1953 *Present :* **H. A. de Silva J.**

PRINCIPAL COLLECTOR OF CUSTOMS, Appellant, *and* T. M. A. WIJESEKERA, Respondent

S. C. 235—M. C. Colombo, 19,430

Customs Ordinance (Cap. 185)—Offence of failure to pay export duty—Ingredient of fraud necessary—Sections 59, 64, 128, 139A.

In a prosecution under section 128 of the Customs Ordinance for non-payment of export duty in respect of goods liable to such duty there must be proof that the accused was guilty of fraud or fraudulent evasion.

APPEAL from a judgment of the Magistrate's Court, Colombo.

T. S. Fernando, Acting Solicitor-General, with *A. Mahendrarajah,* Crown Counsel, for the complainant appellant.

S. Nadesan, with *E. B. Vannithamby,* for the accused respondent.

Cur. adv. vult.

January 19, 1953. H. A. DE SILVA J.—

This is an appeal taken with the sanction of the Attorney-General against an order of acquittal of the accused entered in this case by the Magistrate of Colombo. The complainant in this case is the Principal Collector of Customs and the accused is T. M. A. Wijesekera of Wijesekera & Co., Ltd. The accused-respondent was charged on three counts in the charge, to wit, that the accused on or about the 23rd day of November, 1948, at Colombo within the jurisdiction of this court :

(i) was knowingly concerned in the fraudulent evasion of the customs duties payable on the exportation of 1630·458 tons of naked unrefined coconut oil,

(ii) did export 1630·458 tons of naked unrefined coconut oil, being goods liable to duty the duties for which had not been paid or secured,

(iii) did deal with 1630·458 tons of naked unrefined coconut oil being goods liable to duties of customs with intent to defraud the revenue of such duties, and that the accused abovenamed became liable to forfeit treble the value of the said goods, to wit, a sum of Rs. 6,600,000 and that he was thereby by virtue of section 139A of the Customs Ordinance (Cap. 185) as amended by Ordinance No. 3 of 1939 guilty of offences punishable under the said section 139A of the Customs Ordinance as so amended.

After trial the learned Magistrate found the accused not guilty and acquitted him. It is from that order that this appeal is taken. The learned Magistrate has in his judgment set out the facts clearly. It is hardly necessary for me to detail the facts upon which he has come to his finding except to refer to such of the evidence as having a particular bearing on the points that the parties are at issue.

I may say at the outset that on most questions of fact there does not seem to be much variance between the prosecution and the defence.

As a matter of fact the accused called no oral evidence but relied on certain documents produced by him.

In the year 1942 the Ceylon Government entered into a contract with the United Kingdom Ministry of Food to supply to it the entire exportable surplus of copra and coconut oil. The Commissioner of Commodity Purchase who was also an Assistant Controller of Exports (coconut products) was the sole exporter of copra and coconut oil.

In August, 1948, the contract with the United Kingdom Ministry of Food was revised. The revision of the contract resulted in only a fraction of the Ceylon produced copra and coconut oil being exported to the United Kingdom by the Commissioner of Commodity Purchase and private parties were permitted on a licence to export copra and coconut oil to any destination subject to the condition that the best price was obtained for the commodity exported. In accordance with that policy adopted by the Government, Messrs. Wijesekera & Co., Ltd., of which the accused was the Managing Director at the material dates took steps to export two consignments of coconut oil to the United States of America. The first consignment was 280 tons which was shipped on the steamer ss. *Mount Mansfield*. In respect of this shipment Wijesekera & Co. paid the export duty before the oil was put on board, but no entry was made or passed under the provisions of section 59 of the Customs Ordinance.

The present charge has arisen on a consignment of 1630·458 tons of naked unrefined coconut oil shipped on the vessel ss. *Iris Bank*. The value of the coconut oil purchased from the Commissioner of Commodity Purchase and shipped on the vessel ss. *Mount Mansfield* was duly paid for and customs duty due thereon either paid or secured as required by the Customs Ordinance. The 1630·458 tons of coconut oil put on board the *Iris Bank* by Messrs. Wijesekera & Co., Ltd., were purchased by them from the Commissioner of Commodity Purchase and duly paid for and the necessary licence was obtained therefor. The local agents of the *Iris Bank*, Messrs. Aitken Spence & Co., Ltd., were paid by Wijesekera & Co. a sum of Rs. 112,533·54 being the freight for the said shipment of coconut oil. Wijesekera & Co., Ltd., purchased the oil from the Commissioner of Commodity Purchase, which oil was stored in the Government Bulk Oil Installation (the oil tanks at Summer Hill). This quantity of oil was upon an allocation made by the Commissioner of Commodity Purchase supplied by Messrs. J. H. Vavasseur & Co., Ltd., and the British Ceylon Corporation. Those two companies were probably in charge of the Oil Installation. No bill of entry was passed in respect of this shipment in terms of section 59 of the Customs Ordinance. Mr. Turpie, the Lloyds' surveyor, issued his certificate giving the total quantity of oil pumped into the hold of the *Iris Bank*, the quantity being 1630·458. The actual quantity pumped could not have been ascertained until the certificate of the Lloyds' surveyor was received. A sample of the oil pumped into the hold of this vesssel was taken and duly analysed by the Government Analyst. All payments due to the various parties concerned except the customs duty was duly paid by Messrs. Wijesekera & Co., Ltd. The learned Magistrate by a careful and full analysis of the evidence has found that all matters relating to the shipment was attended to by the accused as Managing Director of the company. The learned Magistrate

has found that the accused as Director of the company was aware that it had to pay the export duty on the coconut oil to the Customs notwithstanding the letter P 42. This letter P 42 looms large in this case. Now this was a letter sent by Commissioner of Commodity Purchase to the Principal Collector of Customs and it runs as follows: "I have the honour to inform you that the undernoted shipments of coconut oil will be effected on the above vessel on my behalf. Please issue shipping order direct, permit shipment. Inspect shipment.

Messrs. J. H. Vavasseur & Co., Ltd.	..	807 tons
Messrs. British Ceylon Corporation., Ltd.	..	807 tons
		1,614 tons ".

This was in a cyclostyled form which was in use when the Commissioner of Commodity Purchase was the sole exporter of coconut oil. The words which were inapplicable in this instance, such as, "on my behalf", "issue shipping orders direct", and "inspect shipment" would seem to have been not deleted before Biddell signed that letter P42 on behalf of the Commissioner of Commodity Purchase. This letter is dated the 23rd November, 1948. Under the same date letter P41 was sent by the Assistant Controller of Export (coconut products) to the Principal Collector of Customs in which it was stated that the shipper was Wijesekera & Co., Ltd. It does not seem quite clear how the Customs officials could have made any mistake about the identity of the shipper in the face of this letter P 41. The Commissioner of Commodity Purchase would appear to have been allowed the concession of delivery to the Principal Collector of Customs the usual bill of entry on a date subsequent to the export of goods.

Section 59 of the Customs Ordinance after making provision for the delivery of a bill of entry, &c., and for payment of duties and dues in respect of goods mentioned in such entry goes on to say " if such goods are removed from the warehouse or other place appointed for shipment before such entry is passed and all duties paid, and in the absence of any explanation to the satisfaction of the Collector the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained ".

The resulting position is clearly this. Wijesekera & Co., Ltd., of which the accused is the Managing Director who on behalf of the company attended to all the arrangements regarding the export of this quantity of oil has failed to enter the bill of entry and pay the necessary duty and dues to the Collector of Customs. There is no gainsaying the fact that the accused was well aware and was concerned in the export of this consignment of oil. The knowledge and intention of its servants have to be imputed to the body corporate. Vide *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd., and another*[1]. Viscount Caldecote L.C.J. has thus observed in the above case : " Bearing that in mind, I

[1] *(1944) 1 A. E. R. 119.*

think that a great deal of the argument of counsel for respondents as to whether you can impute to a Co. the knowledge or intent which the agent of the company has, falls to the ground, because although the directors or general manager of a company are its agents, a company is incapable of acting or speaking or even thinking except in so far as its secretary or general manager or directors and so on have either spoken, acted or thought". In *R. v. I. C. R. Haulage, Ltd.* [1], the Court of Criminal Appeal held, " whether the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the company employing him depends on the nature of the charge, the relative position of the officer or agent to the company and other relevant facts and circumstances. In the present case the fraud of Robarts was fraud of the company ". See also *Moore v. L. Bresler, Ltd.* [2]. It has been held that error in regard to the date of the commission of an offence is never material unless time is of the essence of the offence. *Vide* judgment of Soertsz J. [3]

The section of the Customs Ordinance which needs careful consideration is section 128 in order to determine the charges that are laid against the accused. Section 128 runs thus, " every person who shall be concerned in exporting or taking out of the Island or attempting to export or take out of the Island any prohibited goods or any goods the exportation of which is restricted contrary to such prohibition or restriction, whether the same be laden for shipment or not and every person who shall export or attempt to export any goods liable to duty the duties for which have not been paid or secured, or in any manner deal with any goods liable to duties of customs with intent to defraud the revenue of such duties or any part thereof, or who shall be knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one thousand rupees at the election of the Collector of Customs ".

It is obvious that in order to bring a person within the ambit of section 128, fraud is a necessary element to be proved. There must be proof that the person concerned was guilty of fraud. In fact learned Acting Solicitor-General very properly conceded that at least on counts one and three of the charge the element of fraud on the part of the accused had to be proved by the prosecution, such as deception, &c. His argument is that under section 59 of the Customs Ordinance a non-payment of all duties and dues involves a forfeiture of the goods. A reading of section 59 shows that the forfeiture is in respect of the goods for which the bill of entry was not delivered and for which the duties and dues were not paid and also other goods which shall be entered or packed with them as well as the packages in which they are contained, in the absence of any explanation to the satisfaction of the Collector. In this instance the Collector purported to act under section 128 of the Customs Ordinance when he forfeited treble the value of the goods which amount he reduced to two million rupees in the exercise of his discretion as authorised by the Ordinance. The grand total of the export duty and dues in respect of the

[1] *(1944) 1 A. E. R. 691.* [2] *(1944) 2 A. E. R. 515.*
[3] *S. C. 826—M. C. Avissawella.*

shipment came to Rs. 529,888·25, *vide* evidence of Mr. Thambiah, Collector of Customs.

The learned Magistrate has, in his judgment, analysed section 128 and has come to the conclusion that in order to bring home the guilt to the accused it was incumbent upon the prosecution to prove an element of fraud on the part of the accused in respect of all three counts of the charge. The contention of the learned Acting Solicitor-General is that on count 2 no question of fraud arises. The mere non-payment of export duty and dues results in the accused being liable criminally.

The argument of the learned counsel for the accused-respondent is that section 128 falls within part 12 of the Customs Ordinance and that said part has the following heading, "Smuggling", "Seizures" "and prosecutions generally". He argues that section 128 of the Customs Ordinance is intended to prevent smuggling, &c., of goods. He supports the finding of the learned Magistrate that the prosecution must prove fraud and fraudulent intent to sustain the charge under every one of the three counts. In my opinion that contention must succeed. The first count in the charge runs as follows :—" was knowingly concerned in the fraudulent evasion of the customs duties . . . ". The wording of the 1st count follows that in the last part of section 128. The wording of the 3rd count follows more or less words in the middle part of the said section—" in any manner deal with any goods liable to duties of customs with intent to defraud the revenue . . . . ". The wording of count 2 follows that used in the earlier part of section 128 which runs thus—" every person who exports or attempts to export any goods liable to duty the duties for which have not been paid secured . . . . ". Section 128 read as a whole clearly indicates that the following words " with intent to defraud the revenue of such duties or any part thereof " qualified both the sentences " every person who shall export any goods liable to duty, the duties for which have not been paid or secured " and " in any manner deal with any goods liable to duties of customs ". Now has the prosecution successfully brought home to the accused the charge of fraud? That leads one to the question, What is fraud? I have been referred to the case of *Robert Abraham Cohen* [1]. Lord Chief Justice who delivered the judgment of the Court in this case made the following observation—" another ingredient of the offence is the intent to defraud, and of this the jury should be reminded. But as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the defendant knew, which, of course, would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. That there may be cases where the circumstances would negative the intent is possible, but ordinarily speaking it is indeed difficult to see how it could be found that he did not intend to defraud the revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when he challenged on the matter ".

[1] *(1950) 34 Criminal Appeal Reports 239 at p. 245.*

The principle enunciated in this case was followed by the Queen's Bench Division Divisional Court in *Sayce v. Coupe* [1]. In *Cohen's case* the Lord Chief Justice had used the words " had wilfully shut his eyes to the obvious ". This leads one to a consideration of the meaning of the words " wilfully " as understood in a penal statute. In *Chellappa v. Commissioner of Income Tax* [2] Basnayake J. has considered the meaning of the words " wilfully with intent to evade tax in a criminal prosecution ". Basnayake J. thus observed, " in order to understand the scope of the section it is necessary to ascertain the meaning of the words ' wilfully ' ' evade '. The dictionary gives the following meaning of the word ' wilfully ' : ' with free exercise of the will ; voluntarily ; in law, designedly, as opposed to inadvertently ; in a penal statute, purposely, with evil intent' ". The meaning of the word " evade " is given by Basnayake J. in the same case ; he observes thus, " the word ' evade ' has several meanings according to the dictionary. It means : ' to avoid by artifice ; elude or get away by craft or force ; save oneself from, as an impending evil ; to escape ; get away '. It is also used in the sense of ' defeat the intention of the law while complying with its letter ' ".

The facts in this case do not show that the accused or the company for whom he was acting resorted to any misrepresentation or under-hand contrivance or any other unlawful act deliberately or purposely with the evil intent of depriving the revenue of duties and dues.

The accused has in a lawful manner by taking lawful steps secured the loading of the oil on the vessel *Iris Bank.* The Collector of Customs undoubtedly was aware of the fact that his oil was put on board the vessel. Apart from the documentary and oral evidence led in this case which undoubtedly shows that the Customs authorities were aware of the loading of this oil on this vessel by the accused or his company in compliance with the requirements of section 64, the Master of the ship would have undoubtedly apprised the Customs authorities that the quantity of oil was on board this vessel when it left the Port of Colombo bound for its destination. One is not considering the civil aspect of the claim made by the Collector of Customs which will be duly considered in the District Court of Colombo. The result of a criminal prosecution does not in any manner affect the rights of parties in the civil suit. The negligence or otherwise on the part of officials of the Customs is beside the point in this case. All that we are concerned in this case is whether the accused's action in omitting to pay the customs duty and other Port dues in the circumstances deposed to amounts to an act done with intent to defraud the revenue or duties or any part thereof or any fraudulent evasion or attempt at evasion of such duties or any part thereof.

The consideration of the evidence taken as a whole and the circumstances in this case do not, in my opinion, prove the element of fraud or fraudulent evasion as contemplated in section 128 in respect of the duty and dues of this shipment of oil.

I am, therefore, of opinion that the learned Magistrate has arrived at a correct verdict and the appeal is dismissed.

Appeal dismissed.

[1] *44 Weekly Notes 473.*

[2] *(1951) 52 N. L. R. 416.*