

THE PEOPLE v MAKHOKHA (1967) ZR 173

SUBORDINATE COURT OF THE FIRST CLASS

MOODLEY RM

1st DECEMBER 1967

(Note: R. M. made a ruling on 25th October 1967).

Flynote and Headnote

[1] Criminal law - Smuggling - Elements of offence - Sections 47 and 164 of Customs and Excise Act create distinct offences.

Sections 47 and 164 of the Customs and Excise Act create distinct offences, independent of each other, and it is error to charge the accused under a combination of both sections.

[2] Criminal procedure - Charges - Duplicity - Charge under combination of two sections creating independent offences.

See [1] above.

[3] Evidence - Confessions - Necessity to give caution - "Person in authority" construed - Customs officer.

A customs officer can be a "person in authority" for purposes of the rule requiring a caution or warning before taking a suspect's statement.

[4] Evidence - Confessions - Necessity to give caution - No reasonable grounds to suspect accused at time of his statement.

If an officer had no reasonable grounds for arresting a suspect at the time that he asked the suspect a question, the suspect's answer is not inadmissible in evidence because of the officer's failure to warn or caution the suspect.

Case cited:

- (1) *R v White* (1964) CLR 720.

Statutes construed:

Customs and Excise Act (Cap. AL 6), ss. 12, 47 (1) (6) and 164 (a).

Barr, Chief Inspector, for The People

Gardner, for the accused

Ruling - admissibility of answers by accused.

Judgment

Moodley RM: On the 9th October, 1967, defence counsel applied for the exclusion of certain replies from the evidence of prosecution witness No. 1, a customs officer, and alleged to have been made by accused No. 1 in answer to questions by P.W.1. P.W.1., in evidence, stated that when he approached the Land Rover, Registration No. EN 1803, and spoke to the driver, namely accused No. 1, and asked him where he was from and where he was going to, accused No. 1 is alleged to have replied that he was coming from Ndola and going to the Congo. Under cross - examination P.W.1 stated that he had not warned and cautioned the accused No. 1 before asking those two questions, and that before he had asked those questions he had in fact decided that the vehicle was going to travel into the Congo illegally. Defence counsel submitted that P.W.1 should have warned and cautioned accused No. 1 before asking the questions, since P.W.1 was, at that time, a person in authority, and at that stage had decided that the accused was going to commit an offence.

The prosecution submitted that the question of admissibility did not arise because P.W.1 was in the position similar to that of a police officer endeavouring to discover the author of a crime. There were two persons in the vehicle at that time and for all the witness knew those persons may have been innocent of any offence. P.W.1 had to ask these questions before he could take any action. Reference was made to rule 1 of the Judges' Rules in support of this submission. Rule 1 of the Judges' Rules provides: "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person whether suspect or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into

custody so long as he has not been charged with the offence or informed that he may be prosecuted for it." Rule 2 provides, *inter alia*, "As soon as a police officer has evidence which would afford a reasonable ground for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence...."

Section 12 of the Customs and Excise Act, Cap. A.L. 6, provides "if a proper officer has reasonable grounds for suspecting that any person has contravened or failed to comply with any provision of this act, such proper officer may (a) take such person forthwith to a Police Station and lay a charge against him; or (b) if there is no Police Station in the vicinity, take such person forthwith before a Magistrate with a view to obtaining a warrant for his arrest".

Section 1 of this Act provides that "proper officer" means, in respect of any port or matter, the officer designated by rule or regulation or by the controller to be a proper officer at that port or in that matter.

[3] This court is satisfied that a customs officer can be a person in authority, and [4] is of the view that the questions asked by P.W.1 were routine questions which were put to persons in the course of his duties as a customs officer. Although P.W.1 had stated that he had made up his mind that the Land - Rover, driven by accused No. 1, was going to the Congo and that an offence would be committed, there was no actual evidence that an offence had been committed or was going to be committed. Neither did P.W.1 have any reasonable grounds at that stage for suspecting that the accused had contravened or failed to comply with any of the provisions of the Customs and Excise Act.

In *R v White* [1] the appellants were convicted of receiving. Police officers, acting on a "tip - off" saw the appellants enter the garage. The police officers went into the garage and found the appellants standing round the cases which contained property later identified as stolen. One of the officers asked the appellants what they were doing there, to which the appellants made incriminating replies which were submitted as evidence at the trial. The police officer then cautioned him and asked him where the property had come from. They appealed on the grounds, *inter alia*, that their incriminating replies should not have been admitted because under rule 2 of the Judges' Rules, 1964, the caution should have been administered before the initial question was asked. The Court of Criminal Appeal held, dismissing the appeal, that when the question was asked the police had, at the most, evidence that an offence had been committed and had no evidence which would afford reasonable grounds for suspecting that any of the appellants had committed an offence. In any event the question did not relate to the offence.

The matter may be decided by inquiring whether P.W.1 would, on the stated facts, have been justified in arresting accused No. 1 instead of asking him the question. It seems manifest that he would not.

This court is, therefore, satisfied beyond doubt that P.W.1 had no evidence that an offence had been committed and he had no evidence which would afford him reasonable grounds for suspecting that accused No. 1 had committed an offence. In the circumstances, therefore, there was no duty cast upon P.W. 1 to warn and caution accused No. 1 before he had asked the two questions. Accordingly, the court rules against the submission by defence counsel and the accused's answers, given by P.W. 1 in evidence, will not be expunged from the case record.

Application for exclusion from evidence of accused's replies refused

Judgment

Moodley RM: The accused, John Benard Makhokha and Ndeto Nzeka, were charged with the offence of attempted smuggling, contrary to section 164 (a) of the Customs and Excise Act, as read with section 47 (1) (6) of the said Customs and Excise Act, Cap. A.L.6. The particulars of the offence allege that on the 19th August, 1967, at Mufulira, in the Mufulira District of the Western Province of the Republic of Zambia, both the accused did, together with each other, attempt to smuggle from the State of Zambia into the Republic of Congo, goods, namely thirty - three cartons of Asepso soap, 109 curios, ten cartons of glycerine and one Land - Rover, Registration No. EN 1803, without delivering a bill of entry, or any other documents as may be prescribed, to an officer, namely customs officer.

Both the accused denied the charge and the court recorded a plea of not guilty in respect of each accused.

The burden of proof here is on the prosecution to prove its case against the accused persons beyond all reasonable doubt. There is no *onus* on the accused to establish their innocence. If, upon the whole of the evidence, there appears in the mind of the court a reasonable doubt as to the guilt of these accused persons, then the benefit of that doubt should be given to the accused persons whereupon they should be acquitted of the charge. The prosecution's case is that at about 9.15 p.m. on the 19th August, 1967, P.W.1, accompanied by P.W.4, both of whom were customs officers, were patrolling the eastern border road from Mokambo in a customs and excise vehicle. The eastern border road from Mokambo runs along the border between the Republic of Zambia and the Republic of the Congo - Kinshasa. About eight miles along the road they stopped a Land - Rover, registration No. EN 1803, on a bush road approximately sixty yards from the border and just before the bush road traversed the border road into the Republic of the Congo. P.W. 1 inspected the vehicle, which contained both accused persons and the goods listed in the charge. He formed the view that the accused persons were attempting to smuggle the vehicle and its contents into the Congo. It was in these circumstances that both accused persons were arrested and charged with the present offence.

The prosecution contend that the bush road was not normally used by everyday traffic and was only suitable for vehicles in the Land - Rover category, and that the circumstances in which this vehicle was found on the evening in question indicated that the vehicle was on its way to the Congo Republic. It is said that accused No. 1, who was the driver of the vehicle, had informed P.W.1 when the latter had questioned him that they were going to the Congo. The prosecution further said that none of the accused persons were able to deliver to a customs officer a bill of entry or any other documents which may have indicated that they were lawfully exporting the vehicle and the goods from the Republic of Zambia. It is also said that the point where the bush road crossed the eastern border road into the Congo territory was not an authorised port of entry and exit where customs and immigration check posts existed. The prosecution contends that taking all these circumstances of this case into consideration the only possible inference that one should come to is that these accused persons were in fact attempting to smuggle the vehicle and its contents into the Congo Republic and the court is asked to draw that inference.

The accused persons, when put upon their defence, elected not to give evidence and their defence counsel submitted that the prosecution had not proved its case against the accused persons beyond all reasonable doubt; he further suggested that, although the accused persons had not delivered a bill of entry or any other prescribed documents to a customs officer, the court should not assume that they had no documents. He further contended that it was not unlawful to travel on the bush road in question and, if the vehicle driven by the accused persons had arrived at the intersection of the bush and eastern border roads and then turned left, it could have then travelled towards Mokambo. Defence counsel therefore suggested that the court should not draw the inference which it was invited to do by the prosecution, but to find that the accused persons could in fact have turned left at the intersection of these roads and travelled towards Mokambo where there were authorised customs and immigration check posts.

When one examines the evidence of the prosecution one finds that, in addition to the two accused persons in the vehicle, there was in fact a third person who was said to have been a passenger travelling to Lubumbashi. For some extraordinary reason, P.W.1, the customs officer who had stopped and searched the vehicle, had emphatically stated that the vehicle in question only contained the two accused persons and he firmly denied that there was a third person present in the vehicle. P.W.4, the other customs assistant who had accompanied P.W.1, confirms that he was present with P.W.1 when the latter searched the accuseds' vehicle and he saw a third person who was sitting at the rear of the Land - Rover. This was also confirmed by P.W.5, the customs examining officer at the customs post at Mokambo. He says he was called from his house late in the evening of the 19th August, 1967, and he drove eight miles up the eastern border road when he saw exhibit D, the Land - Rover, driven by the accused No.1. He instructed P.W.4 to take charge of exhibit D and drive the vehicle to Mokambo, but he did not inspect that vehicle at that

stage. On arrival at Mokambo he saw three persons there, two of whom were accused No. 1 and accused No. 2. He says that the third man, in the presence of accused Nos 1 and 2, stated that he was a passenger travelling to Lubumbashi in the Congo Republic and, having satisfied himself that this third man was in fact a passenger, he allowed him to leave. I find it difficult to understand why P.W.1 strenuously denied that he had seen a third person in the vehicle and, after having heard his evidence and after having observed his conduct and demeanour in the witness - box, I am not satisfied that he has been a reliable and accurate witness. Equally I am puzzled as to what standards were adopted by P.W 5 when he says he satisfied himself that the third man was a passenger in the accused's motor vehicle and he therefore allowed him to go. I would have thought that this third person, be he passenger or not, would have been a vital witness for the prosecution in this matter. He may well have testified as to the route these accused persons were intending to take into the Congo Republic, and there may have been other evidence that he could have given which may have thrown some light on the possible motives of these accused persons.

I now come to look at the actual charge which these accused persons face. They are charged with attempted smuggling contrary to section 164 (a) of the Customs and Excise Act, as read with section 47 (1) (6) of the said Customs and Excise Act, Cap. A.L.6. NOW, Section 164 (a) reads, "Any person who (a) smuggles or attempts to smuggle any goods . . . shall be guilty of an offence." Section 47 (1) requires an exporter to deliver to a customs officer customs documents and to produce the goods to be inspected, and no goods were to be exported or accepted for carriage for export until a bill of entry or other customs documents had been so delivered. There is a *proviso* to this section which I do not propose to deal with. Sub-section (6) of section 47 provides, "Any person who exports or assists in exporting any goods in contravention of this section shall be guilty of an offence." Section 2 of the Customs and Excise Act defines "smuggling" as "any importation, introduction, exportation, or attempted importation, introduction or exportation of goods with intent to defraud the Government or to evade any prohibition of, restriction on, or regulation as to, the importation, introduction or exportation of any goods required to be accounted for under this Act . . ."

[1] [2] It seems to me, after a close analysis of sections 47 and 164 of the Customs and Excise Act, that these two sections reveal two distinct offences, independent of each other. In a charge of attempted smuggling under section 164 (a), the prosecution will have to prove that the accused persons attempted to export the goods either (a) with an intent to defraud the Government, or (b) with an intent to evade any prohibition of, restriction on, or regulation as to . . . the exportation of any goods required to be accounted for under this Act. Section 47 requires no such intent to be proved; that section merely requires the production of customs documents before a person exports or attempts to export goods and a person who exports or assists in exporting goods in contravention of that section will be guilty of an offence. In my view, the Legislature had intended that section 47 of Cap. A.L.6 should apply to all authorised points of exit and entry in the Republic, whereas section 164 of the Act went further in that it could also apply to trafficking across the border, where there were no authorised custom check posts, as alleged in the present case. Although the point has not been taken up and argued at the trial, it does appear to this Court that the charge might be bad for duplicity. In my view the accused persons should have been charged with an offence either under section 164 or section 47 of the Customs and Excise Act, and, therefore, it would appear to be wrong to charge them under a combination of both sections. It is interesting to note that sub-section 2 of section 47 of the Act provides, "notwithstanding anything to the contrary contained in subsection 1, the bill of entry or other customs documents may be delivered within such time after exportation of the goods as the officer may allow." With regard to the question of burden of proof in proceedings to determine whether the goods were being lawfully exported, section 188 (1) of the Act provides, "When any goods are stopped or seized under the provisions of this Act, and in any proceedings under the provisions of this Act other than a prosecution, if any question arises as to whether the duties have been paid on the goods, or whether the goods have been lawfully imported or lawfully laden or are being lawfully exported, the burden of proof of the affirmative of these facts shall be on the person

owning or claiming such goods." It appears therefore that, as the accused persons are being prosecuted for this offence, the burden of proof is on the prosecution to prove that these goods were being unlawfully exported, namely, that they were not in possession of valid bills of entry or other prescribed documents and these had never been issued to them by the authorities concerned.

I now come to the question as to whether it will be proper for this court to draw the inference which it was invited to do by the prosecution, namely, that in the circumstances in which the vehicle was found the only possible inference was that these accused persons were attempting to take these goods into the Congo Republic illegally. It would seem that, if the vehicle had been stopped at the intersection and was facing the border at that point at the relevant time when it was stopped, there would be reasonable grounds for believing that the vehicle was heading straight into the Congo Republic, but in the present case the vehicle had been stopped sixty yards from the border and well before the bush road reached the intersection. Now, no doubt taking all the circumstances into consideration one would have had, at the most, a very strong suspicion that the accused persons were intending to take the vehicle illegally across the border road into the Congo Republic. P.W.1 did in fact affirm that he had decided when he had stopped the vehicle that it was in fact heading straight for the Congo Republic. The court found, of course, on a preliminary issue that he had in fact at that stage no evidence that they were to commit an offence. In other words, P.W.1 took the action he did at that stage because he had a very strong suspicion that the accused persons were going to commit an offence. Can it, therefore, be right for this court to infer in these circumstances that the accused persons were in fact heading for the Congo illegally? The court further asks itself this question: Assuming the accused persons drove the vehicle up to the intersection and then turned left at the intersection with the vehicle facing Mokambo when they were stopped by P.W.1, what inference should the court draw in those circumstances? It would appear that the only reasonable inference in such an instance is that the vehicle was heading for Mokambo. Is the court entitled to draw the inference that these two accused persons and the vehicle were-in fact heading straight along the bush road into the territory of the Congo Republic from the point at which they were stopped by P.W.1 on the bush road? In the opinion of this court it would be unreasonable to draw such an inference from purely suspicious circumstances unless, of course, the court is in a position to make firm findings of fact. Taking the entire evidence into consideration this court is besieged by doubts which the established facts in this case have failed to resolve and, therefore, the court is unable to come to any firm conclusions so as to enable it to draw the inference which it was invited to do by the prosecution.

In view of my already expressed doubts as to the correctness of the charge and the inability of this court to draw any inference from the established facts in respect of the circumstances in which these accused persons were found with the vehicle and its contents, I have come to the conclusion that the benefit of those doubts should be given to both accused persons.

In my judgment the prosecution has failed to prove its case against the accused persons beyond all reasonable doubt, accordingly I find both these accused persons not guilty as charged and acquit them thereof.

Accused acquitted.