

GARCIA and DALMEDO v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): December 12th, 1996

International Trade—exportation of regulated goods—unlawful exportation—unapproved exportation of tobacco is criminal offence under Imports and Exports Ordinance, 1986, s.91(1)—obsolete reference to “public quay at Waterport” permitting unapproved exports from quay no bar to conviction since legislative intention clear

International Trade—exportation of regulated goods—unlawful exportation—attempt—loading of regulated goods into boat without licence or approval of Collector of Customs may be attempt to export unlawfully because more than merely preparatory—irrelevant whether substantive offence requires that goods leave Gibraltar

International Trade—forfeiture of goods—procedure—on conviction of unlawful exportation of regulated goods, court to inform accused that forfeiture possible, enquire as to value of goods and likely effect of forfeiture, and hear argument why order should not be made

The appellants were charged in the magistrates' court with attempting to export regulated goods without a licence from the Collector of Customs, and with attempting to export tobacco other than from “the public quay at Waterport” and without the approval of the Collector of Customs, contrary to ss. 79(3)(b), 91(1) and 117(1) of the Imports and Exports Ordinance, 1986.

The appellants were arrested whilst loading boxes of tobacco into a boat at Watergardens. They argued before the magistrates, *inter alia*, that the place was in fact within the public quay at Waterport, and that their loading the boat was no more than a preparatory act toward exporting the tobacco. They were convicted on both charges, and the tobacco was confiscated, although the court had not informed them that this penalty might be imposed.

On appeal against conviction and sentence, the appellants submitted that (a) since the expert witnesses were unable to establish the existence after 1908 of an area which could properly be defined as “the public quay at Waterport,” the charge laid under s.91(1) of the Imports and Exports Ordinance was meaningless and the appellants should not have been convicted under it; (b) they had not attempted to export the tobacco within the meaning of ss. 79(3)(b) and 91(1) merely by loading their boat, since under s.85 of the Ordinance, the time of exportation of goods was deemed to be the time when the boat would leave Gibraltar; and (c) since the clerk to the magistrates had failed to tell them that the tobacco might

be confiscated, and had not inquired as to its value or the likely effect on them of its being forfeited, the sentence was wrongly imposed and should be set aside.

The Crown submitted in reply that (a) the disappearance of “the public quay at Waterport” as a recognized site did not render s.91(1) of the Imports and Exports Ordinance unworkable as a statutory provision, since the intention of the legislature in creating an offence under s.91 was to prohibit the exportation of tobacco from Gibraltar unless approved by the Collector of Customs, and the previous exception for exports from the public quay simply no longer existed; (b) by loading the boxes of tobacco into their boat, the appellants had gone beyond what was merely preparatory to exporting it without the authority of the Collector of Customs and embarked on the offence itself, and since they were charged only with attempting the offence, the definition of exportation itself under s.85 was irrelevant; and (c) since no other penalty had been imposed on the appellants beyond the confiscation of the tobacco, their sentences could not be considered unjust or unexpected.

Held, dismissing the appeals against conviction, but setting aside the sentences:

(1) The appellants had properly been convicted under s.91(1) of the Imports and Exports Ordinance, notwithstanding that the exception allowing unapproved exports from the public quay was now meaningless, since the legislative intention behind s.91(1) was to control the passage of tobacco in and out of Gibraltar by requiring that exports be approved by the Collector of Customs and the appellants had not obtained his approval (page 397, lines 22–45).

(2) The loading of the appellants’ boat was sufficient to constitute an act which was more than merely preparatory to exporting tobacco from Gibraltar. The magistrates had properly concluded that the appellants were guilty of attempting to export the goods without a licence or the Governor’s approval, and it was unnecessary for them to decide at what point the appellants would be deemed to have exported the tobacco had they been charged with the substantive offences (page 398, line 42 – page 399, line 5).

(3) The interests of justice required that before making an order for the forfeiture of goods, the court should warn the accused that this was likely to happen, and ask him the value of the goods, and whether there was any reason why such an order should not be made, recording his replies. Since the clerk to the magistrates had not done so in this case, the sentence would be set aside and an alternative penalty imposed, according to the means of the appellants (page 399, lines 6–37).

Cases cited:

- (1) *Garcia v. Riley*, Supreme Ct., Crim. App. No. 5 of 1992, unreported.
- (2) *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294; [1979] 3 All E.R. 614.

(3) *R. v. Gullefer*, [1990] 1 W.L.R. 1063n; [1990] 3 All E.R. 882.

(4) *Ruiz v. Canepa*, Supreme Ct., Crim. App. No. 5 of 1991, unreported, applied.

Legislation construed:

Imports and Exports (Control) Regulations, 1987 (L.N. No. 6 of 1987), reg. 9:

“Subject to the provisions of regulations 7 and 8, no goods shall be exported except under and in accordance with a licence granted by the Collector.”

Imports and Exports Ordinance, 1986, s.79(3):

“A person who—

... .

exports any goods the exportation of which is restricted or regulated, except in accordance with the restriction or regulation applicable

whether such exportation is prohibited, restricted or regulated under this Ordinance or under any other law, is guilty of an offence”

s.85: The relevant terms of this section are set out at page 398, lines 17–23.

s.91(1): The relevant terms of this sub-section are set out at page 396, lines 25–27.

s.117(1): “A person who acts in contravention of any of the provisions of this Ordinance or of any regulations made thereunder or any of the terms or conditions on which any approval or permission has been granted under this Ordinance, is guilty of an offence under this Ordinance.”

C. Finch for the appellants;

J.M.P. Nuñez for the respondent.

SCHOFIELD, C.J.: The appellants were convicted by the justices, after trial, on the following two charges:

35 “1. On January 12th, 1995 at Gibraltar [they] attempted to export goods, being goods the exportation of which is regulated under reg. 9 of the Imports and Exports (Control) Regulations, 1987, without a licence granted by the Collector of Customs, contrary to s.79(3)(b) of the Imports and Exports Ordinance, 1986.

40 2. On January 12th, 1995 at Gibraltar [they] did attempt to export tobacco namely [*sic*] from a place in Gibraltar at Watergardens not being the public quay at Waterport and without the approval of the Collector of Customs, contrary to ss. 91(1) and 117(1) of the Imports and Exports Ordinance.”

45 On each charge the only penalty imposed was the forfeiture of the tobacco, the subject of the charges. The appellants appeal against both conviction and sentence.

The evidence of Const. Bautista was that he was in a police van with other officers approaching Watergardens heading towards the pontoons there. Dalmedo was standing on a pontoon passing a box of tobacco to Garcia who was in a speedboat. When the officers approached Garcia tried to reverse the boat but its propeller caught in some ropes. Fourteen boxes of Winston cigarettes were unloaded from the boat. Constable Bautista did not ask the appellants the destination of the tobacco.

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Garcia testified that he has a store at Watergardens and when he delivers tobacco to his customers he does so by boat. He was delivering this consignment to Catalan Bay and he was not exporting it. He testified he had never exported tobacco but a previous conviction, it seems for a similar offence although I do not have its details, was put to him. It seems, from the record, that Dalmedo elected not to give evidence.

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Clearly the justices accepted that the tobacco was for exportation and I could not fault that finding. The appellants were loading tobacco into a boat, that much is admitted. It is an unlikely story in itself that Garcia delivers his tobacco within Gibraltar by boat. His action of trying to get away when the police approached gives the lie to his evidence. That Const. Bautista did not ask the appellants where they were taking the tobacco did not deflect the justices from the irresistible inference that the appellants were intending to export it.

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The first ground of appeal argued before me related to the second charge of attempting to export tobacco from a place other than the public quay at Waterport. It is a charge framed pursuant to s.91(1) of the Imports and Exports Ordinance, 1986, which reads: “No person shall, without the approval of the Collector, export or attempt to export tobacco from any place in Gibraltar except from the public quay at Waterport.” It is not contended that the appellants had authority for their actions from the Collector of Customs. Before the justices, Mr. Finch argued that the pontoons at Watergardens where the boat operated by Garcia was moored were within the public quay at Waterport. The justices clearly found against that submission. In argument before me it became apparent that no party was certain of the exact location of the public quay at Waterport. The area is not defined in any statute and although the magistrates had on occasion made an attempt to define the limits of the location, this was no more than a common sense and robust approach by use of local knowledge. I called for evidence on the exact location of the public quay at Waterport.

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Affidavits were filed from Thomas James Finlayson, the archivist for the Government of Gibraltar, and George White, a director of Land Property Services Ltd. They were most helpful. The phrase “public quay at Waterport” can be traced back to the Tobacco Ordinance, 1896 and has been used in various statutes since then. Neither Mr. Finlayson nor Mr. White could trace any plan or map of Gibraltar which refers to a public quay at Waterport. As late as 1888 Waterport Wharf comprised a piece of

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reclaimed land in the shape of an irregular heptagon on which was situated a police station, a revenue station and bonded stores.

5 Between 1888 and 1908 a great deal of reclamation and building work occurred in the area. An Ordnance Survey map of 1908 shows the extension and building works conducted in this period and on that map is marked “Water Port Jetty” close to the location of bonded stores which remained in that location until about 1986. In an Ordnance Survey map dated 1905/6 the jetty marked as “Water Port Jetty” was referred to as a pier. Both Mr. Finlayson and Mr. White conclude that this jetty or pier, to which the public would have access, was the public quay at Waterport. An Ordnance Survey map of 1942 does not show that quay, so it was demolished between 1908 and 1942. The conclusion is, therefore, that there is now no public quay at Waterport.

10 This led Mr. Finch to argue that if a statute sets out a prohibition with reference to a public place and that public place disappears, there is then nothing for the prohibition to relate to and no criminal charge can be framed in a meaningful way. A further and perhaps converse argument was that the statute intended to bestow a right on subjects who wish to export tobacco from the public quay at Waterport. The responsibility of defining the extent of the public quay is on the Crown and, in the absence of such a definition, the statute is unworkable.

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20 The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute considering it as a whole and in its context which includes its historical context (see *N.W.L. Ltd. v. Woods* (2) ([1979] 3 All E.R. at 630, *per* Lord Scarman)). Furthermore, a statute must be construed in such a way as to implement rather than defeat the legislative intention. In this case the intention of the legislature in passing s.91 of the Imports and Exports Ordinance, 1986 was to control the exportation or attempted exportation of tobacco from Gibraltar by a requirement that such exportation be approved by the Collector of Customs. For some reason it was decided that the control was not necessary if the exportation or attempted exportation was to take place from the public quay at Waterport. This exception is one which has been carried through in this type of controlling legislation from the Tobacco Ordinance of 1896. The exception may have had something to do with the existence of the police station, revenue station or bonded warehouse in the vicinity of the quay when the phrase “public quay at Waterport” was first used in the 1896 Tobacco Ordinance—we know not.

25 The disappearance of the public quay at Waterport does not make the statutory provision unworkable. It merely removes the exception to the general control. What this means is that the exportation or attempted exportation of tobacco from anywhere in Gibraltar requires the approval of the Collector of Customs. This approval was not given to the appellants and if, as the justices found, they were attempting to export tobacco, they offended s.91(1) of the Imports and Exports Ordinance.

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A further ground of appeal argued by Mr. Finch was that the acts of the appellants did not amount to an attempt to export tobacco. His argument is that the act of loading goods on to a vessel for exportation is a preparatory act to such exportation and does not amount to an attempt to export the goods. This argument falls on rather stony ground for it goes against existing authority. In the case of *Garcia v. Riley* (1), an appeal by way of case stated, Alcantara, A.J. answered in the positive the question of whether the loading of a boat in itself was sufficient to constitute an act which was more than merely preparatory in respect of an attempt to export tobacco without the approval of the Collector of Customs. 5 10

Mr. Finch rightly pointed out that this decision is not binding upon me and asked me to make a finding contrary to that of Alcantara, A.J. He took exception to Alcantara, A.J.'s finding that it is possible to export goods from Gibraltar without the goods having been taken out of the jurisdiction in view of the provisions of s.85 of the Imports and Exports Ordinance. Section 85 reads: 15

“The time of exportation of any goods from Gibraltar shall be deemed to be the time when the goods are loaded for exportation:

Provided that, in the case of goods of a class or description with respect to which any prohibition or restriction is for the time being in force under or by virtue of any Ordinance, the time of exportation shall be deemed to be the time when the exporting ship, aircraft or vehicle departs from Gibraltar.” 20

Mr. Nuñez says that this provision is meant to deal with the time for exportation for revenue-raising purposes and does not affect the fact of exportation. What the argument seems to miss, if I may say so with respect, is that we are dealing with the charges of attempting to export and not charges relating to the actual exportation. The above provision does not, therefore, seem to apply to the situation in this case for the time or fact of exportation is not alleged to have been reached. 25 30

In *Garcia v. Riley* (1) Alcantara, A.J. quoted the following passage from the judgment of Lord Lane, C.J. in *R. v. Gullefer* (3) ([1990] 1 W.L.R. at 1065):

“Thus the judge’s task is to decide whether there is evidence upon which a jury could come to the conclusion that the appellant had gone beyond the realm of mere preparation and had embarked upon the actual commission of the offence.” 35

And later he said, in relation to attempt (*ibid.*, at 1066): “It begins when the merely preparatory acts come to an end and the defendant embarks upon the crime proper. When that is will depend upon the facts in any particular case.” 40

On the facts of this case, in my judgment, the justices were right to conclude that the appellants had embarked upon the actual commission of the offence. It may have been otherwise if the goods intended for exportation were still in a store or warehouse; it would all depend on the 45

facts of the case. But in this case the appellants were actually loading boxes of goods which they intended to export into the vessel which was to take them out of Gibraltar. That was an act which went beyond the merely preparatory. The appellants were embarked upon the commission of the offence. The convictions of the appellants were safe and sound.

5 The appellants also appeal against the sentence imposed on the conviction, which was an order for forfeiture of the tobacco seized by the police on the arrest of the appellants. On this the appellants must succeed for they were not warned by the justices that such an order was under contemplation or given an opportunity to show cause why it should not be done. There have been a number of cases in which this requirement has been drawn to the attention of the magistrates' court. An example is Kneller, C.J.'s judgment in *Ruiz v. Canepa* (4) in which the following advice was given:

15 "The court, before making a forfeiture order, should have information about the value of the property concerned and the effect such an order will have on the offender if it is made. *R. v. Highbury Corner Stipendiary Magistrate, ex p. Di Matteo*

20 As often as not, that information can only be supplied by the offender, so apart from it being fair to warn him that he is liable to have the relevant property confiscated, it is right to ask him what it is worth, what effect its forfeiture will have on him and if he has anything else to say as to why he should not be deprived of it. He should be asked to show cause.

25 The prosecutor should take instructions on whether the Crown submits the property should be forfeited or not and relay this to the magistrate in court.

When the magistrate tells the offender he is liable to be deprived of the property and the offender or his counsel should show cause why the order should not be made, the clerk should record both, *e.g.*:

30 '*Court*: "I may make an order that you forfeit the launch. Tell me why I should not make that order."

Defendant: "Do not do so. I need it for my work and to maintain my family." "

35 In setting aside the sentence of the justices, I must now determine what sentence is appropriate. To enable me to do so I must make enquiry of the appellants in regard to their financial and other circumstances.

Order accordingly.