1949 *Present :* **Canekeratne and Gratiaen JJ.**

THE ATTORNEY-GENERAL, Appellant, *and* NAGAMANY, Respondent

S. C. 8—D. C. Trincomalee, 3,047

Customs Ordinance (Cap. 185)—Sailing vessel—" Knowingly used " for export of restricted goods—Forfeiture of vessel—Guilty knowledge of owner not necessary—Meaning of expression " goods prohibited of export "—Meaning of word " export "—Sections 128, 128A (1).

In order to justify the forfeiture of a sailing vessel under section 128A (1) of the Customs Ordinance it is not essential to prove guilty knowledge on the part of the owner of the vessel.

Arumugaperumal v. The Attorney-General (1947) 48 N. L. R. 510 followed.

Goods " prohibited of export " contemplated by section 128A include restricted goods which are exported in violation of certain conditions which must first be satisfied.

Goods are " exported ", in the context of the Customs Ordinance, as soon as they are taken in a vessel outside the limits of a port.

APPEAL from a judgment of the District Judge, Trincomalee.

H. W. R. Weerasooriya, Crown Counsel, with *Glanville Perera, Crown Counsel,* for defendant appellant.

C. Thiagalingam, with *S. Mahadevan,* for plaintiff respondent.

Cur. adv. vult.

September 26, 1949. GRATIAEN J.—

The plaintiff in this case was the owner of a sailing vessel *Mathurai Ammal* whose tonnage did not exceed 250 tons. In December, 1947, he had hired the vessel to Supramaniam Nadarajah on the terms of a contract which provided that the owner, to use his own words, was " to be in no way concerned with the use to which the hirer put the vessel ". Supramaniam Nadarajah obtained an " outward coastwise clearance " under Section 64 of the Customs Ordinance (Chapter 185) entitling the vessel to proceed in ballast to Trincomalee from the harbour of Valvettithurai. The master of the vessel for this voyage was K. Kandasamy.

On 20th December the *Mathurai Ammal* arrived alongside Muthur Jetty in a small harbour on the east coast of the Island not far from Trincomalee. On 21st December she was again observed at Muthur. Two days later, without having obtained a certificate of clearance to leave Muthur, she was sighted by the crew of a Customs

patrol-launch sailing in a northerly direction off Pigeon Island twenty miles from Muthur. On the approach of the launch there was much agitation on board the *Mathurai Ammal*, and several gunny bags were hastily thrown over the side of the vessel. This naturally aroused suspicion, and in consequence a customs officer boarded the vessel and discovered in the hold a cargo of sixty-six bags of paddy for the export or transportation of which no official permit could be produced. The inference to be drawn from these facts is irresistible in the absence of any explanation which would justify a more charitable view of the transaction. Kandasamy, in breach of Section 128 of the Customs Ordinance and of the Defence (Control of Export) Regulations in force at the time had used the vessel under his charge to smuggle paddy out of Muthur Harbour. Whether the ultimate destination of this unauthorised cargo was Valvettithurai or a foreign port is a secret which he has not chosen to divulge.

Kandasamy was in due course convicted in the Magistrate's Court of Trincomalee on a charge under Section 128 of the Customs Ordinance of having been " concerned in exporting or taking out of the Island sixty-six bags of paddy the exportation of which was restricted under the provisions of the Ordinance ". At the same time the vessel *Mathurai Ammal* was declared by the Assistant Collector of Customs to be forfeited under section 128A (1) of the Ordinance on the ground that (to quote only the relevant words of the Section) she had been " knowingly used in the exportation of goods prohibited of export ". On receiving information of this order of forfeiture, the plaintiff, after due compliance with the requirements of Section 146 of the Ordinance, instituted the present action against the Crown for the release of his vessel. He contended that its purported forfeiture under Section 128A was not authorised by law. After trial the learned District Judge upheld this submission and entered judgment in favour of the plaintiff as prayed for with costs. The Crown appeals from this judgment.

The main ground on which the learned District Judge declared the forfeiture of the vessel to be contrary to law was that the plaintiff was entirely unaware (which I will assume to be correct) of the fact that his vessel had been used on the day in question for taking contraband goods out of Muthur Harbour. The learned Judge accordingly held that the vessel was not " knowingly used " in the exportation of prohibited goods within the meaning of Section 128A. It is unfortunate that the learned Judge's attention had not been drawn to a decision of this Court where it was held that in order to justify forfeiture of a vessel under Section 128A (1) it was not essential to prove guilty knowledge on the part of the owner. *Arumugaperumal v. The Attorney-General*[1]. Mr. Thiagalingam concedes that this authority was binding on the learned District Judge, but he has invited us to take a contrary view in appeal. I decline to do so because I am in respectful agreement with the opinion expressed by Howard C.J. in that case. Section 128A (1) nowhere states that a condition precedent to its operation is that the offending vessel shall have been " knowingly used " *by her owner* on the unlawful occasion,

[1] *(1947) 48 N. L. R. 510.*

and it seems to me that to read such an unexpressed condition into the section would be quite unwarranted. There are other statutory provisions where the penalty of forfeiture is similarly imposed without regard to the guilt or innocence of the owner of goods in respect of which the Ordinance has been contravened. Section 106, for instance, not merely empowers but makes obligatory the forfeiture of goods in certain circumstances. It seems to me that Section 128A is intended to catch up the case of a vessel which is being " used " in the exportation of prohibited goods by any person, be he owner, charterer, master or anyone else who has effective control of the vessel at the time of its improper use. The word " knowingly " is introduced only to ensure that the penalty of forfeiture shall not be exacted if, unknown to the owner or the person in control of a vessel, prohibited goods are surreptitiously smuggled on board. In such a case the principle laid down in *The Attorney General v. Rodriguesz* [1] would seem by analogy to apply.

The provisions of Section 128A of the Customs Ordinance are no doubt rigorous in their operation. This circumstance does not however justify a Court in refusing to give effect to the clear intention of the Legislature where it is proved that a vessel has been wilfully used by those in charge of her for the conveyance of contraband. As Lord Hewart said in *De Keyser v. Harris* [2], in dealing with a similar provision of law, there is " no opportunity for mercy " in applying the section, and as the Court has " no option between alternatives ", it cannot take into consideration mitigating circumstances (should such exist) to relieve an owner of the penalty imposed by law. The remedy lies elsewhere in cases which may be thought to warrant remission of the forfeiture. The power of mitigation is vested not in the Courts but in other hands—*vide* Sections 155 and 157 of the Ordinance.

This disposes of the ground on which the learned District Judge entered judgment against the Crown. Mr. Thiagalingam has also argued with much ingenuity that the order of forfeiture was bad in law on two further grounds, namely,

(1) that Section 128A does not apply because the bags of paddy which were found on board by the Customs authorities were not " goods prohibited of export " but merely goods " the exportation of which is restricted " within the meaning of Section 128 ;

(2) that as it was clearly the intention of the master of the vessel to transport the paddy from Muthur Harbour to Valvettithurai and *not to a foreign port,* the paddy had not been " exported " from the Island, and that the provisions of Section 128 could not therefore be brought into operation.

I now proceed to consider each of these submissions. Schedule B of the Customs Ordinance contains a " table of prohibitions and instructions " and Section 10 declares that the goods enumerated therein

[1] *(1916) 19 N. L. R. 65* [2] *(1936) 1 K. B. 224.*

" shall not . . . . be exported or taken out of the Island save in accordance with the conditions expressed in the said Schedule ". (I have omitted the words which do not apply to the present case.) The result is that there are certain goods the exportation of which is absolutely prohibited, while other goods can only be taken out of the Island upon certain conditions which must first be satisfied. Paddy undoubtedly belongs to the latter class which may for convenience be described as " restricted goods ". Mr. Thiagalingam's contention is that Section 128 does not apply where goods of that description are taken out of the Island without compliance with the special conditions which apply in the particular case. It seems to me that this very subtle distinction is not warranted by the language of the statute. In the case of paddy, the restriction imposed by law is that it cannot lawfully be taken out of the Island except under the authority of a licence issued by the Controller of Exports. With the greatest respect, I fail to see how the view can reasonably be taken that any paddy in respect of which this restriction has not been removed falls outside the description of goods " prohibited of export " within the meaning of Section 128A.

With regard to the second submission made by Mr. Thiagalingam, I would hold that the paddy was " exported " (as the term must be understood in the context of the Customs Ordinance) as soon as it was taken in the vessel outside the limits of the port of Muthur. It makes no difference whether Kandasamy's intention was to transport it for consumption on board or in some other part of the Island or in a neighbouring country or merely to gratify a sinister impulse to dump it into the sea. The Customs official is concerned on such occasions only with the fact of exportation, and he need not seek to probe the dark and mysterious workings of the smuggler's mind. I would follow in this connection the authority of *Muller v. Baldwin* [1] where, in interpreting an analogous statute, Lush J. held that the word "export " must be used in its ordinary sense, namely " carried out of port ". Indeed, other provisions of the Customs Ordinance would appear to indicate that the Legislature did not recognise a distinction between exportation " *outwards or coastwise in the Island* " for the purposes of the Customs Ordinance (Sections 18 and 67).

In my opinion the forfeiture of the *Mathurai Ammal* was justified because it was " knowingly used " on 23rd December, 1947, by the person who was in charge of the vessel in the " exportation " of goods which were " prohibited of export " in the sense that the restriction imposed on their exportation had not been removed as required by law. I would accordingly set aside the judgment appealed from and enter decree dismissing the plaintiff's action with costs both here and in the Court below.

CANEKERATNE J.—I agree.

Appeal allowed.

[1] *L. R. 9 Q. B. 457.*