THE MONTE CONTES: Conservas Cerqueira Lda v Attorney General

Privy Council
Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter and Lord Merriman.
22 July 1943.

Prize — practice and procedure.
Burden of proof in matters of prize.
Judicial notice — Prize courts not bound by rules concerning judicial knowledge.

Part of the cargo of a Spanish ship, a large quantity of tinned fish, was seized while the ship was in Gibraltar. A writ was issued for condemnation and an appearance entered on behalf of the owners. The court rejected the claim and condemned the goods as lawful prize, as conditional contraband destined for an enemy country.

Held: (i) In matters of prize, the Crown has only to show that the case involves reasonable suspicion; it is then for a claimant to show by affirmative evidence that the suspicion was unfounded.

(ii) A judge in a prize court may act on matters of common notoriety of which in other courts judicial notice could not properly be taken.

Per curiam. Condemnation would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy.

Cases referred to in the judgment.

The Prins Knud, [1942] A.C. 667.
The Louisiana, [1918] A.C. 461.
The Baron Stjernblad, [1918] A.C. 173.
Commonwealth Shipping Representative v P. & O. Branch Service, [1923] A.C. 191.
The Rosalie and Betty, (1800) 2 Ch. Rob. 343.

Appeal

This was an appeal from a decree of the Supreme Court condemning as lawful prize part of the cargo in the S.S. Monte Contes. Counsel for the respondent were not called upon.

Paull K.C. and P. Devlin for the appellants.

The Solicitor General (Sir David Maxwell Fyfe) and Wilfred Price for the respondent.

1 November 1943: The following judgment was delivered—

This is an appeal from an order of the Supreme Court of Gibraltar, Admiralty Jurisdiction—In Prize, condemning a part cargo of 3,428 cases of tinned fish valued at approximately £10,000, shipped on board the Spanish steamship Monte Contes at Vigo for Barcelona. The shipment was made on 24 November 1941. On 16 December 1941, the goods were seized in Gibraltar, and on the same date a writ was issued and served on the vessel, claiming their condemnation on the ground inter alia of enemy destination. On 25 February 1941, a claim was entered on behalf of the owners of the goods, now represented by the present appellants and the underwriters on the ground inter alia that the goods were destined for Barcelona and were not going to an enemy destination. The court rejected the claim and condemned the goods as lawful prize on the ground that they were conditional contraband destined for an enemy country, namely Italy.

The case is marked by a paucity of information. If it was for the Crown as captor to establish affirmatively that the goods were conditional contraband, it might well be that the proof was insufficient. But that is not the true position in prize law. Prize law has its own peculiar rules, as the Board recently explained in *The Prins Knud* [1]. These peculiar rules have been developed out of the peculiar character of the issues to be determined and of the circumstances in which they arise and come before the court. Captors are entitled to seize property, ship or goods if there is reasonable ground for suspicion that the property is subject to be condemned. The property must be brought by captors for adjudication into the Prize Court by means of the issue and service of a writ. Persons claiming to be interested in the property may then enter appearance and file a claim. To succeed in their claim they must prove their title to the property and establish that the facts are such that there is no cause to justify condemnation. Thus the captors must show that the case is one involving reasonable suspicion. If they do

[1] [1942] A.C. 667.

so and if no claim is made, or if the claim fails, the court will in due course condemn the property as prize. But on the side of the claimants positive proof to the satisfaction of the court is exacted. They have to prove that they are entitled to the release of the goods as being their property, and also that the facts are such that there is nothing which would render the property good and lawful prize. In other words they must show by affirmative evidence that the reasonable suspicions were unfounded. That these are the two issues in such cases was stated by this Board in *The Louisiana* [1], in the judgment delivered by Lord Parker.

It will then be convenient to examine what the Crown as captor here alleges to constitute a case of reasonable suspicion, and on the other hand what facts the claimants allege or seek to establish in order to have the seizure set aside and the goods released. The contrast between the two sides is sometimes explained as depending on the onus of proof. In a sense that may be a true description. But more exactly the difference depends on what is the case of either side. The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in a case like this by showing the precise character of the adventure and showing that the ostensible destination is the ultimate destination. In the present case the ground of condemnation relied upon is that the goods are conditional contraband, that is, are food stuffs proceeding to an enemy destination for the use of the Italian armed forces or the Italian Government. It has not been contested that such a destination would render goods liable to be condemned. What is disputed is that there was in fact such a destination. It is not that claimants have to prove a negative, but they have to prove affirmatively what was the actual destination of the goods and that it was such that they were not subject to the penalty of being condemned. In other words, if the court is of opinion, as the Chief Justice at Gibraltar was, that there was reasonable cause for seizing the goods, the appellants have to prove that Barcelona was the ultimate destination of the adventure as far as they controlled or could control it. Their Lordships do not go so far as the Chief Justice when he said that the claimant must prove that the articles will not find their way in one manner or another into enemy territory after they have been imported into the neutral country. Their Lordships are not aware of any authority which would justify this statement in its full breadth. Though seizure may be justified on the ground of suspicious circumstances for which the claimant could not be held responsible, it is different with condemnation, which in general would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy. *The Baron Stjernblad* [2]. But the decision of the Chief Justice is not affected by this point.

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1 [1918] A.C. 461, at p. 464. 2 [1918] A.C. 173.

In their Lordships' judgment there were abundant circumstances to justify the finding of the Chief Justice that the consignment of tinned fish was subject to reasonable suspicion. In the first place the consignment was large in quantity and value. Tinned fish is a convenient and portable foodstuff peculiarly suitable for use by armed forces in the field. It could form a valuable addition to the food resources of Italy available to the Italian Government, which could direct it to the use either of the army or civil population. Barcelona was a convenient port for shipment along the coast to Italy. In addition to this obvious ground of suspicion, the shipping documents, to which in a Prize Court the preliminary investigations are directed, were of the most suspicious character. There was no manifest and no bill of lading in respect of the goods. What is called the mate's receipt did not give the name of the consignee. It is well established that where there is a question of contraband a bill of lading "to order" or a shipping document which does not specify a consignee at the neutral port whose identity and responsibility can be investigated is in itself a suspicious circumstance; even a named consignee may turn out to be merely a cover for an enemy agent *(The Louisiana (supra))*. Where, however, no consignee is named at all, the goods remain under the control of the shipper. There is then no clue as to the person by whom they will be dealt with at the neutral port which is the ostensible destination or in what manner they will be dealt with. In war time a prudent shipper would realise that the failure to name a consignee, whose identity and position in the neutral port can be investigated, is a defect in the ship's papers, which will normally be regarded in a Prize Court as a subject of reasonable suspicion. It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a manifest, and even if it is not obligatory in the case of a coasting voyage such as a voyage from Vigo to Barcelona, to procure it would at least be a natural and ordinary precaution. It is here unnecessary to rely on articles 2 and 3 of the Order in Council, Reprisals, German Italian Restriction (Statutory Rules and Orders 1940, No. 1436, dated 31 July 1940), in particular article 3, sub-clause I, which provides that goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, should, if not covered by a valid navicert, be deemed to have an enemy destination until the contrary is established. The Chief Justice did not found his decision on the Order in Council, nor do their Lordships. The absence however of a navicert, which it was admitted the Vice-Consul at Vigo might have given in a proper case if applied for, may fairly be regarded as in some degree a further element of suspicion. Their Lordships do not therefore need to consider questions which might be raised as to the validity and effect of the Order in Council. One further circumstance of suspicion may be mentioned, that is the strip of paper which was wrapped round the sides of the tins. The tins themselves had printed on the metal a description of the contents in various languages, including English, Italian and others. This is not a matter which could call for comment. But the superimposed paper wrapper had a description only in Spanish and Italian. This may be taken to

contemplate the probability that the tins would go to Italy. It would not in itself raise a case of reasonable suspicion, though it does also to some extent go to support the other elements which point to an Italian destination.

Their Lordships are of opinion that the various circumstances to which they have adverted constitute a very strong case of reasonable suspicion. It must now be seen how the appellants claim to show that Barcelona was not merely the ostensible but, so far as rested on the appellants, the ultimate destination of the goods. The proper witness to prove that the real object of the adventure was to send the goods to a destination other than the enemy in Italy was the responsible representative of the claimant company. He could have produced any contracts under which the goods were shipped and correspondence with consignees or buyers or agents for disposal of the goods in Barcelona. He could have explained the circumstances which led to the shipment, the nature of the market or demand for tinned fish in Barcelona, and that such a shipment was made in the ordinary course of trade. No such person was called. No such evidence was given by anybody. The evidence which was given that tinned fish was labelled in different languages relates merely to a not very important aspect. In truth there was nothing that could fairly be regarded as affirmative evidence to dissipate the suspicious character of the case or to show that Barcelona was intended or contemplated by the appellants as the real and ultimate destination.

Their Lordships therefore see nothing to justify them in differing from the judgment of the Chief Justice condemning the cargo of 3,428 cases of tinned fish as destined for Italy and as conditional contraband. The court is entitled to take notice that a large consignment of foodstuffs such as that in question is to be regarded as calculated to increase the total war effort of Italy, whether as intended to be actually supplied to the armed forces or for feeding the civil population behind the lines. The court can also take notice that if there is, as suggested, a Spanish decree forbidding export of contraband to Italy, such decree may be, and frequently is, subject to evasion.

Counsel for the appellants has contended that a decision against the appellants can only be based on findings of fact which go beyond the legitimate limits of judicial notice, and has relied on certain observations in *The Commonwealth Shipping Representative v P. & O. Branch Service* [1], to the effect that though the court may take judicial notice of the existence of a state of war between this country and another, it may not take judicial notice of particular facts. The argument appears to be that judicial notice could not be taken of facts such as the position of Genoa as a war base of supplies in Italy, or a practice of the Italian Government, as ruler of a totalitarian State, to take the goods for its own use or for disposal in whatever way would best help the war effort. No doubt these and similar matters must be considered before the court can arrive at a case of reasonable

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[1] [1923] A.C. 191.

suspicion. But in their Lordships' opinion these are matters of common notoriety which, as on one occasion Lord Stowell said, could be acted upon by the judge in a Prize Court. Similarly in *The Rosalie and Betty* [1], Lord Stowell said of the duty of judges of Prize Courts, "they are not to shut their eyes to what is passing in the world . . . Not to know these facts as a matter of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the court is to decide: not to consider them at all would not be to do justice". Lord Stowell was there dealing with the various devices used to cover property of the enemy. The same may be truly predicated of the devices used to cover the conveyance of contraband to an enemy destination, particularly where the adventure involves a continuous voyage beyond the ostensible to the actual destination. The present case strikingly illustrates how helpless a Prize Court would be but for the rules which it has developed of proceeding in the first stage on reasonable suspicion based largely upon its experience of "the general nature of the subject". A shipper who made the shipping documents meagre and uninformative and abstained from giving evidence at the trial would get away with the goods but for the rules on which the court acts. The analogy of the English criminal law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a neutral to carry contraband, though the goods may suffer the penalty of confiscation. The other is that Prize Courts, for good reasons as already explained, have adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him. After all, the claimant who knows the true facts is the person who can dissipate the suspicion, if the circumstances are such that he can do so. If he is to succed in his claim it is for him to satisfy the court.

In the result, in their Lordships' judgment the decree of the Chief Justice should be upheld and the appeal dismissed with costs.

They will humbly so advise His Majesty.