provision of Part II of that Act.
- (ii) BECAUSE the Court of Appeal erred in finding that the offence of conspiracy to export foreign currency is punishable only at common law.
- 20 (iii) BECAUSE although the decision of Goswani (1968) 52 Cr. App. Reports at p. 197 or (1969) 1 Q. B. 453 is correct in law, it relates to the exportation and attempted exportation of foreign currency and is distinguishable from the present case.
- (iv) BECAUSE on the basis that to conspire to export foreign currency is punishable only at common law, the amended statement of offence and substituted punishment as imposed by the Court of Appeal were appropriate.
- 30 (v) BECAUSE the reasoning of the Court of Appeal that there were two separate and independent offences committed was correct and consequently the imposition of separate sentences was appropriate in law.

IAN X. FORTE

F. ALGERNON SMITH

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL
OF JAMAICA

B E T W E E N :

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- and -

HERBERT STEWART Respondent

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APPELLANT'S CASE

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