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Present: Ennis J. and Shaw J.

THE ATTORNEY-GENERAL *v.* RODRIGUESZ.

57—D. C. Colombo, 40,842.

Customs Ordinance, No. 17 of 1869, s. 104—Concerned in importing prohibited goods—Meaning of the term "concerned"—Mens rea—Knowledge—Ganja concealed in bags of bran consigned by a forwarding agent to his agent in Colombo—Colombo agent not aware of the presence of ganja in the bags.

The defendant was the manager of the Colombo branch of a firm of bankers and commission and forwarding agents, carrying on business at Tuticorin and Colombo.

Ganja, the importation of which is prohibited by law, was concealed in some bags of bran consigned to the defendant by the Tuticorin branch as commission and forwarding agents for the shippers. The defendant was unaware of any ganja being contained in the bags. and acted in good faith.

Held, that in the circumstances of this case that defendant was not "concerned" in importing any prohibited goods within the meaning of the term in section 104 of Ordinance No. 17 of 1869.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Arulanandam*), for the defendant, appellant.

Fernando, C.C., for the respondent.

Cur. adv. vult.

June 16, 1916. ENNIS J.—

In this case the plaintiff, the Attorney-General, sued the defendant to enforce a forfeiture of Rs. 3,500 claimed under section 14 of the Customs Ordinance, No. 17 of 1869, for being concerned in importing and bringing into the Island 44 lb. 10 oz. of ganja, an article the importation of which into Ceylon is prohibited by law. The learned District Judge held as a fact that the defendant was aware that the ganja was concealed in some of the bags consigned to him, and gave judgment for the plaintiff without deciding the other issues in the case.

Objection was taken to the admission of certain documents received by the defendant from his brother in India. The learned Judge admitted them merely to show that they had been received, but not as to their contents. In my opinion the documents were admissible, under section 8 of the Evidence Ordinance, as statements which accompanied and explained the acts of the defendant.

The facts of the case appear to be as follows:—On August 22, 1913, 402 bags of bran were brought to Colombo from Tuticorin. 141 of

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these bags were marked A S S L, the vilasam of one Sanjeva Muttupillai, and 261 were marked A S, the vilasam of the defendant. Of the bags marked A S S L, 3 were found to contain 7 parcels of ganja, and 8 bags marked A S were found to contain 15 parcels of ganja. An inquiry was held by Mr. Burden, the then Landing Surveyor of the Customs, on August 25. At that inquiry the defendant stated that he had received the bills of lading for the bran from his brother in India; that all the bran was intended for A.S.S.L. Sanjeva Muttupillai; and that he, defendant, was only a transport and commission agent for the shippers, and held the bills of lading as security. He produced advice notices P 4 to P 10 received from his brother. P 4 gave the vilasam A S S L as the actual importer of 141 bags. P5 to P 10 gave the names of various people as the actual importers of 46, 60, 60, 50, 25, and 20 bags, respectively. P 5 to P 10 showed the initials A S S L written on top of each. The defendant explained to Mr. Burden that the 261 bags marked A S were to be distributed to the respective importers by A. S. S. L. Sanjeva Muttupillai. At the same inquiry the same day Sanjeva Muttupillai made a statement to Mr. Burden, in which he said: "I expected two consignments of bran from Virithupatti ..... Nadan was the shipper from Virithupatti. The bags bearing marks A S S L are for me. The bags marked A S are for sundry people, and Nadan wants me to distribute them for sundry people." Three days later Sanjeva made another statement, P 11, to Mr. Burden, in which he said: "I should have cleared the 141 bags marked A S S L for myself, and I would probably have cleared the bags (261) for A S, as I usually do this for them. The 261 bags would probably have been removed to A S boutique."

There is no evidence whatever that the orders for the bran ever went through the defendant. They appear to have been sent direct to Nadan in India, and the goods were sent to him through the firm of M K A to the defendant's Tuticorin agent (*i.e.*, defendant's brother), who shipped them to the defendant in Colombo. The extracts D 17 and D 18 from the books of the Tuticorin agent show that all the 402 bags were in respect of transactions with M K A on the one hand and A S S L on the other hand. They also show that the Tuticorin agent of the defendant made advances and defrayed the charges for A S S L on the security of the goods. The subsequent conduct of A. S. S. L. Sanjeva Muttupillai in himself taking delivery of all the bags other than those detained by the Customs authorities, bringing an action against the Customs to recover even those, and in paying the defendant for all the 402 bags in full supports the first statement made to Mr. Burden by Sanjeva that the 402 bags were in fact for him. These circumstances also bear out the defendant's contention that he acted merely as a commission agent in shipping the goods. The fact that advances were made for the full value of the goods in India does not, in my opinion, show that the defendant was the owner of the goods. There is no evidence to

connect the defendant with the goods other than as a commission agent. It was urged that the goods were all to be taken to the defendant's store after being cleared from the Customs, and the learned Judge has found this to be so in respect of 261 bags on the strength of Sanjeva's second statement to Mr. Burden. In my opinion that statement does not prove the fact. It is contradicted by Sanjeva in his evidence in Court, and it is denied on oath by the defendant, who also stated that "I have never had goods from Tuticorin in my boutique. I have no storeroom." If this statement of the defendant were untrue, it could, it seems to me, easily have been rebutted. In connection with this finding that the 261 bags were to go to the defendant's boutique, and the distribution, if any, was to be made by the defendant, the learned Judge remarks, "even if the bags were to be distributed, the shippers of the goods would not have run the risk of the bags being delivered to the wrong parties, and would, therefore, have seen that the person charged with the distribution of the bags was acquainted with their contents, so that he would be careful not to make a mistake when delivering the bags to the several consignees." The evidence on the point does not, in my opinion, prove that the bags would have been taken to the defendant's boutique before distribution. Mr. Burden in examination-in-chief said: "For the 261 bags marked A S 6 vouchers were produced. I could not by any outside examination of the bags tell to which bags any particular voucher belonged..... I particularly examined half a dozen bags containing ganja, marked A S, A S S L, to find out any distinguishable marks. All the bags examined by me in which there was ganja were double bags. By feeling one could tell the bags were double." If this evidence had stood alone, it would have supported the inference made by the Judge. Mr. Ferdinands, the Preventive Officer at the Customs, said: "All the bags A S, A S S L, had, besides these marks, characters in Tamil on them." The defendant in his letter D 22 of September 2, 1913, to the Principal Collector of Customs, stated that the particular bags for the particular consignees were marked by separate identifying Tamil marks, and he offered to point them out and so ascertain the particular consignees of the bags in which ganja had been found. His offer does not appear to have been accepted, and the bags were not produced in Court. In the circumstances, it must be found as a fact that the person to whom each bag was to be given was indicated on the bag. Now, with regard to the 141 bags marked A S S L, Sanjeva was the person who ordered them, and who took delivery, and there is no suggestion that they were to be taken to the defendant's boutique, yet some of these contained ganja. The inference is strong, therefore, that Sanjeva, and not the defendant, was to carry out the distribution of the bags, especially when it is remembered that all the bags came from Nadan, who received direct Sanjeva's order for (at least) the 141 bags.

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In my opinion the evidence does not bear out the finding of the learned Judge that the defendant was aware that ganja was concealed in some of the bags. All the evidence seems to me to point the other way, and bears out the defendant's evidence on oath that he did not know, and that he acted merely as a commission agent for the importation of bran.

It is next necessary to consider whether even so he was still "concerned in the importation" of ganja within the meaning of section 104 of Ordinance No. 17 of 1869. A long argument as to the necessity of a *mens rea* has been addressed to us, and many conflicting cases cited. I find that the law on the subject and all the cases have been admirably summed up in *Mayne's Criminal Law of India (3rd ed.) 242 et seq.* I cannot do better than cite it in full:—

> It is an almost immemorial commonplace of English judges to state that there can be no conviction on a criminal charge unless the prisoner has a *mens rea*, or guilty mind. The maxim which lays down the doctrine (*actus non facit reum nisi mens sit rea. Non est reus nisi mens sit rea*) has been traced by Sir James Stephen backwards through Lord Coke to the laws of Henry I.[1] Its meaning was discussed with great elaboration in two recent cases,[2] where the judges deferred completely as to its application. In the last case, Stephen J., with characteristic independence, expressed an opinion that the maxim itself was not of much practical value, and was not only likely to mislead, but was absolutely misleading; and in this opinion, Manisty J., who agreed with him in nothing else, most heartily concurred. When the maxim originated, criminal law practically dealt with common law offences, none of which were defined. The law gave them certain names, such as treason, murder, burglary, larcency, or rape, and left any person who was interested in the matter to find out for himself what these terms meant. To do this he had to resort to the explanations of text writers and the decision of judges. There he found that the crime consisted, not merely in doing a particular act, such as killing a man, or carrying away his purse, but in doing the act with a particular knowledge or purpose. The superadded mental state was generalized by the term *mens rea*, and the assertion that no one was a criminal unless he had the *mens rea* really came only to this: that nothing amounted to a crime which did not include all its necessary ingredients.[3] Of course, the mental state which had to be established to make out a crime varied with the crime itself. The maxim that every criminal must have a *mens rea* was generally true, but was always valueless. The real question was whether in each case the accused had the particular *mens rea* which proved him a criminal.
>
> Under the Penal Code such a maxim is wholly out of place. Every offence is defined, and the definition states, not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done knowingly, voluntarily,

[1] *2 Steph. Crim. L. 94 n.*

[2] *Reg. v. Prince, L. R. 2 C. C. 151: Reg. v. Tolson, 23 Q. B. D. 168.*

[3] *2 Steph. Crim. L. 95 per Stephen J.; Cundy v. Le Cocq, 13 Q. B. D. 207; Reg. v. Tolson, 23 Q. B. D. 187.*

fraudulently, dishonestly, or the like. And when it is stated that the act must have been done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended . . . . . .

When a man is charged with an offence, he frequently says that he did not intend to commit it, and apparently supposes that the answer, if believed, would be complete. Does he mean that, in doing the act charged against him, he did not intend to commit a crime; or does he mean that he did not intend to do the act which the law declares to be a crime? In the latter case the plea would generally be a good one. In the former case it would always be bad. It would only mean that he had formed a wrong opinion as to the legal aspect of his conduct, or as to the consequences to himself that might flow from it.[1] For instance, a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence, independent of section 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him, and did not believe the gun would carry so far, this, if a reasonable belief, would negative the criminal intention necessary under section 299, but would be no answer to a charge under section 304A, which involves no intention to injure. If he means that he fired at him, mistaking him for another person whom he had no right to kill, this is no defence whatever; as it is merely a description of the offence defined by section 301. If he means that he fired at him in his house at night honestly believing him to be a burglar, this would be a good defence under section 79, as it shows that he has committed no offence. If he means that he fired at him intending to wound, but not intending to kill him, this, again, would be no defence if the natural result of hitting the man would be to kill him (section 299). To say that he intended to do a particular act, but did not intend that the ordinary consequences should follow from it, is merely to say that he expected that the laws of nature would be suspended in the particular instance for his convenience (see post paragraphs 666 and 667).

Where knowledge of a particular fact is an essential element in an offence, as, for instance, under section 497 of the Penal Code, it must necessarily be proved. So also, where a fraudulent or dishonest intent is an ingredient, there must be a knowledge of the facts which make the act a fraudulent one. Hence, there can be no theft where the property is taken under a *bona fide* though mistaken claim of right (post paragraph 505). Probably some such knowledge is always required in regard to all crimes properly so called, that is, acts which cannot be done without a sense that it is wrong to do them. There is, however, a large and growing class of statutory offences, where acts previously innocent are forbidden, or acts previously optional are commanded, simply because the State considers such legislation necessary for its own interests, or for the protection of some particular class of the community. Here the object of the State is merely to compel the adoption of a particular line of conduct, and the penalties that are imposed are intended, not for punishment, but for prevention, as the only means which the State has at its disposal for the enforcement of its laws. Now, in regard to such cases, questions have frequently arisen whether a person is punishable under the statute when he has violated its provisions in

[1] *See 2 Steph. Crim. L. 113.*

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ignorance of the fact on which the violation depends. In some cases of this sort the judges, influenced by the *mens rea* doctrine, have sought to solve the question by inquiring whether the proceeding was really a criminal proceeding or not.[1] It is now, however, settled that the true test is "to look at the object of each act that is under consideration to see how far knowledge is of the essence of the offence created."[2] In arriving at this decision, it has been held material to inquire: (1) Whether the object of the statute would be frustrated, if proof of such knowledge was necessary; (2) whether there is anything in the wording of the particular section which implies knowledge; (3) whether there is anything in other sections showing that knowledge is an element in the offence, which is omitted or referred to in the section under discussion.

Hence, upon the first of these grounds, it was held that knowledge was immaterial, where a statute imposed a penalty on any one who shall represent any dramatic production without the consent of the author,[3] or where the acts forbidden were "selling to the prejudice of the purchaser any article of food or drug which is not of the nature, substance, or quality of the article demanded by such purchaser,"[4] or "having in his possession and intended for food meat which was unsound and unfit for man."[5] So, where a statute provided that "It shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall have been registered under this Act," a conviction was supported, where it appeared that several persons had been received into an unregistered house, who were in fact lunatics, but whom the defendant, honestly and on reasonable grounds, believed not to be lunatics.[6]

As instance of the second ground, it has been held that where a penalty is imposed upon any one who "allows" or "permits" or "suffers" a prohibited act to be done, this implies knowledge of the nature of the act.[7] So it was held that a person could only be convicted of "unlawfully killing pigeons" when he knew the facts which made it unlawful to kill them.[8] The words "knowingly and wilfully" merely mean that a man did the act being quite aware what he was about, and what consequences would follow from it.[9] A statute which provides that every one who sends dangerous goods by railway shall distinctly mark their quality outside assumes the knowledge which would enable such a description to be given. Therefore, it was held that a person could not be convicted who had merely forwarded goods received from their owner with an untrue description upon them, and who had used proper precautions to find out their true character.[10]

As illustration the third ground: a statute passed for the protection of Government stores made criminal by section 1, the concealing, and

[1] *See Atty.-Gen. v. Siddons, 1 Cr. & J. 220; Cooper v. Simmons 31 L. J. M. C. 138 per Martin B. 144.*
[2] *Per Stephen J., Cundy v. Le Cocq.*
[3] *Lee v. Simpson, 3 C. B. 871; S. C. 16 L. J. C. P. 105.*
[4] *Betts v. Armistead, 20 Q. B. D. 771.*
[5] *Blaker v. Tillstone, 1 Q. B. D. 345.*
[6] *Reg. v. Bishop, 5 Q. B. D. 259.*
[7] *Massey v. Morris, (1894) 2 Q. B. 412.*
[8] *Taylor v. Newman, 4 B. & S. 89.*
[9] *Daniel v. Jones, 2 C1, P1, D1, 351.*
[10] *Hearne v. Garton, 2 E. & E. 66.*

by section 2, the possession of stores marked with a broad arrow. The defendant was charged under section 2 with the possession of such stores which were found on his premises in casks which he had lately received, and which had not been opened. There was no evidence that he knew of their contents. It was held that he could not be convicted. Hill J. said: "The possession in the second section is put in precisely the same category with the concealing, which is a positive act done by the individual in order to constitute the crime." He also considered that any other construction would reduce the statute to an absurdity.[1] On the other hand, where a person was charged under section 13 of the Licensing Act with "selling intoxicating liquor to a drunken person," and it was proved that the person was in fact drunk, but did not appear to be so, and was not believed to be drunk by the person who served him, the conviction was upheld. Stephen J. relied upon the word "knowingly" in other sections, and its absence in section 13, and also on the general policy of the Act to put upon the publican the responsibility of determining whether his customer was sober.[2]

In two later cases, where the circumstances were very similar, a different conclusion was arrived at. In one[3] the defendant was convicted under section 16 (2) of the Licensing Act for having unlawfully supplied liquor to a constable while on duty. He had presented himself without his armlet on, and had been served with liquor without inquiry, but under the *bona fide* belief that, as he had no armlet on, he was not on duty. The conviction was set aside. In this case the sub-section (2) on which he was convicted did not contain the word "knowingly" which was found in the previous sub-section. Day J. said: "In my opinion the only effect of this is to shift the burden of proof. In cases under sub-section (1) it is for the prosecution to prove the knowledge, while in cases under sub-section (2) the defendant has to prove that he did not know." Wright J. said: "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. The principal classes of exceptions may, perhaps, be reduced to three. One is a class of acts which, in the language of Lush J. in *Davies v. Harvey*,[4] are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Another comprehends some and perhaps all public nuisances. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. But except in such cases as these, there must in general be a guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence." So it was held that a person could not be convicted under section 27 of the Sale of Food and Drugs Act, 1875 (38 and 39 Vict., c. 63) for giving a false warranty as to food, when he did not know and had no reason to believe that the warranty was false."[5]

[1] *Per Stephen J., Cundy v. Le. Cocq.*
[2] *Cundy v. Le Cocq, 13 Q. B. D. 207.*
[3] *Sherras v. De Rutzen, (1895) 1 Q. B. 918.*
[4] *L. R. 9, Q. B. 433.*
[5] *2 Steph. Crim. L. 94 n.*

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The whole of this applies with equal force to Ceylon. The present case takes the form of a civil action to enforce a penalty.

Section 104 of Ordinance No. 17 of 1869 is as follows:—

> Every person who shall be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such restriction or prohibition, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they have been deposited, or into whose hands or possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs, with intent to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or the penalty of one hundred pounds, at the election of the Collector of Customs.

It is to be observed that the word "knowingly" found in the latter part of the section before "concerned" does not appear in the first line. It is necessary then to consider whether the defendant was "concerned" in the importation of ganja. The section is a preventive measure, and no question of a civil right arises. The English cases are, therefore, useful as a guide to the interpretation to be placed on the section. I am inclined to the opinion held by Day J. and Stephen J. that the absence of the word "knowingly" throws the burden on the defendant of showing that he was not concerned in the importation of ganja. If the contention of the respondent, that everybody who had anything to do with bringing the ganja, be correct, the owner of the ship which brought the goods, the master, the crew, and the persons who landed the cargo would all be "concerned" with the importation, as well as the transport agents of the purchasers. It must be borne in mind, however, that these persons in this case are *primâ facie* concerned in the importation of bran, not ganja, and it seems to me that some degree of knowledge that they were importing ganja must be imputable to them before they become liable to a penalty. In *Todd v. Robinson* [1] it was held that an officer of a Local Board, who is a shareholder in a company having a contract with the board, is,

[1] *(1884) 14 Q. B. D. 739.*

so long as the contract exists, " interested in a bargain or contract " with the board within the meaning of the Public Health Act, 1875, section 193, notwithstanding that the interest was merely nominal. The Judges in that case drew a distinction between " interested " and " concerned," from which it appears that a person may be interested in a matter without being concerned in it. In *The Attorney-General v. Robinson*,[1] on information under the 8 and 9 Vict., c. 87, s. 46 (1), against the defendant as having been concerned in the illegal unshipping of tobacco at Yarmouth, the defendant was found guilty because he well knew the object of the voyage. On a motion for a rule for a new trial for misdirection the rule was refused. The case was dealt with on proof of knowledge as to the illegal object of the voyage.

In *Morris v. Howden* [2] it was held that a person who undertook to procure a passage for another without profit or commission was not " concerned in the sale or letting of a passage " within the meaning of section 341 of the Merchant Shipping Act, 1894.

A person who merely forwards goods, or receives them as a commission agent, has no right to open the packages to see whether they contain what they are said by the owner to contain, and has therefore no means in this way of knowing whether the owner has concealed illicit goods in the packages. If the contents of the packages are not declared to him, it would be his duty to inquire. Failing an inquiry, he would properly be held to be concerned in the importation of prohibited goods should the packages subsequently be found to contain such goods. This seems to be the *ratio decidendi* in *Davit Silva v. Juanis Appu*.[3] Should, however, the owner declare the goods to be bran, and prohibited articles are subsequently found concealed therein, the transporter might well plead a mistake of fact through no fault or omission of his own, and bring himself within the exception laid down in section 72 of the Penal Code. In other words, he could not be said to be concerned in the importation of prohibited articles, if he had no knowledge of the prohibited article and no means of knowledge. The reported cases seem to me to show that the owner of goods is deemed to have the means of knowledge by examination or analysis as to whether or not he is dealing with prohibited goods (*e.g.*, *Queen v. Woodrow* [4]), while a carrier's only means of knowledge is by inquiry and the declaration of the owner. In *Davit Silva v. Juanis Appu* [3] Lawrie J. held, " the possession of articles which the Legislature has prohibited the removal of is an offence, unless the accused proves a degree of ignorance sufficient to excuse him." In my opinion this applies equally to the recovery of a penalty under section 104 of the Customs Ordinance, and in this case the defendant's degree of ignorance excuses him, as he had no knowledge or means of knowledge that the

[1] *20 L. J. Ex. 188.*

[2] *(1897) 1 Q. B. 378.*

[3] *8 S. C. C. 139.*

[4] *(1887) L. J. Mag. Cases, 122.*

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ganja was concealed in the bran, and the importation was not due to any positive act or omission of his own.

In Ceylon the question is whether the defendant had a sufficient excuse to bring him within the exception specified in section 72 of the Penal Code, and the English cases serve only as a guide to the interpretation of the Customs Ordinance, and as to whether the defendant could be said, in the words of section 72 of the Penal Code, to have in " good faith " believed he was justified by law.

I would set aside the decree, and dismiss the plantiff's action, with costs.

SHAW J.—

The Attorney-General sued the appellant for a penalty under section 104 of the Customs Ordinance, 1869, alleging that he was, on or about August 22, 1913, concerned in importing and bringing into the Island 44 lb. 10 oz. of ganja, an article prohibited by law to be imported into Ceylon.

The defendant carries on business with his two brothers as bankers and commission and forwarding agents at Tuticorin and Colombo, the defendant being manager of the Colombo branch of the business.

On August 22, 1913, the ganja was discovered by the Customs officers concealed in two consignments of 141 and 261 bags of Toor bran, consigned to the defendant from the Tuticorin branch, on two bills of lading dated August 20, 1913, by the B. I. Steam Navigation Company ss. " Palitana."

The consignment of 141 bags was marked " A S S L, " which is the vilasam of one Sanjeva Muttupillai of Wolfendhal, and that of 261 bags was marked " A S, " which is the vilasam of the defendant's firm. The ganja was distributed amongst various bags, some being in the 141 bags consignment and some in the 261.

The defendant by his answer denied that he was concerned in importing or bringing into the Island of ganja in question, and alleged that the bran was ordered from traders in India by Sanjeva Muttupillai and certain others, and was forwarded to the defendant by the Tuticorin branch as commission and forwarding agent for the shippers, and that he was wholly unaware of any ganja being contained in the bags, and acted in entire good faith in connection therewith, and in the ordinary course of business as commission and forwarding agent, and without any intention to contravene the law.

The case on behalf of the plaintiff was that the defendant in fact knew that the ganja was being consigned in the bags, but, even if he did not, that he was, nevertheless, liable to the penalty provided for by section 104, he being concerned in importing the ganja.

The District Judge has found as a fact that the defendant knew that the bags contained ganja, which finding rendered it unnecessary

for him to decide the other point, and he accordingly gave judgment for the plantiff for the penalty claimed.

The case has been argued very fully and ably before us, and I have come to a very decided opinion that the finding of fact of the learned Judge is wrong and cannot be upheld.

The defendant's case was that his firm in India, and he himself in Colombo, acted as forwarding agents only; that the bran was not ordered by or through them; and that, in fact, the defendant did not know it was coming until he received the bills of lading and the advice notes. He stated, and his statement could easily have been refuted if it had been untrue, that he had been carrying on this business of forwarding agent for thirty years, and had never, except in the case of livestock, taken delivery of goods himself, but it had been his invariable custom to endorse the bills of lading over to the real importer on payment of charges and any advances made by his firm, and that in the present case the bran had been ordered by or through Muttupillai, that it was intended that the bills of lading should be endorsed to him when the charges of the defendant's firm and the advances made by the Tuticorin branch had been paid, and that Muttupillai should collect the bags from the Customs and deliver them to the various traders on whose behalf they had been ordered.

The explanation given why the 141 consignment was marked " A S S L " (Muttupillai's vilasam), and the 261 consignment was marked " A S " (defendant's vilasam), was that the first was for Muttupillai himself, and the second was to be collected by him for the various traders named in the advice notes, when the various charges and advances made in respect of their particular goods had been paid to the defendant. The various advice notes sent by the defendant's branch in Tuticorin before the trouble arose bear out this explanation, and the advice notes respecting the 261 bag consignment are headed " A S S L."

The defendant's evidence is supported by that of Muttupillai, who, however, seeks to absolve himself from liability by saying that one Nadan was the real importer, and that he had really ordered the bran for him; it is also supported by the books of the Tuticorin branch of the defendant's firm, which appear to have been regularly kept, and the entries relating to this transaction to have been made before the trouble arose, which show that the 402 bags were consigned to them for shipment to Colombo by the firm of Nana Koona Ana of Kayatar " on A S S L's account."

The defendant appears to have made a similar statement to that which he made in his evidence when he was examined by the Landing Surveyor on August 25, and he also did so in his letter to the Collector of Customs on September 2, and Muttupillai, when examined by the Landing Surveyor on August 25, also stated that he had ordered both consignments. There is also some support of the

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defendant's story in the fact that Muttupillai did, in fact, eventually clear from the Customs both consignments of bran, or rather such of the bags as the Customs would part with, and paid the charges and advances on all the bran to the defendant.

The District Judge came to the conclusion that the 261 bag consignment, marked A S, was ordered by the defendant, and was to be received by him, principally in consequence of a second statement made by Muttupillai to the Landing Surveyor on August 26, in which he appears to have denied that he had anything to do with the 261 bag consignment, and said that if he had collected it he would have delivered it to the defendant

At the time Muttupillai made this statement he was obviously in danger of getting into trouble himself about the ganja, and was, not unnaturally, trying to limit his liability with regard to the 261 bags, which, not being marked with his vilasam, it was more difficult to connect him with than with the 141 bags, and the learned Judge seems to have overlooked the fact that he had made a different statement on the previous day. I cannot accept the statement made on the 26th against the statement made by him on the previous day, and repeated in his evidence, and confirmed by the Tuticorin books and the advice notes. The Judge thinks that the heading A S S L in the advice notes may have been added for the purposes of the defence. Of course, it may have been, but there is no evidence of it, and so far as the appearance of the documents go, the heading A S S L appear to be in the same handwriting and made at the same time as the rest of the documents.

The only other thing that seems to have influenced the Judge in coming to the conclusion he did was that if the bags were to be distributed, the shippers of the ganja would not have run the risk of the bags being delivered to the wrong parties, and would therefore have seen that the person charged with the distribution of the bags was acquainted with the contents, so that he would be careful not to make a mistake when delivering the bags to the several consignees. The Judge seems to have overlooked the evidence that the bags of the 261 consignment were marked with the Tamil vilasams of the several importers. It is true that the Landing Surveyor stated in his evidence that he could not by an outside examination of the bags tell to which vouchers any particular bag belonged, although he examined half a dozen of them; it appears, however, from all the other evidence, including that of Mr. Fernando, the Customs officer who examined the bags, that all the bags were also marked with Tamil characters, and this was also pointed out by the defendant in his letter to the Collector of Customs of September 2, when the bags were still in the custody of the Customs.

I feel no hesitation in saying that the only proper finding on the evidence must be that the whole of the bran was ordered by or

through Muttupillai, and that the defendant acted as shipping agent only, and had no knowledge that the bags of bran contained ganja.

The question still remains whether the defendant is liable to forfeit the penalty mentioned in section 104 of the Customs Ordinance, even although he may have been ignorant that ganja was concealed in the bags, and an elaborate argument was addressed to us as to the cases in which *mens rea* is a necessary ingredient in constituting an offence. I do not think it is necessary to go into the somewhat irreconcilable English cases and *dicta* on the subject, or into the question how far some of these cases apply at all to this Island, in view of the express provisions contained in Chapter IV. of the Penal Code, because it does not appear to me that the doctrine of the necessity of *mens rea* in constituting a criminal offence has any application to a penalty recoverable by civil action as in the present case. The doctrine that it is generally necessary that a person should have a guilty mind before he can be convicted of an offence is peculiarly one of the criminal law, and I know of no case where it has been suggested in civil proceedings for a statutory penalty that the existence or absence of *mens rea* on the part of the defendant affects the matter one way or the other. It would seem to me that if the Legislature enacts that a person shall be liable to be sued for a sum of money should he do a particular thing, he is liable to suffer judgment for that amount, whatsoever may have been his state of mind when doing the act.

The question in the present case is, What is the meaning of the word " concerned " used in section 104, and can the defendant, on the facts, be said to have been " concerned in importing or bringing into the Island " the ganja found in the bags? The contention on behalf of the respondent is in effect that any one having to do with the importation or bringing into the Island, not only of the prohibited article, but of the packages in which it is contained, are liable to forfeit the penalty, even if they do not know that the article is there, and the use of the word " knowingly " in the later part of the same section dealing with other breaches of the Customs law shows that knowledge is immaterial in the case of importing prohibited articles.

The result of such a construction would be somewhat startling, not only the shipping agent, but the captain of the ship, the labourers who handled the cargo, the lighterage company, and even the pilot of the ship, would be liable to forfeit either treble the value of the goods or Rs. 1,000 at the election of the Collector of Customs. I can imagine the Legislature making it an offence punishable by a fine for a person, however innocently, to have anything to do with the bringing into the Island something which public policy demands should be absolutely prohibited, for, in the case of a summons before a Magistrate, it would be in his discretion to inflict a nominal punishment or to discharge the accused if he thought he had done

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nothing blameworthy; but in the case of a suit for a statutory penalty there is no discretion in the Court, and the full amount can be recovered at the discretion of the plaintiff from any person made liable by the statute.

It seems to me that such a construction should not be put upon the section under consideration unless the words clearly demand it, which, in my opinion, they do not.

Very little assistance can be obtained from the dictionary meaning, or the derivation of the word " concerned " and the English cases in which the word has come under consideration do not give much help in its construction as used in the Ordinance we are now dealing with. In *Morris v. Howden*,[1] *Barnacle v. Clark*,[2] and *Todd v. Robinson*,[3] the meaning of the word has come under review, but in no case can I find that it has been suggested that a person can be " concerned " in something that he is ignorant of and derives no benefit from. The word " knowingly " applied to " concerned " in the later part of section 104 is in relation to dealing with goods after importation into the Island, and in respect of which goods evasion of the Customs laws was committed on importation. The effect of the use of the words throws the necessity of the proof of knowledge on the plaintiff in those cases, but it does not appear to me to in any way necessarily imply that a person is " concerned " in an importation of which he has no knowledge, and from which he acquires no benefit.

The fact that the bills of lading in the present case were made out to the defendant no doubt established a *primâ facie* case against him that he was " concerned " in the importation of the goods contained in the packages, but he has, in my opinion, sufficiently established that he had no knowledge that ganja was contained in them, and had no interest in the prohibited article. Under these circumstances, he cannot, I think, be said to be concerned in the importation of the ganja, and I would consequently allow the appeal with costs.

Appeal allowed.

[1] (1897) 1 Q. B. 378. [2] (1900) 1 Q. B. 279. [3] 14 Q. B. D. 789.