1964

Jan. 27-30

Oct. 8

BETWEEN:

TVRTKO HARDY MARUN .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND BETWEEN:

REGINALD JAMES MINOGUE .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petitions of Right—Forfeiture of goods under the Customs Act—Unlawful importation of goods—Tax on imported goods under the Excise Tax Act—Burden of proof that Crown has no right to retain possession of goods seized under Customs Act—Goods taxable although not sold—Goods need not be dutiable to be taxable—Meaning of "jewellery" and "including diamonds for personal use or for adornment of the person"—Taxability of goods re-imported after having been previously imported then exported—Obligation of person bringing goods into Canada—Goods may be forfeited although not found in custody of importer—Forfeiture of goods automatic upon unlawful importation—Title to unlawfully imported goods—"Unusual treatment" within meaning of s. 2(b) of the Canadian Bill of Rights—Old Age Security Act, R.S.C. 1952, c. 200, s. 10—Customs Act, R.S.C. 1952, c. 58, ss. 2(1)(q), 18, 20, 21, 22, 36, 47, 160, 178(1) and (2), 183, 190(1)(a) and (c), 203, 248—Excise Tax Act R.S.C. 1952, c. 100, ss. 23, 29(1)(a) and (f), 30, 33, 35, 44, 46, 56 and Schedule I, s. 9(c)—Canadian Bill of Rights, S. of C. 1960, c. 44, s. 2(b).

The petitioners pray for the return of certain diamonds which are in the possession of the Crown as having been forfeited under the provisions of the *Customs Act*, on the ground that they had been unlawfully imported into Canada, and for other relief. The respondent counterclaimed for taxes alleged to be payable by the suppliants under the *Excise Tax Act* and the *Old Age Security Act*.

Held: That by virtue of s. 248 of the *Customs Act*, the burden is on the suppliants to prove that the Crown has no right, under any provision of the *Customs Act*, to retain the goods in its possession.

2. That the two large diamonds are subject to tax at the rate of 21 per cent of their value, payable upon importation, and the tax is payable on the sale price although the goods do not have to be sold to be taxable.

3. That the goods do not have to be subject to any duty imposed by the customs tariff to be taxable.

4. That the words "including diamonds for personal use or for adornment of the person" as used in Schedule I, s. 9(c) of the *Excise Tax Act*, are an extension of the meaning of the word "jewellery" and refer to a kind of goods.

5. That the two large diamonds in question are of gem quality and fall within the meaning of the words in Schedule I of the *Excise Tax Act*.

6. That because the diamond had been previously imported into Canada under license with no tax being paid, then exported, it cannot be

subsequently reimported, either in identical or altered form, without tax becoming payable.

7. That there is a threefold obligation on any person bringing goods into Canada, (1) to report the goods to Customs, (2) to make due entry of them, and (3) to pay the taxes.

8. That it was not established that the Customs officials have adopted an accepted practice of permitting persons not to declare items such as the diamonds in question, nor can Customs officials waive compliance with statutory obligations upon an importer, nor is an importer so relieved from the consequences of his failure to comply with these obligations.

9. That the fact that the suppliant, Marun, was acquitted by a police magistrate of a charge that, without lawful excuse, he was in possession of goods unlawfully imported into Canada, contrary to s. 203 of the *Customs Act*, which acquittal was sustained on appeal, is not *res judicata* in his favour of the fact that the goods had not been illegally imported and cannot be invoked by him in the present case.

10. That since no application for refund of any tax paid under the *Excise Tax Act* was ever made by the suppliant, Marun, as required by s. 46 thereof as a condition precedent thereto, it follows, without the necessity of deciding the questions whether the goods were properly taxable and whether the tax was paid in error, that the suppliant is not entitled to a refund of the tax.

11. That the suppliant, Marun, by his failure to comply with the positive duties imposed by s. 18 of the *Customs Act* falls precisely within the language of s. 183 of the *Customs Act*.

12. That if the person importing goods fails to comply with s. 18 of the *Customs Act*, the goods are forfeited if found and it matters not where they are found The language of the section does not require that the goods be found in the custody of that particular person.

13. That forfeiture under ss. 178 and 183 of the *Customs Act* is automatic and occurs immediately upon the unlawful importation by virtue of s 2(1)(*q*) of the *Customs Act*, and the goods thereupon become the property of the Crown and no act by any officer of the Crown can undo that forfeiture. Therefore any defect, if such existed, in the notifications and procedure adopted by the Department of National Revenue under s. 150 and 158 of the *Customs Act* is not material.

14. That s. 203 of the *Customs Act* does not mean that if a possessor of goods unlawfully imported has a lawful excuse, then the goods are not forfeited under other provisions of the *Customs Act*, and the suppliant, Marun, could not divest the property in the Crown by delivering one of the diamonds to Minogue no matter how innocent Minogue was.

15. That s 203 of the *Customs Act* is clearly to protect a person who innocently comes into possession of unlawfully imported goods and without means of knowing they were unlawfully imported, from prosecution and possible liability to a penalty equal to the value of the goods and imprisonment, but certainly not to vest title to unlawfully imported goods in such person.

16. That the fact that the *Customs Act* provides that goods unlawfully imported are forfeit to the Crown without power of remission and that the person who unlawfully imported such goods is liable for the tax payable thereon does not constitute "unusual treatment" within the meaning of s. 2(*b*) of the *Canadian Bill of Rights*.

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17. That neither suppliant is entitled to the relief sought in his Petition of Right.

PETITIONS OF RIGHT for the return, *inter alia,* of goods in possession of Crown as having been forfeited under the provisions of the *Customs Act.* Counterclaims by Crown for taxes alleged payable.

The actions were tried by the Honourable Mr. Justice Cattanach at Toronto.

Leonard Noble for suppliant Marun.

R. D. Tafel for suppliant Minogue.

D. H. Aylen for respondent.

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

CATTANACH J. now (October 8, 1964) delivered the following judgment:

These are Petitions of Right whereby the respective suppliants pray, in addition to other relief, the return of certain goods which are in possession of the Crown as having been forfeited under the provisions of the *Customs Act,* 1952, R.S.C., c. 58.

The suppliant, Marun, prays the return of a diamond of approximately seven carats mounted in a tie pin setting and twenty small industrial diamonds as well as a refund of $151.80 paid by him upon the importation of a quantity of industrial diamonds on July 12, 1960.

The Crown, by counterclaim, seeks judgment against the suppliant, Marun, for taxes alleged to be payable under section 30 of the *Excise Tax Act,* 1952, R.S.C., c. 100, section 10 of the *Old Age Security Act,* 1952, R.S.C., c. 200, as amended and section 23 of the *Excise Tax Act,* on the seven carat diamond, a five carat diamond and on the twenty industrial diamonds. It is is conceded by the Crown that no excise tax is exigible on the twenty industrial diamonds under section 23 of the *Excise Tax Act.*

The suppliant, Minogue, prays the return of a diamond of approximately five carats.

By order the petitions were heard together.

The suppliant, Marun, is a diamond prospector who was born in Yugoslavia, and had few educational advantages,

either in his native country or in Canada. He is not wholly proficient in the English language but has no great difficulty in understanding or being understood. In 1959 he engaged in diamond prospecting in British Guiana where he acquired prospecting licenses on Crown lands with authority to stake claims upon and occupy such lands for the purpose of mining for precious and semi-precious stones.

The suppliant, Marun, is the president and manager of R. J. Minogue & Co., Limited and Packsack Diamond Drill, Limited. Both these companies carry on business in North Bay, Ontario as manufacturers and distributors of diamond drill tools and equipment. The manufacture of the bits for such equipment involves the use of industrial diamonds for cutting surfaces.

The suppliants, respectively, as a consumer and producer of industrial diamonds became known to each other through their business relationship which ripened into a friendship.

Because of their mutual business interest in industrial diamonds, Marun and Minogue applied for and obtained the incorporation of a joint stock company, pursuant to the laws of the Province of Ontario under the name of Marun-Pakaraima Diamond Mining Company, Limited, by Letters Patent dated February 16, 1960. Mr. Minogue, personally and through R. J. Minogue & Co., Limited, made a small contribution to the capital of the company so formed by the purchase of shares of its capital stock as did Mr. Marun. At the organization meeting of the company, which was apparently the only meeting held, Marun was elected the president and Minogue the secretary. It was expected that capital would be raised through this company to purchase the equipment necessary to extend the diamond mining activities of Marun in British Guiana.

In the meantime, Marun continued his mining activities in his personal capacity.

In 1960 Marun mined 160 carats of industrial diamonds, consisting of about 900 pieces which he mailed on July 2, 1960 under a British Guiana export licence and on which he paid an export duty.

Marun then returned to Canada and cleared this shipment through Customs in Toronto on July 12, 1960 after

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some difficulty and considerable delay. He paid an amount of $151.80 claimed by the Customs officials as being exigible after first protesting that taxes were not payable. Mr. Minogue was of the same opinion and subsequently so advised Marun. However, at no time subsequent to July 12, 1960 did Marun make an application for a refund of the amount of $151.80 paid by him on the importation of the industrial diamonds.

Because of this experience and in order to facilitate the clearance of imported goods through Customs and to be relieved of the obligation to pay taxes at the time of importation, Marun as president of Marun-Pakaraima Diamond Mining Company, Limited, made application on October 14, 1960 in the name of the company for a wholesaler's sales tax license under the provisions of the *Excise Act*. By letter dated October 21, 1960, the Department of National Revenue, Customs and Excise, advised that the business of the company was not substantial enough to warrant the issuance of a license at that time.

Prior to this application Minogue had advised Marun that the policy to be adopted by the company should be that industrial diamonds be shipped to Canada by air through a Customs broker.

Both Marun and Minogue had been supplied with copies of the *Excise Act* by the Department, receipt of which was personally acknowledged by each of them.

Marun sold a portion of the industrial diamonds to Minogue. He gave some to persons interested in them as specimens. The balance he constantly carried on his person in a plastic vial and during his travels frequently crossed the Canadian border with these industrial diamonds in his possession. One particular diamond was polished in the expectation that it might be raised to gem quality but such experiment proved impractical.

In October, 1960, Marun returned to British Guiana. At that time one of the native labourers working on Marun's mining claims found a diamond weighing 27 carats. The working arrangements were that the finder was entitled to a 95 percent interest in any stones found and Marun was entitled to a 5 percent interest in stones found on his claims.

On a visit to Canada shortly after the finding of this 27 carat diamond, Marun told Minogue about it expressing the view that it was a valuable stone. It was agreed by Minogue and one Zouzelka that Marun should purchase the finder's 95 percent interest in the diamond. For this purpose Minogue advanced $10,000 and Zouzelka $5,000. Marun thereupon returned to British Guiana and acquired the native's 95 percent interest in the stone for $20,000, the balance of the purchase price over the advances of $15,000 being put up by Marun.

The precise nature of the arrangements among the three purchasers was not clear, that is whether they became joint owners of the diamond or whether Minogue and Zouzelka loaned the respective amount of $10,000 and $5,000 to Marun on the security of the diamond. The conduct of the parties was indicative of either such relationship dependent on their mood at any particular time. However, it was understood among them that the diamond should be sold, the three to share in any profit realized or to bear any loss incurred in proportion to their contributions, although Marun considered himself indebted to his partners in the amounts advanced by them and they, in turn, considered him so indebted.

On January 4, 1961, Marun shipped the diamond from Georgetown, British Guiana, through the Royal Bank to its branch in New York, U.S.A. For this service Marun paid the bank 247.14 West Indian dollars including postage, export tax, commission, bank charges and insurance.

Minogue, Zouzelka and Marun then met in New York where they obtained release of the diamond. Marun immediately returned to British Guiana and Minogue to North Bay while Zouzelka remained in New York to negotiate a sale of the diamond. Zouzelka's efforts were unsuccessful and accordingly he returned to Canada leaving the diamond in the custody of Freed Industrial Diamond Corporation in New York.

In February, 1961, Freed Industrial Diamond Corporation shipped the diamond to Murray Scheinman, an importer of and dealer in diamonds in Toronto, Ontario. Scheinman was the holder of an Excise Tax license and accordingly no tax was paid by him at the time of this importation. The diamond was placed on display in a

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leading departmental store in Toronto. Scheinman was not interested in purchasing the diamond himself nor did he find a purchaser for it.

On April 5, 1961 Scheinman returned the diamond by registered mail to Freed Industrial Diamond Corporation in New York.

Marun returned to Toronto shortly thereafter when he learned of these transactions and was informed by Zouzelka there was an outstanding account payable to Scheinman for his services in the amount of $26 which Marun forthwith paid without inquiring what was covered by this account. He testified that he thought it was for "a service passing through the Customs office".

In July 1961 Zouzelka apparently became disillusioned with the deal, and being in need of money, asked for his money back. Marun paid him $1,000 in cash and gave him a promissory note for $4,000. Marun and Zouzelka then entered into an agreement by which Zouzelka transferred his interest in the diamond to Marun, the agreement then stating that Marun and Minogue were each owner of a 50 percent portion of the total ownership in the diamond.

Marun then undertook to dispose of the diamond. At the end of August, 1961 he went to New York and picked up the diamond from the Freed Company and took it to Miami, Florida. There a window was cut in the exterior skin to determine the quality of the diamond which proved to be not up to expectations.

Marun then decided, with the concurrence of Minogue, that the prospects of selling the diamond would be greater if the diamond were cut, but Minogue, whose ardour about the transaction had somewhat cooled, in giving his concurrence reminded Marun that he still considered him indebted to the extent of $10,000.

Marun took the rough diamond to a Mr. Berliner, who had been a diamond cutter, but no longer practised that trade, and who recommended Baumgold Brothers of New York as being experts by whom the diamond was cut into a 7 carat stone and a 5 carat stone, the remainder of the 27 carats becoming waste.

Marun took delivery of the cut stones from Baumgold Brothers on the morning of October 8, 1961 and immediately flew with them in his possession to Toronto. At the Customs inspection at the airport in Toronto, Marun did not declare the two diamonds he now had, nor the twenty industrial diamonds which were still in his possession. He explained his reason for failure to do so as being his belief that the two cut diamonds were no longer commercial but that he intended to display them as specimens of what his mines in British Guiana produced in order to raise funds for further development. It did not occur to him to declare the twenty industrial diamonds upon which he had paid duty on July 12, 1960.

Marun telephoned Minogue in North Bay to advise him of his return to Toronto with the two cut stones, arranging to meet Minogue shortly thereafter.

The two suppliants did meet about ten days later. In a hurried session Marun offered Minogue both the diamonds or his choice of the larger or smaller one. Minogue chose the 5 carat stone. Minogue stated that he took the 5 carat diamond because he had no security for his $10,000 advance to Marun and because he felt he had better facilities for its safe-keeping. He was concerned about the diamonds being carried about by Marun without insurance. He gave Marun a handwritten document dated October 25, 1961 stating that he had a 5 carat diamond in his possession. Upon his return to North Bay he insured the 5 carat diamond for $3,000.

Meanwhile Marun obtained a certificate of appraisal for insurance purposes on the 7 carat diamond, the value of which was appraised at $15,800. However he did not insure the diamond because he could not pay the premium. Instead he had the diamond set in a tie pin at a cost of $30 as a means of safe-keeping (it being under his constant observation) and to display the diamond.

The diamond in this setting was appraised at $13,500 for insurance purposes by the same appraiser who had fixed a value of $15,800 on the same unset diamond.

Marun at the suggestion of Minogue and with his assistance attempted to borrow $5,000 on the security of the 7 carat diamond from the Toronto-Dominion Bank, the manager of which was personally known to Minogue, for

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the purpose of buying equipment to conduct further mining operations. The Manager expressed a willingness to make the loan provided Minogue joined in signing a demand note.

This bank loan never materialized because in the meantime Royal Canadian Mounted Police officers posing as agents of a millionaire principal, approached Marun purportedly to buy the diamond.

Marun was arrested on December 4, 1961 and charged with having in his possession goods unlawfully imported into Canada contrary to section 203 of the *Customs Act*. The 7 carat diamond in its setting and twenty industrial diamonds were seized by the police. This charge was dismissed by a police magistrate on January 17, 1962 and an appeal against such acquittal was also dismissed.

On being released on bail on December 4, 1961 Marun immediately telephoned Minogue advising him that he had been arrested for not declaring the diamond at Customs and that the diamond had been seized. There was an exchange of recriminations with Marun, in exculpation, explaining to Minogue that because of lack of funds he could not stay in New York to arrange proper customs documents.

I might add that Mr. Minogue entertained some misgivings about Mr. Marun's complete honesty which were since dispelled to his satisfaction, but he did take steps to protect his interests as best he could by taking from Marun, 30.50 carats of industrial diamonds at $10 per carat, $500 in cash and 450 of shares held by Marun in the Company and later the 5 carat diamond in the circumstances before recited.

The consent given by him to Marun to cut the 27 carat rough stone was given in writing, which document also stated that any sale of the cut stones was to be with Minogue's consent and that the money received was to be divided evenly between them after the deduction of expenses. It was again recited that Minogue and Marun were joint owners of the stone.

After being advised by Marun on December 4, 1961 that the police had seized the 7 carat diamond Minogue did not deliver the 5 carat diamond in his possession to the police or Customs officials, but on December 21, 1961

officers of the police attended upon Minogue at North Bay where he delivered the 5 carat diamond to them and accepted a receipt therefor.

A notice dated January 5, 1962 was received by Marun from the Department of National Revenue advising that a report of the seizure of one diamond tie pin and twenty rough diamonds had been made on December 4, 1961 on the ground that the said goods were smuggled or clandestinely introduced into Canada and that such goods were liable to forfeiture. This notice also pointed out that Marun had 30 days to present evidence by affidavit in rebuttal upon receipt of which the matter would be presented to the Minister for his decision on the merits of the case in accordance with section 160 of the *Customs Act* and that such decision would be final unless that decision was not accepted by Marun. A copy of sections 158 to 166 of the *Customs Act* was attached to this notice.

Marun forwarded an affidavit, pursuant to such notification stating, in part, that he was willing to pay all required duties.

By letter dated September 17, 1962 the Department advised Marun that a decision had been rendered to the effect that the tie pin setting was released unconditionally and that the 7 carat diamond and the twenty industrial diamonds would be released on payment of $9,710.25, failing payment of this amount within 30 days the diamonds would be forfeited.

A notice dated January 23, 1962 similar to that directed to Marun dated January 5, 1962 was received by Minogue who replied by letter dated February 14, 1962 in which he related the circumstances under which he came into possession of the 5 carat diamond.

On October 26, 1962 Minogue was advised that the 5 carat diamond would be released on payment of $3,817.55, and failing payment of this amount within 30 days the diamond would be forfeited.

Both suppliants objected to the foregoing decisions and since the goods were not returned to them, launched the present Petitions of Right for the relief above described. The suppliant, Marun, refused to accept the return of the tie pin setting when delivery was proffered by officers of the Royal Canadian Mounted Police.

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By virtue of section 248 of the *Customs Act*, the burden is on the suppliants to prove that the Crown has no right, under any provision of the *Customs Act*, to retain the goods in its possession.

There is no doubt that the 7 carat diamond and the 5 carat diamond are subject to tax at the rate of 21 percent of their value payable upon importation. A consumption or sales tax at the rate of 8 percent is imposed by section 30 of the *Excise Tax Act* to which a further tax of 3 percent is added under the *Old Age Security Act* making a total combined tax of 11 percent on the sale price of goods imported into Canada except those specifically exempted. The diamonds in question are not so exempted. While the tax is payable on the sale price the goods do not have to be sold to be taxable. Section 29 (1) (*f*) of the *Excise Tax Act* defines "sale price" for the purpose of determining the consumption or sales tax in the case of imported goods as being deemed to be the duty paid value thereof. Neither do the goods have to be subject to any duty imposed by the customs tariff to be taxable. Section 29(1)(*a*) provides:

> 29. (1) In this Part,
>
> (*a*) "duty paid value" means the value of the article as it would be determined for the purpose of calculating an *ad valorem* duty upon the importation of such article into Canada under the laws relating to the Customs and the *Customs Tariff* whether such article is in fact subject to *ad valorem* or other duty or not, plus the amount of the Customs duties, if any, payable thereon;
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> . . .

In addition to the consumption or sales tax at the rate of 11 percent, the two diamonds in question are also subject to excise tax by virtue of section 23 of the *Excise Tax Act* as being goods mentioned in Schedule I thereto at the rate opposite the mentioned item. Schedule I, section 9(*c*) specifically mentioned "articles commonly or commercially known as jewellery, whether real or imitation, including diamonds...for personal use or for adornment of the person...ten percent."

It was contended that the two cut diamonds in question particularly the 7 carat diamond were not to be used for personal use or adornment of the person, but were to be used as a specimen or sample indicative of the product of the suppliant Marun's mining operations in British Guiana. I do not accede to such contention because

in my view the words "including diamonds for personal use or for adornment of the person" in Schedule I are an extension of the meaning of the word "Jewellery" and refer to a kind of goods. The evidence was clear there are two kinds of diamonds, industrial diamonds and diamonds of gem quality. The two diamonds here in question are of the latter kind and therefore fall within the meaning of the words in Schedule I and are subject to an excise tax of 10 percent payable upon importation on the duty paid value as defined by section 29(1)(*a*) of the *Excise Tax Act* quoted above.

56. Where an excise tax is payable under this Act upon the importation of any article into Canada, the provisions of the *Customs Act* are applicable in the same way and to the same extent as if that tax were payable under the Customs Tariff, 1948, c. 50, s. 9.

Therefore, the taxes imposed under the *Excise Tax Act* are to be treated as duties under the Customs Tariff.

It was also submitted on behalf of the suppliants that the 27 carat rough diamond when first imported by Scheinman in February 1961, it was properly imported from which it followed that the two diamonds cut therefrom when subsequently imported were tax free. The simple answer to such contention is that when the rough diamond was first imported by Murray Scheinman, it was imported under license granted to Scheinman by the Minister under sections 33 and 35 of the *Excise Tax Act*, as a consequence of which no tax was payable, nor was any tax paid, at that time. Mr. Scheinman then exported the rough diamond to New York and being a licensed manufacturer he could do so without being subjected to tax by reason of section 44 of the *Excise Tax Act*. However, it does not follow that the stone having been imported under license with no tax being paid, then exported, that it can be subsequently reimported, either in identical or altered form, without tax becoming payable. Such a result would be absurd and in my opinion, was clearly not the intention of Parliament.

Section 18 of the *Customs Act* imposes a clear obligation upon every person arriving in Canada to report in writing to the collector or proper officer at the nearest Customs House all goods in his custody and the quantity and values of such goods, to answer all questions respecting such articles and to make due entry thereof as required by law. What

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constitutes due entry is set out in sections 20, 21 and 47 of the *Customs Act* which consists of filing an invoice describing the goods, giving the quantity and value thereof which, by section 21, is also required to be stated in the bill of entry although such goods may not be subject to duty. Section 22 imposes an obligation to pay duty which, by section 56 of the *Excise Tax Act,* includes taxes payable thereunder, at the time of entry, unless the goods are to be warehoused.

Accordingly there is a threefold obligation on any person bringing goods into Canada, (1) to report the goods to Customs, (2) to make due entry of them, and (3) to pay the taxes. None of these obligations were carried out by the suppliant Marun when he imported the two cut diamonds and the twenty industrial diamonds into Canada at the airport in Toronto on October 8, 1961, from which it follows that the goods were unlawfully imported on the person of Marun.

During the trial much evidence was led to establish, and it was argued, that the foregoing obligations so imposed by the *Customs Act* are more honoured in their breach than in their observance. It is quite true that travellers returning to Canada do not declare in writing but only verbally or on occasion not at all, a great many articles such as clothing and jewellery being worn, their suitcases and the like goods acquired in Canada, nor are they required to do so by Customs officials for the very practical reason that every person has these items and they are not subject to tax or duty in any event. However, any importer could readily distinguish between such items and those acquired abroad and more particularly between such items as two large and valuable diamonds which had just been cut in the United States and it was not established to my satisfaction that the Customs officials had adopted an accepted practice of permitting persons not to declare items such as these, nor can any Customs official waive compliance with statutory obligations upon an importer, nor is an importer so relieved from the consequences of his failure to comply with these obligations. I, therefore, reject the contention that under the circumstances the two cut diamonds and the twenty industrial diamonds were lawfully imported.

The fact that the suppliant, Marun, was acquitted by a police magistrate of a charge that, without lawful excuse, he was in possession of goods unlawfully imported into Canada, namely, a diamond tie pin, contrary to section 203 of the *Customs Act,* which acquittal was sustained on appeal, is not *res judicata* in his favour of the fact that the goods had not been illegally imported and cannot be invoked by him in the present case. See *Rex v. Bureau*[1].

The suppliant, Marun, in his petition prays the refund of $151.80 paid by him upon the importation of a quantity of industrial diamonds on July 12, 1960.

Section 46 of the *Excise Tax Act* provides that a refund of any tax imposed thereunder may be granted where the tax was paid in error, but by subsection 5 of section 46 no refund shall be paid unless application in writing is made for the same by the person entitled thereto within two years of the time when any such refund first became payable.

Since no application for refund was ever made by the suppliant, Marun, as required by section 46 *(supra)* as a condition precedent thereto, it follows, without the necessity of deciding the question whether the goods were properly taxable and whether the tax was paid in error, that the suppliant is not entitled to a refund of the amount of $151.80 as prayed in his Petition of Right.

I am satisfied that the twenty industrial diamonds found in the possession of Marun and seized were, in fact, pieces remaining from the 900 imported by him on July 12, 1960 upon which taxes had been paid. However, Marun did not report such goods as required by section 18 of the *Customs Act* and was in technical breach thereof.

While section 18 imposes the duties previously outlined upon persons arriving in Canada and having with them goods, whether dutiable or not, the section does not state the consequences of the failure of such persons to fulfill such duties. The consequences are found in other provisions of the *Customs Act.*

Section 190(1)(*a*) and (*c*) is as follows:

190 (1) If any person

(*a*) smuggles or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;

[1] [1949] S C.R. 367 at 374.

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. . .

(c) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall be seized and forfeited, or if not found but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as ascertained, such forfeiture to be without power of remission in cases of offences under paragraph (a).

Section 178(1) and (2) reads in part, as follows:

178. (1) Where the person in charge or custody of any article mentioned in paragraph (b) of section 18 has failed to comply with any of the requirements of that section, all the articles mentioned in paragraph (b) of that section in the charge or custody of such person shall be forfeited and may be seized and dealt with accordingly.

(2) If the articles so forfeited or any of them are not found, the owner at the time of importation and the importer, and every other person who has been in any way connected with the unlawful importation of such articles shall forfeit a sum equal to the value of the articles, and, whether such articles are found or not, . . .

Section 183 reads as follows:

183. If any goods are unlawfully imported on the person, or as baggage, or among the baggage of any one arriving in Canada, on foot or otherwise, such goods shall be seized and forfeited.

Section 203 reads as follows:

203. (1) If any person, whether the owner or not, without lawful excuse, the proof of which shall be on the person accused, has in possession, harbours, keeps, conceals, purchases, sells or exchanges any goods unlawfully imported into Canada, whether such goods are dutiable or not, or whereon the duties lawfully payable have not been paid, such goods, if found, shall be seized and forfeited without power of remission, and, if such goods are not found, the person so offending shall forfeit the value thereof without powers of remission.

Of the sections above quoted only sections 190 and 203 require the presence of a *mens rea* on the part of the person importing or retaining the imported goods.

There is no question that the suppliant, Marun, by his failure to comply with the positive duties imposed by section 18 falls precisely within the language of section 183 quoted above.

Similarly so, the actions of the suppliant, Marun, in importing the 7 carat and 5 carat diamonds also bring him with the operation of section 178. It was contended on behalf the suppliant, Minogue, that the words, "in the charge or custody of such person shall be forfeited and dealt with accordingly" render this section applicable only if the goods were found in the custody or possession of the person who failed to comply with section 18 when the

goods were imported. In my view such is not the proper interpretation of the section. If the person importing the goods fails to comply with section 18, the goods are forfeited if found and it matters not where they are found. The language of the section does not require that the goods be found in the custody of that particular person.

The forfeiture under sections 178 and 183 is automatic and occurs immediately upon the unlawful importation by virtue of section 2(1)(*q*) of the *Customs Act* reading as follows:

> 2. (1) In this Act, or in any other law relating to the Customs,
>
> . . .
>
> (*q*) "seized and forfeited", "liable to forfeiture" or "subject to forfeiture", or any other expression that might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty of forfeiture is imposed;
>
> . . .

The forfeiture is not brought about by any act of the Customs officials or officers of the Department, but it is the legal unescapable consequence of the unlawful importation of the goods by the suppliant, Marun. The goods thereupon became the property of the Crown and no act by any officer of the Crown can undo that forfeiture. Therefore, any defect, if such existed, in the notifications and procedure adopted by the Department under sections 150 and 158 is not material.

I am not convinced that the suppliant, Marun, by his action in failing to comply with the provisions of section 18 of the *Customs Act,* does not fall within the four corners of section 190(1)(*c*) of the *Customs Act* above quoted. The section contemplates the presence of a *mens rea* which I find was present despite the acquittal of Marun on a criminal charge under such section by a police magistrate.

From the evidence adduced it is clear that Marun, being a diamond prospector, had imported industrial diamonds on July 12, 1960 and had paid duty on them. He was, therefore, familiar with the requisite custom procedure. The company incorporated by him and Minogue had decided as a matter of policy, industrial diamonds mined in South America should be shipped to Canada by air

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through a Customs broker. There was a discussion of such policy between Marun and Minogue and it was Minogue's advice to Marun that such method of importation should be followed. Marun, as president of the company, applied for a license under the *Excise Tax Act* to permit of importation without payment of tax at that time, which license was not granted. Marun, when arrested on December 4, 1961 did not tell the police about the 5 carat diamond in Minogue's possession, but he did telephone Minogue and explained that he had been unable to stay in New York to complete documentation for customs importation because of lack of funds. It follows logically, because he was without funds at that time, he imported the diamonds without paying the tax which he must have known was payable. I cannot accept as credible the suggestion that since Marun had paid an account of $26 to Scheinman, he therefore believed that duty had been paid on the diamonds.

As to the 5 carat diamond found in the possession of the suppliant, Minogue, it follows that such stone was forfeited under sections 178 and 183 when unlawfully imported by Marun who could not divest the property in the Crown by delivering the 5 carat stone to Minogue no matter how innocent Minogue was.

Section 203 of the Act does not mean that if a possessor of goods unlawfully imported has a lawful excuse, then the goods are not forfeited under other provisions of the *Customs Act*. In *Smith v. Goral*[1] the plaintiff purchased a motor car from the defendant who had purchased it from a third party. The motor car was seized by the Crown from the plaintiff as forfeit under the *Customs Act* for unlawful importation into Canada without payment of custom duty. None of the parties knew of the claim for duty and all were innocent of the unlawful importation. The plaintiff sought to recover the purchase price relying on the implied warranties under the *Ontario Sale of Goods Act*. The plaintiff succeeded because under section 2(1)(*q*) of the *Customs Act*, the forfeiture occurred at the time the car was unlawfully imported as a consequence of the commission of the Customs offence. Therefore, the seller had no title to the car when he sold it, although it was not physically seized until later.

[1] [1952] 3 D.L.R. 328.

The purpose of section 203 is clearly to protect a person who innocently comes into possession of unlawfully imported goods and without means of knowing they were unlawfully imported, from prosecution and the possible liability to a penalty equal to the value of the goods and imprisonment, but certainly not to vest title to unlawfully imported goods in such person.

I now turn to the counterclaim of the Crown for judgment for the amount of taxes payable upon the importation of the 7 carat diamond, the 5 carat diamond and the twenty industrial diamonds against the suppliant Marun.

Under section 36 of the *Customs Act* the value for duty shall be the fair market value, at the time when and place from which the goods were shipped directly to Canada, of like goods when sold to purchasers who at the same trade level as the importer, namely the price at which Marun, the importer, could have purchased the 7 and 5 carat stones in New York on October 8, 1961.

There was evidence adduced by expert witnesses as to the value of the 7 carat diamond and the 5 carat diamond.

I disregard the evidence of the per carat valuations of the diamonds in their rough state, i.e., the 27 carat rough diamond, for the reason that an accurate appraisal of the cut diamonds could not be made in the original state. Similarly, I disregard, as being unrealistic, the valuation for insurance purposes and for the purpose of a bank loan of the 7 carat diamond at $15,800 and $13,500 and the insurance value of $3,000 on the 5 carat diamond.

An appraiser called by the suppliant, Marun gave a value of between $2,800 and $3,500 for the 7 carat stone and between $2,000 and $2,500 for the 5 carat stone.

A witness called by the Crown estimated the retail value of the 7 carat stone as being between $7,000 and $10,000 and the 5 carat stone as being between $4,000 and $6,000. The wholesale values were estimated by this witness at between $600 to $800 per carat for the 7 carat stone being an amount between $4,200 and $5,600 and the 5 carat stone at an amount between $2,400 to $2,600. This witness fixed the price in Canada in 1963. He stated that the New York price would be the same after allowing

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for exchange and that in 1961 the prices would be 10 percent less.

It was apparent that the diamonds were of inferior colour and marred by flaws. Therefore the market for them would be extremely limited. The suppliant, Marun, being a producer of diamonds would deal at the wholesale level.

Accordingly, I would fix the value for duty of the 7 carat stone at $3,200 and of the 5 carat stone at $2,300. The respondent is, therefore, entitled to judgment against the suppliant Marun in the amount of $1,156.75 which I arrive at by calculating the tax payable at 21 percent on the aforesaid values and a tax at 11 percent on the value of $25 for the industrial diamonds. The respondent is also entitled to the costs of the counterclaim.

It was submitted by counsel for the suppliant, Marun, that to declare the diamonds forfeited and also to exact the tax payable thereon, constitutes cruel and harsh treatment contrary to the *Canadian Bill of Rights*, 1960 Statutes of Canada, chapter 44 and that it is not fair for the Crown to retain the diamonds if the suppliant pays the tax thereon.

Section 2 of the *Bill of Rights* reads in part as follows:

> . . . no law of Canada shall be construed or applied so as to
> (*b*) impose or authorize the imposition of cruel and unusual treatment or punishment.

It will be observed that the pertinent words of the section are "cruel and unusual treatment". The fact that the *Customs Act* provides that goods unlawfully imported are forfeit to the Crown without power of remission and that the person who unlawfully imported such goods is liable for the tax payable thereon, does not constitute "unusual treatment". Therefore the *Bill of Rights* cannot be invoked as an aid to the interpretation of the *Customs Act* to reach a contrary result.

For the foregoing reasons, the suppliant, Minogue, is not entitled to the relief sought in his Petition of Right herein and Her Majesty the Queen is entitled to costs.

Similarly, the suppliant, Marun, is not entitled to the relief sought in his Petition of Right and Her Majesty the Queen is entitled to costs.

Judgment accordingly.