Michaelmas Term
[2019] UKPC 43
Privy Council Appeals Nos 0082 and 0083 of 2017

JUDGMENT

Nurse (Appellant) *v* Republic of Trinidad and Tobago (Respondent) (Trinidad and Tobago) Canserve Ltd (Appellant) *v* Republic of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Carnwath
Lord Lloyd-Jones
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

28 November 2019

Heard on 19 March 2019

1st Appellant	*Respondent*
Peter Carter QC Anand Ramlogan SC Pippa Woodrow (Instructed by Alvin Pariagsingh)	Peter Knox QC (Instructed by Charles Russell Speechlys LLP)
2nd Appellant Anand Ramlogan SC Alana Rambaran Chelsea Stewart (Instructed by Alvin Pariagsingh)	

Appellants:

(1) Darren Nurse
(2) Canserve Ltd

LADY ARDEN:

The issues and the basic principles

1. This appeal is primarily about the mental element or mens rea, in the sense of awareness or belief, as to the nature of the relevant goods required for the commission of certain statutory importation offences. It raises the question whether on the true interpretation of the legislation, an essential ingredient of such offences is an individual declarant's actual knowledge or belief in the falsity of a customs declaration, or the fact that the goods imported in a sealed container constitute goods of another description the importation of which is prohibited. There is a separate question about the criminal liability of that individual's employer.

2. The correct approach to the interpretation of legislation of any kind when an issue arises as to the mental element for an offence is very well established. The courts presume that Parliament intended that the prosecution should have to show that the defendant knew the ingredients of the offence, and that presumption is not displaced with respect to any such ingredient unless there is clear wording to that effect or it is necessarily implicit in the language of the statute that it is displaced. Many authorities support this approach. The Board considers that the five-point summary of the law given by Lord Scarman, giving the advice to Her Majesty, in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, which also addresses regulatory offences, sets out the relevant fundamental principles conveniently and with great clarity:

> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act." (p 14)

3. Lord Scarman's summary distinguishes regulatory offences from other offences, particularly offences described in earlier authorities as "truly criminal" offences. Importation offences fall into the broad category of regulatory offences. Regulatory offences relate to social concerns and help to regulate the way in which people behave in relation to the matters which affect the smooth running of society, such as the payment of tax or avoidance of pollution and so on.

Summary of what has happened in this case

4. In June 2009, Canserve imported a container into Trinidad and Tobago. When it arrived in port, Canserve provided a customs declaration for the goods. This was a customs form no C75 revised and was signed by Mr Darren Nurse ("Mr Nurse"), Canserve's building manager, and was dated 23 June 2009. It verified the details of the goods to which the declaration related; in particular it described the goods and their invoice value. The goods consisted of 20 desks, 100 filing cabinets, 45 bookshelves and 40 installation kits and the invoice price was US$18,881. A customs clerk, Mr Larry Howell, certified that this was the only invoice involved in the relevant transaction. Canserve was the named consignee of the goods.

5. Mr Nurse also signed an application dated 26 June 2009 for permission to remove the container from the port to Canserve's premises before the customs examination took place. He undertook to ensure that the container was kept sealed.

6. Customs officials inspected the container on 10 July 2009. One of those present was Mr Andrews of CARIRI, the Caribbean Industrial Research Unit, who attended on behalf of Canserve. One of the customs officers asked Mr Andrews why he was there. He replied that someone from Canserve had asked him to attend. At that point the customs officer asked Mr Nurse, who was also present: "Why you have CARIRI here if you are all expecting office furniture?" There was no answer. This evidence was not challenged. The customs inspection revealed that the container contained 51 gaming machines, 13 boxes of parts and other associated items. Gaming machines are prohibited from importation and the declaration was clearly incorrect.

7. On 15 March 2010, Mr Lennox Nunez of CARIRI inspected two of the machines and found that there was a software limitation or circuit fault that inhibited the operation of the gaming machines. Subject to that, it would seem to be a reasonable inference (as there appears to be no direct evidence in the documentation before the Board) that the gaming machines actually imported were worth more than the desks and other items described in Mr Nurse's declaration.

8. Three criminal charges were laid against Canserve and Mr Nurse:

i) making and subscribing a false declaration in a customs declaration value contrary to section 212(a) of the Customs Act Chapter 78:01 ("the Customs Act");

ii) importing, contrary to section 213(a) of the Customs Act, goods which were prohibited under the second schedule of the Prohibition (Carriage Coastwise, Importation and Exportation) Order; and

iii) importing goods not corresponding with a customs declaration contrary to section 214 of the Customs Act.

9. Sections 212 to 214 are set out in the Appendix to this judgment.

The previous judgments in this case

(1) Following trial before the Magistrate

10. Trial took place before the Magistrate, Her Worship Mrs Luna Cardenas Ragoonanan. The Magistrate held that there was no case to answer against Mr Nurse and Canserve. The machines did not work and so they did not come within the prohibition against importation within the meaning of the Customs Act. Therefore section 213(a) could not be infringed. As to section 214, the Magistrate held that the prosecution had to prove mens rea and therefore to show that Mr Nurse knew that the items in the container did not correspond with the declaration. However, the declaration did not list the items in the container and the prosecution had little further to show that Mr Nurse or Canserve knew what was in them. As to section 212(a), only Mr Nurse was connected to this and not Canserve, and so there was no case for Canserve to answer on this charge. As to Mr Nurse, the prosecution had failed to show that Mr Nurse had signed the document knowing it to be false.

(2) Following an appeal to the Court of Appeal

11. On 29 June 2017, the Court of Appeal allowed an appeal against the decision of the Magistrate and ordered a re-trial.

12. The Court of Appeal held that the offence created by section 212(a) of the Customs Act was one of strict liability and that the prosecution did not have to show that the declarant knew that the declaration was false in any respect. The Court of Appeal also held that the Magistrate erred in holding that the goods were not prohibited goods if they could not be made to work. As to section 212(a), there was sufficient

evidence of falsity and the offence was one of strict liability. The Court of Appeal followed the decision of the Board in *Patel v Comptroller of Customs* [1966] AC 356. In that case, the Board on an appeal from Fiji, held that the offence of making a false customs declaration contrary to section 166 of the Fiji Customs Ordinance did not require knowledge and so a person could innocently make a false entry.

13. As to section 213(a) and section 214, the Court of Appeal again held that both offences were of strict liability. It ruled that *Customs and Excise Officer Walker v Feese* (Magisterial Appeal No 96 of 2009) (unreported) 10 May 2011 was wrong to the extent it suggested otherwise, and it upheld its previous decision in *De Gale v United Hatcheries Ltd* (Magisterial Appeal No 155 of 1986) (unreported) 15 July 1992.

14. In the course of the hearing, the Court of Appeal asked the parties to make further submissions on the intermediate approach adopted in Canada, known as the "halfway house", which had been raised by the appellants' submissions. The appellants argued that on a proper construction of the three relevant sections, it was open to the defendants to defeat the charges by giving evidence that they acted in an honest and reasonable mistake in doing what they did. The Court of Appeal held that the halfway house argument ought not to be adopted in Trinidad and Tobago because (as applied in Canada at least) it sought to impose a reverse burden on a defendant to prove that he took all reasonable care, and because that was a matter for Parliament and not the courts.

15. On 15 May 2018, the Board gave the appellants permission to appeal on the strict liability issue, and attribution if it arises. By "attribution" is meant the allocation of responsibility to Canserve for the allegedly unlawful acts of Mr Nurse.

16. On the strict liability issue, Mr Peter Carter QC, for the appellants, submits that the Court of Appeal was wrong to conclude that sections 212(a), 213(a) and 214 of the Customs Act created offences of strict liability. On his case, section 212(a) requires proof of knowledge that the customs declaration was false, section 213(a) requires proof that the defendants knew that they were importing the particular goods alleged, and that these goods were prohibited from importation, and section 214 requires proof of knowledge that the goods imported did not correspond to the relevant customs declaration. Mr Peter Knox QC, for the respondent, seeks to uphold the decision of the Court of Appeal.

17. Mr Knox makes the initial point that the appellants must have known that the goods were prohibited as their only defence before the Magistrate was that the machines did not work. However, he accepts that that is not the way the appeal proceeded in the Court of Appeal nor did his arguments as developed turn on this point. The Board proposes to proceed by addressing the arguments that were developed before it.

Discussion

The leading case - Sweet v Parsley - and the relevant points it decided

18. The leading case on determining whether a statutory offence requires mens rea is now *Sweet v Parsley* [1970] AC 132. The Board has already set out a summary of the relevant principles from the speech of Lord Scarman in *Gammon*, which is drawn from *Sweet v Parsley*. The prosecution in *Sweet v Parsley* was of a teacher who rented a house to students and who was prosecuted for being in control of the management of premises used for smoking cannabis at the premises, which had occurred without her knowledge. The House of Lords held that, applying the presumption that mens rea is required before a person can be held guilty of a criminal offence to the statutory provision in question, the requirements of the offence were not satisfied in those circumstances.

19. A key point in *Sweet v Parsley* is that the House of Lords held that, in cases of difficulty over the mens rea required by any statutory offence, the courts must apply the presumption that Parliament intended that a criminal offence should require mens rea in relation to every element of the actus reus for that offence. Lord Reid expressed the point in the following way at pp 148-149:

> "Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.
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> Where it is contended that an absolute offence has been created, the words of Alderson B in *Attorney General v Lockwood* (1842) 9 M & W 378, 398 have often been quoted:
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> > 'The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the

> apparent purpose of the Act, or to some palpable and evident absurdity.'
>
> That is perfectly right as a general rule and where there is no legal presumption. But what about the multitude of criminal enactments where the words of the Act simply make it an offence to do certain things but where everyone agrees that there cannot be a conviction without proof of mens rea in some form? This passage, if applied to the present problem, would mean that there is no need to prove mens rea unless it would be 'a plain and clear contradiction of the apparent purpose of the Act' to convict without proof of mens rea. But that would be putting the presumption the wrong way round: for it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary."

20. The presumption that any criminal offence should involve mens rea is a totally fundamental point. Lord Pearce held at p 156:

> "The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law."

21. Lord Reid continued:

> "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare."

22. Although absolute offences would be rare, in the judgment of Lord Morris of Borth-y-Gest:

> "The question must always be - what has Parliament enacted?" (p 153)

23. Lord Morris answered that question as follows:

> "[t]he inquiry must be made … whether Parliament has used words which expressly enact or impliedly involve that an absolute offence is created." (p 153)

24. So there is a high hurdle to be overcome by the prosecution when it asserts that an offence is one of strict liability that does not require a mental element in relation to any particular ingredient of the actus reus. It must rebut the presumption that mens rea is required, and so clear words will be needed. But the presumption enunciated in *Sweet v Parsley* is nonetheless one that can be rebutted.

25. On the present appeals, the Court of Appeal, in determining whether knowledge was required by section 212(a) relied on the advice of the Board in *Patel*, given by Lord Hodson. The relevant part of the advice in that case was as follows:

> "It is to be observed that section 116 itself contains a number of offences set out consecutively and joined by the conjunction 'or'. It is sufficient to say that some of these would plainly require to be construed so that no offence would be constituted unless mens rea were established. For example, the words
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> > 'should any person counterfeit, falsify or wilfully use when counterfeited or falsified any document required by or produced to any officer of customs.'
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> would not in their Lordships' view be satisfied in the absence of proof of mens rea. It does not, however, follow that all the phrases in the section must be read in the same way, and the making of a false entry may well be in this as in other similar statutes relating to customs absolutely prohibited within the exceptions to the general rule applicable to statutes creating criminal offences.
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> The distinction must be a narrow one in considering the various parts of the section if the conclusion is correct that one cannot 'falsify' without a guilty mind but that one can innocently make a 'false' entry. Notwithstanding the narrowness of the distinction their Lordships are of opinion that this difficulty must be faced.
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> On behalf of the appellant reliance was placed on the minimum penalty of £50 provided by the section as an indication that proof of mens rea must be required. No doubt this is a relevant consideration but it is to be noted that in other similar statutes a standard penalty of £100 is fixed and has not been held to have imported the necessity of proof of mens rea. …

In these cases the language of Wright J in *Sherras v De Rutzen* [1895] 1 QB 918, 921 has often been considered and serves as a useful guide to the proper construction of the statutes under consideration. He says:

> 'There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.'

Their Lordships have not overlooked the judgment of the board in *Lim Chin Aik v The Queen*. That case concerned the presumption that mens rea is an essential ingredient in every offence and was much relied upon by the appellant, but their Lordships find nothing in the judgment of the board delivered by Lord Evershed to lead them to the conclusion that a construction should be placed upon section 116 which involves the addition by implication of the word 'knowingly' before the words 'make any false entry'.

They are of opinion that the decision of the learned judge in giving the opinion of the Supreme Court as to the meaning to be assigned to the word 'false' is correct and that on this point the appeal would fail, since the offence of which the appellant was convicted was absolute and no proof of mens rea was required." (pp 363-365)

26. The Court of Appeal concluded that, largely because section 212(a) did not include the word "knowingly", section 212(a) imposed strict liability. *Patel* was cited in argument in *Sweet v Parsley* but not referred to in the speeches of the House of Lords. The reasoning in *Patel* is somewhat shorter than in *Sweet v Parsley*, and the Board in *Patel* relied to a large extent on the actual wording of the relevant provision. By contrast in *Sweet v Parsley* the House examined not just the wording but also the inherent improbability of Parliament having intended to create an offence of strict liability. The presumption that Parliament intends that every offence should require knowledge of the main ingredients of the offence was regarded as of high importance, and the absence of the word "knowingly" in the offence was not regarded as enough to displace the presumption. The Board observes that the offence in issue in *Patel* was similar to section 212(a). While the reliance of the Court of Appeal on *Patel* was very understandable, these appeals give the Board the opportunity of holding that in future courts should follow the wider approach in *Sweet v Parsley*.

Importance of statutory interpretation

27. The Board must, therefore, examine each of the statutory provisions underpinning the charges. It must apply the presumption enunciated in *Sweet v Parsley*. The Board must determine whether Parliament intends a defendant to be criminally liable even if he does not know that he has in fact imported, or made a declaration about, prohibited goods in the mistaken belief that they are goods of a different category from both prohibited goods and the goods actually imported.

28. Knowledge of any element of the offence is not expressly required by sections 212 to 214 save in two respects. First, section 212(d) uses the words "counterfeits, falsifies or wilfully uses, when counterfeited or falsified", which involve a requirement of knowledge of the falsity (see *Patel v Comptroller of Customs* [1966] AC 356 at 363). Second, subsections (c), (d) and (e) of section 213 use the word "knowingly".

29. Section 214 uses the words "calculated to deceive." The Court of Appeal did not consider the meaning of this expression (see judgment of Mohammed JA, at para 56). The parties are not agreed as to its meaning and have not referred us to the relevant authorities on it. However, as explained above, where a single statutory provision or set of statutory provisions creates a number of offences, some may be interpreted as requiring mens rea and some may not. Accordingly, this point does not affect the disposition of the issues within the scope of this appeal.

30. What is the impact of these express indications as to mens rea on offences within sections 212 to 214 for which there is no statement as to the mens rea required in the relevant respect? Lord Reid observed in *Sweet v Parsley* that the mere fact that the statutory language was silent as to mens rea did not mean that mens rea might not be required. The mere fact that Parliament requires mens rea in relation to one offence in a statute does not necessarily mean that it did not intend mens rea to be required in relation to another offence in the same statute:

> "It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that

> interpretation which is most favourable to the accused must be adopted." (p 149)

Interpretation "outside the Act"

31. Lord Reid considered that the court should consider the statutory wording, the scheme of the legislation and the character and seriousness of the mischief which constitutes the offence, and in addition that the court should then go "outside the Act", because, as he put it:

> "One must put oneself in the position of a legislator." (p 149)

32. The Board will first consider the scheme of the legislation. As to this, sections 212 to 214 of the Customs Act represent a fasciculus of statutory provisions criminalising participation of varying kinds in smuggling goods in or out of Trinidad and Tobago. It is clear from the substantial penalties imposed that Parliament takes the view that these are potentially serious offences.

33. The Board considers that the severity of the penalties requires close consideration in this case. Following an amendment in 2007, the penalties in sections 212 to 214 are particularly high: in the case of section 212, up to TT$ 125,000 (US$18,000 approximately); in the case of sections 213 and substantially to the same effect in section 214, on summary conviction (on first conviction) either whichever is the higher of TT$50,000 (US$7,500 approximately) and treble the value of the goods and imprisonment for up to eight years or (on subsequent conviction) either whichever is higher, TT$100,000 or treble the value of the goods or up to 15 years' imprisonment and on conviction on indictment a sentence of imprisonment for up to 20 years plus (or so the respondent argues) forfeiture of the goods.

34. The seriousness of penalties is in general a factor which militates against the conclusion that an offence is one of strict liability, and it is clearly right that that should be so. Mr Carter relies on the decision of the High Court of Australia in *He Kaw Teh v R* [1986] LRC (Crim) 553 in which the High Court held that on its true interpretation the statutory offence of importing narcotics in Australia required the prosecution to prove that the defendant knew he was importing drugs. The defendant was an individual whose suitcase had been found to have a false bottom and the defendant's defence was that he honestly and reasonably believed that he was not importing any drugs into Australia. The offence in *He Kaw Teh* carried very severe penalties indeed, including life imprisonment, and was regarded as directed to a grave social evil. The Court of Appeal of Trinidad and Tobago took this decision into account in reaching its conclusion that section 212(a) did not create an offence of strict liability in *Walker v Feese*, which the Court of Appeal in these appeals held should not be followed. In the

High Court, Brennan J expressly took a different course from that taken in some of the jurisprudence cited in this judgment. Brennan J did not accept that strict liability might be imposed to commission of an offence, but he did accept that strict liability might be imposed where the purpose was also "to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur" (p 590).

35. While as a matter of statutory interpretation, the severity of the penalties is therefore a relevant factor, the weight to be given to it is subject to qualification in the case of some regulatory offences. Thus, in *Gammon*, the issue was whether a statute creating an offence where a developer diverted from approved plans imposed strict liability. The developer's conduct was capable of producing a risk to public safety. As Lord Scarman explained in *Gammon* (at p 17), the severity of the penalties does not conclusively mean that the offence is not an offence of strict liability. It may still be an offence of strict liability where the proper inference is that this would promote compliance and thus the regulatory purpose of the statute:

> "The severity of the maximum penalties is a more formidable point. But it has to be considered in the light of the Ordinance read as a whole. For reasons which their Lordships have already developed, there is nothing inconsistent with the purpose of the Ordinance in imposing severe penalties for offences of strict liability. The legislature could reasonably have intended severity to be a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the Ordinance. Their Lordships agree with the view on this point of the Court of Appeal. It must be crucially important that those who participate in or bear responsibility for the carrying out of works in a manner which complies with the requirements of the Ordinance should know that severe penalties await them in the event of any contravention or non-compliance with the Ordinance by themselves or by anyone over whom they are required to exercise supervision or control."

36. In the opinion of the Board, the seriousness of the penalties in this case is a function of both the potential value of smuggled goods, which may be considerable, and Parliament's aim of deterring those involved in smuggling. Importantly, the observance of customs regulations depends in the first instance on self-assessment. The system whereby customs duty is paid according to declared value is dependent on declarations being made and on those who sign declarations doing so honestly and carefully. Customs officials are in the nature of things likely only to be able to check the correctness of the declaration in a limited number of cases.

37. Moreover, although the penalties are severe, the judge imposing a penalty does not have to impose the highest penalty and so mitigating factors, such as the relatively minor value of the goods smuggled, can no doubt be reflected in the sentence in any individual case. These factors reduce the likelihood of Parliament having intended that the offence should be subject to a defence of lack of knowledge as to the contents of any sealed container or at least where the defendant has taken reasonable care to ensure those contents are correctly declared. The Board recognises that the penalties are severe, but as discussed above this is an area in which Parliament may well have decided to increase the severity of the penalties as a deterrent to the commission of offences.

38. On the other hand, the presumption that Parliament intended that offences should require mens rea in relation to each element of the offence is a strong one. It means that a legislative intention to impose strict liability as a deterrent to promote compliance is only to be inferred where:

> "there [is] something [the defendant] can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations" (per Lord Evershed, giving the advice to Her Majesty in *Lim Chin Aik v The Queen* [1963] AC 160 at p 174)."

39. Offences under sections 212 to 214 primarily affect those who import or export goods and consignees of goods from abroad. Such persons are likely to have a contractual or commercial relationship with the consignor of the goods and so they can stipulate that the consignor is to take steps to ensure that the correct goods are consigned or even appoint an agent to inspect the container on his behalf before it is sealed and shipped to Trinidad and Tobago. The taking of these steps is likely to assist in reducing or preventing smuggling.

40. Given the fact that the offences cover a wide variety of circumstances arising in connection with the import or export of goods, the Board does not accept the submission of Mr Carter that the fact that the express wording of the offences in certain respects clearly requires mens rea (see for example subsections (c), (d) and (e) of section 213, which use the word "knowingly") means that all the offences created by sections 212 to 214 must do so, or that the decision in *Patel* would have for that reason to be revisited. There is no reason why Parliament should not in the same context create some offences which require mens rea and some which do not.

41. The Board appreciates that an individual who is not involved in any way in the business of import or export may be charged with an offence under these sections. It is

also possible (to take one more example) that a stevedore unloading goods on the instructions of another could be alleged to be within section 213(b).

42. In argument, counsel referred to such a person as a "luckless victim", which is indeed how Lord Evershed (with whom that particular phrase may have originated) referred to him or her: [1963] AC 160, 174. Mr Carter placed considerable emphasis on the fate of the luckless victim.

43. The Board agrees that the potential for unfairness to luckless victims has to be taken into account as a factor weighing against the inference of an intention on Parliament's part that the offence under sections 212 to 214 should carry strict liability. The luckless victim might be the person who picks up the wrong bag off the carousel when he arrives at the airport at his destination, or on whom material is planted at the airport without his knowledge. But the luckless victim in that example would not even know that he had brought in the goods. That is a completely different case from the situation where a person knows that he is importing goods and the identity of those goods turns out to be something different from what he thought.

44. Phrases similar to "luckless victim" have been used in other cases, such as *Frailey v Charlton* [1920] 1 KB 147 at p 153, as the Court of Appeal in this case explained. The Board does not consider that it is necessary to come to any conclusion about exposure to criminal liability in these situations because they are not in issue on this appeal. The defendants in this case knew that they were importing goods. Their case is that they were mistaken about the nature of those goods. The case of the stevedore is also not before the Board on this appeal.

45. Lord Reid refers to the stigma attached to a conviction as one of the factors outside the Act to be considered: [1970] AC 132, 149. Breaking the law is always a serious matter, particularly when it involves the importation of machines that can feed addiction. Though a conviction for importing gambling machines might not be as serious as, say, importing guns, it is still serious.

46. The court also has to take into account as one of the factors outside the Act whether the public interest justifies the imposition of strict liability in the case of smuggling offences, as that would make it more likely that Parliament would have intended that result. So, too, in *R v Brown* [2013] UKSC 43; [2013] 4 All ER 860, the Supreme Court of the United Kingdom held that the statutory offence of unlawful carnal knowledge of a girl under 14 years of age was not subject to a defence where the defendant had reasonable grounds for believing that the girl was over 14 years of age. Lord Kerr, with whom the other members of the court agreed, rejected the argument that this followed from the fact that other offences in the same legislation were subject

to such a defence, and held that the absence of a defence to the offence in question was justified:

> "Precisely the same policy considerations underpin section 4 of the 1885-1923 Acts. Young girls must be protected and, as part of that protection, it should not be a defence that the person accused believed the girl to be above the prescribed age. As Lady Hale said in para 46 of *R v G (Secretary of State for the Home Department intervening)* [2009] AC 92, 'When the child is under 13 … [the accused] takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do …'. If you have sexual intercourse with someone who is clearly a child or young person, you do so at your peril." (para 39)

47. The Board considers that the imposition of strict liability for importation is here also warranted by the public interest. It is important that restrictions on importation are strictly observed so that no injurious goods are imported and so that any customs duties that can be levied are duly paid. The authorities show that there are similar offences of strict liability in several jurisdictions.

48. In determining whether the presumption enunciated in *Sweet v Parsley* is rebutted, the Board must therefore take into account where an offence is charged in the circumstances of this case: (1) the absence of wording in the relevant parts of sections 212 to 214 of the Customs Act about the need to show that Mr Nurse knew that the goods Canserve imported were the goods actually found in the container and that therefore the declaration was false and of the requirement for mens rea in other respects or in other offences within the same sections; (2) the severity of the penalties and the stigma of conviction, and (3) the importance in the public interest of deterring the false or careless completion of customs declarations or other acts in relation to importing or exporting goods.

49. Mr Carter submits that the wording of the relevant subsections ought to be interpreted as requiring mens rea in the light of *Sweet v Parsley*. It is, he submits, implicit in section 212(a) that knowledge is required: one of the factors which leads to this conclusion on his submission is that falsity of the declaration is required. In the Board's view, had the points (1) and (2) in the last paragraph stood alone, the proper conclusion might have been that the presumption has not been rebutted.

50. However, point (3) is a matter to which the Board must give careful consideration. The Board considers that it is of sufficient weight to rebut the presumption. As the Board has pointed out, the system of customs declaration is

important in the interests of the community and depends on the accurate completion of declarations and importers, exporters and others acting within the law. Those who are regularly involved in such activities can take steps to minimise or even obviate the risk of a criminal offence and those who are not regularly so engaged may well use agents who are familiar with the steps that they need to take to avoid committing a criminal offence. It was therefore open to the legislature to take the view that the offence should not require the prosecution to prove that the defendant did not believe that he was making a true declaration or that he was otherwise acting lawfully. In the opinion of the Board, notwithstanding the presumption that Parliament intends criminal offences to require mens rea, in the context both within and outside the Act, that presumption is rebutted in this case.

51. Furthermore, it is not correct to say that the offences in sections 212 to 214 impose absolute liability. Mens rea is required in other respects in relation to these offences: for example, the defendant must know that he is making a customs declaration and not some other completely different document. These points greatly mitigate the consideration discussed above that Parliament cannot have intended to impose criminal liability on a luckless victim and that the imposition of such liability would be unfair.

52. The same conclusion as the Board has reached in relation to section 212(a) must apply to sections 213(a) and 214. Although the penalties are heavier in the case of those sections, the case for applying the *Sweet v Parsley* presumption is not on analysis stronger in those cases as they do not involve any different type of offence.

53. Once it is clear that there is no scope for reliance on a mistaken belief under the statutory offences with which Mr Nurse was charged, there can be no scope for any defence of mistaken belief for him in this regard at common law. It is unnecessary, therefore, for the Board to consider whether there is any such defence at common law.

54. On that basis, and subject to the argument based on the halfway house, the Board dismisses Mr Nurse's appeal.

The Board too rejects the reading in of a halfway house on this appeal

55. Mr Knox urges the Board to consider the halfway house in this case, if necessary on a limited basis. The halfway house was famously adopted by the Supreme Court of Canada in *R v City of Sault Ste Marie* [1978] 2 SCR 1299. Under this approach, where a regulatory offence such as that in issue in the present case, as opposed to what are sometimes called "true crimes", is committed without a fault element in relation to a particular objective element, the defendant can exculpate himself by raising a defence of due diligence, or some other standard, as to that objective element. *Sault Ste Marie*

was a landmark decision which drew on academic and Law Commission work and fundamentally changed the prosecution of criminal offences in Canada.

56. Under the halfway house, as applied in Canada, the prosecution must then disprove the case that the defendant took reasonable care to avoid commission of the offence. It is a halfway house because it does not require the prosecution to prove subjective fault in all cases but only negligence.

57. The halfway house has been upheld subsequent to the adoption of the Canadian Charter of Rights and Freedoms as the Supreme Court of Canada has held that strict liability violates the Charter (see *In re BC Motor Vehicle Act* [1985] 2 SCR 486) and the Supreme Court has also held that the requirement to show reasonable diligence did not violate the Charter (*R v Wholesale Travel Group Inc* [1991] 3 SCR 154). The European Convention on Human Rights, by contrast with the Canadian Charter, does not in general provide guarantees with respect to the substantive requirements of national criminal law.

58. The halfway house starts from the premise that a person should not be criminally liable unless there is subjective fault, and it serves to reduce the criticism of the criminal law that it unjustly penalises those not at fault. When the House of Lords decided *Sweet v Parsley*, the Supreme Court of Canada had not decided *R v City of Sault Ste Marie*. However, the members of the House did consider whether the prosecution should have to prove that the defendant was negligent. The House did not accept that possibility in that case. Lord Reid referred to this possibility at p 150. Read in the light of his judgment in the earlier case of *R v Warner* [1969] 2 AC 256, he plainly considered that negligence (which he called gross negligence) could be an ingredient of an offence but this depended on the true interpretation of the offence. Lord Morris of Borth-y-Gest and Lord Diplock also thought that Parliament could have imposed a duty to be vigilant (pp 155 and 165). That might have led to a defence based on exercising that diligence. It was the supposed commission of an offence despite lack of a defence that drove several members of the House to the view that Parliament must have intended that the offence should require mens rea. Lord Wilberforce did not deal with other ways of interpreting or expressing the offence. There may have been a difference of view between Lord Pearce and Lord Diplock as to whether a halfway house would be inconsistent with the decision of the House in *Woolmington v Director of Public Prosecutions* [1935] AC 462 but it is not necessary for the Board to pursue that.

59. Mr Carter submits that Mr Knox's submission on the halfway house does not have to be considered if he is correct on the displacement in this case of the *Sweet v Parsley* presumption. Mr Carter does not advance the halfway house in his submissions and is concerned that the halfway house should not been seen to reduce the importance of the presumption, which on his submission is the proper route. He also submits that

the adoption of the halfway approach in any form would be a matter for the judiciary of Trinidad and Tobago.

60. The Board agrees with Mr Carter's submissions last noted and declines Mr Knox's invitation. In view of the conclusion of the Court of Appeal on this point, and that of the Board on the meaning which Parliament clearly intended to attach to sections 212 to 214 as they apply in this case, it is not appropriate for the Board to consider the halfway house on this appeal. The matter would in any event have to be fully argued and it would be necessary to overcome the point made by the Court of Appeal, on which the Board expresses no view, that only Parliament could make a decision of this magnitude.

Effect of forfeiture of goods on the arguments in favour of full mens rea

61. The respondent has sought to raise a new point not argued below that, if, as the respondent contends, breach of section 213 also leads to forfeiture on conviction, that provision for forfeiture would logically confirm the conclusion that section 213 imposes strict liability. The version of section 212 included in the Appendix to the judgment reflects the official publication of section 212 and contains no provision (mandatory or discretionary) for forfeiture on conviction. Mr Knox submits that this publication is in error but that is not a matter which the Board could determine on this appeal. In any event, however, it is not necessary for the Board to rely on this point so any view that the Board expresses would be obiter. That said, the Board inclines to the view that this point does not assist in determining mens rea since forfeiture (whether automatic as in section 214 or discretionary as in section 213) is simply a consequence or possible consequence of conviction, and thus sheds no light on the elements of the offence.

62. Canserve accepts that it is liable for the acts of the appellant if, as the Board concludes, an offence of strict liability is found. It does not dispute criminal liability if the offence under section 213(a) is strict. In those circumstances it is unnecessary to deal with its separate appeal.

The Board's conclusion

63. The Board is grateful to counsel for their industry. They cited some cases to which in the opinion of the Board, without intending any discourtesy, the Board finds it unnecessary to refer. As Lord Morris held in *Sweet v Parsley* at p 153:

> "There have been many cases in recent periods in which in reference to a variety of different statutory enactments questions have been raised whether absolute offences have been created. …

> I do not propose to recite or survey these cases because, in my view, the principles which should guide construction are clear and, save to the extent that principles are laid down, the cases merely possess the interest which is yielded by seeing how different questions have, whether correctly or incorrectly, been decided in reference to varying sets of words in various different statutes."

64. For the reasons given in this judgment, and in agreement with the Court of Appeal of Trinidad and Tobago, the Board concludes that this appeal should be dismissed. That means that the case will be remitted to the lower court for retrial in accordance with the directions of the Court of Appeal.

APPENDIX

Customs Act Chapter 78.01, sections 212 to 214

212. Any person who -

(a) in any matter relating to the Customs, or under the control or management of the Comptroller, makes and subscribes, or causes to be made and subscribed, any false declaration, or makes or signs, or causes to be made or signed any declaration, certificate or other instrument required to be verified by signature only which is false in any particular;

(b) makes or signs any declaration made for the consideration of the Comptroller or any other application presented to him which is untrue in any particular;

(c) being a person required by the Customs laws to answer questions put to him by an Officer, refuses to answer such questions or answers untruly any questions put to him by an Officer acting in the execution of his duty;

(d) counterfeits, falsifies or wilfully uses, when counterfeited or falsified, any document required by the Customs laws or by the Comptroller, or required to be submitted to the Comptroller under any other law or used in the transaction of any business or matter relating to the Customs;

(e) alters any document after it has been officially issued, or counterfeits the seal, signature, initials or other mark of or used by an Officer for the verification of any such document or any other purpose in the conduct of business relating to Customs or under the control or management of the Comptroller;

(f) on any document required for the purposes of the Customs laws or required to be submitted to the Comptroller under any other law, counterfeits or imitates the seal, signature, initials or other marks of, or made use of by another person, whether or not with the consent of that other person,

shall incur a penalty of 125,000 dollars.

213. Any person who -

(a) imports or brings or is concerned in importing or bringing into Trinidad and Tobago any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the goods are unloaded or not;

(b) unloads, or assists or is otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and are imported contrary to such restriction;

(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;

(d) knowingly acquires possession of or is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud the State of any duties thereon, or to evade any prohibition or restriction of or applicable to the goods;

(e) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods;

(f) sells, offers for sale or exposes for sale any goods which he knows to be prohibited or restricted, shall, in addition to any offence for which he may be convicted under any written law, incur a penalty -

(i) on summary conviction in the case of a first offence, to a fine of 50,000 dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of eight years;

(ii) on summary conviction in the case of a second or subsequent offence, to a fine of 100,000 dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of 15 years; and

(iii) on conviction on indictment, to imprisonment for a term of 20 years, and in any case the goods may be forfeited.

214. Any person who imports or exports, or causes to be imported or exported, or attempts to import or export any goods concealed in any way, or packed in any package

or parcel (whether there are any other goods in the package or parcel or not) in a manner calculated to deceive the Officers of Customs or any package containing goods not corresponding with the entry thereof shall, and notwithstanding sections 248 and 249 -

(a) on summary conviction, incur a penalty of 50,000 dollars or treble the value of the goods contained in such package, whichever is the greater, and to imprisonment for a term of eight years;

(b) on conviction on indictment, be liable to imprisonment for a term of 20 years,

and in either case, the goods shall be forfeited.