



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter JJA & Hancox Ag JA)

CRIMINAL APPEAL NO. 144 OF 1982

BETWEEN

RAMESH KUMAR GUPTA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged before a senior resident magistrate at Nairobi with the following offence:

“Being in possession of uncustomed goods contrary to section 185(d)(iii) of the Customs and Excise Act, cap 472 Laws of Kenya.

Particulars

Ramesh Kumar Gupta: Between May 1, 1981 and July 1, 1981 at Industrial Area Nairobi, within Nairobi Area, had in his possession 1,030 cartons of whisky which he knew or ought reasonably to have known to be uncustomed.”

The appellant pleaded not guilty, but was convicted after a long and careful trial and sentenced to two years’ imprisonment. He appealed to the High Court (Cockar J and Porter Ag J) but his appeal was dismissed. He has brought a second appeal to this court, where he was represented by Mr Sharma.

On the concurrent findings of fact arrived at in both courts below, 1,030 cartons of Scotch whisky, part of a consignment imported through Mombasa in April 1981, were discovered on July 1, 1981 in a godown or warehouse used by the appellant, by police and customs officers. The whisky had been cleared through the customs at Mombasa without payment of customs duty, as it was consigned to a company in Uganda, on condition that it was duly imported into Uganda via Malaba. The usual bond to secure the duty of Kshs 1,057,618 was presented to the customs authorities in Mombasa by Acme Interfreight Ltd on April 25, and on May 16 the consignment was loaded onto a lorry and trailer with Uganda registration numbers, and handed over to one Stephen, who was armed with the necessary documents of authority issued by the consignee, or his successor in title, it is not clear which. The consignment never reached Uganda, but found its way into the appellant’s warehouse. The cartons were marked ‘TOTGX1851 Kampala via Mombasa’. When found in the appellant’s warehouse they were still so marked, but on a few of the cartons those marks were obliterated by pieces of white paper bearing the caption ‘Nairobi via Mombasa’. When these pieces of paper were stripped off, the original markings were visible underneath. Stephen took delivery of the consignment in Mombasa on May 16, 1981. According to the appellant, in an

unsworn statement at his trial, he bought the whisky from Stephen for Kshs 1,518,000 and was given a receipt signed by Stephen for that sum, the receipt being in the name of Trexim Services Ltd, of Nairobi. It is dated May 18, 1981 (exhibit 16). In an extrajudicial statement made by the appellant on July 16, 1981, which he relied on as part of his unsworn statement at the trial, the appellant said that he was introduced to Stephen, whom he had never met before, in Nairobi 'sometime in May 1981'. Stephen told him he had 'genuine' whisky for sale, which had originally been destined for Pakistan but was redirected to Mombasa. The appellant agreed to buy it 'so long as he would give me proper invoice and receipt'.

About a week later, the whisky arrived at the appellant's warehouse in a lorry and trailer which were 'Uganda registered vehicles'. After seeing the whisky, and supervising its transfer to the warehouse, the appellant handed Stephen two drafts for the full agreed purchase price of Kshs 1,518,000. The appellant then sold 20 cartons, part of this consignment, to Westlands Supermarket on or about 16 June 1981, where some of this whisky was seen being offered for sale by Mr Pavitt, the managing director of Kenya Wine Agencies, a parastatal company vested with the sole importation rights for all wines and spirits into Kenya. Mr Pavitt could tell by looking at the labels that the bottles which he examined had not been imported by Kenya Wine Agencies, and he reported the matter to the proper authorities. On June 26, the appellant was interviewed by Mr Mwaniki, a customs investigating officer. The appellant at first denied having sold any whisky to Westlands Supermarket, but when shown the relevant invoice he admitted having done so. On June 30, 1981, Mr Mwaniki, having received information that a quantity of whisky was stored in a warehouse in Chepkoria Road, again interviewed the appellant, who denied all knowledge of this warehouse. On the next day, the warehouse was forcibly entered, and the 1,030 cartons of whisky discovered. The warehouse was in fact owned or rented by Car Dealers (1969) Ltd, a company of which the appellant is the managing director. On July 28, 1981, the appellant sent a letter to the Commissioner of Customs and Excise, enclosing an invoice headed 'Trexim Services Ltd' dated May 18, 1981, for 1,150 cartons of whisky, costing Kshs 1,518,000; a receipt for that sum, dated the same day, for Kshs 1,518,000, also headed 'Trexim Services Ltd' and signed illegibly; and photocopies of two banker's cheques for Kshs 1,518,000 drawn in favour of Trexim Services Ltd.

In convicting the appellant, the learned trial magistrate summarised her findings as follows:

"I make a specific finding that in the circumstances of this case, and in view of the evidence I have reviewed in great detail, the accused not only ought to have reasonably known that the goods were uncustomed, but knew as a fact that the goods he had in his godown were uncustomed, and that is why he did everything possible to prevent access of customs officials and police officers to the godown, and eventually to the goods in question."

The learned first appellate judges concurred in this finding, and said:

"On our own detailed consideration and independent evaluation of the evidence as a whole and bearing in mind that the evidence is circumstantial, we are satisfied beyond reasonable doubt that when the appellant received the cartoned whisky in his godown ... he knew that it was uncustomed."

Mr Sharma opened the appeal by submitting that the charge of possessing uncustomed goods had not been made out, as the whisky had been cleared through the customs without payment of duty. Goods in transit are exempt from duty. As to this, we think that where goods are admitted into Kenya free of duty in transit to a destination outside Kenya, and the transit is broken by the goods being bought and sold and generally dealt with within Kenya, they cease to be goods in transit and immediately become liable to duty, and so long as the duty remains unpaid, they are uncustomed goods. Furthermore, the definition of 'uncustomed goods' in section 2 of the Customs and Excise Act (cap 472) includes goods which are in any way dealt with contrary to the provisions of the Act. The condition attaching to the admission of goods in transit is that they are to be exported to their destination outside Kenya. That condition was broken in this case when the consignment was bought and sold locally, and part of the consignment was sold to a local retailer, whereupon the goods became uncustomed. This ground of appeal fails.

The remaining grounds of appeal relied on by Mr Sharma relate to the question of the appellant's state of mind when he came into possession of the whisky. Mr Sharma submitted that, far from knowing that it

was uncustomed, the appellant had no reason to know that it was uncustomed. He had bought it openly, and paid a fair commercial price for it, against an invoice from a local company. Mr Sharma submitted that in these circumstances the appellant had given an explanation for his possession which might reasonably be true, so that he was entitled to be acquitted even though the court might not have been satisfied that the explanation was in fact true. Mere suspicion, or the fact that the accused told lies, are not in themselves sufficient to justify a conviction. Mr Sharma referred us to a number of authorities to support these propositions, which we do not need to deal with as we agree with them. In relation to uncustomed goods, the most relevant authority is *R v Cohen* [1951] 1 All ER 203. The law applicable to such cases is summarised in that case in the holdings as follows:

“(1) the offence of knowingly harbouring goods subject to duty was committed when it was shown that the accused person had harboured the goods and had known when he did so that they were uncustomed;

(2) once it was proved that the goods were in his possession a *prima facie* case was established that he had knowingly harboured them and section 259 of the Customs Consolidation Act 1876, (which corresponds with section 208(b) of the Kenya Act in this respect) shifted the burden of proof and placed on him the onus of giving an explanation from which the jury could infer that the goods were in fact customed, or that, having acquired them in the ordinary way of business, he did not know that duty had not been paid;

(3) intent to defraud was also an ingredient of the offence and such intent must be inferred from the surrounding circumstances. Where the appellant not only had the goods in his possession in order to sell them, but also lied to the customs officers when challenged, there was ample evidence of intent to defraud.”

The learned High Court judges correctly held that the prosecution had to prove guilty knowledge, and that where, as in this case, an explanation was given to show absence of guilty knowledge, then it is the duty of the prosecution to produce evidence which demolishes such explanation offered by the defence and re-establishes guilty knowledge beyond reasonable doubt.

This is the crux of this appeal. When the appellant came into possession of this whisky, did he have, or ought he then to have had, guilty knowledge that it was uncustomed, or was he an innocent participant in an ordinary commercial transaction? In inferring guilty knowledge, the courts below took into consideration the surrounding circumstances, as they were entitled to do. In particular they considered the following matters:

- a) the appellant bought this large and valuable consignment from a man who, until a few days before the transaction, was a complete stranger to him;
- b) the consignment was delivered to him in a lorry and trailer bearing Ugandan number plates;
- c) the great majority of the cartons were clearly marked ‘Kampala via Mombasa’;
- d) the appellant did not ask for documentary proof that duty had been paid, or even ask Stephen if duty had been paid;
- e) the appellant lied when he denied having sold any part of the consignment to Westlands Supermarket;
- f) the appellant lied when he denied possessing any whisky in a warehouse under his control;
- g) the appellant obstructed the customs and police officers in their attempts to trace the warehouse and the consignment of whisky which was in it.

These were all matters which justified the inferences drawn in both courts below that the appellant had guilty knowledge, and in rejecting his explanation that he had innocently participated in an ordinary commercial transaction, and in holding that his guilt had been proved beyond all reasonable doubt. In our

view, the complete absence of inquiry from the seller, as to whether duty had been paid, amounted to 'wilfully shutting his eyes to the obvious', to use Lord Goddard CJ's words in *Cohen's* case, which is enough to justify the inference being drawn that the appellant knew the goods were uncustomed. We are of the opinion that this is a case in which the courts below, properly directing themselves as they did, could not reasonably have come to any other conclusion than that the appellant was guilty of the offence charged. For these reasons we dismiss this appeal. We would like to express our appreciation of the admirable judgments delivered by the learned Senior Resident Magistrate (Mrs Aluoch) and by the learned first appellate judges.

Dated and Delivered at Nairobi this 19th day of January 1983.

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.R.W.HANCOX

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR