BETWEEN:

LEVY BROTHERS COMPANY LIMITED AND THE WESTERN ASSURANCE COMPANY ..... SUPPLIANTS;

1958
June 19
1959
Oct. 26

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3 and 4—Conversion of package of diamonds by employee of the Crown in the course of his employment—Crown held liable.

Suppliants bring their petition of right to recover from the Crown the value of a parcel of diamonds imported by suppliant Levy Brothers Company Limited from Belgium, which was lost in the premises of the Customs Postal Branch at Hamilton, Ontario. It was admitted that the parcel of diamonds arrived by prepaid registered air mail at the Hamilton Post Office on or before Saturday, October 15, 1955, and was transferred to the Customs Postal Branch premises. Notice of the arrival of the package of diamonds was sent to Levy Brothers Company Limited, and was received by it in due course. On October 18 it attended at the Customs Postal Branch to make due entry but the parcel could not be found. It is agreed between the parties hereto that the parcel "had presumably been stolen by a person or persons unknown". The suppliants' claim to recover the loss from

[1] [1946] S.C.R. 89; [1946] 1 D.L.R. 433.
[2] [1948] 1 D.L.R. 630; [1948] O.R. 81.
[3] [1934] 4 D.L.R. 532.

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the Crown is based on negligence. The Court found that the package was stolen by a Customs employee during working hours, and in the course of his employment.

Held: That the Crown was not a bailee.

2. That the conversion was one in the course of the servant or servants' employment and the Crown is liable to make good the loss.

3. That neither s. 23(1) of the *Customs Act* R.S.C. 1952, c. 58 nor s. 40 of the *Post Office Act*, R.S.C. 1952, c. 212 apply to relieve the Crown of liability.

PETITION OF RIGHT to recover the value of a package of diamonds lost through the negligence of the Crown.

The action was tried before the Honourable Mr. Justice Thurlow at Toronto.

L. A. Fitzpatrick for suppliant.

R. W. McKimm for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (October 26, 1959) delivered the following judgment:

This is a petition of right by which the suppliants claim the sum of $3,191 for the value of a parcel of diamonds imported by Levy Brothers Company Limited from Belgium, which was lost while in the premises of the Customs Postal Branch at Hamilton.

From the statement of agreed facts filed at the trial, it appears that the parcel of diamonds arrived by prepaid registered air mail at the Hamilton post office on or before Saturday, October 15, 1955, and on the morning of that day, along with 213 other parcels of mail, it was taken by employees of the Customs Postal Branch from the post office to the premises in the same building occupied by the Customs Postal Branch. There the parcels, including the parcel in question, were sorted and put in bins arranged in alphabetical order in two steel bunks, so placed that the open side of the bunks faced each other with an aisle between them. The aisle was closed overhead with wire mesh and at each end with a wire mesh door. Notice of the arrival of the package of diamonds at Customs was prepared and sent to Levy Brothers Company Limited, and

at approximately 12.30 p.m. that day the doors of the bunks were locked by the customs employee in charge and the key placed in an unlocked drawer of the desk of the Superintendent of the Customs Postal Branch. Upon the departure of the employees, the Customs Postal Branch office was closed and locked.

The Customs Postal Branch office was not open to the public on Saturday, October 15, although four employees of that branch, forming a skeleton staff, were at work that morning and carried out the duties already mentioned. The office was not open at all on Sunday, October 16, but was open to the public on Monday, October 17, and on Tuesday, October 18. Members of the public are not permitted access to that portion of the Customs Postal Branch office behind the customers' counter. During working hours of employees of the Customs Postal Branch, the doors to the bunks are kept open. There were approximately sixteen employees of the Department of National Revenue in the Customs Postal Branch office on Monday, October 17, and Tuesday, October 18. The procedure followed in this office was not substantially different from that followed in dealing with dutiable mail arriving in Canada from abroad in all other customs houses in Canada.

There were no markings on the parcel in question to indicate that it contained diamonds, but Levy Brothers Company Limited was at all material times carrying on business as a manufacturer and wholesaler of jewellery and was well known to be an importer of diamonds.

Levy Brothers Company Limited received the notice of arrival of its parcel of diamonds in due course and on October 18 attended at the Customs Postal Branch office to make due entry, but despite a search the parcel could not be found. It is agreed that the parcel "had presumably been stolen by a person or persons unknown." No other parcels were lost during the period in question, and the investigation of the loss did not indicate that anyone had broken into either the office or the bins.

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The suppliants' claim to recover the loss from the Crown, as set out in the petition of right, is based on negligence. In paragraphs 11 and 12, it is alleged:

> 11. The said loss occurred by reason of the breach of duty of Her Majesty attaching to the occupation, possession or control of the said property viz. the diamonds in that:
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> (*a*) Her Majesty failed to deliver up the diamonds to your suppliant Levy Brothers Company Limited when lawfully required;
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> (*b*) Her Majesty failed to properly protect the said property and exposed it to being lost or stolen;
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> (*c*) Her Majesty hired incompetent servants who could not take proper care of your suppliant's Levy Brothers Company Limited property.
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> 12. In the alternative your suppliants allege that Her Majesty's servants and agents were negligent in that:
>
> (*a*) They failed to return the property of the suppliant when lawfully required;
>
> (*b*) They failed to properly protect the property of your suppliant in permitting it to be exposed to be lost or stolen;
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> (*c*) In permitting a small package of such value as herein represented to be kept not under lock and key at all times.

These allegations of negligence were, of course, denied in the defence, and it was further pleaded that the Crown was never in possession of the parcel of diamonds. Nowhere in the petition of right is there any allegation that the diamonds were unlawfully converted by a servant of the Crown in the course of his employment, and the only statement in the pleadings that the diamonds were converted is to be found in paragraph 10 of the defence, in which it is alleged by the Crown that the diamonds were unlawfully removed from the customs warehouse by a person or persons unknown. At the trial, however, counsel for the Crown, as well as for the suppliants, argued the matter of the inferences to be drawn from the admitted facts and the applicability, in the circumstances, of the rule of vicarious liability established by the House of Lords in *Lloyd v. Grace, Smith & Co.*[1], and accordingly, despite the failure of the petitioners to allege it specifically in their petition, it should, I think, be taken that the question of a conversion by a servant of the Crown in the course of his employment is in issue.

[1] [1912] A.C. 716.

The question to be determined is whether, in the situation described, the Crown is liable to make good the loss. It is clear that, apart from statute, the Crown would not be liable and that, if liability exists, it must flow from the provisions of the *Crown Liability Act*, S. of C. 1952-53, c. 30, ss. 3 and 4 of which provide:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

The suppliants' first submission was that the Crown was bailee of the diamonds and was liable pursuant to s. 3(1)(*b*) for failure to take reasonable care to ensure their safety. I do not think that s. 3(1)(*b*) was intended to provide for cases wherein the Crown is or was the bailee of goods, and I doubt very much that that subsection does, in fact, render the Crown liable in tort for injury to or loss of goods bailed to it, but whether the subsection can be invoked for that purpose or not, it is settled law in this Court that, in the circumstances described, the Crown is not a bailee, though the customs officer having control of the goods may be a bailee of them. In *Corse v. The Queen*[1], Burbidge J. said at p. 17:

Even if it were possible under the authorities to hold that the Crown was, in the ordinary acceptation of the word, a bailee of the goods in question, and bound in keeping them to that degree of diligence which the law exacts, for example, of such special or quasi-bailees as captors or revenue officers, the plaintiffs would, I think, fail. There is no evidence of want of diligence in keeping the goods, or, if it is to be inferred that they were stolen by a servant of the Crown, of negligence in selecting or retaining the dishonest servant. But the question is not to be determined by the law of bailments. The officer of the Crown who has the custody of goods sent to a Customs warehouse for examination may be, and no doubt is, in a sense, a bailee of such goods, but the Crown is not. For any wrong committed by an officer of the Crown the injured person has his remedy against such officer, but the Crown is not liable therefor except in cases in which the legislature has expressly, or by necessary implication, imposed the liability, and given the remedy.

[1] (1892) 3 Can. Ex. C.R. 13.

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Moreover, the officer answers for his own acts and omissions only and not for those of his subordinates.

At p. 21 he said:

> Mr. Curran, for them [the suppliants], pointed out that the case differed from the storage of goods in a bonded warehouse, in which case the importer may exercise his option to leave the goods in the warehouse or not, but that in such a case as the present he has no option but must submit to having his goods taken to the examining warehouse to be examined by the officers of the Customs. That is, no doubt, true, and it might be an element to take into consideration if the case depended upon the law applicable to bailees. But we have seen that in such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenues. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officer through whose personal negligence or act the loss happens.

The judgment in *Corse v. The Queen* was followed by Audette J. in *Hodgson, Sumner & Co. v. The King*[1] and, so far as I am aware, has not been overruled. I am, accordingly, of the opinion that the Crown cannot be held responsible for loss of the diamonds on the basis of failure on its part to take reasonable care for their safety. Even if the Crown were bailee, it has been agreed between the parties that the diamonds were presumably stolen by a person or persons unknown, and I see no reason to think on the facts related that the loss was due in fact to negligence on the part of the Crown in any of the several respects alleged in the suppliants' petition. The suppliants' submission on this point, in my opinion, accordingly fails.

Nor do I think it can be said that the loss occurred through negligence on the part of employees of the Crown, as alleged in paragraph 12 of the petition. The Crown not being the bailee of the goods and thus called upon to explain their absence, the burden was, in my opinion, upon the suppliants to show that the loss had in fact been caused

[1] (1914) 15 Can. Ex. C.R. 487.

by negligence on the part of the Crown servants, as alleged in the particulars set out in their petition, for which the servants themselves were liable to the suppliants, and on the agreed facts this, in my opinion, has not been established.

There remains the question whether, on the agreed facts, a conversion of the diamonds by a servant of the Crown in the course of his employment has been established.

It is agreed that at some time on the Saturday morning the parcel of diamonds was in a bin in a room or compartment to which the public does not have access, and when, on the following Tuesday, the loss was discovered, the investigation, which I see no reason to assume was not a thorough one, revealed no indication that anyone had broken into the room or the office. Nor was any other parcel missing. There is no evidence that anyone but some one or more of the four employees who were on duty on the Saturday morning knew of the presence in the bin that day of a parcel addressed to Levy Brothers Company Limited or that anyone but these employees of the Customs Postal Branch had access to the parcel, as well as the knowledge or the means of learning of its presence in the bin that day. Nor is there evidence that, at any later material time, anyone but employees of the Customs Postal Branch had both access to the parcel and the means of knowing of its presence in the bin. In this situation, it is, in my opinion, a fair inference that the parcel was unlawfully converted by some one or more of the Crown employees who had access to the bin during working hours. Whether or not the conversion occurred during working hours is on the agreed facts more doubtful, but having regard to the absence of any indication of a break and the lack of any indication that any of the employees who knew or might have known of the presence of the package of diamonds in the bin was in possession of a key to the office door, I think the preponderance of probability, though slight, favours the view that the conversion occurred on the Saturday or Monday, during a time when both the

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office and the bunks were open and access to the bins could be had by an employee without using a key. Moreover, in the course of argument, counsel for the Crown suggested that, if the inference were drawn that the package was stolen by a customs employee, the most reasonable inference would be that the package was stolen during working hours. Accordingly, I find that the conversion occurred at such a time.

Now, is the conversion so made a conversion in the course of the servant's employment? In *United Africa Co. Ltd. v. Saka Owoade*[1], Lord Oaksey considered the question thus at p. 144:

> In their Lordships' opinion, *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716, 28 T.L.R. 547, establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire v. Bailey*, [1905] 1 K.B. 237, it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and by arrangement with two thieves participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from *Lloyd v. Grace, Smith & Co.* or has been overruled by the decision in *Lloyd v. Grace, Smith & Co.*
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> In the present case the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out, and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in each case whether the wrong was committed in the course of the servant's employment, and in the present case their Lordships are of opinion that upon the uncontradicted evidence the conversion of the appellants' goods took place in the course of the employment of the respondent's servants.

[1] [1955] A.C. 130.

In the present case, it is not disputed that the parcel of diamonds was lawfully taken by the customs employees from the post office and placed in the bin in the premises of the Customs Postal Branch pending due entry and payment of customs duty. During working hours, the employees of the Customs Postal Branch were entrusted with free access to parcels in the bins for the purpose of carrying out their duties, which included collecting the customs duties payable on them and delivering parcels to their owners on due entry and payment of the duties being made. For any of these purposes, it was within the scope of the employees' authority to remove parcels from the bins. The case here for holding the master vicariously liable is weaker on its facts than was the case in *United Africa Co. Ltd. v. Saka Owoade,* but, in my opinion, the Crown employee or employees who converted the diamonds did so while engaged in the duties of his or their employment and while, by reason of that employment, he or they were entrusted with access to the parcel for the purpose of carrying out those duties, which included at times the removing of parcels from the bins. This, I think, is sufficient to classify the conversion as one in the course of the servant or servants' employment, within the meaning of that concept as applied in *Lloyd v. Grace, Smith & Co.* and *United Africa Co. v. Saka Owoade.* It follows, in my opinion, that the Crown is liable to make good the loss.

I may add that I regard the present situation as quite different from that in *Darling Ladies' Wear Ltd. v. Hickey*[1], where the servant who took the plaintiff's car entered his employer's building after his duties, both for the day and in respect of the plaintiff's car, had been completed.

In the course of the argument, s. 23(1) of the *Customs Act,* R.S.C. 1952, c. 58, was cited, and it was objected that, at the material time, the parcel of diamonds was in a customs warehouse and that the Crown was not liable since the parcel was held there at the owner's risk. Section 23(1) is as follows:

> 23. (1) In default of such entry and landing, or production of the goods, or payment of duty, the officer may convey the goods to a Customs warehouse, or some secure place appointed by the collector for such purpose, there to be kept at the risk and charge of the owner.

[1] [1949] O.W.N. 768.

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A similar provision has been in the *Customs Act* continuously since 1877. (*Vide* 40 Vict., c. 10, s. 15(4).) Assuming that the parcel of diamonds was in a customs warehouse pursuant to s. 23(1), I am of the opinion that the section affords no answer to the suppliants' claim. The subsection, as I interpret it, was not originally directed to protecting the Crown against liability, for, as pointed out in *Corse v. The Queen* (*supra*), no responsibility or liability attached to the Crown. Customs officers, however, might be liable, and, in my view, it was to clarify their position that the words "there to be kept at the risk and charge of the owner" were introduced into the section. For loss through such causes as spoiling of perishable goods or fire or other casualty for which the customs officer is not personally responsible, the section may well afford him complete protection, but *Corse v. The Queen* also shows that a customs officer may be liable for loss caused by his negligence, and this, I think, is so despite s. 23(1), the forerunner of which was in effect when *Corse v. The Queen* was decided. If, for example, a customs officer were to negligently or recklessly or deliberately drop a parcel known to contain fragile goods, I think he would clearly be liable for the resulting loss, despite s. 23(1), and if he deliberately converts goods, the protection of the section is, in my opinion, equally unavailing. Given a loss through conversion by a customs officer, he is liable for the tort, and under s. 3 of the *Crown Liability Act* the Crown, as well, is vicariously liable if the tort was committed by the officer in the course of his employment. Section 23(1) accordingly, in my opinion, affords no defence in the present situation.

It was also submitted on behalf of the Crown that the parcel of diamonds, when in the custody of employees of the Customs Postal Branch, was still mail, as defined in the *Post Office Act,* R.S.C. 1952, c. 212, and that s. 40 of that Act applies to relieve the Crown from liability. Section 40, which was first enacted in its present form by S. of C. 1940, c. 57, provides as follows:

> 40. Neither Her Majesty nor the Postmaster General is liable to any person for any claims arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

This section replaced a former one which, since 1867, had, with but one or two immaterial amendments, provided that the Postmaster General should not be liable for the loss of any mailable matter sent by post. In my opinion, the present section does not purport to refer to or protect the Crown or the Postmaster General against anything occurring other than when mail is under the control of the Post Office Department or its employees or in the ordinary course of post. When a customs officer takes possession of a parcel from the post office, pursuant to s. 44 of the *Post Office Act,* he is required to deal with it according to the law relating to customs, and when this has been done he may *return* it to the post office or *deliver* it to the owner. Whether or not the parcel is still mail for some purposes while in the custody of customs officers, what the customs officer is required to do he does as customs officer, not as an employee of the Post Office Department; nor, in my opinion, is the parcel under the control of the Post Office Department while the customs officer has it in his custody. I see nothing in the language of s. 40 to suggest that Parliament, in enacting it, had the custody of goods by customs officers in mind. Nor does s. 40 say that the Crown shall not be liable for loss of goods while they are mail. It merely refers to "anything deposited in a post office," which by definition means "left in a post office or with a person authorized by the Postmaster General to receive mailable matter." The customs officer's authority to receive goods is the statute itself, not that of the Postmaster General, nor do I think that a parcel remains "deposited in a post office" or "left in a post office" when the situation is that it has been lawfully removed therefrom and is in the custody of customs officers, who, when they have carried out their duties, may *return* it to the post office or *deliver* it to the owner. In my opinion, therefore, s. 40 affords no defence to this proceeding.

The suppliant Levy Brothers Company Limited will have leave to make any necessary amendment to its petition of right so as to found its claim upon a conversion by a servant of the Crown in the course of his employment, and there will be judgment that the suppliant Levy Brothers Company Limited is entitled to damages in the sum of

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$3,191, being the relief sought in the petition of right herein, together with its costs of the petition and proceedings thereon. In my opinion, it has not been shown that the suppliant The Western Assurance Company is entitled to any relief against the Crown (*Simpson and Co. et al. v. Thomson, Burrell et al.*[1]), and its claim will be dismissed with such costs (if any) as have been incurred by the Crown in resisting it, in so far as such costs are in addition to and distinct from costs incurred in the general defence of the proceedings.

Judgment accordingly.

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[1] (1877) 3 App. Cas. 279.