

DISTRIBUTABLE (45)

Judgment No. S.C. 102/83

Crim. Appeal No. 196/83

AHMED MOHAMED LAMBAT v THE STATE

SUPREME COURT OF ZIMBABWE,
BECK, ACJ & GUBBAY, JA,
HARARE, SEPTEMBER 26 & OCTOBER 11, 1983.

A.J. Traicos, for the appellant

M. Werrett, for the respondent

GUBBAY JA: The appellant was charged in the Magistrate's Court, Masvingo, with the crime of contravening s 157(2)(b) of the Customs and Excise Act [Cap 177]. The charge sheet alleged that on 17 November 1982 he wrongfully and unlawfully and otherwise than in accordance with the provisions of the Act, bought or received or had in his possession, goods required to be accounted for by that Act or any law relating to customs and excise, before they had been so accounted for. The goods consisted of wristwatches, fishing rods, reels and accessories, and padlocks, all of foreign manufacture.

The appellant, who was unrepresented, tendered a plea of guilty. The prosecutor accepted the plea and requested the magistrate to proceed in terms of the procedure outlined in s 255(2)(b) of the Criminal Procedure and Evidence Act [Cap 59]. That provision requires that the charge and the essential elements of the offence be explained to the accused person and that he be asked if the explanation is understood and whether his plea of guilty is an admission of the elements of the offence.

The record of the proceedings relative to the application by the

magistrate of s 255(2)(b), reveals the following interchange between him and the appellant

"Did you have all those goods that are mentioned in the charge and the Annexure in your possession? Yes

And were these goods accounted for to the Customs in accordance with law? Yes.

They were accounted for to the Customs? How do you mean if they were accounted for?

Well, were they imported and had they been dealt with in this country in accordance with the provisions of the Customs & Excise Act, had duty been paid on

them, had they been declared? No, they were not.
No.

How were they obtained, very briefly? Through various sources that came. There were some salesmen that came and offered these goods to us, or to my sons, or people that are managing my businesses.

And they hadn't been declared to Customs and no duty paid? At the time when we purchased we didn't realise that this was smuggled goods.

And when did you become aware of that? When the Customs approached us and told us that these goods were not through the proper channels.

Did you take any steps to make sure that they had been lawfully imported? I accepted the word of the Customs that they were not lawfully (indistinct)

And prior to that, did you take any steps? No."

Being of the opinion that the appellant had understood the charge and by his plea intended to admit every essential element of the offence, the magistrate entered a plea of guilty. Thereupon the prosecutor produced a statement of facts which was read to and accepted by the appellant. The magistrate duly returned a verdict of guilty and adjourned the trial to enable the prosecutor to ascertain whether the appellant had any previous convictions.

At the resumed hearing an application was made on behalf

behalf of the appellant, who was then represented by a legal practitioner, to withdraw the plea of guilty and require the prosecution to proceed to trial.

The magistrate refused the application. He sentenced the appellant to a fine of \$3 000 and also ordered that the goods, the subject of the offence, be declared forfeited to the Controller.

An appeal was noted to this Court against both conviction and sentence.

Mr Traicos, who appeared for the appellant, challenged the conviction on two fronts. In the first place, he contended that the magistrate had failed to meet the requirements of s 255(2)(b) in that he had inadequately explained the essential elements of the offence to the appellant and so had erred in finding that the appellant had thoroughly understood the charge and admitted all the essential elements. And secondly, that the magistrate had exercised his discretion unreasonably in refusing to permit the appellant to withdraw his plea of guilty and substitute one of not guilty.

It is only necessary to deal with Mr Traicos' first point for Mrs Werrett, on behalf of the State, conceded in argument that it was well taken. That concession was, in my view, properly made.

It is apparent from the passage of the record quoted above that in purporting to explain the essential elements of the offence, the magistrate neglected to ascertain from the appellant whether at the time the goods came into his possession he was aware that they had not been cleared by Customs or had not been accounted for.

Although the Act cast an onus on the appellant to prove such lack of knowledge on a balance of probabilities, it was nonetheless incumbent upon the magistrate to make the enquiry.

Moreover the magistrate should have been put on his guard by the appellant's replies to questions asked of him, that it was only after he had been informed by Customs officials that the goods had not been cleared through the proper channels that he appreciated they had been smuggled. The appellant's approach appears to have been that if in fact the goods had not been cleared by Customs or had not been accounted for by the importers, his subsequent acquisition of them was tainted, thereby precluding any defence to the charge. It was the magistrate's duty to correct that mistaken Impression of the law. Had he done so it is doubtful, to say the least, whether the appellant would have elected to maintain his plea of guilty.

In response to the notice of appeal the magistrate has contended that the appellant's acceptance of the statement of agreed facts amounted to an admission that he knew from the outset that the goods had, not been customs cleared. I do not agree. Nowhere in that statement is such knowledge specifically alleged. Clearly the admission of such an essential element of the offence should not be left to inference. It must be made in unequivocal terms.

In the result I am satisfied that it has not been shown that the appellant, who is not versed in the law, understood and admitted the charge and its elements.

In the circumstances the only proper course for this Court to adopt is to set aside the conviction and sentence,

sentence, permit the appellant to enter a plea of not guilty and remit the case for

retrial before, a different magistrate. It is ordered accordingly.

There was some debate before us as to whether it would be appropriate to further order that in the event of the appellant being convicted he was not to be visited with a sentence in excess of that originally imposed upon him. I do not consider it advisable to so fetter the discretion of the subsequent trial court; for the degree of the appellant's moral blameworthiness may conceivably be shown, on the evidence adduced before that court, to be greater than that which emerges from the statement of agreed facts produced at his former trial.

BECK ACJ: I agree.

Winterton, Holmes & Hill, appellant's legal representatives.