

1928
 Jan. 30.
 Feb. 22.

SAUL WEISSCLAIMANT;
 vs.
 HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Smuggled goods—Seizure—Onus of proof—Sec. 264 of Customs Act.

Held, That where goods alleged to have been smuggled, are found and seized in the possession of any person, the *onus*, under the provisions of sec. 264 of the Customs Act, is upon such person to explain how the goods had come into his possession or how they had been imported into Canada, and if so, to prove that the duty upon them was paid.

Reference by the Minister of Customs and Excise under Section 177 of the Customs Act.

The Action was tried before the Honourable Mr. Justice Audette, at Montreal.

L. Phillips for claimant.

A. H. Tanner K.C. and *J. L. Desaulniers* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (February 22, 1928) delivered judgment.

This is a Reference to this Court, by the Minister of Customs and Excise, under the provisions of sec. 177 of The Customs Act, of the claim of Saul Weiss in respect of a seizure made upon him, on the 8th September, 1925, upon the ground of having smuggled into Canada the following goods and articles, viz.: Stick pins, value, \$37; wedding rings, \$24; ring mounts, \$147; diamond rings, \$1,570, in all, \$1,778; watches and watch cases, \$145; total, \$1,923.00.

To this value of \$1,923 as appears from the Customs Seizure report, should be added the Sales Tax and the duties, establishing the "probable value" of the seizure at \$2,718.23, duty paid, for an infraction of the Revenue Laws of Canada.

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The matter of a Reference under sec. 177, is not in the nature of an appeal and the Court has power to hear and consider it upon the evidence before it, whether the same was before the minister or not. *Tyrrell v. The Queen* (1).

It is well to state here that there were no loose diamonds seized as the question of loose diamonds comes up hereafter.

The circumstances which led to the seizure and what took place at that time, are given by the seizing officer, in his report of the 18th September, 1925.

This officer, Willie T. Conway, having been informed that the claimant had, in his jewellery store, a considerable quantity of goods brought into Canada, from foreign countries and upon which duty had not been paid,—accompanied by officer J. D. Labelle, together with John F. Murphy, a jeweller from a jewellery firm in Montreal,—called on Weiss, on the 8th September, 1925, requested him to produce his books showing the amounts of purchases and sales; but Weiss informed the officer that he did not keep any books. Thereupon the officer had the jeweller pick out the American goods, consisting of rings, watches, watch cases, rings set with diamonds and some stick pins. Weiss had no invoices to check these goods, but claimed he could show where he had bought these goods of American manufacture, claiming he had lost the invoices covering most of the goods so picked out, and that he would get duplicates. The customs officer then took the goods under detention and gave Weiss ten days within which to make proof showing where the goods came from and up to the present day he has failed to do so. The seizure was made and perfected on the 18th September, 1925.

On the 9th October, 1925, the affidavits of Weiss and Belhomme were transmitted to the Department of Customs at Ottawa and are to be found on the Departmental file.

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Weiss, in his affidavit, stated, among other things, that the said seizure covered stick pins, wedding rings, ring mounts, and diamond rings and loose diamonds, and I am transmitting to the department an affidavit of Mr. Henry Belhomme, diamond cutter and polisher, from whom I bought all the loose diamonds, twelve rings set with diamonds, and four dinner rings set with diamonds;

3. The stickpins seized were bought by me from one Abraham Simon, a jeweller in Montreal, from whom I bought the place of business where I now operate, at 1039 St. Lawrence Boulevard, on February 29, 1924, I have not at present a detailed list of the articles contained in the store at the time of the purchase by me, but attach hereto a copy of the Bill of Sale made on February 29, 1924;

4. The balance of the merchandise seized, other than the goods purchased from Mr. Belhomme and Mr. Simon, was purchased by me in the ordinary course of business from various parties, among whom were S. H. Miller, whose invoice is attached hereto; Mr. Kushner and Mr. Riback, and invoices from these latter two parties were given to the officials of the department at the time of the seizure;

5. In am also a manufacturing jeweller, and the great majority of the rings seized were manufactured by me.

And Belhomme's affidavit sets forth that

I am a diamond cutter and polisher by trade, and my place of business is in Room 201, Mappin & Webb Building, Montreal.

2. I have from time to time done business with Mr. Sol Weiss, jeweller, of Montreal, said business being done in the regular way, invoices being given for all merchandise bought and sold;

3. I know that the Department of Customs and Excise has seized certain merchandise belonging to Mr. Weiss, and among other items seized are twelve rings, set with diamonds, as well as a number of loose diamonds;

4. At the request of an officer at the Customs Department in Montreal, I went down and examined the diamonds seized, and hereby swear that the greater majority of these stones seized undoubtedly were sold by me to Mr. Weiss, as I recognize the said diamonds, and know that they came from me and were sold to the said Mr. Weiss, in the regular course of business; this applies also to four dinner rings, set with diamonds, which were also seized;

5. This statement would cover not less than 75 per cent of the diamonds seized, and as to the balance, the diamonds are not easy of identification, and it is difficult to state with absolute assurance that the said stones were sold by me to Mr. Weiss, but it is quite possible and highly probable that the said stones formed part of those sold by me from time to time to said Mr. Weiss.

Both Weiss and Belhomme were not present at the trial and were not heard, and these affidavits and the statements made by Weiss have been so much contradicted, that they are left bereft of any truth or reliability.

Officer Conway in his evidence states that Weiss had stated to him, at the time of making the seizure, that the goods seized were goods mostly all of his own manufacture. First conflict. Then he had stated he would produce evi-

dence as to the stick pins and has not done so. With respect to the wedding rings, Weiss stated he had bought them from one Simon who manufactured them. Simon identified the rings seized and denied this, granting a certificate to that effect. Exhibit D. Another false statement.

With respect to the ring mounts. Weiss stated he manufactured them himself and the jeweller Murphy says they are of American make. Another conflict.

Coming to the diamond rings. Weiss says he manufactured these ring mounts and that he bought all the diamonds from Belhomme. These mounts have been identified as of American manufacture. Belhomme kept no book and when called by officer Conway, in his presence and that of Murphy and Labelle, he claimed he identified 29 of these diamonds which were set on the ring mounts. Yet Belhomme's affidavit states that no less than 75 per cent were sold by him to Weiss. Now, in that respect, jeweller Murphy says it is next to impossible to identify diamonds when set on the ring. Belhomme himself in his affidavit states something to that effect,—that it is not easy of identification. He said:

it is difficult to state with absolute assurance that the said stones were sold by me to Mr. Weiss; but it is quite possible and highly probable that the said stones formed part of those sold by me from time to time to said Mr. Weiss.

A declaration of that nature bears upon its face unreliability and suggests nothing but an effort both of imagination and good will in an endeavour to save Weiss. Conway, in his report of the 5th November, 1925 seems to have found the solution respecting these diamonds when he says there was no evidence to show that any of the diamonds

set in the rings were bought from Mr. Belhomme, and as to the invoices produced (afterwards) by Mr. Weiss from Belhomme they simply read diamonds, and as there were a number of loose diamonds in Mr. Weiss's store at the time of the seizure which were bought from Mr. Belhomme it seemed to me that the invoices only covered the loose diamonds which were not seized.

And in his report of the 18th September, 1925, (p. 2) he further says:

On checking the goods in Mr. Weiss's store I came across a quantity of small diamonds which seemed to be covered by those invoices and I therefore did not touch the same.

With Conway's view and explanation I abundantly concur.

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Coming now to the watches and watch cases. Weiss says two of these watches do not belong to him but to customers. Asked for their names, he could not give them. One of these watches he had on him and he said he was regulating it. With respect to the watch cases, Weiss says they were not his, that he had them for safety deposit in a box in the Bank of Montreal. By reference to exhibit E we find that these two watches, duly identified by the numbers, were smuggled into Canada by one D. Wolofsky and turned over to Weiss. Here again we find Weiss has made another false statement.

With respect to one diamond ring valued at \$100 which was stated as bought from Levine and that Levine had bought it from N. Slover & Co., the latter gave a certificate (Exhibit B) that it was not produced from their factory. This is of the same class of evidence.

Adverting now to ring mounts, Weiss said he bought them from I. Kushner. Now, the latter states that these ring mounts so seized had not been sold by him to Weiss—exhibit C. It is said by witness Conway that he found in Weiss's store an invoice from The Guarantee Finding Co. Inc., which according to his view, covers the mounts seized. Furthermore it is contended by witness Conway that these have been smuggled into Canada, by one Shaffer, mentioned in the Gelfer letter forming part of exhibit C.

It is further established by evidence that the series of invoices from Simon and Oster, in exhibit D do not cover the wedding rings seized.

Coming to the opal and the onyx rings, Weiss contends that those rings were sold to him by S. H. Miller, the pawnbroker. Witness Sagermacker, the manager of S. H. Miller, who was present at the time of the sale of these two rings, testified they were not the same as those under seizure, and he had further established this fact to the same effect by a declaration under the Evidence Act, on the 28th of January, 1928. Here again Weiss comes with a false statement. Those who contradict him are in no wise interested and their evidence is to be accepted in preference to that of the claimant.

Weiss further stated he had bought some of this jewelry from one S. Riback; but the invoice from Riback, filed as exhibit No. 3, does not cover any of the goods

seized, and yet it had been given to Officer Conway by Weiss saying it did. Another false statement.

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None of the persons called could identify the goods under seizure, except Belhomme who claimed he identified 29 of the mounted diamonds without taking them out of their mountings. However I already had occasion to discuss the latter's evidence, and I have shewn how little reliability can be placed upon it in the present circumstances; besides the obvious fact that his affidavit is in direct contradiction to the result of his examination of the rings, in the presence of Conway and others. I am unable to accept this conflicting and dubious evidence. The claimant has failed in that behalf to comply with the requirements of sec. 184 of The Customs Act and the allegations of the Crown's defence are deemed proved and judgment should be given as in a case by default.

The draft of contract found in the departmental file cannot be depended upon as it is neither signed nor certified.

It is unnecessary to pursue any further the review of or comment upon the claimant's unsatisfactory, unreliable, conflicting and false evidence. The goods have been "found" and seized and the onus is upon him, under the provisions of sec. 264 of the Customs Act, to explain how these goods have come into his possession or how they have been imported into Canada, and if so if any duty has been paid upon them, and the claimant has entirely failed to do so.

This section 264 was amended in 1927, by 17 Geo. V, ch. 50, sec. 35, making the matter still more clear by enlarging the scope of the section from what it was before by adding thereto that the onus is upon the person in whose possession the goods were found, although there had been decisions to that effect before. This section 264 is now 262 of the R.S.C., 1927, ch. 42.

The claimant, for reasons best known to himself, has failed to be present at the trial, the date of which had been fixed long in advance. Had he been able to explain his false and conflicting statements, it is not likely he would have neglected an opportunity of doing so.

The claimant has failed to discharge the onus put upon him by sections 184 and 264 of the Customs Act and his

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action must be dismissed. See *Queen v. Six Barrels of Ham* (1); *Regina v. One Box of Jewellery* (2); *Rex v. Leblanc* (3); *Cardinal v. The King* (4); *Crosby v. The King* (5). See also secs. 195 and 202 of the Customs Act.

There will be judgment dismissing the action with costs and maintaining the seizure as good and valid.

Judgment accordingly.

Solicitors for claimant: *Jacobs, Phillips & Sperber.*

Solicitors for respondent: *Tanner & Desaulniers.*