

1969 Present : H. N. G. Fernando, C.J., and de Kretser, J.

CENTRAL JEWELLERY STORES LTD., Appellant, and THE  
ATTORNEY-GENERAL, Respondent

S. C. 592/65 (F)—D. C. Colombo, 1045/Z

*Customs—Offence of attempt to export an article unlawfully—Quantum of evidence—Difference between attempt and preparation.*

Plaintiff resorted to a subterfuge to export a package of a large number of gems worth Rs. 46,000 by trying to pass it off as a package containing a small number of gems worth Rs. 1,200 for which he had already obtained a licence to export.

*Held*, that the facts of the present case established an attempt, and not merely a preparation, to export unlawfully the gems worth Rs. 46,000. The gems, therefore, were liable to be seized by the Customs.

**A**PPEAL from a judgment of the District Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *Cecil de S. Wijeratne* and *Mark Fernando*, for the plaintiff-appellant.

*H. L. de Silva*, Crown Counsel, for the defendant-respondent.

*Cur. adv. vult.*

September 30, 1969, H. N. G. FERNANDO, C.J.—

The plaintiff sought in this action to challenge the validity of a seizure by the Customs of a parcel of gems which the plaintiff proposed to export from Ceylon, and also the validity

of a monetary forfeiture declared by the Customs to have been incurred by the plaintiff in consequence of an attempt to export the gems illegally.

The following facts were established beyond doubt at the trial:—

(1) The plaintiff had on 5th September 1962 made an application to the Controller of Exports for a licence to export 60 carats of Star Sapphires valued at Rs. 1,200 to a consignee in Hongkong;

(2) In accordance with the usual practice, the plaintiff had presented a package containing the 60 carats for appraisal by the Customs appraiser; the valuation of Rs. 1,200 had been accepted on 5th September 1962 as being a fair valuation, and the package was sealed by the Customs.

(3) This appraisal and sealing of the package enabled the plaintiff to obtain on 6th September the licence for its exportation.

(4) On 18th September 1962, one Hassan, a director of the Plaintiff Firm tendered to the Customs Air Freight Section a package for *lead* sealing, which sealing according to the practice would authorise the actual taking out of the package by Air, and Hassan represented that this was the package appraised on 5th September containing 60 gems of the value of Rs. 1,200.

(5) In fact the package then presented, although very similar in appearance to that presented on 5th September was a different one, which was found to contain gems to the value of Rs. 46,000 odd.

(6) The Customs seized this package and demanded the monetary forfeiture on the ground that the plaintiff had attempted to obtain the lead sealing of this package, and the consequent authority to its taking out, on the pretence that it was the package containing gems of the appraised value of only Rs. 1,200.

The position of the trial for the plaintiff on the facts was that there had been a bona fide mistake made by Hassan on 18th September; that while he had intended to present for lead sealing on that day the package which had been appraised on 5th September, he had instead mistakenly presented another similar package containing a different consignment of gems. There was some support for this position. The plaintiff had

received a second order from the same Hongkong purchaser for gems valued at Rs. 46,750, and the plaintiff had applied to the Controller of Exports on 14th September 1962 for a licence for export in fulfilment of that order. On 17th September, the plaintiff had presented a package of gems for appraisal in connection with this order, and the appraiser had accepted the valuation of Rs. 46,750 as being fair. It was quite possible therefore that when Hassan produced a package for lead sealing on 18th September he intended to produce the package appraised on 5th September, but mistakenly produced instead the package appraised on 17th September.

Nevertheless, the learned trial Judge has stated cogent reasons for his conclusion that there was no mistake, but instead a subterfuge by which Hassan attempted to pass off a package containing a comparatively large number of gems as being that which contained only the 60 gems valued at only Rs. 1,200.

It appears that the Air Freight Section had been warned in advance by a Customs appraiser that the latter desired to re-check the package appraised on 5th September. In consequence, officers of the Appraisal Section were summoned on the 18th, when Hassan presented a package for lead sealing. Hassan was then informed of the officers' suspicion that this package was the one which had been appraised on the 17th, and not on the 5th. Hassan however insisted that the suspicion was unfounded. Before the package was opened, he went to his shop to fetch an invoice, and on his return he again insisted that this was the package which had been appraised on 5th September. It was only when the package was being opened that he said "I made a mistake". Hassan had ample opportunity, when he went to the shop to fetch the invoice, to ascertain whether in fact he had made a mistake, and his attitude after returning from the shop fully justifies the conclusion of the trial Judge that there had not in fact been any mistake. Indeed Counsel for the plaintiff in appeal did not seriously challenge that conclusion.

Counsel however argued that the facts of this case established only preparation to commit the offence of unlawful exportation, and not an attempt to commit that offence. But the evidence establishes that the procedure for the lead sealing of packages of this category is an essential part of the process of the exportation of such packages. Without this seal, the package could not have been openly taken out of Ceylon. It seems to me therefore that the act of obtaining the sealing was one done towards the exportation of the package.

While it is often difficult to determine whether an act is done only in preparation to commit an offence, or else towards the commission of the offence, the facts of this particular case serve to show where the stage of preparation ended. The applications for export licences and the presentation of the two packages for appraisal and for the first sealing may fairly be regarded as mere preparation. But the presentation for the second sealing was an attempt to obtain on the package the physical mark of approval for export. This presentation was as much an act done towards exportation as would be the taking of an article on board a ship which is due to depart for a foreign destination. It suffices in this connection to cite a recent English case of *Davey and others v. Lee*<sup>1</sup>.

For the reasons which have now been stated, we dismissed the plaintiff's appeal with costs.

DE KRETZER, J.—I agree.

*Appeal dismissed.*

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