Privy Council Appeal No. 79 of 1920.

In the matter of part cargo ex Steamship "United States."

H.M. Procurator-General - - - - - - *Appellant*

v.

The New York and West Indies Trading Corporation - - *Respondents.*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1921.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal by His Majesty's Procurator-General against a decree of Sir Henry Duke, sitting in Prize, whereby he refused to condemn as lawful prize certain goods claimed by the respondents, and ordered payment to the respondents of the proceeds of the sale of the said goods.

The appeal raises a question of fact, which has now become a very familiar one in the Prize Court and in appeals to this Board from the Prize Court, and that is the question whether the claimants have succeeded in proving that the destination of goods alleged to be conditional contraband is innocent. In the present case there is no doubt that the burden of that proof is thrown on the respondents, inasmuch as the consignee named in the bills of lading is admitted to be an agent for sale of the goods on behalf of the claimants, the consignors, and therefore was not the real consignee under the Order in Council of the 29th October, 1914, as interpreted in the *Louisiana* [1918] A.C. 461 and other cases. It is often a convenient course in dealing with such an appeal, for their Lordships to consider the facts of the case as if

they came before them in the first instance, and then see whether the view which they would have taken agrees with the view taken by the Judge of first instance. If it does, there is an end of the matter; if it differs entirely or on any point, then the question arises whether, following the principles on which this Board deals with appeals on questions of fact, the case is one in which the view taken by the Court of Appeal should prevail or one in which the view of the Judge below should be adopted and followed, notwithstanding that it is not the same as that of the Appeal tribunal.

The respondents, the New York and West Indies Trading Corporation, are a company incorporated under the laws of the State of New York, carrying on business in the city of New York, and the Company was at the date of the transactions in question a neutral. The goods which they claim were 415 bags of Arriba cocoa and 47 bags of Mexican coffee, which were shipped by them at New York on the S.S. "United States," a neutral vessel, under two bills of lading dated the 20th April, 1915, for carriage to Copenhagen, and there to be delivered to A. M. Metz or his assignees. The steamer was stopped, but was allowed to proceed on an undertaking to return the part of her cargo now in question, and that was done, and the goods were seized in the port of Hull on the 2nd June, 1915. The ground relied on for condemnation was that they were as foodstuffs conditional contraband and were destined for an enemy base of supply.

The case made for the respondents was that they were owners of the goods in question at the time of the shipment and of their seizure, and that the goods were consigned by them to A. M. Metz as agent to sell the goods for them for consumption in the kingdom of Denmark, and not to be re-exported. In support of this case affidavits were made by the president and by the vice-president of the respondent corporation. Certain documents were exhibited to the affidavits, and the bills of lading for the cocoa and the coffee each contained a clause obliging the consignee to furnish at Copenhagen on demand a declaration that the goods were for consumption in Denmark and would not be re-exported. Such a declaration was in fact made by A. M. Metz on the 7th May, 1915, which seems to have been after the S.S. "United States" had been stopped but before the return of the goods to Hull and their seizure. A. M. Metz, in a letter to the respondents dated the 8th May, states that the consignment on the "United States" had been captured, so that it seems likely that he knew it on the 7th, but the exact date when the "United States" was stopped does not appear on the record.

The case for the appellant was based on an affidavit of Mr. Greenwood, and on the exhibits to that affidavit. The affidavit states that at all material times the claimant Company was controlled by and acted as cover for a firm, Gontard & Co., of New York, and was, as Gontard & Co. were, deeply involved in German trade. That the firm of Gontard & Co. was formed on the 1st December, 1914, to take over the New York business of Wessels, Kuhlenkampff & Co. of New York, and the business of Wessels

Brothers and Gontard of Jamaica and Colon, which firms were dissolved owing to the British Government ordering the Jamaica branch to discontinue business on the ground that it had been concerned in supplying German cruisers. That Wessels, Kuhlenkampff & Co., prior to their dissolution, were closely connected with Kuhlenkampff of Bremen, and that Gontard & Co., in the endeavours to do business with Germany, employed several firms, amongst others the claimants, as covers for their transactions. That the claimant Company was incorporated in November, 1914; that its president and vice-president, the gentlemen who have made affidavits in this case, and D. E. Fromm, who was treasurer, had all previously been in the employ of Wessels, Kuhlenkampff & Co., but that Fromm resigned on the 1st December, 1914, and became a member of the firm of Gontard & Co. The affidavit further sets out the names and describes the activities of many German firms whose names appear in intercepted messages and intercepted letters exhibited to the affidavit, which exhibits must be dealt with.

Mr. Sowter, the president of the claimant Company, makes an affidavit in answer to this, in which he swears that Gontard & Co. had no interest in the claimant Company and that none of the partners held any stock in it. He says nothing whatever as to the allegation of control and use of the name of the claimants by Gontard & Co. except that he deals with the specific matter of the copy contract exhibited, which will be hereinafter referred to. He gives a long list of consignments which the claimants made to Copenhagen of coffee and cocoa which the British Government never molested, but does not say whether or not those consignments which so escaped were consumed in Denmark or got through to Germany, and he does not deny the German connection attributed to the Company or the allegation of the Company being engaged in forwarding goods to Germany, nor does he deny that he and the other officials of the claimant Company had previous to its formation been in the employ of Kuhlenkampff.

In the letter of the 21st April, 1915, from the claimants to Metz, which related to the consignments now in question, Mr. Sowter, in reference to the seizure of some coffee on the S.S. "Carolina," said: "Neither our corporation nor Messrs. Gontard & Co. have any interest at all in these shipments except that we covered the insurance here in New York in accordance with instructions from our friends in Bahia." This certainly suggests a connection in business with Gontard at this date, and seems further to admit that the mention of their names would have accounted for the seizure. The intercepted messages and letters relate mostly to dealings by Metz, Gontard, Urban, Kanzow and others whose names are known in the Prize Court and are mentioned in Mr. Greenwood's affidavit. The name of the claimant Company does not, however, appear in the intercepted messages, nor is there any direct reference to the consignments now in question, except in a telegram by Metz to the claimants announcing

the capture, which, of course, is not inconsistent with the claimants' case. Assuming the connection between these firms and the claimants which Mr. Greenwood's affidavit affirms, and which is only denied to the extent mentioned, these telegrams are damaging to the claimants' case but otherwise they are harmless.

There are two intercepted documents, however, which are of some importance. One is an account, apparently in the nature of an account sales, between Messrs. Luria & Co. of Hamburg and Messrs. Gontard & Co. for the half-year ending December 31st, 1915, which shows that Messrs. Luria had paid on August 30th, 1915, for account of Messrs. Gontard a sum of $24,000 to the claimants. This seems to show dealings between the claimants and Gontard as to some goods which must have got to Hamburg. This payment is not long after the transaction now in question, and on that ground is perhaps more significant than later documents. It is not explained, nor, as already observed, is the connection of the claimants' business with that of Gontard and of Kuhlenkampff denied except by the statement that Gontard held no shares in the claimant Company. The other document which has to be referred to is an intercepted letter of Gontard to one Neuman of Hamburg, dated 7th January, 1916, with its enclosure. That letter states that he enclosed an agreement which he—Gontard—has made with Linden and Lindstrom for the shipment of coffee by the Swedish steamer "Carolina." The letter clearly shows that the coffee referred to in it was to get to Hamburg. The agreement enclosed (which Gontard says *he* made) purports to be made between the claimants and Linden and Lindstrom.

In his affidavit in reply Mr. Sowter deals with this agreement, and says that it was not made by his Company, and that no one connected with his Company made any agreement or authorised anyone else to make any agreement, with Linden and Lindstrom regarding any shipment on the "Carolina," and no shipment was made by the claimants on the "Carolina." Assuming that this denial is true, it tells somewhat more against the claimants than if they had authorised the making of it. Here is Gontard when he wants to conceal his own name, using that of the claimants and doing the very thing which the Crown suggests was done in the transaction now under consideration. It seems incredible that such a thing could be done unless Gontard knew perfectly well that the claimants would allow the use of their name, and if there was not an actual agreement for such use the way in which he would be most likely to know it would be from its having been done before. Mr. Sowter when he made this affidavit knew that the allegation against him was that in the transaction now in question the name of his Company had been used to cover a transaction which really was Gontard's, just as Gontard was doing in his transaction with Linden and Lindstrom, yet he never in any way deals with that allegation but confines his denial to the shipment on the "Carolina," and his denial is in terms which would be satisfied by his knowing all about the matter except the name of the

ship. Further, although there was in this case no statistical evidence, the Court cannot ignore what long before the present case was heard had become common knowledge as to the excessive imports into Scandinavian countries of coffee and cocoa, and as to the re-export to Germany of a large part of those imports. Having regard to these grave grounds of suspicion, and having regard also to the circumstances of the formation of the respondent Company and of the previous employment of all its officers, including the only two who make affidavits in this case, their Lordships would certainly hold, if the matter came before them in the first instance, that the respondents had not by reliable evidence satisfied the burthen of proving that the destination of the goods was innocent.

This makes it necessary to consider the reasons given by the learned President for refusing to condemn the goods. It appears that he heard some other cases besides those now under appeal, and delivered his judgment on all of them at the same time. In the part of the judgment relating to the case now under appeal, which is all that is printed in the record, he does not refer at all to the question of the burthen of proof, and so far as counsel in the case can tell the Board, he had not in the previous part of his judgment made any general observations as to his view on that matter which would cover the present case. It is difficult to suppose that he had not in the argument had his attention called to the fact that in this case the burthen was on the claimants to prove innocent destination, but it rather seems as if, when he came to give judgment in the present case, he had not that in his mind. After referring to what was known of Metz and of Kuhlenkampff and saying that these matters give rise to a very natural suspicion, he says, "but I am not aware that this Court has ever acted on general suspicion."

It is probably correct that this Court does not accept from a party on whom ultimately rests the burthen of proof facts as proof which amount merely to suspicion. It must however be borne in mind that the cumulative effect of many circumstances each of which in itself is merely suspicion may be such as in the judgment of any tribunal deciding a question of fact may amount to proof. If otherwise all circumstantial evidence might be called mere suspicion. However that may be, the Prize Court, and this Board on appeal in prize cases, in cases where the burthen of proving innocency is put by the Order in Council on the claimant, has frequently held that circumstances of grave suspicion afford sufficient reason for not accepting evidence of the claimant which but for such suspicion would be sufficient to satisfy the burthen. Many of such cases are to be found in the reports, but there are also many within the recollection of their Lordships not reported because they turned only on fact, the principle on which such questions of fact should be determined being considered already established. The position in which a claimant in the Prize Court is placed in the matter of clearing himself from suspicion is most lucidly explained in the

judgment of this Board delivered by Lord Parker in the case of the *Louisiana*, in a passage beginning at page 61 of the Report in Vol. 3 British and Colonial Prize Cases, and at page 464 of the report in [1918] A.C. :—

> " In the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject him to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the Court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question."

In the present case the learned President, after dealing further with some but not all the grounds of suspicion before referred to, ends by saying that he had come to the conclusion that although there were in this case grounds for suspicion, there were not grounds for condemnation.

There was no *viva voce* evidence, and the materials for coming to the right conclusion are the same as those before the President. Their Lordships are of opinion that the learned President (whether by temporarily overlooking the fact of the burthen which rested on the claimants or otherwise) did not proceed in arriving at his conclusion of fact on the principles which have been laid down as correct by binding authority, and they will therefore act on their own view, and humbly advise His Majesty that the appeal should be allowed and that the goods should be condemned, and that the respondents should pay the costs of the appeal.

In the Privy Council.

In the matter of part cargo ex *Steamship "United States."*

H.M. PROCURATOR-GENERAL

v.

THE NEW YORK AND WEST INDIES TRADING CORPORATION.

DELIVERED BY SIR ARTHUR CHANNELL.

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