

RONCO v. VIAGAS

SUPREME COURT (Kneller, C.J.): September 17th, 1993

Sentencing—forfeiture of vessel—condemnation—condemnation under Imports and Exports Ordinance, 1986, s.126 and Schedule 3 lawful prior to conviction for jettisoning cargo contrary to s.112—no breach of Gibraltar Constitution, s.6(1)(a) and (4)(a)(ii), since condemnation is civil proceeding in rem and operates outside criminal process

Criminal Procedure—appeals—appeal against sentence—Crown may raise new points of law on appeal by accused if appeal challenges legality of sentence—new evidence admissible if in interests of justice

The appellant was charged in the magistrates' court with an offence of jettisoning cargo.

The appellant was seen driving a speedboat entering Gibraltar waters pursued by Spanish customs officers. The Gibraltar police gave chase, and observed packages being thrown overboard. The appellant was arrested for unlawfully jettisoning cargo contrary to ss. 112(1) and 117 of the Imports and Exports Ordinance, 1986. The cargo was never recovered. The police confiscated the speedboat and applied for an order for its forfeiture. The appellant pleaded guilty to the offence and the magistrates ordered the forfeiture of the boat.

On appeal, the appellant submitted that (a) the seizure of a vessel as a penalty for jettisoning cargo was unlawful prior to conviction, since the Imports and Exports Ordinance was subject to the protection of the accused's fundamental right to property under s.6 of the Constitution; (b) therefore, although a police officer could seize a vessel already made subject to forfeiture, he could not simply confiscate it or order its forfeiture himself; (c) the Crown could not now allege that forfeiture had occurred when the police seized the vessel rather than under the magistrates' order, since it could not, by raising new points of law on appeal, seek to oust the court's jurisdiction which it had originally invoked; (d) even if the process of condemnation had begun when the vessel was seized, the magistrates' order had intervened before the expiry of the 30 days permitted by Schedule 3 in which to challenge the seizure; (e) the magistrates had given him no opportunity to show cause why the vessel should not be forfeited, which was a breach of natural justice; and (f) the order was unduly harsh in the circumstances and should be set aside.

The Crown submitted in reply that (a) the owner of a vessel used in connection with an offence of jettisoning cargo could be deprived of the vessel either by the arresting officer giving notice, under s.126 and Schedule 3, para. 1 of the Ordinance, that he intended to seize the vessel

(as happened in this case), followed by a process of condemnation (in which case an order for forfeiture was unnecessary) or otherwise by an order of the magistrate under s.124; (b) following notification of seizure to the owner of the vessel, the owner had 30 days within which to notify the Collector of Revenue of any claim that the vessel was not liable to forfeiture or condemnation, failing which it was deemed forfeited; and (c) although in this case the magistrates made an order for forfeiture before the end of the 30-day period, the forfeiture had in fact already occurred, since condemnation was deemed to take effect from the date of confiscation, under Schedule 3, para. 7 of the Ordinance.

Held, setting aside the order for forfeiture:

(1) The process of condemnation under s.126 of the Imports and Exports Ordinance did not offend the rules against deprivation of property in s.6 of the Constitution, since s.6(1)(a) and (4)(a)(ii) permitted compulsory acquisition in the interests of public order and by way of seizure in consequence of a breach of the law. Condemnation was a civil proceeding *in rem* which did not require a prior conviction and was distinct from the criminal process (page 114, lines 3–8; lines 30–32).

(2) Furthermore, the Crown had the right to rely on condemnation as an alternative justification for its actions on the appellant's appeal, since the appeal challenged the legality and appropriateness of the order. The Supreme Court could also hear new *viva voce* evidence from a compellable witness on an appeal from the magistrates' court, under s.290(b) of the Ordinance, if it considered it necessary in the interests of justice (page 114, lines 9–12; lines 18–24).

(3) However, there had been no condemnation in this case but rather a forfeiture order by the magistrates in the criminal proceedings at the request of the police under s.124 of the Ordinance. Some clarification by the Attorney-General's Chambers of the different procedures for forfeiture and condemnation was desirable for the benefit of the police. Since the magistrates had not given the appellant an opportunity to show cause why the forfeiture order should not be made, the court would quash the order and the Crown would be required to serve a notice on the appellant to show cause on a date to be fixed by the Registrar (page 114, line 33 – page 115, line 6).

Case cited:

(1) *Customs & Excise Commrs. v. Air Canada*, [1991] 2 Q.B. 446; [1991] 1 All E.R. 570.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.286: The relevant terms of this section are set out at page 114, lines 13–15.

s.287(c): The relevant terms of this paragraph are set out at page 114, lines 17–18.

s.290(b): The relevant terms of this paragraph are set out at page 114, lines 19–25.

Imports and Exports Ordinance, 1986, s.2(1):

“In this Ordinance, unless the context otherwise requires—
‘ship’ means anything made or used for the conveyance by water of human beings or property...”

s.112(1): The relevant terms of this sub-section are set out at page 112, lines 24–25.

s.124, as amended: “The court may order that any ship ... be forfeited to the Crown if—

- (a) it was employed in the commission of an offence contrary to section ... 112.
- (b) it was, at the time of the offence in the ownership or under the control of the offender, or one of the offenders where there are more than one; or
- (c) it is shown to the satisfaction of the court that the owner of the ship ... knew or suspected or had reason to suspect that the ship ... was being employed in the commission of an offence against this Ordinance.”

s.126: “Where any goods have, or any ship, aircraft or vehicle has been seized or detained as being liable to forfeiture, the procedure for the giving of notice of the seizure or detention, for claiming that the goods were or the ship, aircraft or vehicle was not liable to forfeiture, and for condemnation shall be governed by the provisions of Schedule 3”

Schedule 3, para. 1:

“The Collector shall give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to his knowledge was at the time of the seizure the owner ... thereof:

Provided that notice shall not be required to be given under this paragraph if the seizure was made in the presence of—

- (a) the person whose offence or suspected offence occasioned the seizure; or
- (b) the owner ... of the thing seized or any servant or agent of his...”

Schedule 3, para. 3: “Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of seizure, giving notice of his claim in writing to the collector.”

para. 5: The relevant terms of this paragraph are set out at page 113, lines 7–8.

para. 6: The relevant terms of this paragraph are set out at page 113, lines 9–10.

para. 7: “Where any thing is ... condemned or deemed to have been condemned as forfeited, then the forfeiture shall have effect as from the date when the liability to forfeiture arose.”

para. 10: The relevant terms of this paragraph are set out at page 113, lines 10–13.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex I, s.6(1):

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—

(a) the taking of possession or acquisition is necessary or expedient in the interests of ... public order...”

s.6(4): “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this Constitution—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property—

...

(ii) by way of penalty for breach of the law or forfeiture or seizure in consequence of a breach of the law...”

C. Finch for the appellant;

A. Mitchell and *P. Dean*, *Senior Crown Counsel*, for the Crown.

KNELLER, C.J.: Mr. George Ronco, the appellant, pleaded guilty on May 15th, 1992 to the offence of jettisoning of cargo contrary to s.112(1)(a) and (b), and s.117(1) and (2) of the Imports and Exports Ordinance, 1986. The magistrates duly convicted him on that plea and fined him £200 and made the speedboat *The Big Bull* the subject of a forfeiture order. It was from *The Big Bull* that the appellant jettisoned the cargo. He was given seven days to pay the fine. 25

When the appellant gave notice of his appeal on May 27th, 1992 his grounds were that (a) he was not afforded any opportunity to show cause why the forfeiture order should not be made; and (b) in all the circumstances of the case, the order was an unduly harsh one to make. 30

The circumstances, according to the record, were that at 7.45 a.m. on April 24th, 1992 the appellant, who is a 24-year-old bricklayer, was aboard *The Big Bull* with another two men and was seen by officers of the Royal Gibraltar Police Force Drugs Squad to leave Gibraltar in a flotilla of speedboats based in Gibraltar and sail off towards Morocco. *The Big Bull* was spied returning towards Gibraltar with the appellant, Mr. Mohamed Marzok Hassan, and another man who has not been identified. A Spanish Customs Department helicopter was in pursuit. *The Big Bull* came to rest near the tower in the Dockyard. 40

The police fast-launch *Sir Peter Terry* and crew with Det. Sgt. Alcantara were at sea dealing with another matter but turned to 45

investigate *The Big Bull's* arrival, which did not stop to welcome the *Sir Peter Terry* but left at high speed, despite the fact that those in the police launch flashed a revolving blue and white beacon, sounded a siren and waved to those aboard *The Big Bull*, and the police launch gave chase for about five minutes with beacon flashing and siren wailing.

5

The Big Bull headed out of the harbour through the south entrance towards Rosia Bay and, near the end of the South Mole, Mr. Hassan and the unidentified man threw overboard three large packages, which sank at once. *The Big Bull* turned and headed north followed by the *Sir Peter Terry*, and the hunt ended at Sheppard's Marina where Mr. Hassan and the other man leaped on to the pier and disappeared between the boats on the land.

10

The appellant remained aboard *The Big Bull*. Mr. Hassan was halted by Det. Const. Borrell as he ran out of the Marina towards the Waterport roadway. Detective Const. Borrell cautioned him and told him he had been seen on *The Big Bull* during the chase and throwing the packages overboard. Mr. Hassan did not speak. Detective Const. Borrell arrested him for jettisoning cargo and cautioned him again. Mr. Hassan remained silent. Detective Const. Borrell took him to the Central Police Station.

15

20

Back on *The Big Bull*, Det. Insp. Rodriguez cautioned the appellant, told him he had been steering *The Big Bull*, which he had not stopped when those on the police launch told him to do so, and three bales had been thrown overboard. The appellant said he had not stopped because he thought the *Sir Peter Terry* was a Spanish launch and boxes, not bales, had been cast overboard. Detective Insp. Rodriguez arrested the appellant for unlawfully jettisoning cargo and cautioned him. The appellant said nothing.

25

The third occupant of *The Big Bull* was never found and a search of *The Big Bull* revealed nothing incriminating. Divers of the Royal Navy and the Royal Gibraltar Police Force looked for the bales but have not discovered them because the depth of the sea in that area is 43m. Detective Sgt. Zarb claimed the police confiscated *The Big Bull* under the provisions of s.112 of the Imports and Exports Ordinance and asked the prosecutor to apply to the magistrates for an order of forfeiture for *The Big Bull*.

30

35

According to the record, the appellant challenged one allegation amongst all that, namely, that he and his mates were returning from Morocco, because he said they were returning from Ceuta. The appellant's record was read out to the court and although he had convictions and sentences between June 1988 and August 1991 for assault on the police, violent behaviour, making a disturbance and unlawful possession of controlled drugs, he had none for unlawfully jettisoning cargo.

40

The appellant's counsel, Mr. Finch, submitted that *The Big Bull* could not be taken possession of or acquired except where the relevant domestic law provided for this by way of a penalty for infringing that law. Such

45

domestic law is subject to the protection of the fundamental rights of the individual listed in the Constitution. Forfeiture cannot occur before a person has been convicted of a breach of a law providing for it. A police officer may seize a vessel liable to forfeiture but he has no power to confiscate it or order its forfeiture. The Collector of Revenue may order confiscation but in this case he did not do so. If he did there was no statutory right of appeal but his decision was subject to judicial review or a writ claiming a declaration that he had erred in confiscating it. An order by the executive to forfeit property is not outside the supervision of the Gibraltar courts. 5 10

The Crown, continued Mr. Finch, could not submit that the magistrates had no power to order forfeiture because that would amount to an attempt by the executive to oust their jurisdiction and in this case it had asked the magistrates to exercise their jurisdiction to order forfeiture and did not appeal from their order of forfeiture. 15

The appellant, Mr. Finch concluded, was not asked to show cause why *The Big Bull* should not be forfeited. The value of the speedboat, its importance to the appellant as a means of earning his livelihood, and the hardship which forfeiture would cause him could have been put forward and investigated had he been given an opportunity to be heard on the issue of whether or not to order forfeiture. This was a breach of natural justice of which the appellant complained in his notice of appeal. 20

Mr. Mitchell, for the Crown, began by referring to s.112(1)(b) of the Ordinance, which provides that any ship “properly summoned to bring to by any vessel in the service of Her Majesty” is liable to forfeiture if any person on it throws overboard “any part of the cargo” to prevent seizure. The owner of the ship used in connection with an offence under s.112 can be deprived of it in one of two ways. 25

First, the officer arresting the offender notifies him he intends to seize the vessel and the route to condemnation follows. This is an act of a duly authorized officer and cannot be appealed. A later decision by the magistrates to make a forfeiture order would be otiose. Secondly, if the arresting officer does not notify the offender that he intends to seize the vessel it is not susceptible to forfeiture by the executive and the magistrates have a discretion to exercise under s.124 as to whether or not an order of forfeiture should be made. 30 35

The Crown argued that Det. Sgt. Zarb condemned *The Big Bull* when he arrested the appellant. His notes for the outline of the facts made out for the prosecutor stated that the police confiscated *The Big Bull* under s.112 of the Ordinance. 40

The procedure for giving notice of the seizure or detention of the vessel is set out in s.126 and Schedule 3 of the Ordinance. The Collector gives notice to the person who seems to be the owner but such notice is not required if the seizure is made in the presence of the owners (see Schedule 3, para. 1). 45

Suppose the owner of the vessel or goods confiscated by the executive, *e.g.* the police officer, wishes to claim that either or both were not liable for forfeiture and for condemnation. What is he to do? He is obliged to give notice in writing within one month of the seizure if there is to be no notice from the Collector (because it or they were seized in the presence of the owner) or within one month from the Collector's notice (see para. 3).

If the owner gives no notice of his claim "the thing in question shall be deemed to have been duly condemned as forfeited" (see para. 5). If he gives notice in time, "the Collector shall take proceedings for the condemnation of that thing by the magistrates' court" (see para. 6). The "fact, form and manner of the seizure are taken to have been [as] set forth in the process without any further evidence thereof, unless the contrary is proved" (see para. 10).

Here the magistrates made the order for forfeiture on May 15th, 1992, which was 9 days before the end of the 30 days in which the appellant had to give notice in writing, so Mr. Mitchell prays in aid Schedule 3, para. 7, which provides that the condemnation is deemed to have effect from the date of seizure, which so far as *The Big Bull* is concerned was April 24th, 1992. When the magistrates considered forfeiture on May 15th, 1992 *The Big Bull* was already condemned.

Mr. Mitchell turned to the merits of the forfeiture order in case the Crown's preliminary point, that because condemnation had occurred the order of forfeiture was unnecessary, failed. It was conceded that the appellant may not have had an opportunity to show cause to the magistrates why *The Big Bull* should not be forfeited. Nevertheless, three packages were thrown overboard when he was being chased by the police launch and asked to bring to. The offence is a serious one and the magistrates were entitled to sentence him to pay a nominal fine and to order the forfeiture of *The Big Bull* as the real punishment in the case because what he and his crew did was to interfere with the due process of law.

Those were the skeleton arguments for the appellant and for the Crown which were skilfully fleshed out by Mr. Finch and Mr. Mitchell in their submissions, and I hope they will forgive me if I do not repeat them but go straight on to answer briefly the issues in the appeal, which are:

1. Does condemnation conflict with the Gibraltar Constitution Order 1969?
2. Does the Crown have the right to raise new points on an appeal against sentence?
3. Can the Supreme Court hear fresh evidence during an appeal against sentence?
4. Does it have the power to remit appeals against sentence to the magistrates' court?
5. Is condemnation permissible as a civil event "*in rem*"?
 - (a) Is a conviction necessary prior to condemnation?
 - (b) Is condemnation separate and distinct from the criminal process?

6. On the facts in this appeal, was there condemnation?

7. If not, do the merits justify forfeiture?

Condemnation is provided for in the Imports and Exports Ordinance, 1986 and does not conflict with the Constitution because the compulsory acquisition of the property is in the interest of public order and it is by way of seizure in consequence of a breach of the law and therefore not inconsistent with the protection of the fundamental rights and freedom of the individual set out in s.6(1) of the Constitution (see s.6(1)(a) and 4(a)).

The Crown has the right to bring new points of law to the Supreme Court on an appeal against sentence or any other order because the appeal opens up the legality, appropriateness or otherwise of the order just as this appeal has (see generally ss. 286, 287 and 290).

On appeal “to the Supreme Court from the magistrates’ court, in any criminal case [it] shall be determined by the Supreme Court upon perusal of a copy, certified as a true copy [of his notes] by the clerk of the magistrates’ court” (see s.286 of the Criminal Procedure Ordinance). On an appeal against any order other than a sentence only, the Supreme Court “has the power to affirm, quash or vary the order” (see s.287(c)). The Supreme Court may on any appeal from the magistrates’ court “if it thinks necessary or expedient in the interest of justice” exercise its supplementary powers including that of having a compellable witness “examined before the court ... or before any [of its officers] or a justice of the peace or other person appointed ... for that purpose,” whether the witness was or was not called at the trial, and receiving that *viva voce* evidence or his deposition taken as evidence (see s.290(b)).

It might be argued that the Chief Justice has power to remit an appeal to the magistrates’ court as a consequential order if it appears just and proper if the order is quashed or varied (see s.287(c)), but I need not answer this issue because I shall take a different course.

Condemnation is permissible as a civil proceeding *in rem* and (a) a conviction is not required before condemnation; and (b) condemnation is separate and distinct from the criminal process.

See ss. 112 and 124 of the Imports and Exports Ordinance, 1986 for the discretionary power of the magistrates’ court to order forfeiture of *The Big Bull* to the Crown in the criminal proceedings before them. See ss. 2, 112, 126 and Schedule 3 of the Ordinance, and s.89 and Schedule 3 of the Customs and Excise Management Act and *Customs & Excise Commrs. v. Air Canada* (1) for condemnation as forfeited.

There was no condemnation on the facts in this case. It is different from forfeiture by the magistrates’ court in criminal proceedings. Detective Sgt. Zarb instructed the prosecutor to ask the magistrates for an order of forfeiture and this was done. He chose this as an alternative to the civil proceedings *in rem*. It would help the police if a member of the Attorney General’s Chambers set out for them the different steps in the processes for condemnation and forfeiture.

SUPREME CT.

MES MANI V. ATT.-GEN.

5 The merits may justify forfeiture but the magistrates never gave the appellant an opportunity to show cause why that order should not be made. I shall quash the order for forfeiture but order that the Crown serve the appellant and/or the owner with a notice to show cause before this court why the vessel should not be forfeited to the Crown. The date and time will be fixed by the Registrar.

The appeal will be allowed in part.

Appeal allowed in part.
