27/11

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 148/84.

Special Consideration

1449

BETWEEN MUHAREM MUHAREMI

APPELLANT

and COLLECTOR OF CUSTOMS

RESPONDENT

Hearing: 9th and 10th April, 1984.

Counsel: Crew for Appellant
Sim for Respondent

Judgment: 19 NOV 1984

JUDGMENT OF MOLLER, J.

This is an appeal against a conviction of the appellant in the District Court at Auckland. If that appeal is dismissed, there is no appeal against the sentence imposed.

The appellant, Muharem Muharemi, faced a charge that on 30th August 1982, at Auckland, he committed "an offence against THE SALES TAX ACT 1974, SECTIONS

2, 64, 70 and 77 in that he

" DID AN ACT, NAMELY FAILED TO DECLARE
ONE CETEC BENMAR AUTOPILOT 210 COURSE
KEEPER (SERIAL NUMBER 2065-8)
COMPLETE WITH PLASTIC PROTECTIVE
MOUNTING FRAME.
ONE 'S' MOTOR DRIVE POWER UNIT
ONE DIRECTION FINDING COMPASS
TOGETHER PURCHASED BY HIM IN CALIFORNIA
U.S.A. FOR NZ$3783.00 WITH INTENT TO
DEFRAUD THE REVENUE BY EVADING
PAYMENT OF THE SALES TAX ON THE SAID GOODS."

The following basic facts were either found by the District Court Judge or conceded by counsel:-

1. On 30th August 1982 the appellant arrived in New Zealand at Auckland International Airport.

2. Two women with whom he was associated, namely Colleen Mary Connell and Dwan Smith, arrived on the same aircraft.

3. All the items mentioned in the charge were units which, taken together, formed an "autopilot" system for use in connexion with a boat.

4. The equipment had been purchased by the appellant in the United States.

5. Of the items mentioned in the charge only "the plastic protective mounting frame" was, on his arrival at the airport, in the actual

personal possession of the applicant.

6. The other three items in the charge were, at the time of the arrival of the aircraft at the airport, distributed between the two women.

7. The appellant completed and signed a certain document (considerable reference will be made to it later in this judgment) which, looking for the moment at no more than the actual words used in it, required the appellant, who was at the time a resident of New Zealand, to "List all goods acquired overseas or from a duty free source in New Zealand".

8. The only entry made on that document by the appellant as a description of such goods reads:

> "Instrument Guages (sic) (eg, rev counter, temp guages (sic) etc)";

and he set out the number of such items as eight, and added that the total price paid for them was $NZ120.00.

9. These gauges were not part of the items mentioned in the charge.

10. The total price of the items in the charge when the appellant bought them in the United States was $NZ3783.00.

11. On the document the appellant signed a statement reading: "I declare and certify that the particulars given in this passenger declaration are true and correct."

12. One of the women concerned, Miss Smith, completed and signed the same kind of document, in which she set out four items which were obviously personal to herself as (as appears in the form) a "Singer/Actress", and one item which referred to "Fan motor parts"; these words were followed by the capital letter "S" and an indecipherable word of apparently four letters beginning with the capital letter "T".

13. The last-mentioned item was what appears in the charge as "ONE 'S' MOTOR DRIVE POWER UNIT".

14. There was no document of the same kind produced as an exhibit as having been completed by the other woman, Miss Connell, but the remaining two items in the charge, the autopilot course keeper and the direction finding compass, were the ones found in her personal possession on her arrival at the airport.

15. The appellant had intentionally distributed the component parts of the total unit in the way that I have described.

Before I deal with the problems arising out of this appeal, it is important to consider the way in which the Sales Tax Act 1974 and the Customs Act 1966 interlock with each other, and it is necessary to remember that the applicable legislation is that which was in force at the time of the alleged offence.

In section 3 (1) the Customs Act provides as follows: "In this Act, unless the context otherwise requires, the expression 'Customs Acts' means", amongst a number of Acts, "The Sales Tax Act 1974".

Subsection (2) says this: "In its application to the subject-matter of any other of the Customs Acts this Act shall be read subject to the provisions of that other Act". And subsection (3) is, for the purposes of this appeal, in these terms: "Subject to the provisions of subsection (2) of this section, the provisions of this Act, so far as they are applicable and with the necessary modifications, shall be deemed to be incorporated in and to form part of every enactment declared by this or any other Act to be a Customs Act."

The main argument in this case is as to whether or not the appellant, in dealing with the goods in the way he did, intended to defraud the revenue by evading payment of Sales Tax in respect of them. The District Court Judge found that he did, and I shall come back, at a later stage in this judgment, to consider this aspect of the matter. However, before I do that, I must deal with a number of other matters which arose in the course of the hearing in the Court below.

The first of these questions is this: As a matter of law, was the appellant a person liable to pay sales tax on all the items concerned with this charge?

Section 12 (1)(a)(i) of the Sales Tax Act read, at the material time, as follows:-

> " (1) Subject to this Act, Sales Tax at the appropriate rate specified in the First Schedule to this Act shall be levied, collected, and paid on the sale value of all goods (except goods of the classes or

kinds for the time being exempted from the operation of this Act) -

(a) Imported into New Zealand and -

(i) Entered therein for home consumption under the Customs Act 1966, otherwise than by a licensed wholesaler for subsequent sale by him".

There is no suggestion that the goods with which this case is concerned were exempted from the operation of the Act.

Section 27 (1) of the Sales Tax Act says that the Sales Tax "payable on any goods shall constitute a debt owing to the Crown by the importer, wholesaler, or manufacturing retailer, as the case may be". It is not disputed that the goods with which I am concerned were "for home consumption" under section 12 (1)(a)(i); and the result of that is that subsection (2)(a) of section 27, in its form at the crucial time, applied to them, and that meant that sales tax upon the goods was payable by the "importer" of them "at the time when (they were) entered for home consumption under the Customs Act 1966".

The next section to be considered is section 31 (1) which, at the material time, required that, "except as provided in section 34" (which does not apply here), the sales tax on goods for home consumption "shall be assessed by the Collector and ... shall be paid to him at the time of the entry of the goods ...".

I pause here to note that the word "Collector" as used in the Sales Tax Act has, by virtue of section 2 of that Act, the same meaning as is assigned to it in section 2 of the Customs Act. There it is provided that "Collector" means "any officer appointed

as Collector of Customs at any port or in respect of any district ... and ...includes the chief officer of Customs at any port or other place, and any proper officer acting for the time being in place of the Collector either generally or in respect of any of his powers or functions, whether during any vacancy in the office of Collector or otherwise". Five witnesses were called by the prosecution in the Court below, and, in my opinion, every one of them came within this definition.

I can return now to the question of liability to pay sales tax. It is to be noted that, in a proper case, it is a debt owing to the Crown by the "importer" of goods for home consumption. Neither "Importation" nor "Importer" is defined in the Sales Tax Act, but, because of the interlocking provisions of it with the Customs Act, the definitions in the latter Act apply in this case. "Importation" is defined in section 47 (1) of the Customs Act in this way:-

> " For all the purposes of this Act, goods shall, except where otherwise expressly provided, be deemed to be imported into New Zealand if and so soon as in any manner whatever, whether lawfully or unlawfully, they are brought or come within the territorial limits of New Zealand from any country outside those limits.";

and "Importer", by virtue of section 2 of the same Act, means:-

> " Any person by or for whom any goods are imported; and includes ... any person who is or becomes the owner of or entitled to the possession of or beneficially interested in any goods on or at any

time after their importation and before they have ceased to be subject to the control of the Customs.".

There is, in my view, no doubt whatsoever that, on a consideration of the basic facts that I have set out earlier in this judgment and on the application to them of the legislation that I have discussed, the appellant was liable to pay sales tax on the goods referred to in the charge against him. He was himself personally the "importer" of the plastic frame, and, in respect of the other items, he was the owner of them and therefore the person for whom they were imported. He also was the person "entitled to possession of or beneficially interested in" the goods before they "ceased to be subject to the control of the Customs".

Before I leave this subject, I draw attention to section 4 of the Customs Act. This provides that when "in respect of any imported ... goods there are more importers .... than one (in accordance with the definition of ... 'importer' in this Act) all the provisions of this Act with reference to the importer ....of those goods shall, unless the context otherwise requires, apply severally and independently to each of those importers ...".

An argument advanced by Mr. Crew was that the form containing the declaration and certificate signed by the appellant was one which had no valid legal effect. This requires a consideration of the Customs Regulations 1968.

Clause 30 of the original Regulations (S.R. 1968/169) reads as follows:-

" The Collector may require any passenger arriving in New Zealand from any country outside New Zealand to make a

declaration in form 18 with respect to the effects accompanying the passenger.";

and a Form 18 appeared in the First Schedule to those Regulations. However, it is to be noticed that in Regulation 30 no distinction is made between persons arriving by sea and persons arriving by air.

One goes next to the Customs Regulations 1968, Amendment No. 2. (S.R. 1969/260). Clause 4 of this Amendment revoked the Form 18 under the Regulations of 1968 and substituted a new Form 18. In both the original Regulations and the Amendment of 1969 the words "Prescribed form" meant "a form set out in the First Schedule to these regulations; and a reference to a numbered form is a reference to a form so numbered in that Schedule". Then came Amendment No. 6 (S.R. 1972/238). Regulation 2 of this revoked this definition of "Prescribed form" and said that the words meant

> " ... a form set out in the First Schedule of these regulations, or, where no form is so set out, a form prescribed by the Comptroller; and a reference to a numbered form is a reference to a form so numbered in that Schedule or, as the case may require, a form so prescribed and numbered by the Comptroller .....".

At this point I emphasize that this amendment makes it clear that, if there is no numbered form in the Schedule, any form prescribed by the Comptroller is to be not only prescribed by him but also numbered by him.

In 1973 Amendment No. 7 (S.R. 1973/66) appeared. By Regulation 7 (1) of that Amendment the First Schedule to the principal Regulations was revoked. This, of course, meant that Form 18 disappeared, and, as a result of that, a new definition of

"Prescribed form" was set out in Regulation 2 of the Amendment. This defined "Prescribed form" as "a form prescribed by the Comptroller; and a reference to a numbered form is a reference to a form so prescribed and numbered". This definition emphasizes that, as provided by Regulation 2 of Amendment No 6, a form was to be both prescribed and numbered by the Comptroller.

Amendment No. 8 was made in 1974. It is S.R. 1974/154. On the face of it this Amendment raises problems. It is the first time that a distinction is made between passengers arriving by sea and those arriving by air. In Regulation 3 of it, the Amendment revoked the original Regulation 30, and replaced it with a new one. This read:-

> " The Collector may require any passenger arriving in New Zealand from any country outside New Zealand to make a declaration in Form 18 for sea passengers and Form 18A for air passengers with respect to the effects accompanying them".

What raises the difficulty is that Form 18 had already been revoked as part of the original First Schedule, there had never been a Form 18A before 1974, and this Amendment did not provide one. Although it did contain a new Second Schedule, it did not contain a new First Schedule to replace the one revoked.

Finally, one comes to the Customs Regulations 1968 (Reprint) (S.R. 1975/284). In it Regulation 30 is in exactly the same form as the amendment to the original Regulation 30 appearing in Amendment No. 8. with its references to "Form 18" and "Form 18A". It also notes the revocation of the original First Schedule without supplying a new one. However, it retains the original

clause 4 which, for the purposes of this case, reads this way:-

> " Where a prescribed form contains, by way of note or otherwise, a direction or indication of any requirement by the Customs as to ... Any action, either by way of signing a form of declaration or otherwise, to be taken by the person concerned in the transaction in which the document is used or by his authorised agent ... the requirement so indicated shall be deemed to be prescribed, and shall be complied with by the person concerned in the transaction or his authorised agent."

Having set out all these legislative provisions, I find that, if the Comptroller prescribed a form and also gave that form a number, that form comes within the existing definition of "Prescribed form", and is therefore one validly made and with legal effect.

As a result of agreement between counsel, there was supplied to me at the hearing of this appeal, a photocopy of a document which had not been produced in the Court below. The document was a "PASSENGER'S DECLARATION" in exactly the same form as that signed by the appellant when he made his declaration and certificate. The important thing about this is that it has typed upon it and signed by the Comptroller of Customs the following:-

> " By <u>virtue of the power</u> vested in me under the authority of Section 305A of the Customs Act 1966, as inserted by Section 13 of the Customs Acts Amendment Act (No. 2) 1976, I hereby prescribe this form 13Y, for air passengers with respect to the effects accompanying them and hereby permit this form to be used for this purpose."

The Comptroller did this in March 1982, and therefore it was a prescribed form at the time of the alleged offence, namely, 30th August 1982.

Subsection 2 of section 305A says this:-

> " The production of any document under the hand of a Collector purporting to be a prescribed form or an extract from a prescribed form or a copy of any such form or extract shall in all Courts and in all proceedings be sufficient evidence of the fact that the form was prescribed; and all Courts shall in all proceedings take judicial notice of the signature of the Collector either to the prescribed form or to any such extract or copy."

Both the form signed by the appellant and that signed by Miss Smith has, typed across the top of it, these words:-

> " I, MICHAEL GORDON HOWLEY, Collector of Customs at Auckland do certify that this document is a copy of a form being an entry form for home consumption for air passengers with respect to the effects accompanying them, having been prescribed and permitted to be used by the Comptroller of Customs.";

and this is signed by Mr. Howley. The certificate was not on the documents at the time that the appellant and Miss Smith signed them, but it was placed on them later for the purposes of supplying proof in accordance with section 305A.

I have therefore reached the decision that the documents of this nature which I have had to consider were not only validly prescribed forms but were also sufficiently proved in the Court

below.

I turn now to consider Form 13Y as far as it is material to this appeal. In the form itself, under the heading "NEW ZEALAND CUSTOMS DEPARTMENT", "New Zealand Residents" are told that they are to "List all goods acquired overseas or from a duty free source in New Zealand". On the front of the form when it is folded as it is meant to be, this appears:-

"PLEASE READ CAREFULLY

The Passenger's Declaration applies to all your baggage - including hand baggage.";

and I find that, by virtue of regulation 4, this "note" is part of the prescribed form. Moreover the appellant is a New Zealand resident, and he was told by the form to list all goods that he had "acquired" overseas. He certainly had acquired the goods concerned by way of purchase, overseas, and, in addition, he was an "importer" of them, as that word is used in section 27 of the Sales Tax Act. Therefore he was not only, as already appears from an earlier part of this judgment, under a duty to pay sales tax upon them, but he was also under a duty to declare them in Form 13Y.

The point for decision still remaining is this: When the appellant failed to declare the goods, did he do this "with intent to defraud the revenue"? This was really the main argument raised in the appeal. It was Mr. Crew's submission that the appellant genuinely held the belief that "acquired" meant "acquired and in his possession" at the crucial time.

There is no reference in Form 13Y to the word "possession" except in that part of it which is headed

"MINISTRY OF AGRICULTURE AND FISHERIES

AGRICULTURAL QUARANTINE CERTIFICATE";

and this is a requirement that the incoming passenger, whether he

be a resident of New Zealand or not, must indicate, on that part of the form, whether or not he has certain named items in his "possession". The appellant no doubt read this, because he answered "No" in respect of each such item. It seemed to be Mr. Crew's submission that this may have confused a person who, according to counsel, was not sufficiently conversant with the English language to make careful distinctions in respect of the words used in the form. But, of course, there is no reference at all, in the part of the form relative to the Customs Department, to the word "possession", and, indeed, it could be suggested that the use of the word "acquired" in that part conveyed a clear contrast with "possession" as being the determining factor in the other part. This, of course, was, according to Mr. Crew, subject to the same kind of comment about the appellant's alleged inabilities in connexion with the English language.

It was also suggested that the sentence on the front of Form 13Y dealing with "all your baggage - including hand baggage" could, when taken with the word "acquired", have further confused a person such as the appellant, and limited the note, in his mind, to "baggage"in his possession.

Whether or not a person has an intention to defraud another must always be decided on the basis of what, subjectively, was in the former's mind at the time. In a very large number of cases this must be a matter of inference arising out of all the relevant evidence, and creditworthiness often plays a significant part in the decision.

I should mention at this stage that section 77 of the Sales Tax Act gives the Crown, in proceedings under that Act, the

privilege that "every allegation made on behalf of the Crown in any .....information ..... shall be presumed to be true until the contrary is proved". This section was drawn to the attention of the Judge, but, for the purposes of reaching her decision, she considered that the matter of intent was "not necessarily to be presumed pursuant to the provisions of Section 77", and she finally seems to have proceeded on the basis that this element of the charge had to be proved by the prosecution to the normal standard in criminal matters, although certain facts forming part of the material from which any inference as to intent could be drawn may have come within the dispensations of section 77. However, she found that, even if that were the position, such facts had, in this case, been proved. In connexion with the intent to defraud and the application of section 77, reference was made, in the Court below, to Collector of Customs v. Blackler, a decision of Roper, J., in April 1982 and mentioned in Recent Law in its September issue of that year at page 241.

Having read her judgment carefully, I have no doubt that the District Court Judge was fully aware of, and took properly into consideration, the defence that I have been discussing. For instance, in her judgment, she said this:-

> " There is no doubt in my mind from the documentary evidence produced that the goods that I have been talking about, belonged to the defendant and of course he has confirmed that in his own evidence. He also confirmed that he didn't declare them and although in the course of his evidence there were references to safety equipment not being taxable and other matters of

that kind, finally it came down to it that because he was no (sic) carrying the goods it was his belief he had no obligation to declare them".

In the end, the Judge's decision on the vital point of the appellant's intention turned upon the matter of his creditworthiness, as is shown in the following extracts from her judgment:-

(a) "Now the defendant, of course, also made considerable play of the fact (as I gather), that English is not his first language, although he has lived here for twenty years and he is in business, although I am not aware of the nature of it. As a consequence of that he visits, for example, the United States two or three times a year and he has made it clear that his travel has been extensive and I think that it would be quite proper for me to describe him as an experienced traveller. Now that being so I find myself quite unable to accept his evidence, and it comes down to a question of credibility, quite unable to accept his evidence that he did not know what was meant by the word 'acquired'. In fact as I listened and observed him the very tenor of his evidence would show me that that was not so."

(b) " In this case certain of the allegations which are very relevant to the question of intent

are, of course, to be presumed but what is more have been proved and I have referred to some of those facts already in the conduct of the defendant and my observations of him, and the presumption I think in relation to those basic allegations would be such that I might properly draw the inference that the defendant set upon a scheme to avoid the payment of Sales Tax by spreading the burden and failing to declare himself. Having heard the defendant give evidence, it then becomes, as I said, a simple matter of credibility and I have expressed my view on that and in fact I formed so strong a view of the unreliable nature of the evidence being given by the defendant that I stopped counsel for the informant in the course of his cross-examination, and of course I only took that step because it was patently clear to me I should not place reliance on what the defendant was saying; at its simplest I don't believe him. In the face of the facts that have been presented one would have had difficulty believing him but on my own assessment of what he said I simply do not accept what he had to say. I am quite satisfied that he would have known that he ought to have declared these items and he did not do so and he would therefore of course have had the benefit of evading payment of the Sales Tax which I think was given to me as $899.00. I convict the defendant".

In connexion with this, all that I have to say is that it is my view that I have no right to interfere with such a finding as to credibility made in the Court below, and, even if I had, I should certainly not interfere with it in this instance. One only has to read the typewritten transcript of the evidence to realize how justified the Judge was in reaching the conclusion that she did.

The appeal is dismissed, and the appellant is ordered to pay costs to the respondent in the sum of $200.

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Solicitors for the Appellant: O'Donnell Wood & Partners, Auckland.

Solicitor for the Respondent: The Crown Solicitor, Auckland.