

In The Supreme Court

*Public Law Division*

**BETWEEN**

**RYAN CARTWRIGHT**

*Applicant*

**V**

**THE ATTORNEY GENERAL**

*Respondent*

**BEFORE:** The Honourable Mrs. Justice Deborah Fraser

**APPEARANCES:** Mr. Bjorn Ferguson for the Applicant  
Mr. Kendall Carrol III for the Respondent

**HEARING DATE:** 3<sup>rd</sup> May 2022

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**DECISION**

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*Applicant's Article 20(5) Constitutional right - Fraud By False Pretenses- Article 28 of the Constitution- Section 290 of the Customs Management Act 2011- Customs Broker - Comptroller of Customs - Quasi-judicial - autrefois convict*

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**FRASER, J**

1. This matter concerns the issue of the contravention of the Applicant's Article 20(5) constitutional right. The Comptroller of Customs, on 23 February 2016 issued a fine to the Applicant of \$221,866.50 after he admitted to offences against the Customs Management Act of The Bahamas during his time as a Customs Broker. The Applicant, Ryan Cartwright now stands before the Magistrate Court charged with one (1) count of **FRAUD BY FALSE PRETENSES** contrary to section 348 of the Penal Code, being count 4 on the charge sheet in these circumstances which was related to entry #1056 on the Customs Form C.52.
2. It is the Applicant's case that the offence has already been dealt with under the Customs Management Act, 2011 and cannot be tried again as the principle of *autrefois convict* applies. The Respondent contends that the Applicant has not been tried in relation this matter, and therefore Article 20(5) of the Constitution does not apply. Furthermore, the Respondent believes that bringing this matter before the Supreme Court as a constitutional motion is an abuse of process and that the Respondent has an alternative method under Article 28 of the Constitution.

**Affidavit of the Applicant**

On 31 January 2018 an Affidavit was filed herein on behalf of the Applicant, the relevant portion states:

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4. *I am a Customs Broker by profession.*
  5. *I have been charged with several offences of Fraud by False Pretenses under the Penal Code. I now stand before the Magistrate's Court in order to defend those charges.*
  6. *That prior to being brought before the Magistrates Court, I elected to be dealt with by the Comptroller of Customs for a number of offences under the Customs Management Act.*
  7. *That the Comptroller of Customs in relation to Entry No.1056 and the offences were compounded. The Comptroller of Customs then instituted a fine for the matter concerning entry no. 1056 which is now before the Magistrates Court under the Penal Code as Fraud by False Pretence.*

8. *That I represented myself initially before the Magistrates Court and told him I was already tried in relation to entry no. 1056 (Count no.4).*
9. *I then retained Mr. Bjorn Ferguson to represent me during the remainder of the trial. I was present and saw the exchange between my attorney and the court in reference to the plea of autre fois convict and the issue he raised in relation to the infringement of my constitutional right.*
10. *That Magistrate Samuel Mckinney insisted that the matter proceed and that count 4 remain before the court as a charge.*
12. *That the facts from the matter relating to entry no. 1056 are now before the court and Customs Officers are being called as witnesses in the prosecution's case before Magistrate Samuel Mckinney.*
13. *That the prosecution has provided no special circumstance to warrant or justify having me tried again on the same facts.*
14. *That this has severely prejudiced my defence and this amounts to an abuse of process.*
15. *I verily believe that my right to the protection under Article 20(5) of the Constitution is being breached as a result of me being prosecuted again under the Penal Code”.*

### **Affidavit in Response**

3. By an Affidavit of Stephon Coleby, filed herein on 6 May 2021, the Respondent opposed this application. The relevant statements of the Affidavit are as follows:

*“6. That the Applicant admitted to having committed these breaches of the Customs Management Act (2011) contrary to Section 104 and punishable under Sections 264 and 265, and after the Applicant admitted that he committed the offences he agreed to have the matter dealt with by the Comptroller of Bahamas Customs under Section 290 of the Customs Management Act.*

7. That the Applicant opted to have the matter adjudicated by the Comptroller of Customs, thus having signed the Request for Compounding of An Offence (Form c-52) on 23<sup>rd</sup> February, 2016 is hereby marked, attached and exhibited as "SC2".

11. That three Customs personnel have testified in the matter involving the Applicant before Magistrate Samuel McKinney in the matter relating to entry no 1056. These Officers were Senior Customs/Revenue Officer Cranston Evans, Grade I Customs/Revenue Officer Shawn Smith and Grade II Customs/Revenue Officer Nadia Coleby.

12. That this Office can only speak to the breaches of the Customs Management Act (2011) for which the Applicant has compounded the offence and has been fined in accordance with the power allotted to The Bahamas Customs Department.

13. That in relation to the matter before the Magistrate Court, between Mrs. Karen Silverman and the Applicant, the transaction between both is out of our purview. That in relation to the fraud matters in which the Applicant is before the Magistrate Court charged for defrauding Mrs. Karen Silverman count numbers 1, 2, 3, 6, and 7 were withdrawn by the Police Prosecution on the 24 July, 2017.

14. That the Applicant is still charged before the Magistrate Court in relation to the fraud matters involving Mrs. Karen Silverman in regards to count numbers 4, 5, and 8 of the fraud matters".

### **Issues**

The Court will consider two issues in this matter and they are:

- (1) Whether the Applicant has an alternate means of recourse in accordance with Article 28 of the Constitution?
- (2) Whether the Applicant's Article 20(5) rights are being contravened?

### **Applicable law**

4. The subject of this Constitutional Motion is Article 20(5) which states as follows:

**“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.”**

5. The Respondent in this matter has alleged that there are alternative means of redress available to the Applicant in these circumstances in accordance with Article 28 of the Constitution which states:

**“28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress...”**

6. The Applicant has relied on section 290 of the Customs Management Act 2011 to support his position:

**“290. Compounding of offences by the Comptroller.**

**1) Subject to subsection (2), where the Comptroller is satisfied that a person has committed an offence under this Act in respect of which a fine is provided or in respect of which anything is liable to forfeiture, the Comptroller may-**

**(a) compound the offence and order the person to pay such sum of money, not exceeding the amount of the fine to which the person would be liable if he were convicted of the offence, as he may think fit; and**

**(b) order anything liable to forfeiture in connection with the offence to be forfeited.**

2) **The Comptroller shall not exercise his powers under this section unless the person admits in writing that he has committed the offence and requests the Comptroller to deal with the offence under this section.**

3) (a)

(b)

(c)

**(d) the offender shall not be liable to any further prosecution in respect of the offence;**

4) **Notwithstanding subsection (3)(d), where any prosecution brought it shall be a good defence for the offender to prove that the offence with which he is charged has been compounded under this section”(emphasis mine)**

7. The multiple offences which the Applicant was charged are in relation to the following sections of the Customs Management Act (hereinafter referred to as the ‘Act’) :

**264. Offences in relation to entries.**

(2) A person commits an offence who

(a) fails to make an entry required under this Act: or

(b) makes or signs, or causes to be made or signed, or submits or causes to be submitted to the Customs authority, an entry required under this Act that is erroneous or defective in any material particular.

(2) A person who commits an offence under this section shall be liable on summary conviction to imprisonment for a maximum term of three year or to a maximum fine of ten thousand dollars, or to both such fine an imprisonment.

**265. Offences in relation to other declarations and documents.**

(1) A person commits an offence who -

(a) makes or causes to be made any declaration, certificate, application, or other document, or written statement, under this Act that is false or incorrect in any material particular: or

(b) produces or delivers to a Customs officer any document that is erroneous in any material particular.

(2) A person who commits an offence under subsection (1) shall be liable on summary conviction to imprisonment for a maximum term of **three years** or to a maximum fine of ten thousand dollars, or to both such fine and imprisonment.

- (3) A person, with respect to a document that is required under this Act or that is used in the transaction of any business relating to an assigned matter under this Act-
- (a) who counterfeits or falsifies that document;
  - (b) who knowingly accepts, receives or uses any such document so counterfeited or falsified;
  - (c) who alters any such document after it has been officially issued; or
  - (d) who produces or delivers to a Customs officer any document that is not genuine;

commits an offence and shall be liable on summary conviction to imprisonment for a maximum term of **three years**, or to a maximum fine of ten thousand dollars, or to both such fine and imprisonment.

8. The Applicant, in the Magistrates Court has been charged with section 348 of the Penal Code, Chapter 84, namely: Fraud by False Pretenses which states:

**“Whoever defrauds any person by any false pretence shall be liable to imprisonment for five years.”**

The particulars are that on Tuesday 12<sup>th</sup> August, 2014 at New Providence, with intent to defraud, and obtain from Ms. Karen Silverman the amount of \$18,636.00 by means of false pretenses.

## **DISCUSSION**

9. The Applicant has exercised his rights in accordance with the provisions of the Customs Management Act, 2011 and sought to have his matter addressed by the Comptroller. As required, the Applicant admitted to having breached the Act. In short the Applicant has complied with the obligations of section 290 of the Act and legally opted for the matter to be dealt with by the Comptroller. He was subsequently punished in accordance with section 264 and 265 of the Act as of 24 March 2015.
10. Counsel for the Respondent submitted that the bringing of this matter is an abuse of process and relied on the Privy Council case of **Kemrajh Harrikssoon v The Attorney General of Trinidad and Tobago** to support his point. The case of **Harrikssoon** is distinguishable from this one in that it did not concern a Constitutional right; this can be seen from the words of Lord Diplock whom opined that *“The instant case concerns and concerns only*

*the right of a holder of a public office not to be transferred against his will from one place to another. In their Lordships' view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter I of the Constitution”.*

11. Section 290 (4) of the Customs Management Act 2011 (the ‘Act’) states that it is a good defence for a person who was dealt with under the section, (but subsequently encounters further prosecution for the same offence), to prove that the offence has already been compounded under the Act. Counsel for the Respondent in his preliminary point argued that the Applicant could use section 290(4) as a defence in the matter before the Magistrate which is an alternative means of redress in this matter.
12. The evidence of the Applicant is that, a plea of *autrefois convict* was already pleaded before the Magistrate whom notwithstanding the same persisted with the trial. The Court accepts that if a constitutional right is in danger of being contravened, it has the duty to intervene once the issue is brought to surface. This submission by the Respondent is therefore struck out and I now continue to the substantive matter.
13. Counsel for the Applicant has submitted that the Comptroller of Customs has concurrent jurisdiction of a Magistrate in the exercise of his section 290 compounding power. Counsel for the Respondent however submitted that the Comptroller has no inherent power and can only do what the statute states.
14. In these circumstances, the Comptroller who is a part of an administrative and executive body made a decision based on its findings of guilt in accordance with the statute that governs it, specifically section 290 of the Customs Management Act. In the case of **Palmer v. Inverness Hospitals Board - 1963 SC 311** the board which was a statutory body in the acting of its duties was considered a quasi-judicial body. In the case of **M'Donald v. Lanarkshire Fire Brigade Joint Committee. Earl v. Lanarkshire Fire Brigade Joint Committee. O'Hare v. Lanarkshire Fire Brigade Joint Committee 1959 SC 141**, the committee was considered to have quasi-judicial functions on the carrying out of their duties under the statute. A quasi-judicial body is one which has powers and procedures which resembles those of court of law, or magistrate.

15. The Court is of the view that the Comptroller of Customs sits in a quasi-judicial position in the exercise of his duties in relation to section 290 of the Customs Management Act. This is because even though he cannot give a penal sentence, he has effectively dealt with the matter and can give fines.
16. It is not disputed that the Applicant in this matter opted to be dealt with by the Comptroller of Customs, therefore admitting guilt to a multiplicity of offences under the Act. According to Article 20 (2)(a) of the Constitution, “ **(2) Every person who is charged with a criminal offence — (a) shall be presumed to be innocent until he is proved or has pleaded guilty**”. Counsel for the Respondent submitted that because the Applicant plead guilty and was not tried, that Article 20(5) does not apply to him. Can someone who has already admitted guilt and been tried be tried again for the same offence? It is the view of the Court that pleading guilty and being found guilty yield the same result; this submission is hereby struck out and it is held that the Applicant has been tried as Article 20(5) requires.
17. The Respondent’s position is that the offences are indeed different and should be prosecuted in kind. Counsel for the Respondent submitted that there are two different parties of interest in these circumstances; one is the customer, Karen Silverman and the other is the Comptroller of Customs. Counsel for the Applicant stated that the facts in each instance where the Applicant has been accused are one and the same, therefore, he cannot be tried again.
18. In that regard, Counsel for the Applicant relied on the English Court of Appeal case of **Regina v Beedie [1998] Q.B. 356**. **Beedie** is a case wherein a landlord, negligently, did not properly manage his property for Carbon Dioxide detectors and a young female tenant died of Carbon Dioxide poisoning. He was prosecuted by the Health and Safety Executive under that Health and Safety at Work etc. Act 1974. He plead guilty and was fined £1,500.00. He was further prosecuted under the Housing Act, pleaded guilty and was granted a conditional discharge. At the Coroners Court, he was required to give evidence in relation to how the female died. He was informed by the coroner that his evidence would not incriminate him because he was already tried in relation to the same. Subsequently, a guilty verdict for Unlawful Killing was returned by the jury therein and Police officers charged him with the same. At his trial, the judge rejected to stay the indictment on an

application of *autrefois convict*. On appeal, it was held that the judge erred in allowing the trial to continue; that the principle of *autrefois convict* should prevail. In Broom's Legal Maxims (2nd ed.), pp. 257-258, it states that: "... *and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation - nemo debet bis puniri pro uno delicto.*"

19. Counsel for the Applicant also relied on the test in the case of **Connelly and Director of Public Prosecutions [1964] A.C. 1254** which is "*The true test by which to decide whether a plea of autrefois acquit is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.*" Counsel for the Applicant is of the view that the bar has been met.
  
20. The Court now evaluates the similarities of the facts in the offence in consideration of the law mentioned herein. In order for the offence of fraud to be committed in accordance with section 348 of the Penal Code, one must defraud a person under false pretenses. The dictionary definition of defraud is 'to illegally obtain money from (someone) by deception'. The Applicant has been accused of the defrauding Ms. Karen Silverman under false pretenses; in these circumstances, particulars being that the Applicant "on Tuesday, 12 August 2014, at New Providence, with the intent to defraud, did obtain from Mrs. Karen Silverman the amount of \$18,636.00 by means of false pretenses".
  
21. The cases relied on by the Applicant can be distinguished as Mrs. Karen Silverman is a different entity from Customs. In the cases cited by the Applicant, the virtual complainants were the same. In these circumstances, the Applicant has been accused of offences under the Customs Management Act, 2011 by Customs and Fraud against Ms. Silverman under the Penal Code. The Affidavit of Stephon Coleby accurately states that the Customs department cannot speak to any offence involving the Applicant and Ms. Silverman. Justice dictates that if Mrs. Silverman was truly defrauded in relation to this matter by the Applicant, the Applicant should be duly prosecuted relative to the same.

22. Notwithstanding, the evidence before the Court suggests that the Applicant had in fact received 18,636.00 from Ms. Silverman with which he was to pay to Customs but he proceeded to make a false declaration to Customs. This offence along with others was compounded under section 290 of the Customs Act.
23. Resultantly, he is now required to pay to Customs the amount of 18,636.00, the same amount which Mrs. Silverman is said to have given him. In addition there is no evidence before the Court that the items which Ms. Silverman intended to declare through customs were not received by Ms. Silverman.
24. Therefore, the Applicant could not have dishonestly obtained funds from Mrs. Silverman as the funds which she gave the Applicant were a true representation of what was owed to Customs and which he is now repaying. There is no evidence that at the time of obtaining the funds from Ms. Silverman, the Applicant was deceptive in any way. He was not deceptive about who he was; (as all parties agreed he was a customs broker whom in the normal course of his business would obtain funds from clients) neither was he deceptive about how much money was owed to Customs.
25. If Ms. Silverman had given the Applicant more money than was owed to customs then the Applicant would be liable to answer to the offence of fraud but that is not so on the evidence before this Court. The Court is of the view that defrauding Mrs. Silverman and making a false declaration to Customs are two separate offences however, when taking the above into consideration, the offence of defrauding Ms. Silverman (count 4) should not have been the subject of criminal proceedings.
26. The Applicant has already faced punishment under the Customs Management Act, 2011. Section 290(3)(d) of the Customs Management Act states that ‘**the offender shall not be liable to any further prosecution in respect of the offence**’. Accordingly, it is clear in these circumstances that the Customs Department, cannot bring further prosecution against the Applicant in relation to “entry 1056”.

27. Having considered all the charges, this Court finds that the prosecution of count 4 in the Magistrates court under these circumstances is an abuse of process. Halsbury's law of England, Volume 37 (4<sup>th</sup> Edition) para. 434 states "*An abuse of process of the Court arises where it's process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or simply where the process is misused and infringes on the Applicant's constitutional rights*".

### **DECISION**

28. The Court hereby declares that the Applicant has already been prosecuted on Count 4 in relation to entry number 1056 and in these particular circumstances, the Applicant's Article 20(5) rights are indeed in jeopardy. No further prosecutions should proceed against him as it relates to that count. Count 4 of the docket laid before Magistrate Samuel McKinney is hereby withdrawn against the Applicant.

Dated the 9<sup>th</sup> day of September, 2022

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DEBORAH FRASER

*JUSTICE*