GEEGANAGE

v.

DIRECTOR GENERAL OF CUSTOMS

COURT OF APPEAL
GUNAWARDENA, J.
C.A. 753/97
APRIL 05TH, 2001

Customs Ordinance 17 of 1989 - S. 8, S. 129, goods not tallied with cusdec - forfeiture on Customs Officer - Bias - errors of law - Decision a nullity - No Evidence Rule.

The Director General of Customs, who held an inquiry under S. 8 imposed a forfeiture of Rs. 500,000/- on the Petitioner, an Assistant Superintendent of Customs, under S. 129. The goods imported did not tally with the 'cusdec'.

The petitioner sought to quash the said order on the grounds of (1) Bias (2) errors in law.

Held :

(i) The 2nd Respondent has failed to take relevant considerations into account, and had allowed irrelevant factors to influence the decision.

Per Gunawardena, J.

(i) "If a certain decision, is left unchallenged it will be accepted and enforced as of it were valid. Only a decision of a Court can establish its nullity. One ignores the void decision at one's peril and with ouster and time - limit clauses coming into vogue, effluxion of time can prevent a challenge to a nullity being ever mounted after the stipulated period.

(ii) The decision was based on "No Evidence".

"No evidence" extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

(iii) there is nothing to show that the case was proved, beyond reasonable doubt.

(iv) The decision is flawed by bias.

Notwithstanding the objection to the 2nd Respondent. Inquiring into the matter, he proceeded with the Inquiry. The 2nd Respondent may have even believed that he was acting without bias or with impartiality and on good faith, yet his mind may be unconsciously affected by the objection raised to his hearing.

Per Gunawardena, J.

"that the Petitioners objection would have perhaps displeased the 2nd Respondent would not, of itself in my view, lead to the disqualification of the 2nd Respondent, my own view is that when the Petitioner objected to the 2nd Respondent Inquiring into the matter, the 2nd Respondent should have stepped down with a good grace, for justice must be rooted in confidence."

APPLICATION for Writ of Certiorari.

Cases referred to :

1. *Chief Constable of the North Wales Police v. Evans (1982)* - 1WLR 1155
2. *Director of Public Prosecution v. Head* - 1959 AC 83
3. *R v. Paddington Valuation Officer* - 1966 1 QB 38
4. *Allison v. General Medical Council* - 1894 1 QB 750
5. *Hanks v. Minister of Housing & 'Local Government* - 1963 1QB 999
6. *R v. Police Complaint Board ex. P. Madden* - 1983 WLR
7. *In Re Bramblevale Ltd.,* - 1976 Ch. 128
8. *R v. Enwessor* - 1991 Crim LR 483
9. *Re Solicitor* - 1991 2 All ER 335
10. *Queen v. M. G. Sumanasena* - 66 NLR 350
11. *R v. Barnsley Metropolitan Borough Council exparte Hook* - 1976 1 WLR 1052
12. *Ridge v. Baldwin* - 1964 AC 40
13. *In Re Animinic* - 1969 2 AC 147
14. *R v. Lord President of the Privy Council Ex parte* - 1993 AC 682
15. *Dimes v. Grand Junction Canal Proprietors* - 1852 3 HL Case 759
16. *R v. Sussex Justices* - 1924 1KB 256
17. *R v. London County Council Empire Theatre* - 1994 71 LJ 638
18. *R v. Secretary of State on Environment ex p Kerkstall Valley Co. Ltd.,* - 1996 3 All ER 304
19. *R v. Thames Magistrates Court ex P. Polemis* - 1974 2 All ER 1219
20. *Chief Constable of the North Wales Police v. Evans* - 1982 1 WR 1155 at 1173.

Faiz Musthapha P.C., with *Sanjeewa Jayawardena* for Petitioner.

Ms. Farzana Jameel S.S.C. for 1st, 2nd Respondents.

Cur. adv. vult.

June 28, 2001.

U. DE Z. GUNAWARDANA, J.

The petitioner has made this application for a writ of Certiorari quashing the order dated 18.07.1996 (P14) made by the 2nd respondent (Deputy Director of Customs), who had held an inquiry under section 8 of the Customs Ordinance No. 17 of 1869 (as amended) imposing under sec. 129 of the same ordinance, a forfeiture of Rs. 500,000/- on the petitioner, The petitioner had been an Assistant Superintendent of Customs who had been required on 14. 06. 1996 to examine a certain quantity of cargo or goods in order to be satisfied that the particular batch of goods imported tallied with the "Cusdec", that is, the declaration made by the importer to the customs as to the things he was importing. The declaration made by the importer was to the effect that the cargo consisted of spare parts of Sony radio/cassette players. The prosecution case is that what was imported was not spare parts as declared by the importer, but, the following complete (as opposed to parts) items as well:

(i) 291 complete sets of National radio recorders,

(ii) One complete set 29 "Sony Colour Television Set".

(iii) One National Microwave Oven and other electrical goods.

The above items were valued at 3,181,688/- and the learned Senior State Counsel who appeared for the 1st and 2nd respondents, impressed upon me that by making a false declaration as to the nature and components of the consignment of goods, the importer had paid only Rs. 91,456/- as the duty when, in fact he would have been liable to pay Rs. 2,396,222/- had a true and honest declaration been made, thereby defrauding the State or the revenue of a sum of

Rs. 2,304,766/-. To put it in layman's language, the charge or the case against the petitioner seems to be, because everything is so vague, that he knowingly permitted or suffered the goods itemised above as (i), (ii) and (iii) to be removed from the warehouse without the due duties being paid on such cargo. The 2nd respondent, who held the inquiry with regard to this matter, had found the petitioner guilty of such conduct and in consequence imposed the forfeiture or penalty above- mentioned.

By way of preface, I may say that the arguments put forward by the eminent President's Counsel for the petitioner might, perhaps, have been more acceptably addressed to a court exercising appellate and not supervisory jurisdiction - the latter jurisdiction being the one invoked by the petitioner in his petition seeking, under the judicial review procedure, a quashing of the aforesaid decision made by the 2nd respondent. The arguments advanced on behalf of the petitioner are based solely on factual matters inviting the Court of Appeal more or less, to substitute its view in the interpretation of factual matters or situations dealt with in the written submissions. The submissions adduced on behalf the petitioner impugn the decision, or rather in assailing it had touched, (to reproduce the very words, in a greater or less degree, in which the submissions are couched) on the following matters:

(i) that the goods produced at the inquiry were not those examined and passed by the petitioner,

(ii) that there were contradictions in the evidence of the police officers,

(iii) that the prosecution witnesses admit that the petitioner had conducted a proper examination;

(iv) the reasons as to why the importers paid the fine imposed by the 2nd respondent which, I think are irrelevant in that it is not an aspect which the 2nd respondent could have possibly taken into consideration in reaching the decision sought to be impugned;

(v) that the petitioner was required or directed to do was a "test-check" which was akin to a random check;

(vi) that there was animosity on the part of the 2nd respondent towards the petitioner.

(vii) that the petitioner had been out of employment for 4 1/2 years;

(viii) that petitioner's wife is a "heart - patient" and that petitioner has two children aged 12 and 10 respectively. The two last - mentioned points may have been fittingly pleaded in mitigation after a man had been convicted of some of offence.

The submissions seem to be oblivious of the distinction between appeal and review procedure. If one appeals against a decision, one is claiming that it is wrong, or incorrect. The Court of Appeal if it is persuaded of the merits of the case may allow the appeal and so it substitutes its view for that of the court or tribunal of first instance. Under the judicial review procedure the court is not concerned with the merits of the case, that is, whether the decision is right or wrong. In review (as opposed to appeal) the court only considers whether the decision is lawful or unlawful. In the words of Lord Brightman, judicial review is concerned, not with the decision, but with the decision making process". - *Chief Constable of the North Wales Police v. Evans* [1]

The only point urged in the submissions filed on behalf of the petitioner which would be relevant (under the judicial review procedure) is that of animosity" or bias of the 2nd respondent who was the decision - maker. But the legal implications of bias or what impact bias would have on the decision, had been left un-explained. It has not been explained or submitted that natural justice refers to the rules governing procedures and these rules require that procedure must be free from bias which would potentially, if not for certain, have the effect of denying, in a larger sense, the petitioner's right to a fair hearing. (This aspect of will be considered later in the course of this judgement.)

The relevant decision of the 2nd respondent is infected by the errors of law enunciated below and is a nullity and has to be formally quashed. This leads me to consider briefly the status of a void decision. If a decision is a nullity, anyway, it might be imagined that those affected by such a decision could simply ignore it. At one time there had been a mistaken belief that certiorari will not lie to quash nullities. In *Director of Public Prosecution v. Head*[2] and in *R. v. Paddington Valuation officer* [3] no less a judge than Lord Denning had expressed the view that there is no need to quash what in fact, is a nullity and that it is "automatically null and void without more ado". However, the fact that a decision is potentially void does not in itself prevent its full implementation until the moment when it is contested. If a certain decision, as the one in question, is left unchallenged it will be accepted and enforced as if it were valid. Only a decision of a court can establish its nullity. One ignores the void decision at one's peril and with ouster and time-limit clauses coming in to vogue, effluxtion of time can prevent a challenge to a nullity being ever mounted after the stipulated period.

The decision of the 2nd respondent is liable to be set aside as it is vitiated by following errors of law which renders the decision of the 2nd respondent a nullity:

(i) the 2nd respondent had in reaching the decision failed to take relevant considerations into account whilst he had allowed legally irrelevant factors to influence the decision;

(ii) The decision of the 2nd respondent is based on "no evidence" and as such is erroneous in law;

(iii) there is nothing to show that the 2nd respondent was satisfied that the charge or the case against the petitioner was proved to the requisite standard of proof which, in this instance, is undoubtedly proof beyond reasonable doubt.

It is strange that none of the above mentioned points had been urged on behalf the petitioner. The above-mentioned

points (ii) and (iii) are inextricably interwoven and they cannot be disentangled one from the other or considered in isolation although I have mentioned them, above as two separate heads.

Perhaps, the only point of any worth, arising on the submissions, is the question of bias on the part of the 2nd respondent. The general effect of bias is to render the decision wholly void. *Allison v. General Medical Council*[4]

To deal with the above points in order: it is almost axiomatic or well settled that an administrative action is irrational and as such is ultra vires where it is shown that the decision - maker has acted on the basis of irrelevant considerations or where it can be shown that relevant considerations have been overlooked or ignored. A good working definition of relevance was given by Megaw J. in *Hanks v. Minister of Housing and Local Government*[5] where he discusses the concept of considerations. "If it can be shown that an authority exercising a power has taken into account as a relevant factor something which it should not properly take into account in deciding whether or not to exercise the power, then the exercise of that power, normally, at least, is bad. Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is or ought to be known to it, and which it ought to have taken into account, the exercise of that power is normally bad".

The 2nd respondent had failed to consider the following relevant factors:

(a) that the check that the petitioner was required to make in relation to the cargo in question, was, in the parlance of the customs, a "test" check. It is not that the petitioner on his own initiative decided that a "test" check would suffice. The petitioner did what he was directed to do or as he was told to do by the Assistant Director of Customs who was a superior officer. It is common-ground that a "test check" does not entail as rigorous or thorough a check as would have had to be done if the goods

had been directed to the "red channel", which involves an article by article search or examination. The 2nd respondent had not given a moment's thought to that vital aspect which been completely glossed over-rather surprisingly. There is not a word in the 2nd respondent's order or report as to the nature of the duty or the degree of care that devolved on the 2nd respondent in carrying out the direction of his superior in examining goods that had been assigned to the "amber channel" as the relevant consignment, in fact, was. Under sec. 129 of the Customs Ordinance petitioner becomes liable to penalties ordained therein only if he had "knowingly" permitted the importers to illegally remove the goods without payment of duty thereon.

The term knowingly in relation to violation of a statute means consciously or intentionally.

One cannot be oblivious of the fact that the 2nd respondent in his order had described as false, the report that had been submitted by the petitioner after examination of the cargo which implied that the report was not true to the knowledge of the petitioner. The court of review cannot substitute its view of the facts for that of the inquirer but it is entitled to point out that the inquirer had failed to consider whether the petitioner had failed, in the course of the examination, to observe anything other than spares, (which was what the declaration by the importer disclosed) owing to low degree of intensity of the search, done by the petitioner which would by evidence of carelessness, rather than of anything else. It is worth observing that, as the law stands, as at present, no penalty would be incurred, not under section 129 of the Customs Ordinance, anyway, if the goods, in excess had gone undetected owing to the laxity or remissness or inadvertent negligence on the part of the officer doing the examination, as carelessness is not a ground of legal liability under the Customs Ordinance. The petitioner cannot be held responsible if he had not done his best to attain the degree of care of a reasonable man. In any event, the petitioner had been found guilty of an offence under section 129 of the Customs Ordinance - component element of which offence is

knowledge or rather, mens rea. In this context, it would be germane to point out that the items that had been declared by the importer were, in fact, also amongst the cargo and the possibility of what was undeclared being artfully concealed, (assuming that undeclared goods were also imported) as to esape detection at a random search which was, in fact, what a "test-check" signified, cannot be wholly excluded. In the decision of this matter, there is an interplay of several considerations:

(i) the nature of a test - check, that it is somewhat of a random check;

(ii) possibility of the petitioner being remiss, as opposed to being dishonest;

(iii) considering the nature of the charge, that a finding of guilt can involve even loss of liberty, unquestionably, the standard of proof to be applied to these proceedings is that required for a criminal conviction - as will be explained in greater detail in the sequel. None of these points had received the most cursory attention at the hands of the 2nd respondent. But more unpardonable is the fact that they have not been touched upon in the submissions. The 2nd respondent ought to have ascertained what the relevant facts were and also what standard of proof was required to establish the charge and then married the two, so as to reach the decision, as to whether not the charge was proved.

The 2nd respondent, on the contrary, had attached excessive weight to legally irrelevant and inadmissible matter. In his order he had placed emphasis on the fact that the importer had failed to (in the very words of the order of the 2nd respondent) "legally prove" that excess goods that were found were "items that he had collected from various people" - that being the explanation of Augustine Fernando who represented himself to be the owner of the goods. In other words, from the circumstance of the failure of the owner of the consignment to produce "valid documents" or documentary proof in respect of the items that were found

in excess of what was given in the customs declaration (in order to prove that he had "collected them from various people" over a period to time) the 2nd respondent had drawn the inference that excess goods was part of the cargo that had been imported on the relevant occasion and that the petitioner had knowingly permitted such goods to be removed without payment of duty.

It is, to say the least, a far - fetched inference and is indefensible. The fact that Augustine Fernando said so, that is, that the goods that were found in excess of the declaration he had made to the customs represented items that he had "collected from various people" as also the fact that Augustine Fernando did not produce any "documents" in proof of the fact that he "collected those items from various people" over a period, not being contested, are admitted facts. (What is not in dispute is that Augustine Fernando said so, that is, that he collected what was found in excess from various people over a period, and not the truth of that statement).

The facts themselves not being in dispute, the conclusion drawn by the 2nd respondent from those facts is a matter of legal inference which is erroneous and as such is an error of law. To draw an adverse inference, on a criminal charge of one akin or analoguous to it, as the charge against the petitioner is, from a given circumstance - that circumstance must be wholly incompatible with the innocence of the person or the accused and incapable of any explanation upon any other reasonable hypothesis than that of his guilt. That is, I think, a rudiment of the law which is of universal application. But the circumstance or fact that the importer was wholly at a loss or was incapable of producing any document with regard to excess goods is manifestly an inconclusive fact, in relation to the charge against the petitioner, in the sense that it is quite as consistent, if not more consistent, with the innocence of the petitioner as with his guilt. It may will be that these excess goods that were found in the possession or custody of the importer had come from disreputable or questionable sources. The importer may have previously obtained these goods by being involved in

transactions of doubtful honesty. The fact that the importer was unable to produce "documents" in respect of the excess goods does not un-erringly point to the fact that the 2nd respondent was "knowingly" concerned in any act of fraudulent evasion of payment of duties.

The other feature which is worth observing is that the 2nd respondent's decision, it could be said, is based on "no evidence". In a sense, "no evidence rule" is a ground of old wine in new bottles because review under the head of "lack of evidence" can be seen as a species of unreasonableness, in that no reasonable body would come to a decision unsupported by evidence. There is a growing body of case law reflecting the view that to act without evidence is to act ultra vires. As Wade explains " no evidence" does not mean a total lack or dearth of evidence. He sheds more light on what "no evidence" means as follows: "It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding".

In a way, the application of the "no evidence" rule may, perhaps, result in a blurring of the distinction between supervisory role of the court (under the judicial review procedure) and the appellate jurisdiction of the court because the court's exercise under this head i.e. under the concept of "no evidence" necessarily entails a consideration of the strength of the evidence. The equivalent rule in the United State allows a reviewing court to determine whether an administrative determination made after a formal hearing is supported by substantial evidence on the record taken as a whole.

No evidence rule has, of necessity, to be applied in conjunction with the requisite standard of proof in any given case. I have explained above that the question that the court of review has to consider in the circumstances of this case is this: does the totality of evidence on record reasonably justify the conclusion beyond a reasonable doubt that the petitioner had knowingly allowed the importers to remove the cargo without payment of due duties. Lord Sankey's "golden thread" is wholly relevant in the context. It is not of an age, But for all time.

The decision of the 2nd respondent should have emerged as a consequence of the balancing of the factors favourable to the petitioner as against the factors prejudicial to him. I cannot bring myself to say that there is a proper, if not any, appreciation of the circumstances that tell in favour of the petitioner. One must not forget that it would suffice for the petitioner to have been acquitted if such factors in favour of the petitioner engenders a reasonable doubt. You have to guard against judicialization of procedures to be followed by administrative tribunals and the like. That was the refrain or the recurring phrase in the submissions of the learned Senior Strate Counsel. But the bedrock or the ultimate legal principles such as, that a criminal charge or one that partakes of the complexion of one (criminal charge) ought to be proved beyond a reasonable doubt are sacred and immutable, in any context and ought not to be lightly disturbed. In this case the solitary point which adversely affect the petitioner is that he happened to be the officer who examined the cargo before it was released to the importer. As explained above, the failure of the importer to produce "documents" to explain how he came by the excess goods cannot strengthen the case against the petitioner and no inference of guilt can be drawn against the petitioner therefrom. The points in favour of the petitioner are numerically more:

(i) strap seal was broken at the time the alleged detection was made. Strap seal, I take it, is something like strip of metal affixed to the container, after checking the cargo, as a guarantee of authenticity to show that while the seal is unbroken the contents have not been tampered with. If the detection had been made before the strap seal was broken and while the container was on its way, that is, while the cargo was being transported, then, perhaps, it could have been said that there was room for holding for a certainty, that the cargo was the same as that, which had been examined by the petitioner, although even then the question would arise as to whether (assuming that the importer had made a false declaration) the extra cargo sought to be covertly imported had escaped the observation of the petitioner owing to his negligence and not to his dishonesty;

(ii) the petitioner had been required by his superior officer to do only, what is called, a "test check" which is, somewhat, of a random check, as opposed to a check of item by item;

(iii) the alleged detection was made at the site of what was, in fact, a warehouse or store - room in Kotahena. The fact that the goods were being unloaded at the relevant time is not all that clear. In fact, there is some confusion and a lack of clarity in the evidence on this point as to whether the goods were in the process of being loaded or unloaded. The learned President's Counsel for the petitioner, in his written submissions, had highlighted the relevant excerpt of the evidence of Nanayakkara, a police officer who was a prosecution witness:

Q : "From your own observation you cannot say whether what took place there was un - loading or loading.

A : "Yes"

The importer's position, too, was that the cargo that had been cleared or examined by the petitioner on the relevant date had been unloaded and that they were loading what had been stored or kept in that place after collecting them from various people over a period.

But, whether it was loading or unloading both processes point to the fact that it was a place that was used for storing goods. The fact that the site of the alleged detection was a store-house is consistent with the version of the importer that these finished products that were found in excess such as blenders and so forth had, in fact, been stored or kept in that place, sometime before the date on which this alleged detection was made, although it is consistent also with the story of the prosecution that the goods (in excess of what was declared) were being unloaded. The fact that the place where the alleged detection was made was a store or a place which was used as such enhances the prospect of the story being true viz. that what

was found in excess of the declared cargo was what the importer had kept in that place after having "collected them from various people" over a period.

The points enunciated above favourable to the petitioner, which demand serious consideration, had been completely glossed over by the 2nd respondent. As pointed out above, the only point which is legally incriminating, so far as the petitioner is concerned, was that he checked the cargo, be it noted, in the course of a "test-check" to ascertain whether it tallied with the declaration made by the importer as to the cargo he imported. That circumstance is wholly insufficient to sustain or prove a charge beyond a reasonable doubt. In these circumstances, I have to interfere with the decision of the 2nd respondent finding the petitioner guilty because on that solitary piece of evidence set out above the finding of guilt is so un-reasonable, in the sense that it is clearly beyond the range of responses open to a reasonable decision - maker who had to be satisfied, be it noted, beyond a reasonable doubt. It is manifest that the 2nd respondent had been oblivious to a crucial aspect of the nature of proceedings viz. that the burden that lay on the prosecution was the same degree of proof as required for conviction of a criminal offence. Even the learned President's Counsel for the petitioner was unmindful of that matter - let alone the 2nd respondent. Measure of cogency required to prove a case depends upon the nature of the case. In a civil case it is proof on a preponderance of probability, that is, the more probable version, of the two has to be upheld.

It is the type of proceedings which determines the standard of proof. Criminal proceedings require proof beyond reasonable doubt. In *R. v. Police Complaints Board ex. P. Madden*[6] Mc Neill J. held that disciplinary proceedings taken against a police officer were criminal proceedings. The penalty which had been imposed on the petitioner in this case can involve a loss of liberty and is generally looked upon by the public like a criminal conviction. In *Re. Bramblevale Ltd*[7] it was held that proceedings for contempt of court are quasi-criminal because

a prison sentence could be imposed if the allegation is proved. Therefore, proof beyond reasonable doubt is required. The criminal standard of proof is required before a court can be satisfied that the defendant has benefited from drug trafficking so as to assess the value of his proceeds from that trafficking under Drug Trafficking Offences Act, 1986: *R. v. Enwesor* [8].

The standard of proof to be applied by a tribunal considering whether to strike off a solicitor should, where what amounts to criminal offence is alleged, be that required for criminal conviction: *Re Solicitor*[9] Lord Lane CJ recalled that the code of conduct of the Bar provides that in proceedings before disciplinary tribunal the criminal standard should be applied and His Lordship felt that it would be anomalous if the two branches of the profession were to adopt different approaches in this regard.

It is worth repeating that a finding of guilt could have been reached in these proceedings only if the charge against the petitioner was proved beyond a reasonable doubt. I remember reading somewhere, although I cannot recall the context, that more substantial the interference with human rights, the more the court or tribunal will require by way of justification before it is satisfied that the decision is reasonable. In this case before me, the petitioner's human rights are very much in issue. There is, at best, a suspicion that the petitioner was knowingly concerned in the removal of goods without payment of duty or of due duty.

But, as had been held by Basnayake C. J. in *Q v. Sumanasena*[10] suspicious circumstances do not establish guilt. It is essential that there should have been strict adherence to the rule that criminal charge or one analogous to it must be proved beyond a reasonable doubt, more so as the 2nd respondent's duties were judicial in nature as there was a lis (controversy) inter parties situation in the proceedings before the 2nd respondent. There was the prosecution on one side and suspects on the other and at the end of proceedings a heavy

fine had been imposed in default of payment of which fine the petitioner will, for a certainty, be sentenced to imprisonment. Personal freedom of the petitioner is at stake. This vindicates what I said before, that is, that the petitioner's human rights are in peril or are very much in issue. One is at a loss as to what standard of proof was adopted by the 2nd respondent because his order is silent on that aspect. In *R v. Barnsley Metropolitan Borough Council, ex parte Hook* [11] some members of the Court of Appeal inferred that the local authority concerned was under a duty to act judicially - duty to act judicially being inferred from the fact that the decision was affecting the applicant's livelihood. In *Ridge v. Baldwin* [12] Lord Reid changed the course of the development of the law by holding that to determine whether there existed a duty to act judicially the court should have regard to the nature of the power being exercised and the rights thereby affected.

The above grounds are to be designated as errors of law, and all or any one of which grounds, the impugned decision made by the 2nd respondent has to be quashed. *Animinic decision* [13] seems to suggest that any error of law will have the effect that the body subsequently acts without power and so denying that some errors may be made within jurisdiction and therefore immune from judicial review. The *Animinic (majority) decision* also held that not only errors with respect to preconditions to the exercise of power may lead to acting without jurisdiction but also errors made in the course of exercising the power. This issue is very important because if error of law goes to jurisdiction that expands the scope of judicial review and the possibility of intervention by the courts. *Animinic* is important because it held that any error of law may well be a jurisdictional error and therefore reviewable under the *ultra vires* doctrine. There has been some doubt as to whether or not *Animinic* abolished entirely the distinction between jurisdictional and non-jurisdictional errors. This appears to have been resolved by the House of Lords in *R. v. Lord President of the Privy Council, ex parte* [14] at 682, in which it was held that " in general any error of law made by an administrative tribunal or an

inferior court in reaching a decision can be quashed for error of law". The ground for this is the *ultra vires* doctrine that these bodies had been conferred their decision making powers by the Parliament presumably on the basis that it would be exercised on the correct legal basis. The errors law explained above therefore, renders the relevant decision (of the 2nd respondent) void.

Lastly, the question of bias remains to bé considered. The learned President's Counsel had also submitted tentatively that the 2nd respondent was biased as against the petitioner and stopped short at that. No specific reasons, as such, had been adduced to substantiate the submission. Whilst the grounds dealt with above constituted errors of law - the ground of bias would not, I think, fall so readily under any recognisable head of error of law. However, in reality the rule against bias is an aspect of fair procedure and if there was real likelihood of bias, the decision, for certain, will be vitiated.

The learned eminent President's Counsel must be taken to have submitted that bias ought to invalidate the determination against the petitioner. In *Dimes v. Grand Junction Canal Proprietors*[15] Lord Campbell, in the course of his speech stated: " This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In the *Dimes case* Lord Cottenham had affirmed decrees made by the Vice Chancellor in litigation between Dimes and the canal proprietors. Dimes discovered that despite the fact that Lord Chancellor had for a period held shares in the canal company both in his own right and as trustee, he had continued to hear matters arising out of the litigation, relying on the advice of the Master of Rolls who sat with him. Dimes appealed to the House of Lords against all the decrees made by the Lord Chancellor on the ground that he was disqualified by interest. The House of Lords set aside all the decrees made by

the Lord Chancellor on the ground of pecuniary interest. The rule against pecuniary interest is applied with greater strictness than any other ground on which bias may arise, because the courts take no account of the fact that a decision - maker with direct pecuniary interest did not allow himself to be influenced by it in any way. Such an interest disqualifies automatically. The 2nd respondent, of course, had no such pecuniary interest. But what is significant is that all the decrees passed by Lord Cottenhan were set aside by Lord Campbell although he emphatically stated in the course of his speech thus: "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by interest that he had in this concern; but my Lords, it is of last importance that maxim that no man is to be a judge in his own cause should be held sacred".

I think it would be correct to say that, basically, there are only two rules of natural justice. The first rule of natural justice proposes that both sides ought to be heard. *(audi alteram partem)* The second of the two rules of natural justice viz. "*nemo judex in causa sua potest*" is even of stricter application than the first. It is based on the fundamental requirement which is encapsulated in Lord Hewart's stirring statement in *R. v. Sussex Justices*[16] that: "It is not merely of importance, but of fundamental importance that justice should not only be done, but must manifestly and undoubtedly be seen to be done". The implications are that you either have a case of bias or you do not. The principle that no man shall be judge in his own cause *(nemo judex in causa sua potest)* is based on this rule against bias and is intended to ensure that decision - makers are as independent as is practicable. The rule of bias, which is a variant if not the same thing as the principle of "*nemo juidex in causa sua*" which means literally that no man shall be a judge in own cause. But as a rule of natural justice that maxim has wider connotation and prevents any person suspected of being biased from deciding a matter. There is no denying that there is a real practical difficulty in obtaining evidence of bias for, as some one said, the secrets of the living are even more inscrutable than those of the dead. One cannot read or fathom the thought processes of decision - makers.

The very fact that the petitioner objected at the very outset to the 2nd respondent inquiring or investigating would, in all probability, have aroused antagonism in the 2nd respondent although that in itself cannot be treated as a fact from which inference of bias can be drawn. However, an adjudicator who is likely to be biased ought to be disqualified from so acting.

It is to be remembered that the question of bias is particularly insidious, acting inconspicuously but with harmful effect, and as such is difficult to detect. Notwithstanding the objection to the 2nd respondent inquiring into the matter, he proceeded with the inquiry. The 2nd respondent may have even believed that he was acting without bias or with impartiality and in good faith, yet, his mind may be unconsciously affected by the objection raised by the petitioner to his hearing the matter for the objection implied that the petitioner did not repose confidence in the 2nd respondent. But this point, that is, that the petitioner's objection to the 2nd respondent would have, perhaps, displeased the 2nd respondent would not, of itself in my view, lead to the disqualification of the 2nd respondent. Anyhow, my own view is that when the petitioner objected to the 2nd respondent inquiring into the matter, the 2nd respondent should have stepped down with a good grace for justice must be rooted in confidence. In such circumstances the 2nd respondent cannot realistically be expected to be unbiased. The 2nd respondent could have been easily dispensed with and replaced by another officer to whom the petitioner had no objection. This is not a case of necessity where the 2nd respondent was the one and only person who could have held this inquiry. And there is affidavit evidence by the petitioner explaining circumstantially the cause of the 2nd respondent's animosity towards him although such affidavit evidence will not provide direct or convincing proof, more so, as those facts are denied by the 2nd respondent. But, they say, there is no smoke without a fire.

The petitioner's counsel had formulated his objection to the 2nd respondent inquiring into the matter, to use his own words, as follows: "on instructions respectfully object to this

inquiry being held by Your Honour on grounds that upto this afternoon my clients were informed that they were witnesses in this case, however subsequently this became aware that they are being made suspects and they verily believe that this is so on a order by the learned inquiring officer. I state that making them suspects at the commencement of this inquiry without any evidence against them being recorded is making a determination at the commencement and without even an inquiry ..... therefore they feel that their rights prejudiced and on these circumstances wish to have an independent inquiring officer. I therefore respectfully state that this case be heard by another inquiring officer". (I have reproduced the above proceedings without correcting them). The order of the 2nd respondent in relation to the above objection runs thus:

"Regarding the submission made by Mr. Illiyas AAL I wish to state this is only a fact finding inquiry, Whether person listed as a suspect or witness is immaterial. Decision will be taken based on the facts which will come out at this inquiry. So therefore any body will finally get a fair chance whether he is a suspect or a witness. Therefore, I overrule the submission, made by Mr. Illiyas and conduct the inquiry". I have reproduced above the relevant proceedings before the inquirer verbatim and have not tampered with his diction and choice of words for fear of corrupting or vitiating its pristine purity.

It looks to a detached observer viewing the objection, that the objection is circumstantial, not lacking in seriousness of purpose and has more than a substratum of substance, if not of truth. It is worth noticing that the 2nd respondent (inquiring officer) in his order over-ruling the objection had not directly countered the charge made against him, that is, that it was he who had decided to make the petitioner and others (who were originally to figure as witnesses) suspects. The inquirer in his order had not directly admitted the allegation made against him: nor had he denied or repelled it which, in the circumstances, is tantamount to an admission. The fact, that the 2nd respondent did not seek to controvert the fact that it was he who made the petitioner a suspect, is overwhelmingly significant.

If, in fact, it was the 2nd respondent who had decided to make the petitioner (who was originally a witness) a suspect, which, in fact, seems to be the case, since the 2nd respondent in the order reproduced above had not said anything to repel or deny the allegation, then, it comes very close to the decision - maker (2nd respondent) forming a concluding view in advance. That will give rise to serious doubts about the validity of the hearing process or the inquiry conducted by the petitioner. It would be somewhat difficult for the 2nd respondent to have considered the matter fairly on the merits because of his involvement with an earlier stage in the process that resulted in the petitioner being made a suspect and finally culminated in the petitioner being found guilty.

As I stated before, bias being insidious, one rarely, had to or, is indeed, able to prove actual bias on the part of any decision - maker. I think appearances are everything. This perhaps explains why it is very often said that justice "must be seen to be done".

R. v. Sussex Justices, ex parte Mc Carthy (Supra) is considered a landmark decision of the question of bias. Mc Carthy was sued for damages and prosecuted for dangerous dirving after having been involved in a motor -cycle accident. The magistrate's clerk for the criminal prosecution was employed by a firm of solicitors which was the same firm that was acting in civil proceedings for a client that was taking the civil action against Mc Carthy. This was the only connection between the clerk and the defendant. The clerk retired with the magistrates when they considered their verdict and the magistrates proceeded to find Mc Carthy guilty. Mc Carthy sought to have the conviction quashed. The mere presence of the clerk was considered sufficient for a writ of certiorari to be granted to quash the conviction. It is in this case that Lord Hewart CJ made that statement which has become justly celebrated: "**It is not merely of importance, but of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done**".

I have cited the above case with a purpose, that is, in order to emphasize one fact viz. that it is crucial that justice should not be compromised by the least suspicion of impropriety in the decision - making process for "justice is the most sacred thing on earth".

In deciding what degree of suspicion (of bias) determines when a decision should be set be aside on the ground of bias, the courts have evolved different tests which until quite recently were considered as alternatives. On the one hand, there is an investigation of the real likelihood of bias. This test addresses the particular case in hand and inquires whether, in the given circumstances, there was a real chance that the alleged bias might have had some effect on the decision - making process that, in fact, took place.

If, for example, this test had been applied in *ex parte Mc Carthy case* referred to above, the conclusion might well have been that the conviction or the decision on the magistrates should not be set aside and should have remained in place, because although the association existed which later excited suspicion, the clerk may not have been aware of the association and he may have taken no part in the actual deliberations of the magistrates. On the other hand, reasonable suspicion puts the test onto a somewhat higher plane. The idea here is that if any reasonable person would so much as suspect that bias might arise, then this will be enough to satisfy the test.

It is clear that whatever test that one may adopt one has no choice, in the circumstances of this case, but to hold that the decision complained of is destitute of all force and is a nullity as it is vitiated, also, by bias. Even if the formula of "real likelihood of bias" - Which is more favourable to the decision - maker and less favourable of the petitioner - is adopted, the decision of the 2nd respondent is liable to be quashed:

(i) one can say that bias in the 2nd respondent's heart has un-wittingly, so to say, overflowed into his words or speech. The 2nd respondent has, to say the least, had made some

injudicious observations, at the very outset i.e. on 08. 07. 1996. To reproduce those observations in exactly the same words as had been used by the 2nd respondent: "Before the commencement of the inquiry I instruct the prosecution and the investigation officers of the preventive to do further investigation regarding this case. When I went through the inquiring file I found no proper investigation had been done and there may be fresh evidence against the suspect if proper investigation could be done in this case. Therefore, I postpone this inquiry until the Preventive Investigation Division submit a fresh investigation report to me soon. The next date will be informed." Implicit in the observation of the 2nd respondent reproduced above is, at the lowest, a feeling in him that the suspects might get off undeservedly owing to the incompleteness or the unsatisfactory nature of the investigations and not because they were innocent.

One must, of course guard against over - judicialisation of procedures to be followed by administrative officers, investigating officers and the like but the above remarks made by the 2nd respondent serve to show that he was not disinterested in the outcome of the ultimate decision. There is reasonable suspicion that the 2nd respondent has committed himself somewhat firmly with the prosecution as to make it difficult for him to deal fairly with the case on its merits;

(ii) as explained above, the 2nd respondent had omitted to consider the points that told in favour of the petitioner. The upshot of all this was that the petitioner had not had the benefit of a fair - hearing. Suspicion may arise. perhaps, faint though it be, that the 2nd respondent had pretended not to notice such significant facts as that the check of the cargo to be undertaken by petitioner was not an article by article check, that the strap seal was broken and was not intact at the relevant time and that more than three hours had elapsed since container had left the premises of the port. It had been said in *R v. London County Council,*

Empire Theatre[17] that "preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias ..... for it does not follow that the evidence had been disregarded."

But, in the case before me, the situation is just the opposite, and two vital pieces of evidence favourable to the petitioner had been, by accident or design, passed over, and particularly against background of the preliminary observations referred to above made by the 2nd respondent (which showed that he was lacking in detachment and was not disinterested in the outcome) and his failure to give reasonably sufficient time to enable the petitioner to file written submissions, there is room for a reasonable man to think that the 2nd respondent unfairly refrained from considering what was favourable to the petitioner, because 2nd respondent was biased against the petitioner and was not "persuadable". Although the 2nd respondent's remarks reproduced above seem to suggest very strongly that he was dissatisfied at the outset with the paucity of evidence that was available to him and had even directed the officers to unearth or obtain more evidence - yet interestingly, he had gone on to find the petitioner guilty, on the self-same evidence, notwithstanding the fact that additional evidence was not at all forthcoming. In considering whether the 2nd respondent was affected by bias one has to consider the impression given to other people. If in the order of the 2nd respondent, he had considered and attached sufficient weight to the points in the petitioner's favour that would have tended, in some measure, to erase the impression of apparent bias created by other circumstances.

The learned Senior State Counsel somewhat hinted at the fact that the inquiry held by the 2nd respondent was not impressed with the character of a "judicial" or "quasi-judicial" proceedings. I cannot bring myself to accept that position because the 2nd respondent had to make a decision which clearly affected the rights and even the personal liberty of the parties before him. If the petitioner fails to pay the penalty he will undergo a jail sentence. It is true, or rather it used to be true,

that traditionally, the rule against bias or interest applied only to decision - making processes which the courts classified as "judicial" or "quasi - judicial". Today, that is not quite the idea. The learned Senior State Counsel must be thinking of that theory which is obsolescent if not obsolete. The learned Senior State Counsel seems to be oblivious to the fact that the idea of procedural fairness has resulted in the extension of a right to a fair - hearing being applied to a much broader range of activities and decision - making. The learned Senior State Counsel, who is somewhat of a recognised authority on these matters knows, and that for certain, that the not so recent judgement in *R. v. Secretary State for Environment, ex. P. Kirkstall Valley Campaign Ltd.*[18] opens up the dramatic possibility of an extension in the ambit of the rule against bias or interest. In that case Sedley J. stated thus: "I hold, therefore, that the principle that a person is disqualified from participation in a decision if there is real danger that he or she will be influenced by a pecuniary or personal interest in the outcome, is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings".

I should further note that the amount of time that a party has been given to reply to the case, if any, against him is a significant factor. Even if details of the opposing case are provided there is undoubtedly a need for the petitioner to have been given a proper opportunity to respond to the show cause notice against him and to prepare a case. The 2nd respondent should have conducted himself with more humanity, if not with anything else. The requirements of a fair hearing are not, of course, rigid or fixed but will vary with the circumstances of the case. In this case before me there were substantial differences (on the evidence) on issues of fact because the petitioner challenged the prosecution case, almost, in its entirety. The differences on vital issues could not be resolved without an adequate opportunity being given to the petitioner to respond to the prosecution case by means of either oral or written submissions. The petitioner's counsel in his written submissions had impressed on me that the petitioner was given less than 24 hours to file submissions in writing. The 2nd

respondent ought not have treated the application for reasonable time to file written submissions, on behalf the petitioner, so lightly and so flippantly. In fact, the petitioner was given less than six daylight hours to file submissions. One somehow, gets an uneasy - feeling that it was done in that way to make it impossible for the petitioner to accomplish the task. The 2nd respondent (inquirer) had made the direction on 17. 07. 1996 around 5 P. M. that the written submissions of the petitioner be filed by 12 noon on the very next day on which latter day itself the order of the 2nd respondent had been delivered imposing the oppressive penalty.

And it is as clear as clear can be that the 2nd respondent had expected the petitioner's counsel to conjure up submissions in consequence of which the apparent opportunity given to file submissions became, a veritable sham. The situation that arose in this case is somewhat reminiscent of what happened in *R. v. Thames Magistrates' court ex P. Polemis*[19]. The facts are: the captain of a ship received summons to the Magistrate's court on the day that his ship was due to sail. He was charged with discharging oil into the Thames. An adjournment was refused by the court and he was found guilty and fined. The conviction was quashed because the defendant had not been allowed sufficient time to respond. The principle involved in both cases, broadly speaking, is identical. In the case before me, as in the case above - mentioned, the suspect had not been given a reasonable opportunity to prepare the defence. Lord Widgery asserted in the Polemis case, cited above, that in such circumstances requirements of justice would not have satisfied the test of being manifestly seen to be done, whatever the jurisdiction. It is to be observed that when the petitioner failed to submit written submissions, the 2nd respondent promptly delivered the order finding the petitioner guilty which makes me wonder whether the 2nd respondent was not predisposed in favour of the prosecution, if, in fact, he had not pre-judged the case.

I cannot think of a more befitting quotation with which to crown or conclude what I had said in this order on the aspect

of bias and more particularly of a party's right to respond to the case against him than an excerpt from Lord Denning's Hamlyn Lectures which were said to be made somewhere in 1949. To quote: " I know of nothing which is so essential to a right decision as to have the benefit of arguments which put forward all that can be said on each side..... every tribunal should give a reasoned decision, just as the ordinary courts do. Herein lies the whole difference between a judicial decision and an arbitrary one.....".

As Lord Musthill observed in the Doody case to which I referred in my judgment in CA861/98 the "standards of fairness are not immutable". The demands of fairness will be determined by the context of the decision. In the circumstances, in the unusually short period of time that was given to the petitioner to prepare and make submissions in writing, my own view is that no worthwhile representations could have been made on his behalf unless, perhaps, the counsel was gifted with exceptionally great mental ability which species is a rarity. Almost all the points considered in this judgment had not been raised by the counsel. But, what I have done is not without precedent.

J. L. Jowell (Professor of Public Law in the University of London) had said that where Lord Denning could be faulted was in taking points of law or fact as the basis of his judgment when these had not been argued and when an opportunity was not given to controvert the points involved. But the points I have considered in this judgment are all matters borne out by the record and are incontrovertible facts or immutable principles which are so well known, such as that in a case of this sort charge has to be proved beyond a reasonable doubt.

The procedure adopted by the 2nd respondent is contrary to natural justice. Under the judicial review procedure, the court is not concerned with the merits of the case, whether the decision was right or wrong, but whether it was lawful or unlawful. In the words of Lord Brightman: "judicial review is concerned not with the decision, but with the decision - making - process" - *Chief Constable of the North Wales, Police v. Evans*[20] at 1173.

The decision of the 2nd respondent is flawed by bias. In addition, as indicated above, one can recognise from the fact of the record all the errors of law conceivable: it is an error of law to give inadequate reasons, to act on no evidence, to act on evidence which ought to have been rejected, or to fail to take into consideration evidence which ought to have been considered and to apply the wrong burden of proof. The 2nd respondent had, in fact, been oblivious to the aspect of burden of proof, as had been others of even very greater eminence.

For the aforesaid reasons I do hereby grant an order of certiorari quashing the order (or the report) of the 2nd respondent dated 18. 07. 1996.

Application allowed