25/11

IN THE COURT OF APPEAL OF NEW ZEALAND CA 154/93

1993

MEDIUM PRIORITY

BETWEEN COLLECTOR OF CUSTOMS

Appellant

AND DAVID MICHAEL GLAVISH who claims an interest in one Harley Davidson motorcycle and other articles imported into New Zealand by DAVID MICHAEL GLAVISH and FRED PETER MANUKAU

Respondent

Coram Hardie Boys J
McKay J
Tompkins J

Hearing 28 October 1994

Counsel H S Hancock for Appellant
D Ryken for Respondent

Judgment 18 November 1994

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

This appeal is from a judgment of Hillyer J delivered at Auckland on 29 April 1993 effectively dismissing a claim by the Collector of Customs for the condemnation of a Harley Davidson motorcycle owned by Mr Glavish. The claim was brought under s 280 of the Customs Act 1966 and was founded on s 272, which is as follows:

> **Vessels (being vessels that have a tonnage that does not exceed 250 tons), vehicles, aircraft, and animals forfeited** - Every vessel (being a vessel having a tonnage that does not exceed 250 tons), vehicle, aircraft, or animal used in smuggling goods, or in unlawfully conveying goods with intent to defraud the revenue of customs, or in the

> importation or conveyance of prohibited imports or forfeited goods, shall be forfeited.

The motorcycle had been bought by Mr Glavish in the United States and had been packed by him and friends in a crate belonging to one of those friends, Mr Manukau, to whom it was consigned at his address in Mangere. Mr Glavish lived in Warkworth. For packing, the handlebars were removed and placed in the crate with the motorcycle. There was virtually no petrol in its tank and the ignition keys were not left with it. On its arrival in New Zealand, before the crate had passed into the possession of anyone else, Customs officers found that there had been packed around the motorcycle a variety of items. It appears they belonged to several people. Many of them were dutiable and, not having been declared, were liable to forfeiture under s 270(f). Their forfeiture is not in dispute. The motorcycle itself was declared, but concealed with it were two firearms. A .39 Smith and Wesson Special GTC revolver was hidden in the motorcycle's backrest which had been placed in a loose pillion bag; and a Jennings J22 LR .22 pistol, in a brown paper bag wrapped inside a plastic bag, was hidden in the cavity between the petrol tanks. These firearms are prohibited imports. Taped to two of the motorcycle's shock absorbers were three flick knives, and in a shoe box in the crate were six cases of .22 ammunition and five of .38. These items do not form the basis for the claim of forfeiture. It is in fact based solely on the pistol hidden in the motorcycle itself.

Mr Glavish claimed to have no knowledge of the firearms, and that was not disputed in the High Court as it was accepted that ignorance on the part of the owner of the goods is irrelevant for forfeiture purposes.

In the High Court, as in this Court, the argument turned on the meaning of s 272, specifically whether the motorcycle was a vehicle used in the importation or conveyance of prohibited goods. Hillyer J thought that the section envisages the forfeiture of the means of transport used: all the items listed in the section are modes

of transport that could be used to bring forfeitable goods into the jurisdiction, or to carry them away, for example from the wharf. He said that the real act of importation or conveyance in this case occurred by the movement of the ship carrying the crate, not by the presence of illegal imports hidden in the body work of a piece of cargo; and that in the context of the section, the motorcycle was in reality a thing inside a crate which happened to be accompanied by prohibited imports; it was not at the time a vehicle. He added that had Parliament intended that goods used to conceal contraband be subject to forfeiture it could have said so: as had the Parliament of the United Kingdom in s 141 of the Customs and Excise Management Act 1979, which includes a reference to any container or other thing which has been used for the concealment of the thing liable to forfeiture.

In support of the appeal Mr Hancock submitted that the removal of the handlebars and the packing in the crate did not render the motorcycle any the less a vehicle; nor did its use as a place of concealment for the pistol. He also submitted - and this is to condense his submission - that the word "use" should not be considered narrowly so as to limit the section's application to vehicles being used as the actual means of transport. He submitted that on the plain and ordinary meaning of the words this motorcycle was being used, certainly for the importation, if not for the conveyance of the pistol; it was being used by virtue of the pistol being concealed within it, and thus being able to be brought into the country.

Mr Ryken on the other hand submitted that the section contemplates usage in the form of some physical act in taking the goods across the border or away from the border. It is directed to forfeiture of objects used as the means of importing or conveying prohibited goods, as opposed to goods which accompany or conceal prohibited goods. Here the motorcycle could not be driven, but was simply cargo.

Legislation providing for the forfeiture of uncustomed or prohibited goods has a long history, which for present purposes may be traced back to the 1825 Act for Prevention of Smuggling, 6 Geo IV, c 108. Section 32 provided that together with the goods there should be forfeited "all horses and other animals and all carriages and other things made use of in the removal of such goods". There were a number of separate sections providing for the forfeiture of ships. These provisions were brought together in s 202 of the Customs Laws Consolidation Act 1876, which so far as is relevant read:

> All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited. ...

With some inconsequential changes, these words were brought down into s 250 of our Customs Law Act 1908. In its successor, the Customs Act 1913, the wording was condensed to the form now appearing in s 272 of the 1966 Act; the inclusion of the maximum tonnage (at first 50 tons) and of aircraft are more recent additions.

The history of s 272 shows clearly that it deals with two different activities: first bringing goods into New Zealand and landing them here, and secondly transporting them from the point of landing. The concept of importation may go beyond the entry and landing of goods, but the distinction between the two activities is both appropriate and sufficient for present purposes. The distinction was recognised by the High Court of Australia in *Forbes* v *Traders Finance Corporation Ltd* (1971) 126 CLR 429 although the slightly different statutory provision under consideration in that case indicated a degree of overlapping. Applying the distinction, it is apparent that New Zealand being an island nation, vessels and aircraft are what must necessarily be used to bring in and land goods; while vehicles and animals can be

used for transporting them only after landing (apart from the doubtless rare exception of amphibious vehicles or swimming or wading animals).

It follows that in as much as the section is speaking of vessels and aircraft used as a means of carriage, it is equally speaking of animals and vehicles being used for that same purpose. All four are modes of transport or conveyance and it is in that sense that we consider they are referred to here. We do not think the change from the gerund "conveying" in the earlier part of the section to the noun "conveyance" in the later part affects this conclusion. Reading the section as a whole, it does not in our view refer to the situation in this case, where the motorcycle was being used not as a mode of transport or conveyance, but as a place of concealment.

This view is born out by s 271, by which the forfeiture of goods is extended to "the case, covering, or other enclosure, not being a bulk cargo container or a pallet, in which the goods are contained at the time of seizure". This section thus deals with one of the circumstances covered by s 141 of the United Kingdom Act mentioned above. It points up the distinction between containment (which includes concealment) on the one hand, and importation and conveyance on the other. Acceptance of Mr Hancock's argument is tantamount to including vehicles in s 271, which the Legislature has not chosen to do.

We have reached this conclusion without recourse to any presumption or principle of statutory construction. But to the extent that s 272 may be thought ambiguous, the conclusion is fortified by the rule that a penalty may be imposed only where the words of the statute plainly so direct: *Murphy* v *Farmer* (1988) 79 ALR 1 (High Court of Australia), referred to by this Court in *Minister of Customs* v *Admail International Ltd* (CA 71/89, judgment 31 October 1989).

In *Eric Bruce Hutton* (Auckland, M 1698/80, 13 October 1981) Vautier J dealt with an information in rem seeking condemnation of a motor car which had been brought into New Zealand from Pago Pago by ship. On a search of the vehicle, a revolver and ammunition were found concealed in it. Vautier J concluded that it was being used for both the importation and the conveyance of the revolver, a prohibited import, and made an order for condemnation. He rejected an argument that the conveyance had been by ship:

> It seems very obvious that if the customs officers had not detected the presence of the revolver in its hidden position, the vehicle would have been used for getting the revolver away from the eyes of the authorities and away from the wharf and thus for conveyance to that extent.

However, the judgment does not give details of the factual situation. If the car were about to be used to drive out of the ship, or, having been unloaded, away from the wharf, Vautier J's conclusion would be consistent with the majority judgments in *Forbes* v *Traders Finance Corporation Ltd.* But if at the time the revolver was discovered the car was in the ship's hold in such a position or in such a way that it was not being used or about to be used as a mode of transport or conveyance, we would respectfully disagree with his conclusion. In that circumstance, the car would have been used to conceal, not to convey, the prohibited import.

The passage we have quoted from Vautier J's judgment led counsel in the present case into some discussion of various hypothetical possibilities, particularly as to the position had the crate been cleared through Customs without the concealed weapon being discovered. There is little value in attempting an interpretation of the section on the basis of hypotheticals, but a comment may usefully be made about the one described by Vautier J. Had the vehicle been driven away with the firearm concealed in it, it would plainly have been liable to forfeiture under s 272. Mr Hancock questioned the good sense of an interpretation of the section that enabled

forfeiture at that stage, but not at an earlier stage. If there is validity in the point, the solution must lie in appropriate legislation rather than in a strained construction of the section. Alternatively, it would lie in the hands of the Customs officers themselves: they need not have removed the firearm when they did.

Apparently unlike the vehicle in the *Hutton* case, it seems that the motorcycle here could not have been ridden away from the Customs shed. That fact did not in our opinion mean that it was not a vehicle, but simply confirmed that it was not being used as such. The plain intention was that it should be taken in its crate to Manukau's address. During that journey, the firearm would be conveyed by the truck on which the crate was placed. It would be artificial to speak of it being conveyed by both the motorcycle and the truck. The same may be said of when the crate was on the ship. Whether the truck (or the ship had it weighed less than 250 tons) would be liable to forfeiture would doubtless depend on questions of proximateness and control, as indicated by Windeyer J who gave the majority judgment in *Forbes* v *Traders Finance Corporation Ltd*; although consideration would have to be given to the decision of the English Court of Appeal in *Customs and Excise Commissioners* v *Air Canada* [1991] 1 All ER 590, which held that a large commercial jet was forfeitable because there was cannabis resin in a container carried in its cargo, a fact unknown to and unknowable by the airline's employees. Questions of that kind need not be resolved in the present case.

For the foregoing reasons the appeal is dismissed. The appellant is ordered to pay the respondent's costs in the sum of $3,000 together with disbursements, including the reasonable travelling and accommodation expenses of counsel, as fixed by the Registrar.

Solicitors
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