

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO COA2019PCCR00001

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA**

BRENTON HENRY v R

Garth Lyttle and Miss Renee Malcolm for the appellant

Miss Tracy-Ann Robinson and Miss Alice-Ann Gabbidon for the Crown

25 September 2019 and 20 November 2020

P WILLIAMS JA

[1] On 25 September 2019, we heard Mr Brenton Henry's appeal against his conviction by Her Honour Miss Maxine Ellis, Parish Court Judge in the Parish Court for the Corporate Area (Criminal Division) on 23 March 2017. At the completion of the hearing, we made the following orders:

- "1. The appeal is allowed.
2. Conviction quashed and sentence set aside.
3. Judgment and verdict of acquittal entered."

[2] We promised then to put our reasons in writing. This we now do, with apologies for the delay.

Background

[3] On 21 October 2015, Mr Henry was arraigned on five informations and pleaded not guilty. The charges were as follows: -

- “1. Being knowingly concerned in dealing with goods to wit 2002 BMW motor car bearing chassis number WBSBR92060EH78060 in a manner to evade duties due thereon. Contrary to section 210(1) of the Customs Act.
2. Was knowingly concerned in the fraudulent evasion of import duties of customs payable on one 2002 BMW motor car bearing chassis number WBSBR92060EH78060. Contrary to section 210(1) of the Customs Act.
3. In a matter relating to the customs, made a declaration required to be verified by signature which is false in a material particular to wit: that BMW motor car serial number WBSBR92060EH78060 imported on the vessel Pilgrim which reported on the 21/11/2004 consigned to Sara Butt is a 2001-318 Coupe with engine size 1995cc. Contrary to section 209(1)(a)(i) of the Customs Act.
4. In a matter relating to the customs, caused to be made a false declaration to wit that BMW motor car Serial Number WBSBR92060EH78060 imported in the name of Sara Butt on Vessel Pilgrim which reported on 21/11/2004 is a 2001 318 Coupe with engine size 1995cc. Contrary to section 209(1)(a)(i) of the Customs Act.
5. Was concerned in importing into the island certain restricted goods to wit; one 2003 BMW M3 motor car bearing chassis number WBSBR92060EH78060,

contrary to such restrictions. Contrary to section 210(1) of the Customs Act.”

[4] Although the manner in which the notes of evidence are recorded suggests that the trial continued without adjournments, it was on 23 March 2017 that a verdict of guilty was recorded on one information. On 14 December 2017, Mr Henry was sentenced to pay a fine of \$3,447,900.00 or 12 months’ imprisonment.

The case for the Crown

[5] On 24 November 2004, Sidonne Foster, who was employed with Securitings Administrators Limited at the Kingston Wharves as a motor vehicle interchange person, was engaged in her normal duty of interchanging all the vehicles which were being off-loaded from a ship named ‘Pilgrim’. These duties entailed recording the details of the condition in which the motor vehicle came off the ship on a mobile vehicle check sheet.

[6] On that day, she recorded the details of a BMW motorcar that was off-loaded from the ship. She testified that she distinctly remembered dealing with a BMW and described it as being grey in colour. She remembered recording on the check sheet all the contents she had seen inside the vehicle, and that it was a complete vehicle which was subsequently driven from the ship to a holding area. In her checking of the vehicle, she did not check under the hood and was unable to say what size the engine was. The only means of identification of the vehicle was the serial number, which she recorded as WBSB92060EH78060. A copy of the mobile vehicle check sheet she had prepared was admitted into evidence. The model or the year of manufacture of the BMW was not recorded on this sheet.

[7] Under cross-examination, it was suggested to Miss Foster that the vehicle had not been driven off the ship, nor was it driven from the area in which she was to any other place. Although she had not seen Mr Henry at the wharf on that day, she could not say that the BMW had not been driven by him.

[8] A copy of an application for motor vehicle transaction was also admitted into evidence during Miss Foster's testimony. The name of the owner was recorded as being Sara Butt; the year of manufacture was not clear, but it appeared to be, initially, 2000 and to have been corrected to 2001; the colour was described as silver; type of body was coupe; and the cc rating was 1995. The application was signed by Sara Butt and dated 17 December 2004 and was for new registration plates. The motor vehicle number recorded on the application was WBSBR2060EH78060, which was largely consistent with what Miss Foster had recorded except that the letter 'R' was missing from her record.

[9] Miss Patrina Ogilvie-Lee was employed at the Jamaica Customs Agency as a supervisor and, on 15 December 2004, she was stationed at the Motor Vehicles Unit. Among her duties as supervisor was to vet the documents prepared after a customs officer had completed documentation of motor vehicles being imported into the island. She would verify the information on the import entry form, (which was initially known as C78, but subsequently became known as C87), along with the accompanying documentation to ensure they corresponded. From the information of the supporting documents, she would do a calculation of the duties to verify that the duties calculated were correct. The duties calculated were dependent on the cc rating.

[10] On 20 August 2014, Mr Winston Lawrence from the Revenue Protection Division ("RPD") visited the Kingston Wharf where Miss Ogilvie-Lee was then stationed and showed her a copy of a C78. She recognised her signature on the form and thus was able to identify it. She also was able to identify the form by the importer's name, Sara Butt. Along with the C78, she identified the copies of six supporting documents which contained all the relevant information relating to a BMW vehicle, namely a bill of lading, a receipt of sale made out to Sara Butt from German Salvage, a bill of sight, a permit from the Trade Board and a letter of authorisation from Sara Butt, giving permission to Mr Henry to transact business on her behalf. Miss Ogilvie-Lee testified that she was also shown other documents she described as "the German Salvage that list the price of the BMW and a document that is a warranty certificate for BMW". The copies of the C78 and supporting documents were admitted into evidence.

[11] The consignor named on the C78 was German Salvage and the importer was named as Sara Butt and the form was signed by her. The description of the vehicle as recorded on the C78 was as follows:

"Year: 2001; 318 Coupe Convertible M3; BMW, RHD, Doors: 2, Color: SILVER; Seats: 4; SIN: WBSBR92080EH78060; Eng No: NA; CC/CID: 1995; STANDARD; GAS; M/Car ; Mileage 14299; SALVAGE, Model#: NA; Lic#:"

On the back of the form, the following was recorded in a section entitled "examination and release of goods":

"Examine and release 1 2001 BMW 318 coupe m/car SIN# WBSBR92060EH780601, silver, 2 doors, 4 seats, R.H.D, gas, S.T.D"

This endorsement was dated "2004.12.16". There was also a supplementary import entry form attached to the C78, on which Sara Butt was named as the importer and which was signed as such.

[12] The information on the various supporting documents was consistent in relation to the vehicle identification number. The document with the heading 'German Salvage' had Sara Butt named as the person to whom the vehicle was sold on 27 August 2004. The status of the vehicle was described as "damage repairable" and it was further described as follows:

"water damage-needs re-wiring and complete electrical system, gearbox rebuild, engine overall interior relinting to remove mud and dirt from inside, slight body damage to both sides of car."

[13] On the bill of lading, the vehicle is described as "a bmw m3". On this document, Mr Henry was listed as the shipper and Miss Butt as the consignee. On the proforma invoice and/or bill of sight, the description of the goods included "2001 BMW 318 coupe m/car convertible M3". The notation for the cc rating had the number 1995 crossed out and replaced with the words 'not seen'. Also included in the description was the word "salvage". In the section provided for the importer or agent, the name Sara Butt appears above a stamped impression for 'Dennis G Thelwell Customs Broker'.

[14] Another supporting document was an order and clearance permit individual application form. The named importer was Sara Butt; the name of the consignor was given as German Salvage. The full description of the vehicle was 2001 BMW 318, with type of body described as being a coupe. Noted at a section for extras was the word

"damage". This document was signed by Mr Henry for Sara Butt. It bears the stamp of the Trade Administrator. On it is written, "Permit produced for eighteen thousand six hundred and seventy five (us) dollars for one (1) 2001 BMW 318 coupe motor car only".

[15] Another supporting document was a vehicle registration document which had Mr Henry named as the new keeper. The vehicle was described as a BMW 318 coupe with 1995cc rating. Finally, there was a declaration of particulars relating to customs value which was signed by Sara Butt.

[16] Miss Ogilvie-Lee testified that, based on an endorsement on the C78, an amount of \$1,191,558.37 was paid for import duty, GCT and custom user fees. She explained that after the documents are prepared, vetted and signed off on, the duty is paid and the importer or customs broker then proceeds to do the clearance, at which stage there is an examination by a customs officer to ensure that the description in the document corresponds with the subject car on the ground. Under cross-examination, Miss Ogilvie-Lee explained that the documents are prepared, vetted, signed off on and, after the duty is paid, the importer or customs broker will proceed to the clearance at which stage there will be an examination by a customs officer. She accepted that the purpose of "that examination is to ensure that the description in the document corresponded with the subject car on the ground".

[17] Miss Michelle Chambers was acting as the Chief Internal Auditor at the Jamaica Customs Agency in 2002-2008. In that position, she was the custodian of the entries and supporting documents in relation to the C87. She testified about the procedure

relating to the use made of the C87 and the supporting documents. Under cross-examination, Miss Chambers acknowledged the C87 form in this matter and saw that the only person named there as the importer was Sara Butt.

[18] Manfred Vogt worked with Stewart Auto Sales at the time that company was the sales retailers for BMW Automobiles. He testified that he had "a mechanical degree in Germany" and had his "major in automotive in Germany". He had been working as an auto mechanic since he was 14 years old. In February 2016, he was the regional trainer in the English-speaking Caribbean for Stewart Auto Sales for BMW. His duty was to train technicians, after sales service advisors, sales clerks and management in auto-making. As such, he also conducted testing on BMW vehicles, he stripped and built up the cars and had done personal examination and testing on models.

[19] He was familiar with the BMW M3 as well as the BMW 318 coupe. He explained that the difference between the two "is a big difference day and night". He said even non-experts could tell the difference. The body shapes differed and the engines and the interior of the vehicles were different.

[20] As Mr Vogt was about to give evidence about a specific vehicle, the learned Parish Court Judge noted that there was "objection to the witness giving evidence about the motor vehicle". There is no notation as to how this objection was resolved and no indication as to whether the vehicle was admitted into evidence. At a later point during the examination of Mr Vogt, the learned Parish Court Judge noted "exhibit is shown to witness" and Mr Vogt said: "This is the vehicle I examined". This exhibit did

not receive the usual number for the purpose of identification. However, Mr Vogt went on to give evidence and was extensively examined about the motor vehicle.

[21] Mr Vogt testified that on 26 June of 2015, he was shown a vehicle at the offices of the RPD which he recognised to be a M3 convertible. He explained that the vehicle he saw was a soft top convertible, whereas a 318 coupe was a hard top with a complete metal roof. He said there was no description in the fleet of BMW vehicles called 318 coupe convertible M3. Mr Vogt said that although everything was possible “for the M3 engine to work in a 318 coupe, it would take a lot of work and lot of investment money wise”.

[22] The vehicle was transported to Stewart Motors where Mr Vogt said he carried out a thorough inspection of it. He acknowledged that the appellant was not present either at the time he was first shown the vehicle, or at the time of this inspection. In the course of his examination of the vehicle, he noted the chassis number and went online to the BMW server and identified the vehicle as an ‘M3’. After his checks and examination of the vehicle, he concluded that it must have been produced after 2001 and that the engine size was 3000cc, depending on the software. He was unable to say if the engine had been overhauled since he had not opened it.

[23] Under cross-examination, Mr Vogt agreed that if the vehicle was described as M3 by the customs department, that would be correct. He said that if the customs department classified the vehicle as M3 318 coupe, that would have been incorrect. He went on to say the classification is M3, however, it would be wrong to classify it as M3

318. He agreed that if the vehicle was described as M3 318, that description would be accurate. He said that if it was described as M3 318 coupe, that would not be an accurate description. He agreed that the vehicle he examined was not a new one.

[24] The prosecution led evidence from Miss Latoya Atlan who worked at Tax Administration of Jamaica, formerly known as Inland Revenue Department. Between January 2010 and June 2012, she was the manager for the National Motor Vehicle Registry and, as such, her role was that of keeper of the records for motor vehicles registered in Jamaica. She testified that on 18 November 2011, following a request from an officer from the Financial Investigation Division ('FID'), she checked for physical records for a 2001 grey BMW M3 vehicle, registered on 7 December 2004, in the name of Sara Butt. As a result of the checks she located certain documents. Miss Atlan identified certain documents which were admitted into evidence namely: a certificate of fitness, motor vehicle transaction form, import licence, insurance cover note and import entry.

[25] In the certificate of fitness, the vehicle was described as a 2001 BMW grey convertible with M3 as the model/mfg type. The cc rating was 1995. In the section provided for the date is "04. 12. 17" and within the stamp impression of the Island Traffic Authority is "Dec 17 2004." The letter of authorisation which was exhibited was addressed to the Trade Board, dated 1 October 2004 and authorised Mr Henry to act on behalf of Miss Butt in pursuance of her application for an import licence. The insurance cover note was in the name of Miss Butt and was for insurance of a 2001 BMW M3 convertible sedan with a 1995 cc rating. It was issued on 17 December 2004.

[26] Mr Douglas Marshall, who was employed as a motor vehicle examiner with the Island Traffic Authority and was stationed at the Swallowfield Examination Depot in 2004, testified that he was shown a certificate of fitness by Mr Lawrence. This happened on 18 November 2011. He was able to recognise his signature on the document indicating that he was the officer who had examined the vehicle to which it related. He identified the certificate of fitness admitted as an exhibit through Miss Altan as a duplicate copy of the certificate of fitness. He explained that the information captured on the certificate of fitness would be checked against the import entry form.

[27] Under cross-examination, he maintained that the vehicle presented to him for inspection was not a damaged vehicle. He said he considered it new in the sense that it was being presented and examined for the first time.

[28] Mr Desmond Robinson worked at the FID and, in September 2005, he was the regional director in charge of investigation. At that time, he received a case file from the intelligence department in relation to a BMW vehicle that was imported in the name of one Sara Butt.

[29] He testified that he was tasked with carrying out investigations to ascertain if the said vehicle was in breach of the Customs Act. The file contained several documents to include C78 entry, suppliers invoice from German Salvage, a bill of sight, import permit, order and clearance permit, bill of lading and customs C84 declaration form. After he had analysed and made certain observations of the documents in the file, he conducted an investigation and received certain information. Based on his observation and the

information received, he formed the conclusion that the vehicle was in breach of the Customs Act. He said that, based on the documentation, the vehicle imported was to be a 318i with a capacity cc rating of 1995; but, based on his training, the vehicle was a M3 motor car with a much larger engine than 1995cc.

[30] As a result, Mr Robinson contacted a co-worker, Mr Gifton Palmer, who was assigned in Montego Bay and gave him some instructions. He gave Mr Palmer further instructions on 31 January 2006.

[31] On 1 February 2006, Mr Henry attended Mr Robinson's office in Kingston, in relation to the vehicle. Mr Robinson explained to him the reason the vehicle had been seized. He explained that the vehicle was in breach of the Customs Act and that there were outstanding duties. Mr Robinson then conducted a question and answer session, after Mr Henry had agreed to submit to being questioned without an attorney-at-law being present. He said Mr Henry informed him that he did not need an attorney-at-law since he was himself an attorney-at-law. The document which was created as a result of the session was admitted into evidence.

[32] In the document, Mr Henry was recorded as having stated that he owned cars in Jamaica only. He was asked specifically about a BMW and said his girlfriend Sara Butt was the "official owner". He explained that he supplied the funds and knew the procedures, he bought it, shipped it and cleared it in Jamaica. He said the "make of the BMW" was a 3 series M3 body kit which when "acquired had no engine, gear box or crankshaft". He admitted to reporting the vehicle stolen to an insurance company in

England. He was asked if, among the documents filed in the claim with the insurance company, there was a motor theft pro-forma statement signed by him indicating that he had bought the said vehicle from "specialist cars BMW for 42,155 pounds". His response was, "yes, but it is false". He was asked if he was the original owner of the car before it got damaged/destroyed and responded "yes". He also said he sold the vehicle to the salvage company for £6,000.00 and then purchased it for £10,000.00. He was then asked about the cost of restoring the car after it was damaged in an accident and he said the cost was about £17,000.00.

[33] Mr Robinson further testified that he received information from a technical expert that worked at Stewart Motors that the chassis number of the vehicle was that of a BMW M3 and not a 318i. Further, he was advised that the BMW M3 did not carry lower than 3000cc rating. Mr Robinson testified that that was the information on which he made a finding and came to a conclusion that the vehicle was in breach of the Customs Act.

[34] It should be noted that, from the record of proceedings, there was no objection to an application that the question and answer document be admitted into evidence. In the submissions to this court on behalf of Mr Henry, Mr Garth Lyttle contended that he was not present when the document was admitted into evidence. The learned Parish Court Judge, in fact, failed to record when any counsel was present throughout the trial. Also in his submissions, Mr Lyttle challenged the contents of the document, stating that Mr Henry maintained that certain questions contained on one page of the document were never put to him. Counsel pointed to the fact that only Mr Robinson's

signature appeared on this page. However, it is clear from the record of proceedings that Mr Robinson was extensively cross-examined in relation to several of the other documents which were exhibited, but no questions were asked in relation to the question and answer document.

[35] In October 2011, some five years after the BMW had been seized, Mr Winston Lawrence received a report which caused him to commence investigation into the importation of a BMW M3 convertible vehicle. He testified that, as a result of a request made through the registrar of the Supreme Court, he obtained documents related to the vehicle. He examined the information specifically contained in the import licence and the customs entry form. Mr Lawrence said he identified what he described as “discrepancies that is to say disobedience of the import licence. The goods imported is [sic] not what the licence permits”. He said he also had an opportunity to see if the motor car was a 318i BMW and sought the assistance of a BMW dealer to assist in determining the accuracy of his observation. He testified that he saw a BMW M3 and not a M318.

[36] Following his investigation, he formed the opinion that the importer of the vehicle was in breach of the import permit granted. He took steps to lay informations and obtained summons which were subsequently served on Mr Henry.

[37] Under cross-examination, Mr Lawrence agreed that only one of the documents exhibited was signed by Mr Henry on behalf of Miss Butt and on it was stated that the make and model of the motor vehicle to be imported was a 2001 BMW 318i coupe. This

was the application to the Trade Board for the permit to import the vehicle into the island. He agreed that the clearance permit was issued for one 2001 BMW 318, cc rating 1995. When asked why he prosecuted Mr Henry, Mr Lawrence responded as follows:

“Having examined everything I honestly formed the view he was connected to the importation of this car that it is a M3 and that that importation was contrary to the specific performance of the permit granted by the Trade Board.”

He maintained that the “goods imported did not conform to the goods that were to be imported”.

[38] At the conclusion of the Crown’s case, the learned Parish Court Judge recorded the following:

“Case for Crown
No Case Submission
Court rules case to answer”

There is no record of anything being said by or on behalf of Mr Henry, after her ruling that there was a case to answer.

The decision

[39] The only result recorded is noted on the information charging Mr Henry with causing to be made a false declaration, contrary to section 209(1)(a) (i) of the Customs Act, as follows:

“Verdict: 23-3-2017

Guilty

Sentence: pp

Fined \$3,447,900.00 or 12 month's imprisonment time to pay until 28.02.2018 in the sum of \$1,000,000.00 in his own surety."

This was signed by the learned Parish Court Judge. No verdict was recorded on the other four informations.

[40] In her findings of fact, the learned Parish Judge Court commenced in the following manner:

"Mr Brenton Henry, hereinafter referred to as the accused, is charged with the offence of Breaches of the Customs Act 209-(1) A person commits an offence if:-

- (b) He makes or signs any declaration made for the consideration of the Commissioner, on any application presented to him which is false in a material particular."

[41] Curiously, she made no mention of the fact that he was before her on five informations. Even more curious is that the section she identified as being the one for which he was charged was not, in fact, correct. He was charged under sections 209(1)(a)(i), and 210(1) of the Customs Act. He was neither charged nor arraigned for a breach of section 209(1)(b).

[42] The learned Parish Court Judge conducted an extensive review of the evidence. She made findings of fact under the following headings:

"The accused is the original owner of the vehicle.

The accused is the importer of the vehicle.

The vehicle is a BMW M3.

The accused misrepresented the vehicle to customs in a material particular.

The vehicle has an engine when it arrived in Jamaica.

The vehicle was not damaged.

The accused is not a truthful person.”

She concluded her findings in the following terms:

“I warn myself that persons lie for different reasons rather than due to a guilty mind. In this case I find that the lies are consistent with the scheme on the part of the accused to deceive custom into accepting information that is false in a material particular that the vehicle was a cc rating lower than 3000 that is 1995, damaged that is ‘salvage’ and therefore a much lower value than the purchase price when originally purchased. This pattern of lies and in particular in respect to the information as to the type, condition and cost of the vehicle was intentional and calculated and aimed ultimately to cause the custom [sic] to assess and charge a lower import duty on the vehicle.

In all the circumstances the prosecution has adduced evidence to prove beyond a reasonable doubt that the accused is in breach of section 209(1)(b) of the Customs Act.”

The appeal

[43] In advancing the appeal, Mr Lyttle posited grounds on which he challenged the learned Parish Court Judge accepting the evidence and arriving at the conclusion she did. The main thrust of the submissions was that the documentary evidence showed that the BMW motor vehicle imported was a ‘2001 make’ motor vehicle and not a ‘2003 make’ as purported by Mr Robinson. He also contended that the learned Parish Court Judge erred in accepting the evidence of Mr Robinson and Mr Lawrence that the BMW

was not a '2001 make' vehicle when there was no credible evidence to contradict what was stated in the exhibits.

[44] In response on behalf of the Crown, Miss Alice-Ann Gabbidon submitted that the evidence adduced did, in fact, support the conviction and that the appellant had failed to show that the verdict was palpably wrong. She contended that the learned Parish Court Judge properly weighed the evidence given by the witnesses, assessed their credibility, considered the issues and concluded that the elements of the offence were made out. Miss Gabbidon urged that there was no basis on which the convictions ought to be disturbed.

[45] This court, however, could not get beyond the fact that the learned Parish Court Judge had convicted the appellant for an offence for which he had not been charged and arraigned. As such she failed to properly address her mind to the offences for which he had been brought before the court.

[46] Miss Gabbidon acknowledged that the learned Parish Court Judge had erred in the manner in which she dealt with the matter and initially asked this court to consider whether the provisions of section 303 of the Judicature (Parish Court) Act could be relevant. The section provides: -

"No appeal shall be allowed for any error or defect in form or substance appearing in any indictment or information as aforesaid on which there has been a conviction, unless the point was raised at the trial or the court is of opinion that such error or defect has caused or may have caused, or may cause injustice to the person convicted."

[47] However, eventually, Miss Gabbidon correctly conceded that this section was not applicable to the circumstances of this case. The error identified was not concerned with any form or substance on the information. In any event, this was not an error which could have been raised at the trial itself. Inexplicably, the learned Parish Court Judge, in considering the evidence, related it to the wrong section of the Customs Act and thereafter arrived at a verdict which cannot be justified.

[48] The provisions of section 304 of the Act seem much more applicable in the circumstances of this case. That section provides:

“No judgment, order or conviction of a Judge of the Parish Court shall be reversed or quashed on appeal for any error or mistake in the forms or substance of such judgment, order or conviction, unless the court is of the opinion that such error or mistake has caused, or may have caused, or may cause injustice to the party against whom such judgment, order or conviction has been given or made.”

[49] This conviction was based on an error which was the cause of injustice to this appellant and which this court had no option but to quash. This was sufficient to dispose of this appeal, but there is another issue which, in our we are of the opinion, requires the comment of this court.

Proceedings after the seizure of the motor vehicle

[50] From the facts, it was clear that there was a gap of five years between the time that the vehicle had been seized from Mr Henry and the time he was charged. The vehicle was seized in January 2006 and, in June 2006, Mr Henry and Mrs Sarah (Butt) Henry filed a claim form against Mr Desmond Robinson and the Attorney General of

Jamaica ('the defendants'). In it they claimed, among other things, the return of the vehicle and a declaration that no further customs duty other than what he had in fact paid was payable to the Government of Jamaica by the claimants. The defendants counterclaimed to recover the sum of \$7,576,491.99 being outstanding duties payable on the BMW motor car, on the ground that the amount of \$1,188,158.37 paid by Mr Henry and Mrs (Butt) Henry was paid on the basis of false declaration made by them to the Jamaica Customs Department.

[51] The matter was heard by Thompson-James J (Ag), as she then was, ('the judge') over five days commencing on 4 December 2008 to 17 February 2009. On 24 November 2009, the judge gave her decision in the written judgment - **Brenton Henry and Sarah (Butt) Henry v Desmond Robinson and The Attorney General** (unreported), Supreme Court, Jamaica, Claim no HCV 1329 of 2006, judgment delivered on 24 November 2009. This judgment was shared with this court in bundle filed on behalf Mr Henry.

[52] The judge heard evidence from Mr Henry and Mrs (Butt) Henry on their claim and from several witnesses on behalf of the defence, to include Miss Sidonne Foster and Mr Desmond Robinson, who had testified for the Crown in the criminal proceedings.

[53] After an extensive review of the evidence and a careful analysis of the applicable law and relevant case law, the judge concluded that the seizure of the vehicle was without cause and that the reason for the seizure being mere suspicion, the seizure therefore was unlawful. She declared that no further customs duties were payable and

that the claimants were entitled to the return of the vehicle. The counter-claim was dismissed.

[54] There was an appeal of this decision, which was heard by this court on 12 and 13 October 2011 and, on 16 May 2014, a judgment was delivered, reported as **Robinson (Desmond) and Anor v Henry (Brenton) and Anor** [2014] JMCA Civ 17.

The appeal was dismissed and the judgment of the judge was affirmed.

[55] Panton P, writing on behalf of the court, noted the following in his concluding remarks:

“During the hearing of the appeal, counsel for the respondents stated that although there had been no order for a stay of execution of the judgment, the appellants have failed to return the car as instructed by the court below. It is now expected that the order of the court will be executed without further delay.”

[56] The authorities thereafter held on to the car illegally and despite that order being made on 16 May 2014, it was in June 2015 that Mr Manfred Vogt testified that he inspected a vehicle – the BMW convertible M3. He did this inspection without Mr Henry being present.

[57] It must be noted that it was sometime in October 2011, two years after the decision of Thompson-James J (Ag), that the matter was brought to the attention of Mr Lawrence who then commenced investigations. He would have been aware that there had been other proceedings concerned with this motor vehicle, since he testified that it

was from the Supreme Court that he obtained the documents that assisted in his investigations. The informations which were obtained to place Mr Henry before the court are dated 27 October 2011. At that time, the appeal had been heard and adjourned for a decision. It appears from the informations that Mr Henry was first before the Parish Court on 15 November 2011. It was not until June 2015 that Mr Vogt examined the motor vehicle with the trial commencing on 21 October 2015. The trial therefore took place after the decision of this court.

[58] Before this court, Mr Lyttle indicated that he had urged the learned Parish Court Judge not to embark upon a trial, as the Supreme Court and this court had already addressed the issues surrounding the importation of this vehicle in Mr Henry's favour. He said the judgments of both courts had been shared with the learned Parish Court Judge. Indeed, one of the grounds of appeal was as follows:

"The learned Trial Judge misdirected herself and refused to accept and read the judgments from the Supreme Court (2016 HCV 1329) and Court of Appeal (168/2009) in relation to the said motor vehicle which was given in favour of the appellant and be guided by the order of both superior courts."

As part of the submissions related to this ground, Mr Lyttle has invited this court to say that the learned Parish Court Judge was wrong to embark upon this trial as it was the same parties, same motor vehicle, the same witnesses and the same issues before the court.

[59] It is recognised that in her response to this ground, Miss Gabbidon quite appropriately submitted that it is trite law that the criminal jurisdiction and the civil

jurisdiction of the court are two distinct jurisdictions, with different burdens and standards of proof. It was contended that the core issue in the civil case was considerably different from that in the criminal case. In the former, the issue was whether or not the motor vehicle was lawfully seized and in the latter, it was whether or not the appellant had made false representations in relation to the description of the motor vehicle. It was urged that the civil proceedings had no bearing on the criminal matter and thus, if the learned Parish Court Judge had seized herself of the facts in regards to the civil judgment, her mind would have been prejudiced in relation to the criminal charge.

[60] There is undisputedly some merit in the submissions made by Miss Gabbidon. However, there is another perspective that is to be brought to bear to the background to the criminal proceedings. The fact that the investigation and instituting of charges against Mr Henry commenced after the findings of the Supreme Court, that the seizure of the motor vehicle was unlawful, and that this was accompanied by an order for the vehicle to be returned to Mr Henry, cannot be ignored. It must be the cause of some concern. The judgment in the Supreme Court necessarily involved a rejection of the counter-claim that the assessed custom duties and general consumption tax were calculated on the basis of false declarations made by Mr Henry and Mrs (Butt) Henry to the Jamaica Customs Department. Also, in the judgment from this court, it was recognised that the detention of the motor vehicle was on the basis that the Henrys had made false declarations.

[61] The issues resolved in the proceedings prior to the institution of criminal proceedings were, therefore, not entirely different from those raised in the criminal proceedings commenced afterwards. Although it is recognised that the jurisdictions are different, the circumstances, which involved a disregard of orders made by the Supreme Court as well as this court, are such that there is an appearance that the processes of the court were improperly used. The question, therefore, that we feel compelled to comment on is whether this prosecution could not be regarded as an abuse of process.

[62] An abuse of process was defined by Lord Lowry in **Hui Chi Ming v R** [1992] 1 AC 34 as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings" (at page 57). It has also been recognised that the term cannot be more precisely defined. In **Rhett Allen Fuller v The Attorney General of Belize** [2011] UKPC 23, the Board was concerned with a question of whether an application for extradition was an abuse of process. Lord Phillips, writing on behalf of the Board, had this to say early in the judgment:

"5. The Board observes at the outset that part of the problem raised by this appeal lies in the fact that "abuse of process" is not a term that sharply defines the matter to which it relates. It can describe (i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay, or (ii) using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law, or (iii) using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive."

[63] It has long been accepted that a court has the inherent power to stay criminal proceedings on the basis that they are oppressive and constitute an abuse of process.

In **R v Maxwell** [2010] UKSC 48 Lord Dyson, writing on behalf of the court, stated:

“13. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court’s sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court’s sense of justice and propriety’ (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).”

[64] The investigations and institution of criminal proceedings in this matter involved what amounted to a flagrant disregard of orders of the Supreme Court and this court and gave the appearance of being unfair and oppressive. It is clear that the issue of abuse of process was not specifically raised before the learned Parish Court Judge and she cannot therefore be faulted for not considering the issue. In any event, we are not purporting to resolve this appeal on the issue but in these circumstances we felt compelled to consider it.

Conclusion

[65] Ultimately, the learned Parish Court Judge erred when she convicted Mr Henry for an offence for which he had not been charged or arraigned and, in so doing, failed to address the charges for which he had, in fact, been pleaded. It was for this reason that the conviction had to be quashed and the sentence set aside.

[65] Before disposing of the matter, we consider it necessary to address the fact that the learned Parish Court Judge, having convicted and sentenced Mr Henry on only one information (albeit for an offence that was not charged therein), failed to return a verdict on all the other charges to which he had pleaded not guilty. There is nothing recorded in the learned Parish Court Judge's finding of facts that is indicative of a finding of guilty in relation to the offences charged in the informations that bore no endorsement of a verdict.

[66] The omission to record the verdict of the court on all the informations was unfortunate and could amount to injustice to Mr Henry, who is entitled to have his name cleared, having pleaded not guilty to the charges. He would have joined issue with the Crown and has not had the benefit of verdicts of acquittal entered in his favour on the remaining informations. In the interests of justice, therefore, we direct that immediate steps be taken, whether by way of the entry by the Director of Public Prosecutions of a *nolle prosequi* or otherwise, to regularise the record in favour of Mr Henry. This is particularly important, in our view, in light of our consideration that the criminal prosecution in this case amounted to an abuse of the processes of the court.