X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T.No.175/81

687

Special Consideration

Appeal reported

REGINA

v.

COOMBS

Charge: Possession of heroin for supply (1)

Counsel: P. Dacre for Crown.
D.L. Stevens for Accused.

Trial: 14, 15, 16, 17 May, 1984.

Ruling: 15 May, 1984.

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(ORAL) RULING OF VAUTIER, J.

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When the jury for the trial of this case was about to be chosen and without prior notice having been given to the Court, Mr Stevens on behalf of the accused gave notice that he wished to make application to have excluded entirely evidence proposed to be called for the prosecution as to the search of the house at Gum Road, Henderson, and the finding in the room from which the accused had, it is said, just emerged, of quantities of heroin and also a substantial amount of cash. Evidence was accordingly heard on the voir dire from Mr Hitchcock, Supervising Customs Officer, Mr Hartley, Chief Customs Officer in charge of drug investigations for Auckland and Detective Sergeant Mitford-Burgess. The point here raised is one of considerable general importance because it amounts to a challenge to hitherto accepted practices regarding searches carried out by Customs officers in relation to suspected drug offences. The evidence on the voir dire showed that entry to

the house was effected and the search carried out in terms of a warrant issued to Mr Hitchcock in terms of s.217 of the Customs Act 1966 which, so far as it is necessary to refer to its terms here, reads as follows:

> "Entry and search under Customs warrant - (1) Subject to subsection (2) of this section, any officer having with him a Customs warrant granted to him under this Act may at any time in the day or night and on any day of the week enter into, by force if need be, and search any house, premises, or place in which he has reasonable cause to suspect that there are any uncustomed goods, or any goods subject to the control of the Customs, or any goods unlawfully imported ...
>
> (2) On each occasion on which any officer proposes to use his warrant for the purposes of this section he shall first obtain the permission of the Collector, who shall not grant permission unless he is satisfied that such reasonable cause as aforesaid exists.
>
> (3) Any officer so acting under a Customs warrant may take with him and have the assistance of any member of the Police and such other assistants as he thinks necessary."

Detective Sergeant Mitford-Burgess acknowledged that the other police officers entered the house in reliance upon the Customs warrant I have mentioned and not in reliance upon any of the provisions of s.18 of the Misuse of Drugs Act, 1975.

Mr Stevens submitted that the search thus carried out was unlawful for three reasons which, stated broadly, were these: First, that there was no legal power to search for drugs the subject of control under the Misuse of Drugs Act 1975 by reliance upon a warrant issued under s.217 of the Customs Act 1966. Secondly, that apart from this the material upon which Mr Hitchcock purported to derive the reasonable

cause to suspect the presence of goods coming within the section was itself to a certain extent unlawfully obtained and, thirdly, that there were in fact no proper grounds for the reasonable cause to suspect in terms of the section and such reasonable cause, it was submitted, was a condition precedent to the exercise of the search power.

Dealing with the first of these grounds, in amplification of this it was pointed out that s.216 authorises the Comptroller to grant to any officer of Customs a warrant in the prescribed form and s.217 deals with the use of such warrants. Neither of these sections, it is submitted, has any application as regards the matter of importation or exportation of controlled drugs as both are expressly excluded from this field of inquiry by the terms of s.36 of the Misuse of Drugs Act 1975 which reads:

> "Application of Customs Act 1966 - Sections 212 to 215, 270, 271, 274 to 282 and 285 to 287, of the Customs Act 1966 shall apply in relation to the importation and exportation of controlled drugs, except controlled drugs specified or described in Part IV, Part V, or Part VI of the Third Schedule of this Act, as if such controlled drugs were restricted goods within the meaning of that Act."

It is submitted that the Misuse of Drugs Act as a whole provides a code dealing with all facets of the law relating to the importation, sale and use etc., of controlled drugs and in particular a code laying down the law with regard to matters relative to search for and seizure of such drugs. It was said that the Act as a whole provides evidence that Parliament has expressly applied its mind to the question of the application of the Customs Act in relation to the question of misuse of drugs and to the question

of the involvement of Customs officers in this field and has been at pains to spell out precisely the provisions of the Customs Act which are to have application to such matters. Attention was drawn to the fact that the sections, which are by s.36 expressly stated to have application, relate to such matters as the searching of persons on arrival in New Zealand, on boats and in vehicles and such matters with which Customs officers would clearly likely to be involved in the course of their ordinary duties.

It was further pointed out that the Customs Act was in the year following the enactment of the Misuse of Drugs Act 1975 amended by the Customs Amendment Act No. 2 1976, s.2 of which introduced a special definition of the meaning to be given to the words "unlawfully imported" when used in the Customs Act. The new provision reads:

> "'Unlawfully imported' means imported in breach of the provisions of this Act or any other Act."

It was conceded by Mr Stevens that this new definition was of importance because it could be argued that the result of this amendment was that s.217 of the Customs Act 1966, which is not of course referred to in s.36 of the Misuse of Drugs Act, thereby became applicable to the matter of searching for drugs. It was Mr Stevens' submission, however, that such an argument was not tenable. It would mean, he said, that Parliament only one year after the enactment of the Misuse of Drugs Act had impliedly amended or repealed s.36 insofar as that section did not, when it was enacted, apply ss.216 and 217 of the Customs Act to the matter of misuse of drugs at all. Such an argument, it was said,

was untenable having regard to the accepted principles of statutory interpretation considered in the light of the contents and purpose of each of the statutes. Mr Stevens here made reference to the passage in Halsbury, 4th Ed. Vol. 44, para.966 and to Maxwell on Interpretation of Statutes, 12th Ed. p.191 and particularly 193 and 196 which show that repeal of a statute by implication is not favoured and will not ordinarily be accepted as having occurred. He pointed out that the earlier and later provisions here under consideration could be construed so that effect was given to both of them without any such implied repeal of the earlier provision arising from such construction. The amendment of the Customs Act in 1976 referred to was, he submitted, intended to apply to goods imported under a number of statutes which, unlike the Misuse of Drugs Act 1975, contained no express powers of search or seizure at all. He referred to the Animals Act, the Animal Remedies Act, the Apiaries Act and various other statutes coming into this category. He also referred to the fact that the later provision in the Customs Act is worded in a general way whereas the Misuse of Drugs Act provision is of a particular nature showing that Parliament in the earlier statute directed its attention specifically to the particular case, making provision for it unambiguously, and that therefore the presumption applied that a subsequent general enactment could not have been intended to interfere with the earlier specific provision.

The argument was further supported by reference to various other provisions in the Misuse of Drugs Act 1975 which made it clear, it was said, that s.217 of the Customs Act was not intended to be and should not be applied in relation to the

question of drug laws enforcement. In this way, reference was made to s.18 of the Act which, it was said, itself represents a substantial incursion into matters of individual liberty beyond what is generally encountered. Subsections (2) and (3) of s.18 empowering search without warrant in the circumstances were referred to. It was thus, it was said, clear that Parliament had been concerned carefully to confine the powers of search to the circumstances which are set out in s.18. He adverted to the fact that subsection (2) showed that the special power there conferred was limited in its application to the search for certain drugs only. The power of search thus conferred was, in Mr Stevens' submission, clearly intended to be used in emergency situations only as there was the provision in subsection (1) applicable to the ordinary case, whereby a search warrant had to be obtained in the usual way pursuant to s.198 of the Summary Proceedings Act 1957. The point made, Mr Stevens said, was reinforced by the requirement in subsection (6) of s.18 for a special report to be furnished where the special powers contained in subsections (2) and (3) are availed of. The general effect was clearly, therefore, he submitted, that normal judicial approval should apply regarding the matter of searching for the suspected presence of drugs. In the light of all this it was submitted that when s.36 is found not to refer to s.216 and s.217 there is the clear intention evidenced that these sections should have no application in the Misuse of Drugs Act. It was further mentioned that other provisions of the Misuse of Drugs Act have shown the particular importance attached to the providing of safeguards involving judicial scrutiny, for example, s.14 of the Misuse of Drugs Amendment Act 1978 relating to interception warrants.

It was pointed out also that s.198 of the Summary Proceedings Act referred to in s.18 enables a search warrant to be obtained if there is "reasonable ground for believing" a certain situation to exist. Those same words, it was pointed out, are used also in subsections (2) and (3) of s.18 of the Misuse of Drugs Act, whereas s.217 of the Customs Act provides the lesser standard of "reasonable cause to suspect". Mr Stevens here cited the case of Seven Seas Publishing Proprietary Limited v. Sullivan and Others (1968) NZLR 663 where there are various references in the judgment of McGregor, J. to the distinction between the two tests.

There were, it was pointed out, a number of provisions in the Misuse of Drugs Act which clearly prescribe the duties of Customs Officers and their role in relation to the matter of enforcement of drug laws. Reference was made in this connection to s.18(5) and ss.12 and 13 of the Amendment Act of 1978.

The evidence elicited in the course of the voir dire showed, it was said, that the training of Customs officers was substantially less than that of police officers and Parliament would presumably be aware of this and this provided a further reason for Parliament stopping short of allowing Customs officers to embark on what was described as the complex task of determining whether there was "good cause to suspect" in the drugs area. It was thus submitted, overall, that to conclude that the powers contained in s.216 and s.217 of the Customs Act had application

to searches connected with drugs amounted to a conclusion which was clearly contrary to all those legislative indications to the contrary.

Mention was also made of the fact that when the new definition to which I have referred was introduced into s.2 of the Customs Act, s.270 relating to forfeiture in terms of the Customs Act was also amended to include a reference to goods unlawfully imported. It was submitted that it was only by reliance upon this amendment that drugs were brought within the purview of the Customs Act. Reference was here made to the recent decision of the House of Lords in Attorney-General of New Zealand v. Ortiz and others (1983) 2 All ER 93, that goods are not forfeited in terms of our Customs Act until they are seized. Attention was also drawn to the fact that when the new definition was introduced into s.2 it had to be borne in mind that this definition was subject to the introductory words of the section "unless the context otherwise requires".

Turning then to the second ground advanced as to the search in this case being unlawful, that is as to the matters relied upon being material itself unlawfully obtained, the matter here being considered of course related to the reliance placed by Mr Hitchcock and other Customs officers upon the fact that the intercepted letter contained a passport in the name of the accused showing that he had recently visited Penang, a known source of the drug heroin. In relation to the seizure of this letter it was pointed out that no unlawfully imported goods were in fact found in the letter and Mr Hitchcock's evidence showed that s.278 of the Customs Act requiring notice to be given

following seizure had not in this case been complied with. There were further submissions directed to the extent of the powers conferred in this regard. It was said that s.203 enabled an examination of the contents of the letter but did not go so far as to enable documents contained therein to be read or notation made of their contents as was clearly done on the evidence adduced in this case. It was further submitted that s.203 enables examination of goods only and this wording in the section, it was said, does not extend to documents which are items of property separately defined in s.2 of the Act. Section 217, it was pointed out, refers to goods and subsequent sections referred separately to goods and documents, for example, ss.218, 219 and 220. It was accordingly submitted that an examination of documents was unlawful and that the word "examined" in s.203 must be construed in the light of the language elsewhere used and the purpose of the section itself. Reference was made to Halsbury, 4th Ed. Vol.44, para.871. The only power conferred, it was submitted, was to determine what, in fact, the item was in order to decide whether or not it was something which was being unlawfully imported.

As to the third ground, the submission was that in fact in this case there was no reasonable cause to suspect within the meaning of those words as used in s.217. Reference was made to the decisions in Police v. Anderson (1972) NZLR 233, Police v. Cooper (1975) 1 NZLR 216 and R. v. Lee (1978) 1 NZLR 481 It was further submitted that the test was an objective test open to challenge and the testing of the weight of the material and that the phrase has been construed to mean a reasonable ground of suspicion upon which a reasonable man may act.

It was further submitted that there was no evidence submitted to establish that the Collector was in fact satisfied in terms of s.217(2).

On these various grounds accordingly it was submitted that the search was an illegal search and that it was a fundamental proposition that this Court has a discretion to exclude illegally, improperly or unlawfully obtained evidence on the grounds that it was so obtained. Mr Stevens here referred to the decisions regarding this aspect, Kuruma, Son of Kaniu v. The Queen (1955) AC 197, Herman King v. The Queen (1969) 1 AC 304, as supporting the broad proposition in the way which I have set it out above and he referred to instances of the Court of Appeal in this country dealing with the question of evidence unfairly obtained in the manner to which the Privy Council cases to which I have referred have described, e.g. R. v. Capner (1975) 1 NZLR 411 and R. v. Hartley (1978) 2 NZLR 199. Reference was also made to the recent decision of Casey, J. in R. v. Hannah, Parker and Ommeren, T.58/83, Auckland Registry, Ruling 15 February, 1984.

There was also reference made by Mr Stevens to Australian decisions, namely Wendo and Others v. The Queen (1964) 109 CLR 559, Bunning v. Cross (1978) 19 ALR 641 and the supplement to Cross on Evidence, (5th New Zealand Ed. Supplement No. 1) where the criteria which were referred to in the case of Bunning v. Cross (supra) abovementioned were summarised.

As to the submissions relating to the first ground advanced in this matter, that is to say the effect of s.36 and the other sections of the Misuse of Drugs Act referred to,

I find myself unable to accept the reasoning which has been put forward and I prefer and adopt the contrary submission advanced by Mr Dacre for the Crown. There is, in the first place, in my view, an obvious reason for the inclusion in s.36 of the Misuse of Drugs Act 1975 of the various sections of the Customs Act 1966 there mentioned and for the specific provision made in relation to them. Sections 216 and 217 of the Customs Act are not, of course, expressly excluded in any way as it was put by Mr Stevens. They are simply not mentioned. The reason in my view is simply that the draftsman no doubt thought it unnecessary to do so having regard to the purpose for which s.36 was included. The sections which are specifically referred to are so included in my view because of the desire and intention to make use for the purposes of the Misuse of Drugs Act 1975 of various provisions of the Customs Act giving powers to Customs officers with regard to what are termed "restricted goods". The Customs Act provisions which are thus adverted to could not be availed of in relation to illegally imported drugs without such a provision as was made in s.36 because "restricted goods" under the Customs Act which are the only category under which illicit drugs could be conveniently brought in terms of the various provisions referred to are so defined in the Customs Act as to make it clear that drugs would not fall within them. The definition in the section shows that the term "restricted goods" within the meaning of the phrase as used in the Act is limited to goods the importation or exportation of which is prohibited by the Customs Act and that, of course, had no application as regards drugs. By means of the language employed in s.36, however, these various obviously useful sections are incorporated into the drug misuse Legislation. Now, of course, by virtue of the amendment to s.270 there is a reference in the

Customs Act which embraces drugs imported contrary to the terms of the Legislation but this, of course, was not so at the time when s.36 was being drafted. In any event it is limited to sections in which the phrase "illegally imported" is to be found. The powers which are incorporated into the Misuse of Drugs Act by s.36 such as those contained in ss.212 to 215 enabling Customs officers to search persons arriving in the country and so on, as I have previously mentioned, are obviously very essential and necessary powers in relation to the matter of detection of drug offences. In my view Customs officers and not police were obviously the most appropriate officials to carry out duties of this kind. The situation however when the Misuse of Drugs Act was drafted and enacted in 1975 was quite different as regards s.217 of the Customs Act from that pertaining with regard to all the sections specifically mentioned in s.36. That section already had in it a reference to goods unlawfully imported and on the ordinary English meaning being attributed to those words it could certainly be said that the provision as it stood was wide enough to enable searches to be effected in terms of that section for suspected illegally imported drugs. In any event, however, in the following year there was the amendment made to s.2 of the Customs Act and that of course made it clear beyond all doubt that it was not only goods unlawfully imported under the Customs Act that were to be regarded as being referred to when those words are used throughout the Customs Act but also goods unlawfully imported under any other statute. It may indeed, I think, be to dispel any possible doubt on this matter that the amendment was effected to s.2 of the Customs Act and to s.270. I do not find myself able to conclude, therefore, that simply because s.36 does not specifically apply in its terms to ss.216

and 217 that it shows an intention that those sections should have no application. The question of implied repeal accordingly does not in my view arise and I conclude that the warrant issued to Mr Hitchcock was available for the purpose of search for illegally imported drugs.

As regards the second point, that is to say that the material upon which the suspicion was formed was in part illegally obtained, reliance was, I have mentioned, placed on the fact that no seizure notice had been given under s.278 but it is to be noted, of course, that that section provided that no seizure made is to be invalidated or rendered illegal by failure to give such notice. In any case I am satisfied that the accused was verbally informed of the seizure of the letter and I would not regard the search as being illegal on this basis.

It is said that having regard to the decision previously mentioned, Attorney-General of New Zealand v. Ortiz and Others (supra) it was not permissible for the Customs Department to rely upon s.270 as authority for the seizure of the letter from the Post Office. This argument, I think, may overlook the fact that there is a right in s.203 to examine goods reasonably suspected to be subject to control of Customs and also may overlook the fact that the Court in the Ortiz case was concerned with the application of s.274 and not s.270 of our Customs Act.

I am not satisfied in the fairly brief time which has been available to me to consider the points that there was any actual invalidity or illegality in relation to the obtaining of

the postal package and the examination of its contents. With regard to the latter point, the separate reference to documents in the Customs Act is clearly necessary because of the fact that in many instances powers are given with relation to documents which have a bearing on the question of the dutiability of goods and the like. The fact that the documents are separately referred to in this way does not in my view carry with it the consequences when goods are referred to in s.270, this term cannot be construed as wide enough to include documents.

As regards the third ground, that is to say that there was here no reasonable cause to suspect the presence of illegally imported goods, this of course is a matter of fact and on the basis of the evidence which has been adduced I conclude that the officer did have reasonable ground for forming the suspicion as required by the section. I derive assistance as regards this aspect of the matter from the authority to which Mr Dacre referred, Meates v. Attorney-General (Customs Department) (1981) 2 335, where a Judicial Review was being sought of the acts of Customs officers relating to searches carried out pursuant to s.217 of the Customs Act. The evidence adduced is such in my view as to cause me to accept, as did the Judge in that case, that the Collector himself was satisfied of the existence of reasonable cause so as to be acting in compliance with s.217(3) of the Act.

Even if I am wrong in my conclusions as regards any of the matters which I have discussed up to this point, the situation in my view is, however, in any event, that the evidence could not be excluded by me because of the established law relating to

evidence obtained by means of an illegal search or other illegal means. The authorities which are binding upon me do not in my view go nearly as far as to validate the very broad submission made by Mr Stevens. The fact that there has been some illegality or non-compliance with statutory requirements in the carrying out of a search is not, as I understand the decided cases, in itself a ground for rejecting the evidence. The two Privy Council decisions already referred to make that in my view completely clear. In England, of course, the point has been reinforced and indeed extended by the decision of the House of Lords in R. v. Sang (1980) AC 402. It is unnecessary, however, in this case to place reliance upon the broader basis of the law to which Sang refers. Mr Stevens made reference to certain Australian decisions to which I will refer in a moment but I must note that Kuruma v. The Queen (supra) has been applied and accepted as stating the law in this country. As is pointed out in the case mentioned by Mr Stevens, R. v. Lee (supra) the Judge there, at p.487, said:

> "I do not think that it has ever been doubted that Kuruma's case applies in New Zealand. It was adopted by Wild CJ in Mathewson v. Police (1969) NZLR 218. See also McFarlane v. Sharp (1972) NZLR 838."

It has to be noted that the Courts in England have consistently applied the principle that evidence is not rendered inadmissible by reason of its being obtained illegally and in Jeffrey v. Black (1978) 1 All ER 555, a decision of the Court of Criminal Appeal, the headnote reads thus:

> "A judge at a criminal trial had a discretion not to allow evidence to be called by the prosecution which would be unfair or oppressive but the discretion to exclude evidence

> should be exercised only in exceptional cases. The fact that evidence had been obtained in an irregular manner was not of itself sufficient ground for the exercise of the discretion in favour of the defendant."

Mr Stevens indeed has been unable to refer me to any decision in which evidence has been excluded solely upon the basis of it being illegally obtained.

The High Court of Australia decision in Wendo and Others v. The Queen (supra) states the position, according to the head-note, to be as follows:

> "The fact that relevant evidence has been unlawfully or irregularly obtained does not, in itself, afford a reason for refusing to admit it, although the fact that it has been so obtained is a matter to be considered, along with all other relevant circumstances, in determining whether the evidence should be admitted."

With regard to the Australian decisions referred to, however, it must also be noted that it has been acknowledged that decisions in Australia, including the case of Bunning v. Cross (supra) and the earlier decision in R. v. Ireland (1970) ALR 727, to which Mr Stevens referred, are at variance with the decisions of the Judicial Committee and the House of Lords. In the judgment of the Chief Justice in Cleland v. R. (1982) 43 ALR 619, at p.623, there is a passage reading thus:

> "R. v. Ireland and Bunning v. Cross are at variance with decisions of the Judicial Committee and the House of Lords: Kuruma v. R. (1955) AC 197; R. v. Sang (1980) AC 402; (1979) 2 All ER 1222: see also Morris v. Beardmore (1981) AC 446; (1980) 2 All ER 753. In R. v. Sang, where the question was fully considered, the House answered the question put to it as follows:

> '(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.'"

As I have said it is unnecessary to take the matter as far as that in the particular case but I certainly am not at liberty in my view to prefer decisions in Australia to those of the Privy Council.

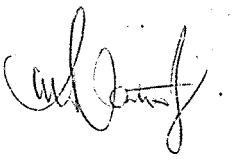
As regards the question of the rejection of the evidence on the basis of the general discretion of a trial judge to exclude evidence the prejudicial effect of which outweighs its probative value, there can of course here be no question of the exercise of such a discretion being called for. The evidence is of vital importance to the Crown case and indeed Mr Stevens conceded that in the Australian decision of Bunning to which he referred, it was accepted that the fact that other evidence was not available on the point in issue was a contra indication to the exclusion of the evidence.

There is also in my view nothing whatever here presented to indicate that there is an element of unfairness presented apart altogether from questions relating to the construction to be placed upon the statute and the questions as to alleged illegality. In this regard Mr Stevens did put forward a number of submissions on the basis that the police were in fact misusing

the procedure of making searches for illegal drugs by reliance upon the fact that Customs officers could obtain and act upon warrants upon the terms of ss.216 and 217. He referred to the evidence he elicited as to there being an agreement between the Police Department and the Customs Department and suggested that there was a deliberate arrangement to act upon the basis of Customs warrants in order to evade or avoid the necessity to utilise the search warrant procedure under the Misuse of Drugs Act. There is no evidence before me to substantiate any of these matters nor do I conclude that there is any real basis for the suggestions which were thus advanced. Clearly the Customs Department and the police have a dual role to play in relation to this matter of drug law enforcement. The Customs Department, from the nature of their duties relating to the importation of goods into New Zealand, are clearly in the best position and the most administratively convenient position to carry out many facets of the investigation of illicit drugs most of which, of course, come into this country from overseas.

I therefore consider that the suggestions as to the law being improperly used in some way because of the collaboration between the Customs Department and the police in these matters are completely unfounded. Much was made of the fact that the Detective Sergeant conceded in his evidence that he regarded himself as being in charge of the operation on this particular morning. That may appear to be not quite in accord with the way in which s.217(3) is phrased but I cannot regard that matter as having any significant importance for the very reasons which were referred to by Mr Mitford-Burgess in his evidence.

Accordingly, the objection to the admission of the evidence is disallowed.



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