

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant
and

HERBERT STEWART Respondent

AND BETWEEN :

HERBERT STEWART Appellant
and

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CASE FOR HERBERT STEWART RESPONDENT ON THE APPEAL
and APPELLANT on the Cross Appeal

RECORD

1. This is an appeal and cross appeal from the Judgment of the Court of Appeal of Jamaica (Zacca, President (Acting), Kerr J.A., Carberry J.A., Rowe J.A. and Carey J.A. (Acting) given on 13th March, 1981. By their judgment the Court of appeal -

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(i) affirmed (after amendment of the indictment) Herbert Stewart's conviction by the Resident Magistrate of St. James at Montego Bay on 19th December, 1979 for conspiracy to contravene the Customs Act as affected by Section 24 and Part III of the Fifth Schedule of the Exchange Control Law 154; but set aside the Resident Magistrates' sentence and imposed a sentence of a fine of \$100 or 3 months imprisonment with hard labour.

(ii) dismissed Your Cross-Petitioner's appeal against conviction by the Resident Magistrate on 19th December 1979 for contravention of section 4(i) and paragraph 1(1) of Part II of the Fifth Schedule of the Exchange Control Law.

2. Herbert Stewart was charged on an indictment

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RECORD

containing 2 counts as follows:-

"STATEMENT OF OFFENCE - FIRST COUNT

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 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 orders) \$1,570.00; Canadian (notes) \$67.00; Canadian (money order) \$241.00".

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"STATEMENT OF OFFENCE - SECOND COUNT

Contravention of section 4(1) and paragraph 1(1) of Part II of the Fifth Schedule of the Exchange Control Act.

PARTICULARS OF OFFENCE

Except with the permission of the Minister Herbert Stewart during the month of May, 1979, being a person in the Island who is entitled to sell foreign currency and not being an authorised dealer failed to offer foreign currency for sale to an authorised dealer such 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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3. The nature of the evidence adduced at the trial before the Resident Magistrate appears from the judgment of the Court of Appeal. In summary, Herbert Stewart was in May 1979 a sergeant of Police and an immigration officer at the Sangster International Airport, Montego Bay, Jamaica. On 18th May, 1979 he was observed at the airport in the company of one Dulcie McLean who subsequently departed the same day on an Eastern Airline aeroplane bound for Miami. He was seen escorting Miss McLean through the outgoing immigration desk, to the intransit lounge and thence out to the aeroplane. He was seen to be carrying a brown paper bag which at one stage he placed into, but subsequently removed from Miss McLean's handbag. He was still holding the bag when he was accosted by officers of the Financial Investigating Unit as he was about to board the aeroplane with Miss McLean. The bag was found to contain the foreign currency specified in the indictment.

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4. The Resident Magistrate convicted Herbert Stewart on both counts of the indictment. On each count he was sentenced to a fine of \$30,000 or 6 months imprisonment at hard labour, the sentences of imprisonment to run consecutively in a default of payment of the fine. The

foreign currency was forfeited.

5. Herbert Stewart appealed to the Court of Appeal. In relation to the conviction on count 1, it was argued that a conspiracy to export foreign currency was a conspiracy to contravene the Customs Act and did not fall within the ambit of paragraph 1(1) of Part II of the Fifth Schedule to the Exchange Control Law, 1954. Reliance was placed upon R v Goswami (1969) 1 Q.B. 453 and R. v Mirchandani (Jamaica Crim. App. No. 85/78 unreported). The Court of Appeal accepted this argument. They went on, however, to accede to a submission on behalf of the Director of Public Prosecutions that in the circumstances the right course was to make the appropriate amendment to count 1 of the indictment, although in R v Mirchandani the Court of Appeal had been unwilling to countenance such an amendment. Accordingly in count 1 of the Indictment the Statement of Offence was amended to read "Conspiracy to contravene the Customs Act as affected by Section 24 and Part III of the Fifth Schedule of the Exchange Control Act". Herbert Stewart's conviction for this offence was then affirmed, but the sentence was set aside and a sentence of a fine of \$100 or 3 months' imprisonment with hard labour was substituted.

6. The Director of Public Prosecutions subsequently applied to the Court of Appeal for, and obtained, leave to appeal to Her Majesty in Council, the Court certifying that the following point of law was of exceptional public importance, namely: p.38

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.

7. In relation to the conviction on count 2, it was argued for Herbert Stewart, inter alia, that he should not have been charged, tried and convicted for two offences which amounted to one activity and that the allegation in count 2 was merely incidental to the substantive offence in count 1 or any allegation alternative thereto. The Court of Appeal dealt with this argument in the following terms: p.37 1.41

"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 be manifestly excessive to impose substantial penalties on both counts".

RECORD

Notwithstanding the Court of Appeal proceeded to uphold both the conviction on count 2 and the sentence imposed by the Resident Magistrate.

8. As to the appeal and the point of law certified by the Court of Appeal it is respectfully submitted that a conspiracy to export foreign currency in contravention of the restriction imposed by Section 24 of the Exchange Control Act is not punishable by virtue of Part II of the Fifth Schedule of the Act. The Court of Appeal were correct in this case and in Mirchandani's case so to hold, as were the Court of Appeal in England in R v Goswami 1969 1 Q.B. 453. The construction of the relevant provisions of the Exchange Control Act upheld by each of those courts is hereby adopted. 10

9. It follows that count 1 of the Indictment was bad and the conviction and sentence of the Resident Magistrate cannot stand. Further it is respectfully submitted that the Court of Appeal exceeded their jurisdiction in substituting a conviction for another offence where:

- (i) Herbert Stewart had not been charged and tried of an offence known to law; 20
- (ii) the conviction substituted was not one upon which he could have been convicted on the indictment upon which he was tried, and required a substantive amendment to the indictment.

It is respectfully submitted that in any event it was too late to permit an amendment and that R v Newland 1954 1 Q.B. 158 provided the Court of Appeal with no support for the course they took in permitting amendment.

10. It is submitted that the indictment should not have contained distinct counts for practically the same offence and further since the prosecution alleged a conspiracy, joined in an indictment with a substantive offence the prosecution should have been made to elect upon which count they desired to proceed (see Practice Direction 1977 1 WLR 537). It is plain that the prosecution considered it essential to proceed upon the conspiracy count for they sought leave to amend in the Court of Appeal. Since no conviction for conspiracy can stand, it is submitted that the conviction and sentence on count 2 should not be allowed to stand, it being purely incidental to the conspiracy count. Alternatively it is submitted that the Board should in all the circumstances not permit the sentence on count 2 to stand. 30 40

11. It is respectfully submitted that the appeal should be dismissed and the cross appeal should be allowed for the following among other

REASONS

1. BECAUSE Count 1 of the Indictment did not disclose an offence known to law.
2. BECAUSE the Court of Appeal had no power to permit count 1 of the indictment to be amended alternatively erred in granting leave to amend.
3. BECAUSE the conviction and sentence on count 2 of the indictment should not be allowed to stand.

GEORGE NEWMAN

IN THE PRIVY COUNCIL

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FROM THE COURT OF APPEAL OF JAMAICA

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Cross Appeal

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