

1944

Present: **Keuneman J.**

ARUNASALEM, Appellant, and COLLECTOR OF CUSTOMS,
Respondent.

250—*M. C. Point Pedro, 2,777.*

Customs Ordinance (Cap. 185) section 34—Failure of master of boat to account for goods entered in manifest—Penalty imposed under section—Charge under s. 139 (a).

The penalty imposed on the master of a boat under section 34 of the Customs Ordinance for failing to account for goods entered in the manifest on the arrival of the boat at a port is a fine within the meaning of the Ordinance and section 139 (a) has no application to such a case.

A PPEAL from a conviction by the Magistrate of Point Pedro.

L. A. Rajapakse, K.C. (with him *S. Mahadeva*), for accused, appellant.

Walter Jayawardene, C.C., for complainant, respondent.

Cur. adv. vult.

June 13, 1944. KEUNEMAN J.—

The accused was charged as follows:—That he did at Valvettiturai on March 2, 1943, become liable under section 34 of the Customs Ordinance (Chapter 185) to a penalty of Rs. 10,000 as master of boat No. 46 by reason of the fact that on the arrival of the said boat at Valvettiturai from Tuticorin 389 bundles of beedies and 111 bags of beedi tobacco entered on the manifest of the said boat granted at Tuticorin was not found on board, and that he had thus committed an offence punishable under section 139 (a) of the Customs Ordinance, as amended by section 8 of Ordinance No. 3 of 1939.

The relevant portion of section 34 runs as follows:—

“ If any goods entered on any clearance or other paper granted at the place from which any ship shall have come, shall not be found on board such ship, or if the quantity found be short *and the deficiency be not duly accounted for* the master shall be liable to a penalty not exceeding Rs. 200 for every missing or deficient package and twice the amount of duty chargeable on the goods deficient and unaccounted for if the duty can be ascertained, and the Collector is authorised to require the payment of such fine and dues, and to decline the granting of a clearance outwards to the master of any vessel so liable and refusing to pay such fine and dues. ”

Section 139 (a) as amended runs:—“ If any person by reason of any action or omission becomes liable under the provisions of any section of this Ordinance to forfeit any goods or any sum of money, or to any penalty *other than a fine*, such person shall, in addition, be guilty of an offence ”

Two principal points have been urged by Counsel for appellant:

- (1) that the penalty imposed by the Collector was a “ fine ” within the meaning of the Ordinance, and that section 139 (a) has no application.

(2) that the accused has "duly accounted for" the deficiency. As regards (1) I think it is clear that the Collector imposed a penalty of Rs. 200 for each of the missing packages, making a total of Rs. 10,000. There is no evidence that any portion of the penalty of Rs. 10,000 was levied in respect of duty chargeable on the missing packages. Can the penalty imposed be regarded as a fine? Crown Counsel argued that "fine" meant a fine imposed by Court, but clearly the word "fine" is not used in that sense in section 34. The words "such fine and dues" used in the latter part of section 34 clearly refer to the penalties mentioned earlier, and the section expressly says that the Collector "is authorised to require the payment of such fine and dues" and to decline the granting of a clearance if such fine and dues are not paid. The Collector had authority then to require the payment of a fine.

What is the difference between "fine" and "dues"? I am of opinion that the imposition of a penalty of Rs. 200 in respect of each of the missing packages is clearly in the nature of a *fine*. I do not think it can be regarded as dues. On the other hand, recovery of Customs duty in respect of the missing packages may well be regarded as "dues". The word "fine" certainly fits the former penalty better than it fits the latter. I am therefore of opinion in this case that the penalty imposed was a *fine* within the meaning of the Customs Ordinance. It follows that section 139 (a) which deals with a "penalty other than a fine" has no application to the facts of the present case.

There is really no need to deal with point (2) taken by the accused, but I must say that I am not at all satisfied with the reasoning of the Magistrate in this connection. He has used manifestly exaggerated language, and has accepted as fact what has not been proved in evidence. For instance he has said:—"I have no doubt whatever that these 389 bundles of beedies and 111 bags of beedi tobacco have been illicitly landed in the port of Valvettiturai". This is in direct contradiction of the evidence of the Customs Officer (the only witness for the prosecution) who said, "As far as I am aware there is no evidence that this cargo was brought either into the territorial waters of Ceylon or unloaded in any port in Ceylon". The defence of the accused was that in the course of a voyage from Tuticorin to Nagapatam, the ship encountered violent weather and strong winds off Point Calimere. As a result the mainsail was carried off and the mast fell and dashed against the side of the ship, which sprang a leak. To save the lives of the crew the master was compelled to jettison all the cargo and the provisions. The Customs Officer, when he visited the ship, found the damage to the ship which I have described. The Magistrate appears to have had his mind obsessed with what he calls "a similar case" where another boat was also compelled to come to Valvettiturai after jettisoning the cargo. I need only add that there is no evidence on the record to show how and under what circumstances that other ship came into Velvettiturai, or to show any connection between that ship and the present one, and the Magistrate would have been well advised to base his judgment on the evidence recorded in this case.

The Magistrate also commented on the fact that this ship, like the other one, drifted into Valvettiturai and not into the ports of Kankesan-turai or Point Pedro where there are Customs Stations, and thought it strange that the winds and currents should have brought both ships into Valvettiturai. But here again there is not a scrap of evidence as to where the winds and currents would carry a ship. It is clear that the Magistrate has elevated suspicion to the rank of proof and his finding is accordingly vitiated.

I however decide the case on the first point raised by Counsel for the accused. I set aside the conviction and sentence and acquit the accused.

Set aside.
