IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 46/93

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE WOLFE JA

BETWEEN A & F FARM PRODUCE CO. LIMITED

A N D ANDRE CHIN APPELLANTS

A N D COMMISSIONER OF CUSTOMS AND

EXCISE RESPONDENT

Enos Grant & Mrs Jacqueline Samuels-Brown
for appellants

Lennox Campbell, Senior Assistant Attorney General
for respondent

20th 21st 22nd 23rd February & 7th April 1995

CAREY JA

This appeal relates to an application for certiorari which was refused by the Full Court of the Supreme Court (Malcolm, Theobalds & Langrin JJ) on 18th June 1993. By those proceedings the appellants sought to remove into the Supreme Court to be quashed a notice of detention dated 9th March 1993 and a notice of seizure dated 15th March 1993, concerning their importation of a large quantity of margarine into the Island.

The appellants challenged the adverse decision on four grounds, viz:

> "(a) That the Full Court misdirected itself in law on the interpretation of the provisions of the Customs Act, in particular, sections 15 to 19 and sections 209 to 219 of the Act, and/or
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> (b) That the Full Court misinterpreted its functions and/or applied the wrong principles in reviewing the decisions of the Respondent;

> (c) That the Full Court misdirected itself in law on section 408 and 413 of the Judicature (Civil Procedure Code) Act and the nature of affidavit evidence on the hearing of a Motion and accordingly wrongly admitted two affidavits filed on behalf of the Respondent or failed to strike out the offending paragraphs thereof.
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> (d) That the Full Court took into consideration irrelevant matters and in so doing exercised its discretion wrongly."

So far as the events leading to the issue of the notices of detention and seizure go, I am content to adopt their rehearsal in the judgment of Langrin J who delivered the main and indeed the only judgment with which the other judges agreed. At pp. 44-45 he stated as follows:

> " The first applicant is registered and incorporated under the Companies Act of Jamaica and carries on a business as importers and dealers while the second applicant is its Managing Director.
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> On or about the 17th February, 1993 the first applicant purchased from Sunlight Foods Inc., Miami, Florida, 900 cases of margarine being 45,000 lbs in weight at the normal price of US$10,800 for sale to its customers in the baking industry. The margarine was imported specifically for Clients who wished to satisfy the increased demand for buns in the approaching Easter season. On arrival of the margarine the applicants through its Customs broker made all the necessary declarations. On the 8th March, 1993 the proper officer at the Valuation Branch of the Respondent valued the goods based on the price purportedly paid by the applicant
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> When the second applicant went to collect the goods on the 10th March, 1993 he was informed that they were detained on the orders of the Revenue Protection Division. On the 11th March, 1993 the second applicant attended the office of the Revenue Protection Division with his Attorney-at-Law when they were handed a Notice of Detention
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> Finally March 16, 1993 a Notice of Seizure was delivered to the first applicant. The stated grounds were that the container and goods were liable under section 210 and/or 211 because the entry and supporting documents

showed an incorrect value for the goods."

With respect to ground (a) Mr Enos Grant argued that the Full Court misinterpreted the powers which the Customs Act gave to the Commissioner of Customs and Excise, that there was no power to issue a notice of detention or notice of seizure where a dispute as to the duty payable arose and section 17 of the Customs Act was the relevant provision. It provides as follows:

> "17.-(1) If any dispute shall arise as to whether any or what duty is payable on any goods imported into or exported from the Island, the importer, consignee or exporter, or his agent, shall deposit in the hands of the Commissioner the duty demanded by him."

He said this provision constituted a safeguard for the citizen. It created a regime which allowed for the ordered collection of the revenue and allowed the citizen to have assessments reviewed by the Commissioner and to appeal to the Revenue Court (Section 18 of the Act).

With all respect to these passionate arguments mounted by Mr Grant, I have no doubt they are wholly misconceived. In the first place, there never was any dispute in relation to the correct duty payable. It was not a situation where the Commissioner was demanding a particular sum as the appropriate duty while the importer was maintaining that a different amount was payable. Obviously what is contemplated in section 17 is the sort of situation where for example each side is relying on a different category in the tariff or classification of items of duties and thus a difference in computation necessarily arises. No question of any breach of the Customs Act arises. In the instant case, that was not the position. The Commissioner was alleging the commission of a breach of the Customs Act, i.e. a criminal offence. At the time the notice of detention was issued, the Commissioner had reasonable grounds for believing that a criminal

offence had been committed by the appellants. Further, at the time of the issue of the notice of seizure he had sufficient information in the form of confirmatory proof of the commission of an offence.

In the particulars of facts supporting the grounds of their application for certiorari, the appellants themselves were aware that no dispute existed as to duty because they were told that the "values of the said goods were wrongly stated." This occurred on 11th March 1993 a few days after the goods had been detained by the Customs. In the face of that statement, it is quite impossible to maintain that the dispute related to the appropriate duty payable.

Section 17 of the Customs Act is analogous to section 260 of the Customs and Excise Act (UK) which was considered by the House of Lords in **Commissioners of Customs and Excise v Tan & anor**. [1977] 2 WLR 181. For convenience I quote the headnote:

> "T, who with her husband had purchased two jade pendants in the Far East for f8,300, brought them to London where he told a customs officer that she did not know their worth. The officer valued them at f50 and demanded a duty of f12.50, which was paid by T, who was allowed to take the pendants away. Subsequently, T and her husband, having sold or agreed to sell the pendants, were convicted of an offence under section 304 of the Customs and Excise Act 1952, in that they knowingly and with intent to defraud Her Majesty of the duty payable thereon were concerned in dealing with goods which were chargeable with a duty which had not been paid. The Court of Appeal allowed the defendants' appeal.
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> On appeal:-
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> Held, that in the absence of concealment misrepresentation or fraud the payment of duty demanded by the customs officer at the place of entry, followed by the authorized removal of the goods in question, discharged the passenger's liability, even though the officer had made a mistaken

> valuation, and a supplementary claim for more duty could not thereafter be made."

It follows from this holding by Their Lordships, and it is as plain as can be that a dispute as to duty cannot arise where some breach of the Customs Act involving fraud, misrepresentation or concealment has been committed or is suspected of having been committed. The Full Court in the judgment of Langrin J put it this way:

> ...These sections (sections 15 & 17) are premised on the fact that the dispute which has arisen is based upon a genuine error on the part of the taxpayer. The House of Lords case of **Commissioner of Customs and Excise v Tan and Another** [1977] 2 WLR 181 makes it abundantly clear that Sections 15 and 17 do not apply where there is fraud, misrepresentation and concealment."

Mr Enos Grant founding himself on the premise that the dispute related to the duty payable was able to argue that since the respondent had not followed the regime prescribed by section 17, and instead had issued a notice of detention and a notice of seizure, then she had acted in excess of jurisdiction. It was an easy step thereafter to contend that the Full Court misinterpreted the provisions of sections 15-19 and sections 209-219.

I have already indicated that sections 15-19 concern disputes as to duty payable while sections 209-219 deal with a variety of offences and further sets out the conditions for detention and seizure in section 212 and section 214 respectively:

> "212-(1) Notwithstanding the provisions of section 211, if, upon the examination of any imported goods, which are chargeable with duty upon the value thereof, it appears to the Commissioner that the value of such goods as declared by the importer and according to which duty has been or is sought to be paid is not the true value thereof, it shall be lawful for the Commissioner to detain the same, in which case he shall give notice in writing to the importer of the detention of such goods, and of the value thereof

> as estimated by him, either by delivering such notice personally, or by transmitting the same by post to such importer addressed to him at his place of abode or business as stated in his entry.
> ...
> 219. Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) and notwithstanding anything contained in section 217, the Commissioner may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure."

It is quite plain that the respondent has a power to detain where the value declared by the importer is incorrect. This statutory power is accorded to her by section 212. But in addition to this statutory power, for the purposes of the efficient carrying out of the many and varied provisions of the Act, customs officers are given the powers of constables. They would thus have the power to detain goods imported into the Island to ascertain if any breach of the Customs Act has occurred. Having said this, I must go on to point out that the basis of the detention of the goods in this case, was information in the respondent's possession providing reasonable grounds for believing that the imported goods were under-invoiced, and to be more specific, that an offence under the Customs Act may have been committed. The detention notice had endorsed thereon, "For investigation" as the grounds for detention of the imported goods. There was nothing misleading about this endorsement and it was specific. The only investigation conceivable in the circumstances, must have been into some breach of the Customs Act. any other view, I suggest, would be less than naive.

I am driven to conclude that the submissions made by Mr Grant on ground (a) cannot succeed and must be rejected.

It follows that if his arguments fail on his first ground, inevitably those relating to the allied ground (b) must end in like manner. The judgment of Langrin J in which Malcolm and Theobalds JJ concurred, shows, on any fair examination, that the Full Court was very mindful of the supervisory functions it was engaged in performing with respect to the actions of the respondent and her officer Mr Farr. Langrin J referred to **Council of Civil Service Unions & Ors v Minister for the Civil Service** [1984] 3 All ER 935 and considered the three heads whereby administrative decisions are amenable to judicial reviews. Certiorari being one of the remedies in the composite of judicial review, it cannot be doubted that these heads are applicable to the relief sought by these appellants. He then examined and construed the sections already enumerated and concluded there was no illegality. He dealt also with the remaining heads of irrationality and judicial impropriety and concluded that the impugned conduct or decision of the respondent did not at all fall within their ambit.

The Full Court in the exercise of its supervisory function, held correctly as I have shown that section 17 is inapplicable where some breach of the Customs Act is committed or suspected to have been committed which involves almost always fraud or concealment or misrepresentation. In order to determine whether the respondent had exceeded her powers, an interpretation of section 17 was very necessary. With all respect to the pertinacity of Mr Grant, nothing was advanced by him which showed that the Full Court erred in any of the ways suggested in his second ground or indeed, fell into error in any way.

With respect to ground (c) Mr Grant objected to the contents of an affidavit filed by Mr Farr a customs officer and the Commissioner of Customs on the footing that they

could not be used as they breached provisions in the Judicature (Civil Procedure Code) Law viz, section 408 and section 413. These I set out below:

> "408. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this Law an affidavit may contain statements of information and belief with the sources and grounds thereof.
> 413. The Court or a Judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

Section 408 allows hearsay evidence in proof of its truth in interlocutory proceedings provided the sources and grounds are stated. This provision of course, applies to and governs all interlocutory proceedings in the Supreme Court. Certiorari does not of course, qualify as an interlocutory proceeding. Howsoever that might be, the objection fails, in my view, for a more fundamental reason. The purpose of the affidavits provided by the respondent was not to prove the truth of any fact. Their purpose was to furnish the court with the material on which the officers based their suspicions that a breach of the Customs Act had been committed by the appellants. I use the word "material" deliberately rather than "evidence" because the officers did not have to prove that they had evidence to prove the commission of an offence. The material even if it did not amount to a prima facie case, was sufficient. That being so, it was that material which they would be constrained to place before the court to enable it to determine whether the officers had reasonable and probable cause for their conduct in detaining or seizing the imported goods. See my comments in **Flemming v Myers & Attorney General** (unreported) SCCA 63/85 delivered 18th December 1989 at page

13. The technical evidential rule governing interlocutory proceedings do not, in my judgment, apply in the circumstances of this case.

Having regard to the conclusion at which I have arrived, I do not find it necessary to refer to those cases cited by Mr Grant which speak to the sufficiency of evidence in a judicial enquiry. For example see **R v West London Coroner Ex parte Gray** [1987] 1 WLR 1023 one of those cited. We are concerned not with the sufficiency of evidence but with the nature of the material upon which an administrative tribunal is required to act. The situations are without doubt quite different and those cases can provide no assistance in this matter.

Mrs Samuels-Brown argued ground (d) as amended and as set out earlier in this judgment. A great deal of what she had to say however, overlapped or repeated in more elegant and felicitous terms submissions advanced by her leader. When her arguments are distilled, I understood her to say that only paragraph 4 of Mr Farr's affidavit represented the basis of the detention and seizure of the goods in question and contained the bald statement of under-invoicing which was insufficient to found the basis of the decision to detain and eventually seize the goods, she said. Further that bald statement was the irrelevant matter which the Full Court considered.

Paragraph 4 states as follows:

> "4. On, or about the 3rd day of March 1993, the Revenue Protection Division received information that Irving Chin through A & F Farm Produce Co. Ltd., (with respect to which person and company on-going investigations were being carried out) would be importing a container of margarine or shortening from the United States of America (USA) and that said goods would be under-invoiced. It was confirmed on the 4th day of March, 1993 that there was in fact a consignment of margarine on the wharfs imported by A & F Farm Produce Co. Ltd., from the USA."

It must be clear from what has already been said that the respondents were obliged to place before the Full Court the material on which the detention notice was made. Under-invoicing dismissed by counsel as a bald assertion, is however, a term pregnant with meaning, for it involves the commission of an offence under section 210 of the Customs Act. The material in the possession of the respondent however, included the following facts:

i. Goods were imported into the Island by the appellants. With respect to those goods information had been earlier received that they would be under-invoiced.

ii. There were ongoing investigations in which contact was made with United States Customs and information was obtained from them with respect to the under-invoicing.

iii. The true value of the goods was sought and obtained. The documentary proof was received after the detention.

iv. Prior to the detention the appellants had declared the value of the goods.

Those further facts contrary to arguments of Mrs Samuels-Brown are to be found in other paragraphs of Mr Farr's affidavit, especially paragraph 8 in which it was deposed as follows:

> "8. I discovered also that the duty payable by the first applicant had been based on under-invoicing and/or fraudulent valuations and consequently the proper duties were not assessed. During the course of my investigations, I liaised with the U.S. Customs Department and obtained from them a copy of the Exporter's Declaration made by Sunlight Foods Inc., the suppliers of the aforementioned margarine to the Applicant. Exhibited hereto and marked 'RF-3' is a copy of the said Exporters Declaration. The aforesaid Declaration shows a value of US$15,750.00. Had this true value of the margarine been declared the first applicant would have been liable to pay additional duties of $49,940.50."

The significance of that information contained in paragraph 8 was that it corroborated the so-called "bald assertion" of under-invoicing. The information howsoever described, was the basis of the detention. It was therefore necessarily relevant and essential for the consideration of the Full Court and for these reasons the arguments of Mrs Samuels-Brown must be rejected.

In the result, I would dismiss the appeal with costs to the respondent to be taxed if not agreed and affirm the order of the Full Court.

DOWNER JA

Did the respondent Commissioner of Customs and Excise exercise her discretion properly to detain and seize a container of margarine consigned to the appellant A & F Farm Produce Company Limited of whom Andre Chin was managing director? The Supreme Court (Malcolm, Theobalds, Langrin JJ) answered that question in the affirmative, and refused to issue orders of certiorari and mandamus sought by the appellant importers. They were aggrieved by that decision so they have sought redress on appeal.

> ***Were discretionary powers conferred by law on the respondent Commissioner to seize and detain goods pursuant to investigations for "offences against the customs law"?***

It is convenient to refer initially to section 211 of the Customs Act (the Act) to demonstrate that if it could be proved that the appellant importers brought in goods "in a manner calculated to deceive the officers of customs," then criminal proceedings were appropriate and the goods were liable for forfeiture. Here are the words of the section:

> 211. If any person shall import or export, or cause to be imported or exported, or attempt to import or export any goods concealed in any way, or packed in any package or parcel (whether there be any other goods in such package or parcel or not) in a manner calculated to deceive the officers of customs, or any package containing goods not corresponding with the entry thereof, such package and the goods therein shall be forfeited, and such person shall incur a penalty of two thousand dollars, or treble the value of the goods contained in such package, at the election of the Commissioner." [Emphasis supplied]

At this point it is relevant to note that "entry" has a special meaning and it is defined in section 2 of the Act. Then reference must be made to paragraph 4 and 5 of the importers' affidavit. They read:

> "4. That on or about the 17th day of February, 1993, the 1st Applicant purchased from Sunlight Foods Inc., in Miami, Florida 900 cases of margarine, being 45,000 lbs. in weight, at the normal price of US$10,800. for sale to its customers in the baking industry. That a copy of the invoice is now produced and shown to me as exhibit 'AC 1'.
>
> 5. That on the arrival of the said goods in Kingston, the 1st Applicant and I on its behalf obtained the necessary permit from the Coconut Industry Board and Tax Compliance Certificates to import the said goods into the Island. That a copy of the said certificate is now produced and shown to me as exhibit 'AC 2'. That the 1st Applicant employed a licensed Customs Broker to clear the said goods from the wharf; in due course we made all the necessary declarations, supplied all information and complied with all regulations and procedures relevant thereto including declaring and submitting the relevant documents, in particular the said invoice, to the proper officers of the Respondent. That on or about the 8th day of March, 1993, the proper officers at the Valuation Branch of the Respondent valued the goods based on the price paid for the goods by the Applicant. That copies of the documents processed by the said proper officers are now produced and shown to me as exhibit 'AC 3A, 3B, 3C and 3D'. "

Special attention must be paid to exhibit 3C, the Import Entry C.78 which is one of the Forms prescribed by section 258 of the Act. It has the consignor as Sunlight Foods Inc. which will be shown to be misleading.

Section 212 is important for it recognizes that there are instances where the statutory power to detain does not connote any criminal intent on the part of the importer. Mr. Enos Grant in a painstaking argument implied that this section was

applicable to the appellants. It must be cited so that its force and effect may be highlighted. It provides that:

> "212.-(1) Notwithstanding the provisions of section 211, if, upon the examination of any imported goods, which are chargeable with duty upon the value thereof, it appears to the Commissioner that the value of such goods as declared by the importer and according to which duty has been or is sought to be paid is not the true value thereof, it shall be lawful for the Commissioner to detain the same, in which case he shall give notice in writing to the importer of the detention of such goods, and of the value thereof as estimated by him, either by delivering such notice personally, or by transmitting the same by post to such importer addressed to him at his place of abode or business as stated in his entry."

Subsection (2) envisages three alternatives. If the value is found to be correct, the goods are delivered to the importer. In which case the first alternative is that:

> "(2) The Commissioner shall, within fifteen days after the detention of such goods, determine either that the goods are or may be correctly entered according to the value declared by the importer and permit the same to be delivered, ..."

Alternatively he may retain the goods for public use and compensate the importer in accordance with the following formula:

> "... or to retain the same for the public use of the Island, in which latter case he shall cause the value at which the goods were declared by the importer, together with an addition of ten per centum, and the duties already paid to be paid to the importer in full satisfaction for such goods;..."

Or the Commissioner may rely on the third alternative which states:

> "or he may permit such person, on his application for that purpose, to enter the goods according to such value and on such terms as he may direct."

Clearly, therefore, there must be some criminal aspect in this case which impelled the respondent Commissioner to contemplate instituting proceedings for

"offences against the customs law." If this is so then one important aspect of Mr. Grant's submission as the basis to quash the notices of detention and seizure, fails.

Since imported goods are under the jurisdiction of the respondent Commissioner, it is incumbent on her pursuant to section 211 of the Act, to investigate whether the packages containing the goods corresponded with the entry. In order to carry out these criminal investigations, customs officers are accorded police powers which are stipulated in sections 2 and 3 of the Act.

> "... 'officer' includes any person employed in the Department of Customs and Excise, the Revenue Protection Division of the Ministry of Finance and all officers of the Constabulary Force, as well as any person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed to be an officer acting in the execution of his office or duty;"

Then section 3 reads:

> "3. For the purpose of carrying out the provisions of the customs laws all officers shall have the same powers, authorities and privileges as are given by law to officers of the Constabulary Force."

It is against that background that the notices of detention and seizure which is sought to be quashed must be adverted to. The material part reads:

> " **NOTICE OF DETENTION**
>
> To A & F Farm 86 East St. c/o Wharfinger Berth #5
>
> I have to inform you that the undernoted goods have this day been detained on the following grounds:
>
> 'For Investigation' "

This notice was dated 9th March 1993 and at that stage the respondent Commissioner's mind was open. Then as regards the notice of seizure, its relevant part is as follows:

> " **NOTICE OF SEIZURE**
>
> To A & F FARMS .....
> In accordance with Section 215 of the Customs Act, I have to inform you that the under noted goods have this day been seized on the grounds that:- They are liable under Section 210 and/or 211 of the Customs Act in that the entry and supporting documents stated an incorrect value for the packages."

It was dated 15th March 1993. Accordingly, therefore criminal proceedings were contemplated and the notice of detention makes this clear that the matter was being investigated. Section 212 was not the relevant section as the appellants would have wished.

Forfeiture presupposes there was a prior detention seizure and since police officers have common law powers to detain and seize potential exhibits for criminal offences, customs officers also have such powers. The power of police officers in that regard was expounded by Lord Denning MR in ***Ghani v Jones*** [1969] 3 All ER at 1700. In a classic passage commenting on ***R v Waterfield R v Lynn*** [1963] 3 All ER 659; [1964] 1 QB 164 Lord Denning MR at p. 1704 said:

> " The decision causes me some misgiving. I expect that the car bore traces of its impact with the brick wall. The police had reason to believe that Lynn and Waterfield were implicated in a crime of which the marks on the car might be most material evidence at the trial. If Lynn and Waterfield were allowed to drive the car away, they might very well remove or obliterate all incriminating evidence. My comment on the case is this: the law should not allow wrong doers to destroy evidence against them when it can be prevented. Test it by an instance put in argument. The robbers of a bank 'borrow' a private car and use it in their raid, and escape. They abandon it by the roadside. The

> police find the car, i.e. the instrument of the crime, and want to examine it for fingerprints. The owner of the 'borrowed' car comes up and demands the return of it. He says he will drive it away and not allow them to examine it. Cannot the police say to him: 'Nay, you cannot have it until we have examined it'? I should have thought that they could. His conduct makes him look like an accessory after the fact, if not before it. At any rate it is quite unreasonable. Even though the raiders have not yet been caught, arrested or charged, nevertheless the police should be able to do whatever is necessary and reasonable to preserve the evidence of the crime."

Then His Lordship further said at p. 1705:

> "I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied:
>
> *First.* The police officers must have reasonable grounds for believing that a serious offence has been committed - so serious that it is of the first importance that the offenders should be caught and brought to justice.
>
> *Secondly.* The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).
>
> *Thirdly.* The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.
>
> *Fourthly.* The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

> *Finally.* The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards."

So on the face of it, the allegation by the appellant importer that the officer :

> "acted arbitrarily and/or capriciously and/or vindictively and/or maliciously in detaining and seizing the said goods and container, in particular as the Applicants did not give them a history of their past importations and with the intention of compelling the Applicants so to do."

was erroneous.

There was evidence adduced that the customs officers had reasonable suspicion that the appellant imported goods in contravention of section 211, 210, 209 and other sections. That section 215 recognizes this common law power to seize and detain is evident for its wording. The material part reads:

> "215.-(1) Whenever any seizure shall be made, unless in the possession of or in the presence of the offender, Master or owner, as forfeited under the customs laws, or under <u>any law by which officers are empowered to make seizures</u>, the seizing officer shall give notice in writing of such seizure and the grounds thereof to the Master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering the same to him personally, or by letter addressed to him, and transmitted by post to, or delivered at his usual place of abode or business, if known;" [Emphasis supplied]

It is in the light of this that in the context of ***Ghani v Jones*** (supra) at p. 1073 Lord Denning MR said:

> "... I take it to be settled law, without citing cases, that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come on any other goods which show him to be implicated in some other crime, they may take them provided they

> act reasonably and detain them no longer than is necessary. Such appears from the speech of Lord Chelmsford in ***Pringle v Bremner and Stirling*** [1867] 5 Macpherson's H.L. Cas. 55 at p. 60 and ***Chic Fashions (West Wales), Ltd v Jones*** [1968] 1 All E.R. 229; [1968] 2 Q.B. 299."
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> ***Was there admissible evidence to raise a reasonable suspicion for issuance of Notices of Detention and Seizure?***

Mr. Enos Grant for the appellant raised a preliminary point now embodied in his grounds of appeal concerning the admissibility of the evidence presented by the respondent to raise the reasonable suspicion which warranted investigation into allegations of criminal conduct by the appellant importer. He alleged that the evidence was hearsay and therefore inadmissible. The law of evidence as regards the state of a person's mind has been stated in varying circumstances by our highest courts. Mr. Campbell for the respondent, in his helpful submission, cited the relevant authorities. Take ***Subramaniam v Public Prosecutions*** [1956] 1 WLR 965 where the courts in Malaya wrongly excluded such evidence from the appellant who attempted to advance the defence of duress.

Mr. DeSilva speaking for the Privy Council in a well known statement of principle said at p. 970:

> " In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before

> their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes."

Lord Bridge in approving this principle in ***R v Blastland*** [1986] 1 AC at 55 described it as "the classic illustration of the statement admissible to prove the state of mind." An example even more relevant is to be found in ***Shaaban Bin Hussien & Others v Chong Fook Kam and Another*** [1969] 3 All ER 1626 where Lord Devlin states the pre-conditions for the admissibility of evidence which is pertinent to demonstrate reasonable suspicion. At p. 1630 the passage runs thus:

> "...Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control."

Here in our jurisdiction the common law principles are enshrined in Chapter 1 section1(9) of the Constitution and precludes the legislature from enacting finality clauses to exclude judicial review. It reads:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

So at the very commencement of the constitution judicial review is recognised.

Then Lord Wright in a passage from ***McArdle v. Egan [1933] All ER Rep 611*** states the position of the type of evidence the respondent Commissioner presented with clarity. It reads as follows at pages 612-613:

> "The question which the judge has to discuss, as my Lord has stated, is that which is set out in Bullen and Leake (3rd Edn. at p. 795, note):
> 'A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed. ... [Here, of course, it had been committed] and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another.'
> So that the inquiry is as to the state of mind of the chief constable at the time when he ordered the arrest, and it involves that it must be ascertained what information he had at the time, even though that information came from others. Of course, the information must come in a way which justifies him in giving it credit; the suspicion upon which he must act, and, indeed, ought to act, in the course of his duty, must be a reasonable suspicion. In the present case, I am not at all clear that the learned judge has put to himself the right question, because his language is:
> 'The onus rests upon the defendants to show that they had reasonable and probable cause to justify the arrest.'
> That may cover and involve the true question, namely, whether he had reasonable and probable cause to suspect the arrested man, or it may not; but when I examine the evidence in this case, and in particular the evidence of the chief constable, I find he gives eleven reasons."

Turning to the evidence which the Supreme Court had to consider, here are excerpts from the evidence of the investigator, an acting Revenue Agent Robert Farr:

> "4. On, or about the 3rd day of March 1993, the Revenue Protection Division received information that Irving Chin through A & F Farm Produce Co. Ltd., (with respect to which person and company on-going investigations were being carried out) would be importing a container of margarine or shortening from the United States of America (USA) and that said goods would be under-invoiced. It was confirmed on the 4th day of March, 1993 that there was in fact a consignment of margarine on the wharfs imported by A & F Farm Produce Co. Ltd., from the USA."

The Detention Notice sought to be quashed was then issued. It is essential to quote paragraph 5 of the Affidavit:

> "5 A Detention Notice was issued on the 9th day of March 1993 and as a result, I examined a container consigned to A & F Farm Produce Co. Ltd, and in it I saw 900 pieces of Sunnyland Suntex Baker's Vegetable Margarine."

So while the labels were from Sunnyland Refining Co the consignor on the Import Entry Form was Sunlight Food Inc.

After a meeting with the importer and his counsel, Farr continued his investigations. He then continued thus:

> "7. After the meeting, I continued investigations and discovered that the brand of margarine named on the invoice of the First Applicant, Delmar was different from that seen in the container I examined on the 9th day of March 1993 which as stated above bore the brand name Sunnyland Baker's Vegetable. Enclosed herewith and marked 'RF-2' is a copy of the label I took off one of the cartons I examined on the 9th day of March 1993."

In the light of this finding reference must be made again to section 211 of the Act to the importation in a concealed way "in a manner calculated to deceive the customs

officers". Certainly, this was enough to give rise to reasonable suspicion of a breach of section 211 of the Act.

There were further findings grounded on reasonable suspicion to support an allegation of -

> "in any manner dealing with goods with intent to defraud her Majesty of any due duties thereon"

which would be a breach of section 210 of the Act. The penalty is:

> "... shall for each such offence incur a penalty of five thousand dollars, or treble the value of the goods, at the election of the Commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited."[Emphasis supplied]

Farr further continues thus:

> "8. I discovered also that the duty payable by the first applicant had been based on under-invoicing and/or fraudulent valuations and consequently the proper duties were not assessed. During the course of my investigations, I liaised with the U.S. Customs Department and obtained from them a copy of the Exporter's Declaration made by Sunlight Foods Inc., the suppliers of the aforementioned margarine to the Applicant. Exhibited hereto and marked 'RF-3' is a copy of the said Exporters Declaration. The aforesaid Declaration shows a value of US$15,750.00. Had this true value of the margarine been declared the first applicant would have been liable to pay additional duties of $49,950.00."

The significant feature to note on this aspect of the case is that on the Import Entry Form prescribed by the Act, the value of the goods in United States dollars is stated to be $12,789. This is in marked contrast to the US$15,750 on the export declaration from the suppliers. Further, the importers A & F Farm - Andre Chin either made or caused to be made the following declaration on the Import Entry 678 Form:

> " IT IS DECLARED THAT THE IMPORTER IS THE IMPORTER OF THE GOODS SPECIFIED IN THIS ENTRY AND THAT ALL THE ABOVE PARTICULARS ARE TRUE AND CORRECT."

This information was certainly cogent and gave rise to a reasonable suspicion that section 209 of the Customs Act was breached. That relevant part of that section reads as follows:

> "209. If any person shall in any matter relating to the customs, or under the control or management of the Commissioner, make and subscribe, or cause to be made and subscribed, any false declaration, or make or sign, or cause to be made or signed any declaration, certificate or other instrument, required to be verified by signature only, the same being false in any particular, .."

Then the penalty section reads as follows:

> "every person so offending shall incur a penalty of one thousand dollars."

Patel v Comptroller of Customs [1966] AC 356; [1965] 3 WLR 1221 the leading authority on this section of the Customs Act was cited with approval in ***R v Barber*** [1973] 21 WIR 343 at 359.

Further investigations demonstrated that the investigator had ample grounds for suspecting fraud on the revenue. He said:

> "9. I received from the manufacturers of margarine imported by the first Applicant, Sunnyland Refining Company, a quotation of the cost per pound of the margarine imported by the first Applicant which amounted to US$0.29 at the factory gate in Birmingham, Alabama. Exhibited hereto and marked 'RF-4' is a copy of the quotation from Sunnyland Refining Company. A supplier/distributor would have to add to this cost of US$0.29, the cost of transporting the goods from Birmingham, Alabama to the port of exportation (in the Applicant's case; Miami, Florida) storage cost, overheads and profit margin, which

> would further increase the unit cost per pound for margarine.
>
> Based on the declared value and invoice submitted by the First Applicant the cost per pound for the margarine imported would be US$0.24, which is significantly less than the costs aforementioned."

Be it recalled that when the container was examined the label found which was exhibited reads in part " Manufactured by Sunnyland Refining Co. Division of Kane-Miller Corp." Since however, Sunlight Foods Inc, the consignor is different, it must have given rise to a reasonable suspicion to defraud the revenue. It is in the light of that, I have found Mr. Grant's submissions that the Commissioner misdirected herself as regards the interpretation of section 209 of the Act and that the Supreme Court applied the wrong principle in reviewing her decision, was not well founded.

> ***Can the Commissioner's decision to seize and detain be faulted on the ground of "Wednesbury unreasonableness"?***

Mrs. Samuels-Brown was given the proverbial basket to carry water and in the circumstances, she carried it well. She attempted to challenge the Commissioner's decision on the ground of "Wednesbury unreasonableness". Lord Diplock in ***Council of Civil Service Unions and Others v Minister for the Civil Service*** [1984] 3 All ER 935 at p. 951 defined it thus:

> " By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. ..."

In the light of the previous findings that in exercising her discretion, the respondent Commissioner had admissible evidence to prove that she correctly interpreted section 209 and 213 of the Customs Act, there was no argument that could convince this court that the respondent Commissioner could be faulted on this ground.

> ***(I) Was the Commissioner wrong in principle to detain and seize the margarine having regard to section 15, 19, and 219 of the Act?***
>
> ***and***
>
> ***(2) Was she in breach of the principle of procedural impropriety?***

As to (1)

The burden of Mr. Grant's submission was that it was open to the respondent Commissioner in reliance on section 15, 17, and 18 to treat the alleged shortfall in revenue as a civil matter rather than contemplate criminal proceedings, was governed by ***Commissioner of Customs & Excise v Tan & Another*** [1977] 2 WLR 181. To determine whether the submission is valid, excerpts from those sections of the Act will have to be examined:

> "15.-(1) Where by entry, bond, removal of goods or otherwise, any obligation has been incurred for the payment of duties of customs, such obligation shall be deemed to be an obligation to pay all duties of customs which may become legally payable, or which are made payable or recoverable under the customs laws, and to pay the same as the same become payable."

Subsection (2) takes into account errors in the assessment or refund of duty and obliges the taxpayer to repay. It reads:

> (2) When any duty has been short levied or erroneously refunded, the person who should have paid the amount short levied, or to whom the refund has erroneously been made, shall pay the amount short levied or repay the amount erroneously

> refunded, on demand being made by the Commissioner."

The Act envisaged that there would be disputes and stipulates for the payment of the duty demanded by the respondent Commissioner. It also proceeds for an appeal to her in first instance for a revised assessment. Section 17 makes provision for this and reads thus:

> "17-(1) If any dispute shall arise as to whether any or what duty is payable on any goods imported into or exported from the Island, the importer, consignee or exporter, or his agent, shall deposit in the hands of the Commissioner the duty demanded by him."

Then 19(2) follows the pattern of revenue status in indicating how and when the objection ought to be made, as follows:

> (2) In the case of any such dispute the importer, consignee or his agent, after having first deposited the duty in accordance with subsection (1) may, within three months after such deposit, apply to the Commissioner, by notice of objection in writing, to review and revise the assessment of duty on the goods, and such application shall state precisely the grounds of objection."

The remaining five subsections detail further procedural steps and if the dispute is not settled, the matter will go on appeal to the Revenue Court as provided for in section 18 of the Act. Section 19 of the Act states how value is to be determined so as to assess the duty payable.

It is against this background that the case of ***Tan*** must be examined. The relevant passage from the judgment demonstrates that resolution of disputes by objection and administrative and judicial appeals, are not pertinent when there is a reasonable suspicion of fraud.

Lord Wilberforce put it thus at p. 186:

> " After removal, it is possible for the Customs in certain circumstances to forfeit the goods. But these

> circumstances are strictly limited. Under section 32 there is a power to forfeit if a person making entry has failed to comply with the statutory requirements in connection with the entry. That is not this case. Section 44 lists other causes of forfeiture under ix heads: these all involve improper importation of one kind or another - unlawful removal, prohibited or restricted goods, concealment, deceptive packing. None of these headings cover the case where there is a permitted import, a declaration in the right place and at the right time, and a payment of duty. I think that such a claim as the Customs now make - which I emphasise, is that they have the right to forfeit the goods when they discover that not enough duty had been paid - ought to be spelt out in clear words.
>
> This analysis of the process by which goods imported by passengers are passed through the Customs machinery, and of the powers and duties of the Customs and of the passenger at each successive stage convinces me that, assuming that no false statement or concealment has taken place, the payment of duty demanded by the customs officer at the place of entry, followed by an authorised removal of the goods, discharges the passenger's liability and that a supplementary claim for more duty cannot thereafter be made."

Lord Dilhorne was of the same view. He said, adverting to the sections of the U.K. Act comparable to section 15 and 19 of our Act at p. 190:

> "This subsection gives, I think, the clearest indication that it is the duty of customs officers to assess and determine the amount of duty payable and that when the duty they require to be paid, is paid, duty is no longer chargeable even though the goods have been valued at too low a figure, provided that the officer was not led to value them at too law a figure in consequence of an untruth told by the importer."

Then Lord Russell also recognises that untrue statements takes the matter out of the realm of the civil courts. He said at p. 191:

> " (2) Section 301 expressly provides for the case where the full amount of the duty payable is not paid by reason of a materially untrue statement, that in such case the amount of the duty unpaid shall be

> recoverable as a debt due to the Crown or may be summarily recovered as a civil debt."

Mr. Enos Grant took every point that it was possible to take for the appellant. Further reference was made to the provision of section 219 of the Act. That section reads:

> "219. Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) and notwithstanding anything contained in section 217, the Commissioner may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure."

There was no evidence that the Commissioner sought any general direction from the Minister nor would it have been appropriate since criminal proceedings were contemplated.

On this aspect of the case, the appellants have failed to persuade me that the Commissioner failed to exercise her discretion correctly. So neither certiorari to quash the notices of detention and seizure nor mandamus to compel the respondent Commissioner to return the margarine to the appellants after the payment of the correct duty, were appropriate remedies in these circumstances.

As to (2)

As regards "procedural impropriety", bearing in mind Lord Diplock was dealing with the aspect labelled "legitimate expectation", the principles he expressed are applicable to the circumstances of this case. Here is Lord Diplock's description of how legislative provisions combined with the gloss by the common law may enshrine natural justice. At p. 951 of ***Council of Civil Service v Minister of the Civil Service*** (supra) His Lordship said:

> " I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

Then continuing his exposition, on the same page His Lordship said:

> "... But in any event what procedure will satisfy the public law requirement of procedural propriety depends on the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made."

The aspect of "procedural impropriety" relevant to this case, was the obligation to follow the statutory procedures which gave the importer notice of the detention and seizure of his goods which the respondent Commissioner had reasonable suspicion, was uncustomed goods. The notice of seizure states on its face, that the seizure was pursuant to section 215 of the Act. That section with its side note Procedure on Seizure, has been analysed presumably and it follows section 214 which lays down the provision as to forfeiture, is permissible.

That the statute provides for notice to the importers and also provides for the importer to give notice to the Commissioner of his claim before forfeiture and condemnation proceedings are instituted. There are special provisions that perishable goods as margarine be sold forthwith at public auction and the monies to abide the results of a claim by the importer. It is open to the importer to make such a claim if they are of opinion that it would be feasible. What the appellants cannot claim

is that they are not afforded the statutory procedural protection to claim their property which has been seized and detained by the respondent Commissioner.

Afterthoughts

The emphasised provisions in sections 210 and 211 of the Act to my mind contravene the principle of the separation of powers as enshrined in the constitution: see ***Hinds v The Queen*** [1975] 3 JLR 279-280. This view was put forward in the recent case of ***Danhai Williams & Danwills Construction Limited v The Attorney General of Jamaica*** SCCA 7/94 delivered December 9 1994 and I adhere to that view. That principle would also render sentences "during the Governor General's pleasure" unconstitutional. Such sentences ought to be adapted and modified to mandatory life sentences.

As for the Customs Act, if the relevant provisions are not repealed to bring them in conformity with the Constitution, then a provision referred to indirectly in these proceedings, might be resorted to. Section 219 of the Act already adverted refers to section 217. That section reads:

> 217. Where a penalty is prescribed for the commission of an offence under this Act or any regulations made thereunder such offence shall be punishable by a penalty not exceeding the penalty so prescribed; provided that where by reason of the commission of any offence the payment of any customs duty has or might have been evaded the penalty imposed shall, unless the court for special reasons thinks fit to order otherwise, and without prejudice to the power of the court to impose a greater penalty, be not less than treble the amount of duty payable."

So if the emphasised provisions of section 210 and 211 are found to be unconstitutional by this court, the matter can be remitted to the Resident Magistrate's Court to determine the duty and a discretionary sentence can be imposed of not less

than three times the duty payable. In such circumstances, the respondent Commissioner when relying on section 252 for the valuation of goods to determine the appropriate penalty, will find that that the Commissioner's valuation may be challenged so as to produce transparency and fairness in the sentencing process.

Perhaps I may point out that it was open to the Governor General, on the advise of the Attorney General as principal adviser to the Government - see section 79 of the Constitution, to have made the "adaptation and modification" necessary to bring such sections in conformity with the Constitution by virtue of section 5(a) of the Jamaica (Constitution) Order in Council, 1962. It reads:

> "(5) (a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the Gazette, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

These adaptations and modifications which must now be made by Parliament are necessary to give effect to section (2) of the Constitution to ensure its supremacy over other laws. Lord Diplock pointed this out as early as 1975 in ***Eaton Baker & Another v R*** [1975] 25 WIR 463 where at 469 he said:

> " Section 2 of the Constitution lays down the general rule that if any law is inconsistent with the Constitution it shall to the extent of the inconsistency be void. Section 26 (8) creates an exception to this general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and alleged inconsistency is with a provision of the Constitution that is contained in Chapter III. ..."

So he corrected the broad statement he made in ***Hinds*** (supra) that these laws before the appointed day are protected by section 4 of the Jamaica (Constitution) Order in Council.

Regrettably, the unconstitutionality of section 29(1) of the Juvenile Act was not brought to his attention. Nor does it seem that the unconstitutionality of the sentences of being detained at the Governor' General's pleasure in section 25 of the Criminal Justice Act has been brought to the attention of the legislature.

Conclusion

Before parting, I would like to say how much I am indebted to the careful judgment of Langrin J. Also for the very able submissions of Mr. Enos Grant and Mrs. J. Samuels-Brown for the appellants and Mr. Lennox Campbell for the respondent. The upshot is that the order below refusing certiorari and mandamus is affirmed. The appellants must pay the agreed or taxed costs of this appeal.

WOLFE JA

I have read the judgments of Carey JA and Downer JA, in draft, and I agree the appeal should be dismissed and the order of the court below affirmed.