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IN THE HIGH COURT OF NEW ZEALAND No. M1431/91
AUCKLAND REGISTRY

633

IN THE MATTER of an Information in
Rem under s280 of the
Customs Act 1966

BETWEEN THE COLLECTOR OF CUSTOMS

Plaintiff

AND ONE HARLEY DAVIDSON
MOTORCYCLE AND OTHER
ARTICLES imported into
New Zealand by David
Michael Glavish and Fred
Peter Manukau

Defendant

Date: 5 February 1993

Counsel: M Ruffin for plaintiff
 D Ryken for David Michael Glavish

Judgment: 29 April 1993

HIGH
PRIORITY

JUDGMENT OF HILLYER J

This is a proceeding for condemnation under s280 of the Customs Act 1966. The dispute in this case depends upon the interpretation of s272 of the Customs Act. That section reads:

"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 Collector of Customs submits that a Harley Davidson motorcycle purchased by Mr Glavish, in the United States, was used "in the importation and conveyance of prohibited imports" and is thus subject to forfeiture to the Crown. Mr Glavish disputes the forfeiture and condemnation of the motorcycle.

Mr Glavish purchased the Harley Davidson motorcycle during a visit to the United States of America in 1990. In his evidence, he stated that it had always been a dream of his to own a top quality Harley Davidson and so when the opportunity to purchase one arose at the motorcycle convention he was attending, he took advantage of it.

In order to transport it back to this country, the motorcycle was packed in a crate belonging to a friend, one Fred Manukau. The motorcycle was duly declared to Customs. To ensure that it would not be damaged in transit, various items were placed around the motorcycle. Many of these items were dutiable and, not having been declared, were liable to forfeiture pursuant to s270(f) of the Act. Mr Glavish does not dispute that forfeiture.

For present purposes, the important thing is that two firearms were found concealed on the motorcycle when Customs officers searched the crate. One, a .39 Smith & Wesson special CTG revolver, was hidden in the backrest, and the second, a Jennings J22 LR.22 calibre pistol, was hidden between the twin fuel tanks of the motorcycle. These were prohibited imports. Six cases of .22 ammunition and five cases of .38 ammunition were also found in a shoebox in the crate.

Mr Glavish says he knew nothing about the presence of the firearms on the body of the motorcycle. Mr Ruffin, for the Customs, did not dispute his ignorance

regarding the presence of the firearms in the crate, but contended that, for the purposes of these proceedings, such ignorance was irrelevant.

Actions for condemnation of forfeited goods have a long history (see *Forbes v Traders Finance Corporation Ltd* (1971) 126 CLR 429 at 441 per Windeyer J) and this history is notable for its severity. One aspect of this severity is the reversal of the burden of proof - see s299 of the Act, and a second is that innocence on the part of the true owner of the goods in question is no defence to forfeiture and condemnation. *Attorney-General v Graham* [1966] NZLR 807; *Forbes* (supra); *De Keyser v British Railway Traffic and Electric Co* [1936] 1 KB 224 (DC). Thus, should the plaintiff succeed in his argument that the motorcycle was a "vehicle used ... in the importation or conveyance of prohibited imports or forfeited goods", I have no discretion as to the appropriate order to make. Forfeiture automatically follows. As Richardson J, delivering the judgment of the Court of Appeal in *Minister of Customs v Admail International Ltd* (CA 71/89 31 October 1989) however said:

"But at the end of the day the crucial question is to ascertain the intention of Parliament as expressed in the legislation. In some cases, of which in my view this is one, neither consideration of the broad purposes of the legislation nor comprehensive analysis of the total scheme of the legislation may provide an immediate answer."

Bearing these matters in mind, I turn to the problem in this case; was the Harley Davidson motorcycle a vehicle used for the proscribed purposes set out in s272 of the Customs Act 1966?

Mr Ryken for Mr Glavish submitted that the motorcycle was not a "vehicle" because it was not under motive power. He submitted the motorcycle was a "thing" used

for importation, but not a "vehicle" used for importation, and that s272 does not cover goods used in the manner in which the motorcycle was being used in this case. He referred to s141(1) of the Customs and Excise Management Act 1979 (UK) which renders liable to forfeiture "any other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture..." It appears plain that this case would lead to forfeiture in the United Kingdom because it is indisputable that the motorcycle was used to conceal forfeitable goods.

Mr Ruffin however, submitted that because motorcycles are vehicles, this one came within the section.

Section 272, it seems to me, envisages the forfeiture of the means of transport used. The things subject to forfeiture under the section are all modes of transport that could be used to bring forfeitable goods into the jurisdiction or to carry them away, for example from the wharf, as in an unreported decision of Vautier J, "In the matter of a motor vehicle imported into New Zealand by Eric Bruce Hutton." (13 October 1981 M1698/80 Auckland Registry) and *Forbes v Traders Finance* (supra).

The section refers to vessels (under 50 tons) aircraft and animals as well as vehicles, all ways of transporting goods..

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 bodywork of a piece of cargo. I agree with Mr Ryken that the motorcycle in this context, was in reality a thing inside a crate which happened to be accompanied by prohibited imports. It was not at the time a vehicle. Parliament could have made goods used

to conceal contraband subject to forfeiture (cf s141, Customs and Excise Management Act 1979) but, on my reading of s272, it has not done so.

Thus I hold that the Harley Davidson motorcycle is not subject to forfeiture.

Mr Glavish is entitled to costs, which I fix at \$1000 plus disbursements if any, to be settled by the Registrar.



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P.G. Hillyer J

Solicitors

Haigh Lyon for plaintiff

Crown Solicitor, Auckland for defendant

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