The Attorney General V. Gnanapiragasam

I49/1965

Present: H. N. G. Fernando, S.P.J., and T. S. Fernando, J.

THE ATTORNEY-GENERAL, Appellant, and I. GNANAPIRAGASAM and another, Respondents

S. C. 529/1962—D. C. Jaffna, 959/M

Customs Ordinance (Cap. 235)—Section 152—Seizure and forfeiture of goods—Proof that the goods had been imported into Ceylon—Burden is then on claimant to show that the importation was lawful—Exchange Control Act, No. 24 of 1953.

Appeal—Finding of fact—Power of Appeal Court to evaluate the evidence.

In an action against the Attorney-General in which the 1st and 2nd plaintiffs (husband and wife) sought a declaration that they were entitled to eight bars of gold which were seized and forfeited by the Collector of Customs, it was admitted by the 1st plaintiff that he did not purchase the gold bars at any Customs sale, nor at any auction sale, nor from any dealer, nor through the Central Bank, nor from anyone in Ceylon. His evidence that " the only way in which he got the bars " was by having them made for him from old jewellery was not acceptable. Therefore no reasonable explanation was available, on the evidence, for the plaintiffs' possession of the bars, other than the explanation that the bars had been imported into Ceylon.

Held, that, in the circumstances, the burden of showing that the importation was lawful was on the plaintiffs (Section 152 of the Customs Ordinance) and that the burden had not been discharged.

Held further, that, in regard to the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the trial Judge.

APPEAL from a judgment of the District Court, Jaffna.

V. Tennekoon, Solicitor-General, with *H. Deheragoda*, Senior Crown Counsel, and *S. Pasupati*, Crown Counsel, for the Attorney-General.

S. J. Kadirgamar, with *G. T. Samerawickreme*, *R. R. Nattiah* and *K. N. Choksy*, for the plaintiffs-respondents.

Cur. adv. vult.

June 21, 1965. H. N. G. FERNANDO, S.P.J.—

This was an action against the Attorney-General in which the Plaintiffs sought a declaration that they are entitled to eight bars of gold which were seized by the Collector of Customs, Northern Province, and forfeited in purported pursuance of Sections 45 and 106 of the Customs Ordinance, read with certain provisions of the Exchange Control Act No. 24 of 1953.

The Seizure of the eight bars of gold was made in following circumstances:— On receipt of certain information Customs and Police officers raided the house occupied by the Plaintiffs (who are husband and wife) on the evening of 25th March 1958. At that time the second Plaintiff, the wife, was in the house with her children. But the first Plaintiff, the husband, was not present. The house consisted of two rooms, a kitchen and a back veranda. Because of the prior information a search was made for gold, first in the two rooms and later in the kitchen. There were found in the kitchen what had been described as a provisions box of the type ordinarily used to keep foodstuffs. There was found in this box a basket which contained dry fish and a parcel wrapped in a newspaper. The contents of the parcel were found to be eight bars of gold, and the newspaper in which they were wrapped was a Ceylon newspaper of the date 18th March 1958. The bars of gold were immediately seized by the Customs party and thereafter a further search was made in the house, in the course of which there were found in an almirah in one of the rooms a number of letters to which reference will be made later. The gold and letters were seized by the Customs

officers and were taken to the Customs office. The second Plaintiff was also taken there in custody. At the Customs office, the Collector questioned the second Plaintiff and recorded her statement. She said that she had sent someone to search for her husband but he was not to be found. She also stated that, when the parcel had been shown to her by the Customs officers (apparently before it was opened), she had sworn that she did not know what it was. In the statement itself she again insisted that she did not know what was in the parcel. On the next day also when questioned she was unable to account how the gold was in her house.

There was no contest at the trial regarding the value of the bars which according to the Crown witnesses was Rs. 85,000. Six of the bars were approximately of the same dimensions and each of them were almost of identical weight, i.e., 999.92 to 999.99 grams: the other two bars were larger but almost identical with each other in dimensions and weight. All the eight bars represented the gold contained in 1089 gold sovereigns.

At the trial the only witness called for the Plaintiffs was the husband, the first Plaintiff. His position was that he was the owner of the gold bars and his wife co-owner with him, under the law of Thesawalamai. He stated that from about 1948 he had been a trader in dry fish: that in the first two years his nett profit from the business was from Rs. 100 to Rs. 200 per month and that thereafter until the end of 1957 the profit had been between Rs. 6,000 and Rs. 7,000 per year. He said also that he had borrowed Rs. 30,000 to Rs. 35,000 from friends and relations. With these moneys he had throughout the period of about eight years prior to 1958 bought old jewellery at various places in the Northern Province and had the gold melted and made into bars. He had employed for this purpose a jeweller whom he identified as one Lechumanan Asary who had resided near the Sivan Kovilady in Vannarponnai. In his explanation in cross-examination of his alleged purchases of old jewellery this jeweller loomed large. Whenever the first Plaintiff saw any jewellery which he wished to purchase, he would take the jeweller and have him test the gold and he would act on the jeweller's advice in purchasing it. He said that he used to keep the old jewellery with

him, and about once a year he would take his accumulated purchases to the jeweller for melting and in about two or three days he would receive a bar of gold from the jeweller. According to the evidence the first bar was completed in 1950, and thereafter until 1957 he had one bar or sometimes two made every year. When asked why he had the gold melted into bars, his explanation was that his object was to sell the bars in the market at a profit. In fact according to him he had in fact sold some of the bars which had been made at the early stages. At the time he purchased old jewels the price of a sovereign had been Rs. 55 to Rs. 60, and at the time of the seizure the price was Rs. 73. This explanation that the first Plaintiff bought gold by way of a business adventure, in order to convert gold into bars and later sell them at a profit was mentioned more than once in the first Plaintiff's evidence. But it is necessary to reproduce a bit of his evidence in cross-examination by which the learned District Judge appears to have been much influenced:— "I had 8 bars. I have 8 children. Whenever I want I can melt them and make jewels for my children." The Plaintiff did not however say that he had actually got any jewellery made for his children. The indications are very much to the contrary, for he admitted that he had pawned some of his wife's jewels. Indeed, the wife said in her statement to the Collector of Customs that "most of my jewellery was pawned by my husband and sold. I have no jewellery except a single earring". It is relevant to note in this context also that the rent which the Plaintiffs paid for their house was only Rs. 5 per month, this being a fair indication of the conditions of poverty in which the Plaintiffs and their children had lived for many years.

In his judgment the learned Trial Judge stated as follows one question which arose for his consideration:— "The next question which arises is whether—(a) the said gold slabs were made for the first Plaintiff by a goldsmith Lechuman Achchary as stated by the Plaintiff from old gold jewellery purchased by the 1st Plaintiff from time to time with his savings;". Thereafter the Judge made the following observations:— "Regarding (a) above, Lechuman Achchary has not been called as a witness. None of the persons from whom the 1st Plaintiff purchased old gold jewellery from 1948 to 1958 were called as witnesses. Of course it will be difficult to

recall the names and identity of such persons. Having regard to the ostensible poverty of the 1st Plaintiff, the story of the 1st Plaintiff that he purchased old jewellery from 1948 from time to time, and had the same converted to 8 slabs of gold, is hard to believe. According to the 1st Plaintiff, the said 8 slabs of gold were meant as an investment for his 8 children. This is rather a coincidence which I am unable to ignore as pure accident. Sometimes truth is stranger than fiction; but we do know that such things happen in real life. I am therefore unable to reject his explanation as untrue. Further, the claim of the 1st Plaintiff that he had been borrowing large sums of money, without any written security, from some of his friends, again appears strange."

It is not quite clear from these observations what weight the learned Judge attached to the circumstance that the jeweller was not called as a witness or what consideration was given to the first Plaintiff's explanation of this matter. According to the first Plaintiff he had searched for the jeweller before the Customs raid in March 1958, and at that stage someone had told him that the jeweller had gone away to India. He did not say in evidence that he had learned then that the jeweller had permanently left Ceylon. Yet he admitted that he had made no inquiries as to the whereabouts of the jeweller after the Customs raid. He claimed that he told his lawyers that the jeweller Ledchumanan Asary had made the gold bars, but he did not inform them that the jeweller had left Ceylon. If indeed (as he said) he gave the name of the jeweller to the lawyers and did not inform them of the jeweller's departure from Ceylon, one would have expected that the jeweller would have been cited as a witness. In fact the first Plaintiff said in evidence that his Proctor wanted to take out a summons on the jeweller. But the two lists of witnesses on record do not include the name of Ledchumanan Asary. Having regard to the Plaintiff's evidence concerning this matter, the mere reference to it in the judgment "Ledchumanan Asary has not been called as a witness" is to say the least unsatisfactory, for it leaves us quite unaware of the inference, if any, which the Judge himself drew from the fact that the jeweller was not cited or called as a witness. In the absence of any assistance from the judgment it would not be unreasonable at this stage to draw the inference that

the jeweller was not cited as a witness, either because his name was not mentioned to the Proctor, or else because his evidence would not have supported the Plaintiffs case. The third explanation, favourable to the Plaintiffs, is not now available to them. To infer that the jeweller was not cited because he could not be found would be unreasonable, since the first Plaintiff's own evidence was that he did not inform the Proctor of the jeweller's absence from Ceylon, and that he did not himself make inquiries for the jeweller after the raid. In fact he said that he had not thought of having the evidence of the jeweller to support him and that he had thought that his own evidence will do.

The brief observations of the learned Judge which have been reproduced above appear to imply that he did not believe the story that the first Plaintiff has been able, out of the profits of his dry fish trade and out of the loans obtained from friends and relations to buy large quantities of old jewellery. And it is clear from other passages in the judgment that in the opinion of the Judge funds became available to the first Plaintiff in quite a different fashion. Among the letters seized by the Customs officers from the almirah in the Plaintiff's house were some which had been addressed to the first plaintiff from places in India. The Crown produced these letters apparently in the hope of establishing that the letters disclosed a possibility that the first Plaintiff was engaged in smuggling operations between India and Ceylon and also in the business of conveying to Ceylon illicit immigrants from India. It was thought presumably that this possibility would support the Crown case that the gold bars had been brought to Ceylon in the course of smuggling operations in which the Plaintiff was concerned. Objection was taken by the Plaintiff's counsel to the production of these letters but some of them were admitted. This has however had a most unexpected consequence. The learned Trial Judge has referred to certain expressions and implications in these letters and held that they "establish a lucrative illicit business carried on by the first Plaintiff in secret". He thought it "very probable that the proceeds of such a business would be converted into gold, and hoarded". The Judge thus decided that he could believe the story of the purchase of old jewels and of their conversion into slabs,

because he was satisfied that funds for the purpose were available to the first Plaintiff from these smuggling and other unlawful operations. Although he did not expressly reject the incredible story that the Plaintiff obtained loans of comparatively large sums without interest, without security and without being pressed for repayment, he made the following inference regarding the alleged loans:— "The persons who lent such large sums of money, without written security, are really partners in the 1st plaintiff's business, with the right to share a good portion of the profits, but without the risk of being charged or convicted with being concerned in such illicit business." Counsel for the Crown must have been much surprised at the manner in which the learned District Judge utilised the letters which had been produced at the Trial with such different expectations. They can rightly claim that the facts as found by the Trial Judge in his judgment are not facts which were relied on by the Plaintiffs. If they had been so relied on, it would have been open to the Crown by evidence to counter the inferences which the Judge ultimately drew from the letters.

These considerations apart, there is one feature of the letters which does not appear to have been noticed by the Trial Judge. He refers in the judgment to D10, D12, D14, D15, D16, D17, D21, and D23 but he does not refer to their dates, which are as follows:— 20.12.57: 14.11.57: 19.12: undated: 25.8.57: 10.3.58: 15.1.58: 29.10.57. Now, the Plaintiff's case was that the first bar was made in 1950 and the other seven at intervals during the period 1951 to 1957. If then the question which the learned Judge considered was whether the Plaintiff did have the funds to buy the jewellery regularly throughout the entire period of eight or nine years, could he from these letters draw the inference that the Plaintiff had throughout been in sufficient funds? It was perhaps a reasonable inference from the letters that the first Plaintiff may have been concerned in smuggling operations in 1957 and 1958, but it was in my opinion quite unreasonable to assume that a man who was a smuggler in 1957 had probably been a smuggler during the preceding seven years. A similar unreasonable inference was drawn in regard to the Judge's explanation for what the first Plaintiff called loans. Even if his "partners" provided cash to their fellow

smuggler, the only evidence of such transactions was that according to the first Plaintiff he received Rs. 12,000 from one Anthonypillai in 1957, Rs. 7,000 from one Vinasithamby also in 1957 and Rs. 6,000 from one Selvanayagam in 1954 and 1955. Here again there was no evidence that money was received whether as loans or as speculative investments during an earlier period. In assuming so lightly that these loans were in fact contributions towards smuggling ventures, the Judge did not notice what seems to be a relevant consideration. If indeed these persons had joined the first Plaintiff in such ventures, was it likely that the first Plaintiff would have divulged their names in Court.

Sitting in Appeal we are as well able as the Trial Judge to consider whether the letters written in 1957 established the probability that the first Plaintiff and the three men he named had engaged in smuggling operations from about 1949. This is especially so in a case in which the first Plaintiff's own explanations as to the meaning and purpose of the letters were contrary to the explanations which the Judge chose to infer concerning them.

The learned Judge was satisfied "that the second Plaintiff was not even aware of the existence of the gold in the house, until she saw the gold when the package was unwrapped in her presence". This conclusion he reached because of the first Plaintiff's statements to that effect at the Trial, and of the second Plaintiff's similar statements to the Customs officers. But no consideration was given in the judgment to items of evidence which could well affect the truth of these statements. According to the first Plaintiff, he used to buy old jewellery regularly during a period of eight years and to keep them with him until they were converted into bars from time to time. The bars too, in gradually increasing number, were in the almirah in which the first Plaintiff kept his clothes. He said that the almirah was "in his charge" but there was no evidence that the wife had no access to the almirah. The evidence as to the finding of letters in the almirah by the Customs officers did not disclose that the almirah had been forced open, or that the keys, if any, of the almirah were not readily available to the wife. The Plaintiff described the house as consisting of one room, a front veranda, a back

veranda, and a kitchen. In other words, to anyone familiar with a house of that description rented at Rs. 5 per month, it was a one roomed house. It is scarcely credible that in such circumstances the wife had not at some time during a period of seven or eight years become aware of the presence in the almirah of jewels and bars of gold. The learned Judge was able to accept many "strange" circumstances as true, but he has expressed no opinion as to this particular "strange" circumstance, that the first Plaintiff desired to maintain, and actually succeeded in maintaining, such perfect secrecy in regard to his hoard of gold. Even if the Judge could discount the natural inquisitiveness of a wife, there is no evidence from the first Plaintiff of any special precautions taken to avoid the risk of discovery by one of his eight children. On the day of the raid itself, the gold was found, not in an almirah, but in a box of which the wife had the keys. There was ample opportunity for the wife, if she so wished, to examine the contents of the box. If the truth is that the first Plaintiff did not want his wife to know of the existence of the gold, was it likely that after eight years of careful concealment he would have allowed that opportunity to his wife and children during what he said was on this occasion his absence from home of two or three days? Here again, we have not the advantage of knowing the Judge's view concerning a fact which materially affects the credibility of the first Plaintiff's evidence. But let me suppose that the first Plaintiff did successfully conceal knowledge of the existence of the gold even from his wife. Could an inference then arise, that the first Plaintiff's desire for extreme secrecy arose from some guilty knowledge on his part that the gold had been stolen, smuggled or otherwise unlawfully procured? The first Plaintiff's statement, that he kept secret for so long the fact that he was amassing wealth, was scarcely credible. But the possible explanation for secrecy which I have just mentioned above would have been perfectly reasonable. In baldly stating his finding that the wife was ignorant of the existence of the gold, the learned Judge failed to consider whether the fact of her ignorance might affect the truth of the version as to the time when and the manner in which the bars came to be in the possession of the first Plaintiff.

The judgment states that "according to the first Plaintiff, the 8 slabs of gold were meant as an investment for his 8 children". This statement is referable only to the very brief extract from the evidence which I have reproduced in an earlier part of this judgment. The facts mentioned in the answers "I had eight bars. I have 8 children" were not regarded by the Judge as mere coincidence. He stated that he could not ignore them. The Judge inferred that each of the eight bars was made for the benefit of one of the eight children. That inference, if correct, could well support the version of a gradual accumulation of gold bars by the first Plaintiff. But that inference was inconsistent with his evidence, for he repeatedly said that he intended to sell the gold for profit and never claimed that he intended to invest the gold or its proceeds for the benefit of his children. Moreover, the Judge's own assumption, that the first Plaintiff must have had Partners who enjoyed the right to share in the proceeds of smuggling operations, conflicts with the theory that "the 8 slabs of gold were intended as an investment for his 8 children", and with the finding that the slabs belong to the first Plaintiff. The identity in number of the gold bars and of the Plaintiff's children was purely coincidental. It misled the Trial Judge into a misunderstanding of the Plaintiff's evidence as to the purpose of his alleged dealings in gold. And it is perfectly clear from the judgment that because of this misunderstanding, the Judge was "unable to reject (the Plaintiff's) explanation as untrue".

To examine now the main question which the Judge himself posed for his consideration, the points involved in the question were:— (a) Did the first Plaintiff during the period 1949 to 1957 have savings available to make regular purchases of old jewellery? (b) Was the gold for the bars procured by the first Plaintiff from time to time in the form of old jewellery? (c) Did the jeweller Ledchumanan make the eight gold bars from time to time?

With regard to point (a), it is clear that the Judge disbelieved the evidence that the first Plaintiff had savings available with which to make large purchases of gold in the form of old jewellery. That was why he made a voyage of discovery and satisfied himself that there were other sources from which the Plaintiff derived funds. I have

stated my opinion that the letters on which the Judge relied did not justify the inferences that those sources were available at any time before 1957, and that the version of a gradual accumulation of gold bars may therefore be true. In any event, it was not the Plaintiff's case that such sources had in fact been available, and the Crown could not be expected to rebut a position not adopted by the Plaintiffs at the Trial.

With regard to point (b), the Judge did not consider in his judgment the probability, having regard to the available evidence, of the version that the first Plaintiff could have maintained complete secrecy for so long a period regarding his procuring and his keeping in his house old jewels and bars of gold. Nor on the other hand did the Judge consider the question whether the second Plaintiff's denial of the knowledge of the existence of the gold bars supported the probability that the bars had been acquired recently, and not during the course of years as alleged. At this point alone, the Judge was "unable to reject the first Plaintiff's evidence as untrue", and must perhaps be regarded as having believed that evidence. But that belief was based upon inferences which have been shown to be unreliable, and upon an assumption, not in accord with the Plaintiff's evidence, that the eight bars were meant to be an investment for the eight children.

With regard to point (c), the Judge does not anywhere state even an opinion that the named jeweller made the gold bars. The only observation about Ledchumanan, that he was not called as a witness, cannot in reason be construed as acceptance of the Plaintiff's evidence on this point. On the contrary, that observation is in accord with the inference that Ledchumanan would not have supported the Plaintiff's case. The judgment states no reason why the presumption mentioned in Section 114 of the Evidence Ordinance was not acted upon in this case.

The finding of fact that the gold bars were made in Ceylon to the order of the first Plaintiff was not reached on a perception of the oral evidence; it was in no way based upon credibility or demeanour, and was referable solely to inferences and assumptions which have

been mentioned. "Where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the Trial Judge, and ought not to shrink from that task." (Lord Reid in *Benmax v. Austin Motor Co.* [(1955) 1 A. E. R. 326.]) The inferences drawn in the instant case, that the first Plaintiff was regularly in funds and thus in a position to acquire gold gradually during a long period, were not justified by the letters which at the most revealed that he may have been involved in smuggling and other illicit operations about 1957. It was not argued on behalf of the Crown that it would be contrary to public policy to permit the Plaintiff to prove his case by relying on his own unlawful acts of smuggling and of similar prohibited activity, and that question need not be considered. But I doubt whether the interests of justice required or permitted the Trial Judge in this case to infer for the benefit of the Plaintiff the commission by him of such unlawful acts, when he had in fact denied in evidence that he did commit them.

I am satisfied that the learned Judge should have rejected as false the entirety of the relevant evidence of the first Plaintiff, and that he should have rejected the claim that the bars of gold were made in Ceylon to the order of the first Plaintiff. There are then the first Plaintiff's admissions that he did not purchase the gold bars at any Customs Sale, nor at any auction sale, nor from any dealer, nor through the Central Bank, nor from any one in Ceylon. His position quite clearly was that "the only way by which he got the bars" was by having them made for him, from old jewellery, by Ledchumanan Achchary. He cannot now claim through his Counsel in Appeal that he stole the gold bars or found them somewhere as abandoned treasure. Therefore no reasonable explanation is available on the evidence for the first Plaintiff's possession of the bars, other than the explanation that the bars had been imported into Ceylon. Even if it be correct that the fact of importation must be proved beyond reasonable doubt, that fact has been so proved in the circumstances of this case.

If then these bars must be held on the evidence to have been imported into Ceylon, the burden of showing that the importation

was lawful was on the Plaintiffs (Section 152 of Cap 235). The only attempt made at the Trial to discharge this burden was the version that the bars were made to the order of the first Plaintiff from the gold acquired in the form of old jewellery. It follows from the rejection of that version that the burden has not been discharged.

Counsel for the Plaintiff has submitted that there was no prohibition or restriction of the import of gold prior to the enactment of the Exchange Control Act in 1953. This position has not been contested by the Crown in the present case, although it is in fact probable that the importation of gold was prohibited or restricted for a long period under Defence Regulations. But Counsel's argument which is based on that position cannot succeed. He submitted that the Crown must prove that the importation of these bars took place after the Exchange Control Act came into force, and that the burden of showing lawful importation need only be discharged upon such proof being furnished. Section 152 of Cap. 235 cannot in my opinion be so construed. It is clear that once there is proof of the importation of goods into Ceylon, the claimant must establish all such facts as are necessary to prove lawful importation. One such fact to be established would be the actual time of importation, if it is sought to rely on the position that the act of importation at such time would not have been unlawful.

For reasons stated, the appeal is allowed, and the Plaintiffs' action is dismissed with costs in both Courts.

T. S. FERNANDO, J.— I agree.

Appeal allowed.