

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.

February 3.

EMPEROR v. DE SYLVA.*

*The Bombay A'bkári Act (Bombay Act V of 1878), sections 3 (10), 9, 43 †
—Cocaine—Import by sea into the Bombay Harbour—“Import,” meaning
of—Sea Customs Act (VIII of 1878), section 19.*

Section 9 of the Bombay A'bkári Act (Bombay Act V of 1879) does not prohibit importing cocaine generally; it merely prohibits its importation unless duty has been paid.

The intention and requirement of the section in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded.

The mere entry into the Bombay harbour of a ship conveying dutiable goods or merely tying it up against the dock wall is not importing goods in contravention of the obligation to pay duty.

The term “import” as used in the Bombay A'bkári Act, 1879, includes the conveying into any part of the Presidency of Bombay by sea.

* Criminal Reference No. 129 of 1908.

† The Bombay A'bkári Act (Bombay Act V of 1878), sections 3 (10), 9, 43 run as follows:—

3 (10). “Import” and “export” include respectively the conveying into, or out of, any part of the Presidency of Bombay, from, or to, any other part of India.

9. No liquor, hemp or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(a) it is liable to the payment of duty under the Indian Tariff Act 1894, or any other law for the time being in force relating to the duties of customs on goods imported into British India, and the duty prescribed by such law has been paid thereon; or

(b) such import is permitted under the power next hereinafter conferred.

43 (1) Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act—

(a) imports or exports liquor, hemp or any intoxicating drug into or out of any part of the Presidency of Bombay, or

shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

THIS was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

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The accused was charged with an offence punishable under section 43 of the Bombay A'bkári Act (Bombay Act V of 1879), inasmuch as a parcel of cocaine weighing ten pounds bearing his name and address was detected in a ship anchored in the Bombay Harbour.

The Chief Presidency Magistrate who tried the case submitted the following questions for determination by the High Court.

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43 Bombay Act V of 1878, if the ship containing such cocaine—

- (a) enters Bombay Harbour;
- (b) is tied up against the Bombay Dock Wall.

2. Whether the Bombay Harbour is a part of the Bombay Presidency within the meaning of section 43, Bombay Act V of 1878.

3. Whether a person who has committed the act referred to in question (1) has a *locus penitentiæ* while the cocaine remains on board the ship and no attempt has been made to land it.

Strangman, Advocate-General, instructed by *Nicholson*, Government Solicitor, for the Crown.—The provisions of section 43 of Act V of 1878 must be read with section 9 of the same Act. Various notifications have been issued under the Sea Customs Act (VIII of 1878) prohibiting the importation of cocaine except by certain chemists and agents mentioned in the notifications. "Import" means to bring or carry from a place abroad. The word does not involve landing. Importing into Bombay Presidency is bringing into Bombay harbour whether the goods brought are landed or not. The accused committed the offence as soon as the parcel of cocaine came into the Bombay harbour.

Bombay harbour is a part of the Bombay Presidency: see *Ibert's Government of India*, pp. 19, 20; *Encyclopædia of the Laws of England*; Vol. XII, p. 131. The whole of the harbour forms part of British India: see *Reg v. Elmstone*⁽¹⁾, *Reg v. Kastya Rama*⁽²⁾.

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 104.

(2) (1871) 8 Bom. H. C. R. Cr. C. 63 at p. 65.

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Lowndes, instructed by *Godinho*, for the accused.—If importation is complete the moment a ship comes within the limits of the Bombay harbour everyone on board the ship who has dutiable goods commits an offence under section 9 of the A'bkári Act. There can really be no importation till the person bringing dutiable goods has had an opportunity of paying duty: see *Queen-Empress v. Ascensao*⁽¹⁾. Goods are only imported when they are landed and delivered to the importer: see *Canada Sugar Refining Company v. Reg.*⁽²⁾

A person may bring dutiable goods, but on finding that the duty is very heavy may never land them. In such a case he can never be said to have imported the goods because they are brought into the harbour in a ship. If importation is not complete till a person has had an opportunity to pay duties, then the question whether that person had a license for a particular kind of goods or not is immaterial. He may sell the goods to a license-holder on board the ship or he may throw them away finding the duties to be exorbitant.

The Government Notification of 15th April 1908 does not prohibit importation of cocaine. It merely restricts its importation to certain persons. But other persons may apply for a license and import it.

Section 3 (10) of Act V of 1878 is to be read subject to section 9.

Bombay Presidency has been defined in the Bombay General Clauses Act (Bom. Act I of 1904), section 3 (7). The word 'territory' means land only. The ship bringing the cocaine was not within the territory because it was in territorial waters. The territorial limit of every State extends to three miles from the shore. The State has jurisdiction over it. But this is quite different from the 'territory' included in the expression Bombay Presidency. The Bombay A'bkári Act distinctly speaks of importation within the territory of Bombay Presidency. There is nothing to show that the Bombay Government administers the portion between the shore and the imaginary harbour line. Ilbert speaks of the Port of Bombay and not of the Harbour. There is no Act to

(1) (1890) Batahal's Unrep. Cr. C. 503.

(2) [1898] A. C. 735.

show that Bombay harbour is under the administration of the Government of Bombay. The passage in the Encyclopædia says that territory includes harbour, ports, etc., but there is no authority referred to in support of this statement. The remarks on p. 99 in *Reg. v. Elmstone*⁽¹⁾ are merely *obiter dicta*.

Regulation II of 1827 divided Bombay Presidency into Zillas. The regulation does not speak of the sea. It excludes the sea.

Strangman in reply.—The Bombay harbour is within the Ordinary Original Civil Jurisdiction of the Bombay High Court: see *Queen v. Essub Ibrahim*⁽²⁾. The Bombay harbour is within the Ordinary Criminal Jurisdiction of the Bombay High Court. The Ordinary Original Civil Jurisdiction and Criminal Jurisdiction are both the same: see clauses 11 and 21 of the Letters Patent. The Government of Bombay has administered the port and harbour of Bombay, as in Bombay Act I of 1873 there are provisions dealing with the harbour. The harbour therefore forms part of the Bombay Presidency. In *Queen-Empress v. Ascensao*⁽³⁾ the accused was fined before he had opportunity to pay duty. But in the present case the importation of cocaine is restricted under notifications issued under section 19 of the Sea Customs Act. In the former case the importation of wine was neither prohibited nor restricted. In this case no payment of duties would have entitled the accused to import the parcel. If harbour is included in the Bombay Presidency then the bringing in of cocaine into the Bombay harbour is importing into the Bombay Presidency. The liability to pay duty arises as soon as a ship arrives within the limits of the harbour, though the duty is, for the sake of convenience, levied after the goods are landed.

The Indian Tariff Act (XVI of 1875) imposes the duty. The Sea Customs Act shows how it is to be collected. The latter Act uses the words "leviable" and "payable." The duty is leviable as soon as the goods come: see sections 3 (d), 11, 15, 17, 20, 20 (c), 24, 25, 27, 29, 30, 32, 33, 41, 46, 53, 54, 55, 57, 80, 81, 82, 83, 85, 88, 128, 129, 131, 142, 168, 194, 196. Section 128 is

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 104.

(2) (1845) Perry's O. C. 577.

(3) (1890) Ratanlal's Unrep. Cr. C. 503.

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an important one. Section 194 allows a Custom Officer to open any package and examine goods on board a ship.

Section 9 of the A'bkári Act does not restrict the meaning of import in section 43. It should be read in the light of the Sea Customs Act which came into force before the A'bkári Act. Import has a general meaning in sections 3 (10) and 43 and cannot have a restricted meaning in section 9.

Lowndes.—Harbour may be part of the Bombay Presidency but the three-mile territorial limit is not. The A'bkári Act speaks of the Indian Tariff Act but not of the Sea Customs Act. The Legislature specially refers to one and not to the other. The A'bkári Act is not therefore subject to the provisions of the Sea Customs Act.

The Privy Council has held in *Canada Sugar Refining Company v. Reg.*⁽¹⁾ that the words 'levy' and 'collect' only mean 'payable.' The word 'levied' means 'paid,' and not 'become payable.' As the A'bkári Act provides for bonded warehouses, the offence of importation is not complete until goods are landed and there was an opportunity to pay duty.

The Government Notification simply restricts the importation of cocaine until permission is obtained. It does not say that permission should be obtained even before the article is brought into the harbour. If a man is in a foreign country, for instance, it is not possible to get a permit, and if he brings cocaine in a ship and then applies to the proper authorities for license, it would be absurd to hold that he has committed an offence.

HEATON, J.:—The questions which we are asked to answer are these:—

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43, Bombay Act V of 1878, if the ship containing such cocaine

(a) enters Bombay harbour,

(b) is tied up against the Bombay Dock wall.

(1) [1898] A. C. 735.

2. Whether the Bombay harbour is a part of the Bombay Presidency within the meaning of section 43 of Bombay Act V of 1878.

3. Whether a person who has committed the act referred to in question (1) has a *locus penitentiæ* while the cocaine remains on board the ship and no attempt has been made to land it.

The first question involves a consideration of the meaning of section 43 of Bombay Act V of 1878. That section makes penal the import of cocaine "in contravention of this Act or of any rule or order made under this Act." It does not appear that anything has been done in contravention of any rule or order made under the Act. No rule or order thereunder exists, so far as we are informed, prohibiting or restricting the import of cocaine. There may have been a contravention of an order made under section 19 of the Sea Customs Act. With that, however, we are not concerned. In the absence of any rule or order relating to the import of cocaine and made under Bombay Act V of 1878, all we have to do is to determine whether the bare provisions of the Act have been disobeyed. It is said they have, and section 9 of the Act is referred to. The Act may or may not give power to make a rule or order prohibiting or restricting the import of cocaine, but section 9 does not, it seems to me, prohibit importing that drug generally; it merely prohibits its importation unless duty has been paid, because cocaine is a thing liable to the payment of duty under the Indian Tariff Act. Having only the words of the Act itself, having no rule or order made under that Act, that is the only conclusion at which I can arrive. The intention and requirement of section 9 in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded. So the import with which we are dealing is not an import within the meaning of section 43 unless it is an import in contravention of the Act, that is, in the particular case put to us, in contravention of the obligation to pay duty. Ordinarily, we are told duty is required to be paid on shore usually after the ship conveying the dutiable goods has come to rest in the harbour or dock. If this be so, the mere entry into

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the harbour or tying up against the dock wall, is not importing goods in contravention of the obligation to pay duty. Further discussion of the point is useless because the facts have not been found by the Magistrate.

So far I have assumed that on the facts stated there is an import and have only considered whether such import is in contravention of the Bombay Abkari Act. There is not, in my opinion, any doubt that the facts stated do amount to an import. That word is stated in the Act to include the conveying into any part of the Presidency of Bombay from any other part of India, and therefore by implication and having regard to the common meaning of the word, must include the conveying into any part of the Presidency of Bombay by sea. The Bombay Presidency is defined in the Bombay General Clauses Act 1904 to mean "the territories within British India for the time being under the administration of the Governor of Bombay in Council."

It does not seem to be really doubted that the Bombay harbour is under the administration of the Governor of Bombay in Council, but were doubt on this point to arise, it could be set at rest by ascertaining as a question of fact whether the harbour in whole or in part is or is not under the administration of the Governor of Bombay in Council.

The facts have not been fully stated to us. They may show that there has been such an evasion of opportunity to pay duty as to make the import punishable. That, however, is for the Magistrate to decide. He has referred abstract questions to us and not questions arising out of facts fully ascertained and stated.

In my opinion it is impossible to answer the third question in a general form, and in any set of facts the answer would be so dependent on the facts as to be a matter which the Magistrate should decide for himself.

The other questions referred do not it seems to me admit of more precise answers than those here given.

CHANDAVARKAR, J. :—I concur.

R. B.