

## IN THE SUPREME COURT OF FIJI

## Appellate Jurisdiction

Criminal Appeal No. 35 of 1960

Between:

REGINA

Appellant

v.

FONG YUEN

Respondent

Customs Ordinance (Cap. 166)—section 145—persons entitled to institute proceedings.

The respondent appeared before the Magistrate's Court charged with an offence contrary to section 116, Customs Ordinance (Cap. 166) which provides:

"116. Should any person make any false entry in any form, declaration, entry, bond, return, receipt or in any document whatever required by or produced to any officer of customs under this Ordinance, or should any person counterfeit, falsify or wilfully use when counterfeited or falsified, any document required by or produced to any officer of customs, or should any person falsely produce to any such officer of customs under any of the provisions of this Ordinance in respect of any goods or of any vessel any document of any kind or description whatever that does not truly refer to such goods or to such vessel, or should any person make a false declaration to any officer of customs under any of the provisions of this Ordinance, whether such declaration be an oral one or a declaration subscribed by the person making it or a declaration on oath or otherwise, or should any person not truly answer any reasonable question put to such person by any officer of customs under any of the provisions of this Ordinance, or should any person alter or tamper with any document or instrument after the same has been officially issued or counterfeit the seal, signature or initials of or used by any officer of customs for the identification of any such document or instrument or for the security of any goods or for any other purpose under this Ordinance, such person shall on conviction for every such offence, except where a specific penalty is herein provided, be liable to a fine not exceeding two hundred pounds nor less than fifty pounds and in default of payment to imprisonment not exceeding six nor less than two months."

These proceedings had been instituted against the respondent by the presentation of a formal charge by a police officer under the provisions of section 79 (3), Criminal Procedure Code. Counsel for the respondent submitted that since these were proceedings for the "enforcement of a penalty", no person other than a collector of customs could institute these, by reason of section 145, Customs Ordinance (Cap. 166) which reads:

"145. Every suit or proceeding for the recovery of any duty or other charge leviable under this Ordinance or for the enforcement of any penalty or for the forfeiture of any goods, vessel or boat or any other article or for the satisfying of any bond or security under this Ordinance shall be entered in the name of the Comptroller of Customs and may be instituted by a collector of customs."

The magistrate upheld this submission and dismissed the case.

The Crown appealed.

*Held.*—Reversing the magistrate's decision,

(1) Any other person so entitled in law could institute proceedings under s. 145 in addition to a collector of customs.

(2) In proceedings under the Customs Ordinance the Comptroller of Customs is to be entered in place of the normal "Regina" in criminal proceedings, and as plaintiff in civil proceedings.

Appeal allowed.

*Justin Lewis Solicitor-General*, for the Appellant.

Respondent not represented.

KNOX-MAWER, Ag. J. [24th June, 1960]—

This is an appeal by the Crown against an order of the Magistrate's Court of the First Class, Suva, discharging the respondent in respect of a charge preferred against him under section 116 of the Customs Ordinance Cap. 166. The learned Solicitor-General has appeared on behalf of the Crown and the Court is indebted to him for the considerable assistance afforded by his carefully prepared and lucid argument in this case.

The proceedings against the respondent were instituted by the presentation of a formal charge by a police officer under the proviso to subsection (3) of section 79 of the Criminal Procedure Code. Counsel for the respondent submitted that these proceedings could not be thus instituted by reason of section 145 of the Customs Ordinance Cap. 166. The learned trial Magistrate upheld this submission, dismissed the case, and discharged the respondent.

Section 145 of the Customs Ordinance Cap. 166 is as follows:—

"Every suit or proceeding for the recovery of any duty or other charge leviable under this Ordinance or for the enforcement of any penalty or for the forfeiture of any goods, vessel or boat or any other article or for the satisfying of any bond or security under this Ordinance shall be entered in the name of the Comptroller of Customs and may be instituted by a collector of customs."

The Crown agrees that these proceedings were for the "enforcement of a penalty" under the Customs Ordinance, and therefore fall within the provisions of this section. Clearly the section relates to both civil and criminal proceedings. The words "shall be entered in the name of the Comptroller of Customs" make it mandatory in proceedings, civil or criminal, under the Customs Ordinance, for the name of the Comptroller of Customs to be entered, in civil actions as the plaintiff, and in criminal proceedings in place of the normal "Regina". This omission is curable under section 148 of the Customs Ordinance Cap. 166. Moreover, the fact that the Comptroller is a Crown servant renders the omission a particularly technical one.

The issue in this case is whether the words "and may be instituted by a collector of customs" are words of limitation precluding any person other than a collector of customs from instituting criminal (and civil) proceedings under the Ordinance. The use of the word "may", particularly when contrasted with the use of the word "shall" in the preceding clause, leaves

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me in no doubt upon this issue. These are not words of limitation. The effect of the clause is that, in addition to any other persons so entitled in law, a collector of customs *may* also institute proceedings under the Customs Ordinance. Of course, in the case of criminal proceedings, any person "who believes from a reasonable and probable cause that an offence has been committed by any person", can institute proceedings by making a complaint to a Magistrate (see section 79 Criminal Procedure Code); although the use of the formal charge form is confined to police or other public officers acting in the course of duty.

However, as the learned Solicitor-General has pointed out, there is certainly no superfluity in the clause so far as it authorizes a collector of customs to institute civil proceedings under the Ordinance, for in the absence of such specific provision a collector of customs would not, *prima facie*, otherwise be so authorized.

In the outcome therefore the learned Magistrate's order is set aside. He is directed to proceed with the trial of the respondent in respect of the offence charged.