JOSEPH FINESTONE ..... APPELLANT

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

1953

*Apr. 28, 29
*Jun. 26

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Evidence—Exporting to destination not authorized by permit—Entry on bill of lading made by customs officer pursuant to duty under foreign law—Whether admissible—Error and defect in notice of appeal—Export and Import Permits Act, 1947, c. 17, ss. 5, 13—Criminal Code, s. 1018(2).

The appellant was charged with having exported tin plate from Canada to an ultimate destination not authorized by his permit for the export, issued under the *Export and Import Permits Act*, 1947, c. 17. The goods were to be shipped from Montreal to New York for furtherance to a South American country. The evidence consisted of a customs bill of lading, produced from the records of the Collector of Customs at New York, on which a signed entry was endorsed to the effect that the goods had been shipped from the United States destined to a

*PRESENT: Taschereau, Rand, Kellock, Estey and Locke JJ.

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European country. The bill had been prepared for admittance of the goods to the United States and was required by the law of that country.

Held: As to counts other than 6 and 7, the document was admissible.

Held further: As to counts 6 and 7, the copies of documents before the Court were improperly admitted and the appeal as to these counts was allowed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the trial judge's decision and convicting the appellant.

A. Tourigny Q.C. and J. Drapeau for the appellant.

G. W. Hill Q.C. and J. G. Ahearn Q.C. for the respondent.

The judgment of the Court was delivered by:—

RAND J.: The charge against the accused was for exporting tin plate from Canada to an ultimate destination not authorized by the permit for the export, and the substantial question in the appeal concerns a rule of evidence.

The goods were shipped from Montreal to New York for furtherance by water to a country in South America on bills of lading showing the accused to be the shipper. For admittance to the United States at the border point, what is called a customs bill of lading is made out by the railway on behalf of the shipper from the information furnished on the bill of lading; and since, on such a transit through the United States, the goods must be in bond, the customs bill of lading, supplemented, undoubtedly, by an official seal placed on the car, evidenced the receipt of the goods from the Customs authorities and committed them to the Collector of Customs at New York. The document was produced in court from the records of the Collector by his assistant solicitor. Endorsed on it was a signed entry that the goods had been shipped from the United States destined to a European country.

That control of the goods by the customs department of the government, effected by the customs bill of lading, was required by the law of the United States. In order that the transit be cleared, it was necessary that the goods should be exported and the entry to that effect on the records of the Customs Collector made in the course of public duty authenticates that fact. The document accepted in evidence contained such a record, and the question is whether it was admissible.

(1) 16 C.R. 41.

The argument made to us somewhat confused the admissibility of an entry made strictly in the course of business and one made pursuant to a public duty. The rule in relation to the latter does not seem ever to have been doubted. As early as 1785 in *R.* v. *Aickles* (1), it is said:

> The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.

In *Doe* v. *France* (2), Erle J. says:

> It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth.

In *Irish Society* v. *Bishop of Derry* (3), *Parke B.* says:

> The bishop in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received.

In *Richardson* v. *Mellish* (4), in admitting a list showing the names, capacities and descriptions of all persons embarked on a ship, Best C.J., overruling an objection, said:

> For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of 53 Geo. III, cap. 155. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which sailing instructions, the list of convoy, and the list of the crew of a ship are admissible.

The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy. They have equal force in the case of an entry made pursuant to a duty under a foreign as well as a domestic law; *People* v. *Reese* (5) (Cardozo C.J.). In the infinite variety of commercial relations we have with the United States, it would be virtually impossible in such a case as that before us to establish proof if this long accepted rule could not

(1) (1785) 1 Leach Cr. L. 390 at 392.
(2) 15 Q.B. 758.
(3) 12 Cl. & F. 468.
(4) 2 Bing. 229, 240.
(5) 258 N.Y. 89.

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be invoked; and since the Court retains a discretion in admitting the document, any special circumstances tending to qualify the dependability of the entry would be subjected to judicial scrutiny.

It was urged by Mr. Tourigny, however, that for two of the shipments there was no evidence that the ultimate destination had been other than that authorized by the permit. The original documents in the office of the Customs Collector in New York had been mislaid and were not available and photostat copies tendered were rejected; there is, therefore, no evidence of the destination of export from New York before the Court. It is necessary, then, to consider, first, the precise requirement of the permit that is alleged to have been violated and the extent to which that violation can be said to be shown by the documents before us.

Sec. 5 of the *Export and Import Permits Act* reads:

> No person shall export or attempt to export from Canada any goods included in a list established pursuant to section three of this Act except under the authority of and in accordance with a permit issued under this Act.

The permit given the accused is headed "Application for permit to export war materials and other goods"; the name of the consignee is Charles Brauner, New York; the country of ultimate destination is stated to be Peru; and the application is granted "subject to the conditions entered on the reverse side of this permit." No such conditions are shown.

All that can be deduced from this, as the charge laid shows, is that to be exported in accordance with the permit, the goods must have as their ultimate destination a point in Peru.

The first of these two counts, No. 6, is supported by bill of lading for Car No. 29107 stated to have been shipped in bond to New York City for export "under T. & E. entry to Callao, Peru."; the second, No. 7, by bill of lading for Car No. 144541, shipped likewise in bond to New York for export "under T. & E. entry to Callao, Peru." The former is endorsed "intended for S.S. *Copgapo,* Chilean Line"; the latter "intended for S.S. *Santa Louisa,* Grace Line." I am unable to see how it can be contended that these acts of the accused in Canada contained in the directions and entries on the bill of lading can be taken to evidence a shipment in violation of the permit.

A further point was taken that the notice of appeal by the Crown was insufficient. There was admittedly an error in the description of the charges from the acquittal on which the appeal was being taken; but the references to the Court and to the dates of the adjudications made clear to the accused both the error in the description and the judgments against which the appeal was being taken. Mr. Tourigny frankly conceded that the accused was in no way misled.

Under sec. 1018 (2) of the *Criminal Code* the time within which notice of appeal may be given may be extended at any time by the Court of Appeal. The point was considered by that Court in this case, but was rejected, which can only mean that the notice was dealt with in such a manner as brought the appeal properly before the Court. There is no question of the jurisdiction to do that and we would not interfere with a discretion so exercised.

I would, therefore, allow the appeal as to counts 6 and 7 and dismiss it as to the others.

Appeal dismissed except as to counts 6 and 7.

Solicitors for the appellant: *A. Tourigny and J. Drapeau.*

Solicitors for the respondent: *G. W. Hill and J. G. Ahearn.*