

ATTORNEY-GENERAL
v.
KUMARASINGHE

COURT OF APPEAL.
GUNASEKERA, J.,
YAPA, J.
C.A. NO. 643/93
H.C. NEGOMBO CASE NO. 12/90
JANUARY 13, 1995.

Criminal Procedure – Indictment – Importing gold without a permit from Central Bank S. 21(1) 21(2) 51(1) 51(4) of Exchange Control Act – Passenger in Transit Lounge – Importation – Ingredients of the offence – Imports and Exports Control Act, No. 1 of 1969, S. 22.

The accused, a Sri Lankan passport holder was indicted for having imported into Sri Lanka, 40 pieces of Gold valued at Rs. 2 million without a valid permit issued by the Central Bank. After arriving in Sri Lanka on an Air Lanka flight he had been at the Transit Lounge with the pieces of gold to proceed to Male. The High Court of Negombo acquitted the accused.

Held:

- (1) Section 22(1) of the Exchange Control Act imposes a prohibition on the importation of Gold into Sri Lanka without a permit from the Central Bank.
- (2) Importation is given an extended meaning in Section 21(2).

Gunasekera, J.

"It would be absurd to say that where the gold is left in the aircraft without it being removed it is importation and to hold that it is not importation, when gold is physically brought out of the aircraft into the transit lounge"

- (3) Importation is not defined in the Exchange Control Act but recourse could be had to Section 22 of the Imports and Exports Control Act 1 of 1969.
- (4) The moment the accused-respondent landed in Sri Lanka soil with gold, the act of importation was complete.

Case referred to:

1. *Regina v. Smith (Donald)* 1973 Queens Bench Division 924.

APPLICATION for revision of the order of the High Court of the Western Province.

C. R. De Silva, D.S.G. with Kapila Waidyaratna, S.C. for Attorney-General.
H. L. De Silva, P.C. with R. I. Obeysekera, P.C. and A. W. Yusooff for saccused-respondent.

March 24, 1995.

GUNASEKERA, J.

The accused-respondent was indicted by the Attorney-General with having imported into Sri Lanka 40 pieces of gold valued at Rupees 2 million 88 thousand on 13 July, 1989 without a permit issued by the Central Bank of Sri Lanka in contravention of Section 21(1) read with Section 21(2) of the Exchange Control Act, and thereby committed an offence punishable under Section 51(1) read with Section 51(4)(b) of the said Act.

After trial the Learned High Court Judge by his judgment dated 16 August, 1990 acquitted the accused-respondent of the charge in the indictment and directed that his personal belongings taken into custody during the raid be returned to him. Further the Learned High Court Judge directed that the 40 pieces of gold taken into custody from the accused-respondent be returned to him in the presence of his Attorney-at-Law. Aggrieved by the said order of the Learned High Court Judge the Attorney-General has filed this Application in revision canvassing the correctness of the order.

According to the proceedings had in the High Court, the facts were as follows. The accused-respondent was a Sri Lankan passport holder who had returned from Singapore on Air Lanka flight No. UL455 on 13 July 1989 and had been at the transit lounge at the Katunayake International Airport. He had possessed a two-way ticket, Colombo-Singapore and Singapore-Colombo and a one-way ticket, Colombo-Male. He has had with him a travelling bag and a brief case. Customs Officers who were on duty, had been suspicious as he was waiting in the transit lounge. On questioning him he had disclosed that he was a Sri Lankan national who had returned from Singapore on Air Lanka flight UL455 and was awaiting a flight to Male. At about 7.20 p.m. flight ML101 bound for Male had arrived at the Airport. On the said flight being announced the accused-respondent had got out of the transit lounge and had been on his way to board the plane when he had been stopped by the Customs Officers and his bags examined. Inside the brief case they had detected 40 pieces of gold, and on being questioned the accused-respondent had stated that he was carrying it to Male.

Mr. C. R. de Silva, Deputy Solicitor-General who appeared for the petitioner submitted that the finding of the Learned High Court Judge that the accused-respondent had not contravened the provisions of the Exchange Control Act when he was detected with 40 pieces of gold without the requisite permit from the Central Bank, whilst he was a transit passenger awaiting a flight to Male intending to take the gold to Male, was erroneous. It was contended by Learned Deputy Solicitor-General that Section 21(1) of the Exchange Control Act imposes a prohibition on the importation of gold into Sri Lanka without the permission of the Central Bank. Section 21(1) states that "No person shall except with the permission of the Bank import any gold" . . . Section 21(2) states that "The bringing or sending into any port or other place in Sri Lanka of any gold intended to be taken out of Sri Lanka without being removed from the vessel or Aircraft in which that gold is being carried shall, for the purpose of this Section be deemed to be the importation of that gold."

It was submitted by Mr. H. L. de Silva, P.C. who appeared for the accused-respondent that since Section 21 of the Exchange Control Act creates a criminal offence when the extended meaning given by Section 21(2) is sought to be applied to gold alleged to be imported into Sri Lanka that all the essential ingredients or constituent elements required by section 21(2) must be established before a person can be held to have contravened section 21(1) of the Act. In other words, when seeking to apply the extended interpretation to gold brought into Sri Lanka it is not open to the court to dispense with any of the qualifying constituent elements contained in Section 21(2). If all the qualifying elements are not present in the situation to which the deeming provision is sought to be applied the court cannot lawfully hold that there was an importation as contemplated in section 21(2).

The question for determination in this case is as to whether the accused-respondent had imported gold into Sri Lanka, when he was found in possession of 40 pieces of gold in the transit lounge, awaiting a flight to Male at the Katunayake International Airport. The ordinary meaning of 'import' is to bring from abroad. The term 'importation' is not defined in the Exchange Control Act. However an examination of Section 21 reveals that an extended meaning is given to the word 'importation' in Section 21(2). Thus the legislature

appears to have intended to deal with a situation where a transit passenger leaves a consignment of gold in an aircraft without off-loading it from the aircraft and he is without a permit from the Central Bank to be dealt with for the importation of that gold.

On the admitted facts of this case Section 21(2) has no application because the gold had not been left in the aircraft. The matter for determination in the instant case is whether the accused-respondent who had removed the gold from the aircraft and brought it to the transit lounge can be said to have imported the gold. In determining this question it is useful to consider what importation means. Since the word importation has not been defined in the Exchange Control Act recourse could be had to its definition which is provided in the Imports and Exports Control Act. Section 22 of the Imports and Exports Control Act 1 of 1969 states that "Import" with its grammatical variations and cognate expressions when used in relation to any goods means the importing or bringing into Sri Lanka, or causing to be brought into Sri Lanka whether by sea or by air of such goods. Going by this definition we are of the view that the moment the accused-respondent landed on Sri Lankan soil with the brief case containing gold that the act of importation was complete. And that if he failed to produce the requisite permit for possession of that gold that he has contravened the provisions of Section 21(1).

Learned Counsel for the accused-respondent strongly urged that the facts of the instant case attracted Section 21(2) of the Exchange Control Act and contended that all the essential ingredients or constituent elements required by Section 21(2) must be established before the accused-respondent can be held to have contravened Section 21(1) of the Act. In other words when seeking to apply the extended interpretation to gold brought into Sri Lanka that it is not open to court to dispense with any of the qualifying constituent elements contained in Section 21(2). We are unable to agree with this contention of Learned Counsel having regard to the facts of this case. To do so in our view would be to do violence to the intention of the legislature. In our view it would be absurd to say that where the gold is left in the aircraft without it being removed it is importation and to hold that it is not importation when gold is physically brought out of the aircraft into the transit lounge of the airport as has happened in this case.

In the case of *Regina v. Smith (Donald)* ⁽¹⁾ "Packets containing cannabis addressed to a person in Bermuda were put on board an aircraft in Kenya which was bound for Heathrow airport in the United Kingdom. At Heathrow the packets were unloaded and without leaving the customs area were put on board a second aircraft bound for Bermuda. The cannabis was discovered when the packets arrived in Bermuda. The Defendant was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis imposed by the Dangerous Drugs Act 1965, contrary to Section 304(b) of the Customs and Excise Act 1952, and with being knowingly concerned in the fraudulent evasion of the prohibition against the exportation of cannabis imposed by the Act of 1965 contrary to Section 56(2) of the Act of 1952. There was evidence that the parcel was sent from Kenya by the defendant acting with others, and that he knew that the most likely route to Bermuda was via London. He submitted that the packets of cannabis had been neither imported into nor exported from the United Kingdom since all that had occurred at Heathrow had been a transshipment within the customs area from one aircraft to another for the purpose of onward transmission to Bermuda, and that since he had not intended to import the packets into or export them from the United Kingdom he could not be guilty of being knowingly concerned in the offences alleged against him. The submissions were rejected, and the Defendant was convicted."

On a consideration of the evidence led in the case and the submissions of Learned Counsel we are of the view that the finding of the Learned Trial Judge that the accused-respondent had not contravened the provisions of the Exchange Control Act when he was found in possession of 40 pieces of gold without a permit from the Central Bank in the transit lounge of the Katunayake International Airport, awaiting a flight to Male, as a transit passenger, is erroneous. Therefore we set aside the order of the Learned High Court Judge dated 16.8.93 acquitting the accused-respondent and also the order directing that the 40 pieces of gold be returned to him.

YAPA, J. – I agree.

Order of the High Court set aside.