Trinity Term
[2020] UKPC 16
Privy Council Appeals No 0080 of 2018
and 0085 of 2018

JUDGMENT

Director of Public Prosecutions (Respondent) *v* Lagesse (Appellant) (Mauritius)
Director of Public Prosecutions (Respondent) *v* Seeburrun (Appellant) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

15 June 2020

Heard on 27 April 2020

Appellant (Lagesse)
James Guthrie QC

(Instructed by Stephenson Harwood LLP (London))

Appellant (Seeburrun)
Me Hervé Duval
(Instructed by Sheridans LLP)

Respondent
David Perry QC
Satyajit Boolell SC
Victoria Ailes
(Instructed by Royds Withy King (London))

LORD SALES:

1. This case concerns an allegation of conspiracy to import a motor vehicle into Mauritius without paying proper excise duty. The Supreme Court of Mauritius allowed an appeal from the decision of the magistrate sitting in the Intermediate Court, who had acquitted the defendants on the relevant charges. The Supreme Court directed that there should be a retrial. Two of the accused, Mr Lagesse and Mr Seeburrun, appeal to the Board.

Factual background

2. The appeal concerns the importation of a very expensive high performance motor car, a Mercedes Benz SLS63 AMG ("the car") in February 2011. Through the offices of a broker, Mr Toolsee, the car was purchased from a dealer in the United Kingdom at a price of £143,500 and then shipped to Mauritius at considerable expense, running to about £43,000.

3. The car was purchased and shipped using funds provided by Mr Lagesse. Mr Lagesse is a wealthy businessman in Mauritius. The car was intended to be for his use.

4. Under the Excise Act, any returning citizen is permitted to import one motor vehicle at a concessionary rate of excise duty. This concession was contained in Part C 3 of the First Schedule to the Excise Act (as amended) ("Part C 3"). The concession was subject to conditions, including that the returning citizen make a relevant declaration, submit documentary evidence of his purchase of the vehicle outside Mauritius prior to the date of his return, and ship the vehicle to Mauritius within 180 days of that date. Part C 3(9)(b) provided that the concession would be lost and the returning citizen would be liable to pay the full amount of the excise duty and value added tax, representing the concession, plus a penalty, where "(i) he sells, pledges or otherwise disposes of the motor vehicle within four years of the date of its importation".

5. With a view to importing the car into Mauritius at the concessionary rate, Mr Lagesse and Mr Toolsee made contact with Mr Seeburrun, a citizen of Mauritius who had been working in the United Kingdom for several years and was planning to return to Mauritius. At the time of his return in November 2010, Mr Seeburrun's occupation was as a self-employed teacher. While in the United Kingdom he had worked as a station assistant for Transport for London on a modest salary.

6. Mr Seeburrun's name appeared on the customs declaration documentation as the importer of the car and he made a claim for the concessionary rate of excise to be applied in respect of it. On 19 February 2011, a couple of days after the arrival of the car in Mauritius, Mr Seeburrun signed a "reconnaissance de dette" ("the promissory note") acknowledging that he owed Mr Lagesse R6.8m (the equivalent of the £143,500 purchase price of the car) and promising to repay it at the end of four years without interest. Mr Seeburrun took delivery of the car on its arrival in Mauritius and was in possession of it for a short period before handing it over to Mr Lagesse.

7. At about the time of the importation of the car, a lease document was drawn up according to which Mr Seeburrun would lease the car to one of Mr Lagesse's companies ("the draft lease"). The draft lease referred to a loan of R11m from the company to Mr Seeburrun and contained terms providing for the car to be rented to the company for four years from 20 February 2011 for R300,000 with a right for the company to purchase it at the end of that period for R100,000. In the event, the draft lease was not signed by either party. It is unclear why the draft lease was brought into being, or why it referred to a loan amount of R11m. According to Mr Seeburrun's account, the draft lease was superseded by the promissory note and the free loan of the car by him to Mr Lagesse.

8. The customs declaration gave the value of the car per purchase invoice as £70,582, rather that £143,500.

9. The car was registered in the name of Mr Seeburrun. However, Mr Lagesse paid for its insurance and road tax.

10. After the importation of the car in Mr Seeburrun's name, it came to the attention of the tax authorities in Mauritius that the car was in Mr Lagesse's possession and was being used by him. The tax authorities and the police investigated.

11. In 2013, Mr Lagesse, Mr Seeburrun and Mr Toolsee were charged as follows: (i) all three were charged with conspiracy in breach of section 109(1) of the Criminal Code (Supplementary) Act in relation to an offence contrary to sections 158(1)(a) and 160(1)(b) of the Customs Act, by acting to evade payment of excise duty and taxes on the importation of the car by making use of the concession for returning citizens (count 1); (ii) Mr Lagesse was charged with having possession of the car on which excise duty had not been paid, in breach of section 156 of the Customs Act (count 2); (iii) Mr Toolsee was charged with forging an invoice for the car in the sum of £70,000 and making use of that forgery (counts 3 and 4); and (iv) Mr Seeburrun was charged with swearing a false affidavit stating that he had taken delivery and possession of the car and had allowed Mr Lagesse to drive it (count 5).

12. In the Intermediate Court, the defendants were acquitted on all counts. The respondent appealed to the Supreme Court in relation to all the counts other than count 5. The Supreme Court allowed the appeal and ordered a retrial on all the counts, including count 5. The respondent accepts that it was not open to the Supreme Court to order a retrial on count 5.

13. Mr Toolsee has not appealed to the Board. The appeal before the Board is concerned only with counts 1 and 2 in relation to Mr Lagesse and Mr Seeburrun.

The decisions in the courts below

14. At the trial in the Intermediate Court, the prosecution's case in relation to counts 1 and 2 was that Mr Seeburrun's name was used to import the car, but in reality the importer was Mr Lagesse and the promissory note signed by Mr Seeburrun was a smoke-screen intended to conceal the true position. The draft lease had also been drawn up to conceal the true arrangement, albeit it had not in the event been signed. The purported arrangement between Mr Lagesse and Mr Seeburrun according to which Mr Lagesse had lent Mr Seeburrun R6.8m to buy the car, Mr Seeburrun became its owner and then, as a favour and without there being any obligation to do so, lent it to Mr Lagesse to use, was a sham. The reality of their arrangement was that Mr Lagesse was the purchaser of the car and became its owner; he was the true importer of the car; and Mr Seeburrun allowed his name to be used to hold himself out to the authorities as the owner of the car and its importer, in order to allow Mr Lagesse to obtain the benefit of the concessionary rate of excise duty on it. On the prosecution's case, according to the true arrangement between Mr Lagesse and Mr Seeburrun, Mr Lagesse was the importer of the car and as such should have paid the excise duty due in respect of its importation at a very much higher rate. Since Mr Lagesse was not a returning citizen, he was not entitled to the excise duty concession and was obliged to pay the full excise duty rate.

15. The magistrate in the Intermediate Court found that there was an agreement between the three accused for Mr Seeburrun to import a car from the United Kingdom, to be ordered by Mr Toolsee, by using Mr Seeburrun's returning resident status to benefit from the concessionary rate of import duty, "the purchase of which car would be financed by [Mr Lagesse] who would then be allowed by [Mr Seeburrun] to use and have possession of the said car in return". However, the magistrate made the assumption that Mr Seeburrun was the importer and the owner of the car, without examining the prosecution's case that in reality the importer and owner of the car was Mr Lagesse. Instead, the magistrate analysed the case by reference to Part C 3(9)(b)(i), and the question whether Mr Seeburrun could be said to have sold, pledged or disposed of the car in the period after his return to Mauritius. The magistrate held that Mr Seeburrun had done none of those things. In particular, simply letting Mr Lagesse use the car was not unlawful and did not qualify as a disposal for the purposes of that provision.

16. On the appeal by the respondent, he complained that the Intermediate Court had not addressed itself to the prosecution case as presented to it. The prosecution's argument had been directed to identifying the true importer of the car, which it said was Mr Lagesse, and was not based on the proposition that Mr Seeburrun was the true importer but had later disposed of the car to Mr Lagesse within the four year period specified in Part C 3(9)(b)(i). The relief sought by the respondent in the notices of appeal filed by him was in standard general terms, asking to have the judgment of the Intermediate Court "quashed, reversed, set aside, amended or otherwise dealt with as the Supreme Court shall deem fit and proper". However, in neither the written submissions nor the oral submissions made on his behalf was it said that there should be a retrial.

17. The Supreme Court referred to the relevant principle of interpretation of tax statutes, as summarised by Ribeiro PJ in the Hong Kong Court of Final Appeal in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, para 35, that "[t]he ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically." On that approach, the Supreme Court held that the object of the scheme in Part C 3 is to provide a tax concession for qualifying returning residents, and that it is clearly not meant to benefit non-qualifying residents.

18. The court then addressed the respondent's argument that the ostensible arrangement between Mr Lagesse and Mr Seeburrun had been a sham, that is to say that it had been a smoke-screen to mislead the revenue authorities and did not correspond with the true arrangement between them. The court said that the transaction had to be viewed as a whole, in light of the cumulative effect of its different parts. The scheme decided on by the accused involved a number of steps (from identifying the person who on paper would be the importer, the actual importation of the car, the financing of the car and the conduct of the parties after it cleared customs) which the court observed could be suggestive of what was agreed by them prior to the importation of the car. According to the court, it is arguable that looking at the arrangement as a whole the prosecution would be able to make out its case that the ostensible arrangement of Mr Seeburrun purporting to be the importer was a sham designed to conceal the true position, that Mr Lagesse was the importer. In the view of the Supreme Court, the magistrate had erred in law by adopting an unduly narrow interpretation of Part C 3 and by looking at each step taken by the accused independently, "rather than looking at the whole scheme put up by [the accused] and the motive behind the same". The court placed weight on the fact that Mr Seeburrun had never exercised any of the rights which the owner of a car would normally exercise and, in light of that, said that the financing agreement "demands to be analyzed thoroughly". The magistrate had not given proper consideration to the case brought by the prosecution. Therefore, the respondent's appeal was allowed.

19. The Supreme Court did not feel able itself to substitute convictions for the acquittals in the Intermediate Court, so it ordered a retrial.

The appeal to the Board

20. Mr Lagesse and Mr Seeburrun take four points on the appeal: (1) they say that the Supreme Court had no jurisdiction to overrule the decision of the Intermediate Court and order a retrial; further, (2) the Supreme Court acted unfairly in allowing the respondent's appeal, because during the hearing the judges in that court gave the impression that they accepted the arguments of counsel for Mr Lagesse and Mr Seeburrun that the respondent's appeal should be dismissed and in their judgment allowed the appeal on the basis of a new case, not put by the prosecution at trial; (3) the Supreme Court was wrong to allow the appeal on the merits; and (4) the Supreme Court erred in ordering a retrial without inviting submissions on that issue and it would be unfair for the Board to affirm its order. The Board will address these points in turn.

(1) The jurisdiction of the Supreme Court

21. Section 10(1) of the Constitution of Mauritius ("the Constitution") provides that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

22. Section 82(1) of the Constitution provides:

> "The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."

23. Section 92 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888 (as amended) ("the 1888 Act") provides, among other things, that where any person is charged with an offence before the Intermediate Court an appeal shall lie to the Supreme Court against any final decision of that court by the person charged against his conviction or by the Director of Public Prosecutions against any dismissal of a charge.

24. Section 96 of the 1888 Act provides in relevant part as follows:

> "…

> (2) Subject to subsections (3), (4) and (5) the Supreme Court may affirm or reverse, amend or alter the conviction, order or sentence, and may, if the order made or sentence passed is one which the trial court had no power to make or pass, as the case may be, amend the judgment by substituting for the order or sentence such order or sentence as the court had power to make or pass, as the case may be.
>
> …
>
> (5) Where, on an appeal under section 92, the Supreme Court is of opinion that a serious irregularity has occurred, it may declare the trial to be a nullity and order a fresh hearing."

25. The respondent submits that the Supreme Court had jurisdiction under both section 82(1) of the Constitution and section 96(5) of the 1888 Act to order a retrial in this case. The Board agrees.

26. As explained below, the Supreme Court was right to find that the decision of the Intermediate Court contained material errors of law. This has the result that the Supreme Court had jurisdiction, in the exercise of its constitutional supervisory function set out in section 82(1) of the Constitution, to order a retrial. Those circumstances also meant that a serious irregularity had occurred within the meaning of section 96(5) of the 1888 Act, so that the Supreme Court also had jurisdiction under that provision to order a retrial. This was the jurisdiction to which the Supreme Court referred in its decision.

27. The jurisdiction of the Supreme Court, on an appeal from the Intermediate Court, to order a retrial was considered in the judgment of the Board delivered by Lord Hope of Craighead in *Dosoruth v State of Mauritius* [2004] UKPC 51; [2005] Crim LR 474, paras 23-25. In that case, the accused had been convicted in the Intermediate Court and his appeal was dismissed by the Supreme Court. The accused wished to have his case re-examined in the light of further evidence which had not been adduced in the criminal proceedings, and commenced a constitutional action in the Supreme Court pursuant to section 17 of the Constitution seeking an order for a retrial to give effect to his right under section 10(1) of the Constitution. That action was dismissed by the Supreme Court and his appeal to the Board was also dismissed. As part of the argument on that appeal, Mr Ollivry QC for the accused submitted that a separate constitutional action was appropriate because in the criminal proceedings the Supreme Court would not have had the power to order a retrial when presented with new evidence which called in question the justice of the conviction. The Board rejected that contention at paras 23-25 of the judgment:

"23. … Mr Ollivry's principal submission was that it would not have been open to the appellate court in any event to order a new trial because section 96(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act, which sets out the powers of the Supreme Court on hearing an appeal, provides that no new evidence shall be admitted by that court on hearing an appeal. Section 96(5) provides that where, on an appeal under section 92, the Supreme Court is of opinion that a serious irregularity has occurred, it may declare the trial to be nullity and order a fresh trial. Mr Ollivry said that this power was not available to the court in its appellate capacity as no serious irregularity had occurred in this case. So it was the duty of the Supreme Court to hear the evidence in the proceedings for constitutional relief so that it could order a new trial in the exercise of its powers under section 17 of the Constitution.

24. Their Lordships cannot accept this argument. The right of appeal which is given to the convicted person by section 92 of the District and Intermediate Courts (Criminal Jurisdiction) Act is a right to a re-hearing of the case under section 96(1) of the Act in the light of the information, depositions and other evidence that were before the trial court. It is in that context that section 96(1) provides that no new evidence shall be admitted. This means that the appellate court must proceed upon the facts which were put in evidence before the trial court. But section 96 must be read together with section 82(1) of the Constitution, which provides that the Supreme Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court. It is not necessary for proceedings for constitutional relief to be brought under section 17 of the Constitution to enable the Supreme Court to exercise this power. It is available to be exercised in any proceedings which are brought before that court, including those under section 92 of the Act. Section 82(1) is in the widest terms. Among the orders that may be made under it is an order remitting the case to the inferior court so that, if it thinks this appropriate, it may take account of additional evidence.

25. The appellate court also has power under section 96(5), if it is of the opinion that a serious irregularity has occurred, to declare the trial to be nullity and order a fresh hearing. It was open to the appellant to contend that there had been a serious irregularity at his trial if, as he contends, he was convicted on the false assumption that the incident which Mrs Kedhoo [the complainant in the case] described could have happened on a Saturday afternoon as she said

> it did. The constitutional guarantee of a fair hearing in section 10(1) requires that a generous construction should be given to the expression 'serious irregularity'. But the appellate court was not asked by the appellant in his grounds of appeal to exercise this power, so the point was not tested in that court. Mr Ollivry sought to avoid this objection to his argument by asserting that no serious irregularity had occurred in this case. But it is hard to see why this was so if, as he asserts, the appellant was convicted of participating in a transaction with Mrs Khedoo that on her own account of it could not have happened."

28. Against this, Mr James Guthrie QC for Mr Lagesse makes a number of submissions. He relies on *Lamto v The State* 2017 SCJ 275 as more recent authority to the effect that the phrase "serious irregularity" in section 96(5) of the 1888 Act has a narrow meaning. In that case, the Supreme Court held that a failure by the Intermediate Court to analyse and consider the evidence before it and its proceeding on the basis of a misdirection in law did not constitute a "serious irregularity" within the meaning of section 96(5) which would permit a direction for a retrial to be given. Mr Guthrie also maintains that the phrase has to be read in the light of the power in section 96(5), where such an irregularity is found to have occurred, to declare the trial in the Intermediate Court to be a nullity. Therefore, he says, in order to qualify as "serious" the irregularity has to be so profound as to render the trial a nullity, which could not be said of any irregularity which might be found in the present case, in which the respondent's case was only that the magistrate had made a mistake. The generous construction given to the phrase in *Dosoruth* was to be explained on the basis that the Board was considering a case where the accused wished to seek a retrial and could rely on his rights under section 10 of the Constitution, and the reasoning in it does not apply to an appeal by the prosecution, which is what is in issue in the present case. In Mr Guthrie's submission, by the 1888 Act the legislature has given precise definition to the powers of the Supreme Court on an appeal from the Intermediate Court as regards ordering a retrial, thereby giving effect to section 82(1) of the Constitution, which should not be taken to have any wider force. Mr Hervé Duval SC for Mr Seeburrun adopted Mr Guthrie's submissions.

29. The Board does not accept these submissions.

30. In *Lamto*, the Supreme Court proceeded without referring to the authoritative guidance given by the Board in *Dosoruth*. Furthermore, the reasoning of the Supreme Court in relation to section 96(5) of the 1888 Act is, with respect, flawed. The case concerned an appeal by the prosecution. In the relevant part of its judgment, at p 11, the court, in justifying its rejection of the prosecution's application pursuant to section 96(5) for a retrial, said as follows:

> "To hold otherwise would create a situation whereby each time a trial court either misapprehends or fails to analyse the evidence adduced before it or draws the wrong inference therefrom or misapplies or misinterprets the law thus rendering unsafe a conviction, the case would have to be remitted back to the lower court for a fresh trial. It would also unfairly allow the prosecution to perfect its omission at trial stage by giving it a second opportunity."

However, this overlooks the fact that section 96(5) is expressed in permissive, not mandatory, terms ("… the Supreme Court … may declare the trial to be a nullity and order a fresh hearing"). Therefore it by no means follows that each time a "serious irregularity" is identified there has to be a retrial, which was the unattractive outcome which the Supreme Court in *Lamto* believed was in prospect which led it to adopt a narrow interpretation of the phrase. Since the Supreme Court has a discretion under section 96(5) whether or not to order a retrial when a "serious irregularity" has occurred, it is in a position to ensure that a retrial will only be ordered where there is no unfairness to the accused and where doing so will not confer an unmerited advantage on the prosecution. There is thus no need to adopt a narrow interpretation of the phrase in order to avoid such outcomes.

31. In the Board's view, both the constitutional background and the more immediate statutory context for section 96(5) point towards the phrase "serious irregularity" bearing a wider meaning, so as to cover any material irregularities which may occur in the course of a criminal trial and which could mean that an incorrect outcome has been arrived at. On the other hand, the phrase excludes immaterial or trivial irregularities. The phrase sets out the threshold condition to be met before the Supreme Court has the power under that provision to order a retrial. There will be many cases where a material irregularity has occurred at first instance in which the Supreme Court, as an appellate court, cannot be sure whether the correct outcome of the trial should have been a conviction or an acquittal, for the very reason that the trial process has not been conducted in a proper way. In such a case, the obvious way in which justice will be served (subject to supervening factors which may bear upon that question, as discussed below) is for there to be a fresh examination of the facts of the case in a trial conducted in a proper way and according to law. Interpretation of the phrase "serious irregularity" should be directed to enabling the Supreme Court to promote justice in all such cases, rather than disabling it from doing so.

32. That interpretation of section 96(5) is reinforced by section 82(1) of the Constitution, which is a provision in the widest terms, as the Board observed in *Dosoruth*. The Supreme Court has the constitutional function of supervising criminal proceedings before subordinate courts, including the Intermediate Court, which means that it must be in a position to act in an appropriate way to correct material irregularities which occur in such proceedings; and, further, under section 82(1) the Supreme Court

has the function of taking action to ensure that justice is duly administered by any such court, which means that if the due administration of justice requires that there be a retrial before such a court the Supreme Court's role is to order that. Section 96(5) should be read so as to conform with the Constitution.

33. Further points support the same interpretation, when looking at matters from the point of view of an accused who appeals against his conviction in the manner discussed by the Board in *Dosoruth*. Where an accused has been convicted by the Intermediate Court in circumstances where there has been a material irregularity in his trial, it is clearly apt to describe the irregularity as "serious", since it may mean that an innocent accused has been found guilty. Further, the appellant accused in a particular case may realistically appreciate that the Supreme Court might be reluctant simply to acquit him where there is a good arguable prosecution case and may therefore ask for a retrial in the alternative. As observed in *Dosoruth*, the constitutional guarantee in section 10(1) of the Constitution of a fair trial on a criminal charge supports the wider interpretation of the phrase "serious irregularity" in such cases. In the context of section 96(5), particularly when read in the light of section 82(1) of the Constitution, there is no good reason to suppose that the legislature intended that the meaning of that phrase should be different, depending on whether the prosecution or the accused happens to be the party who asks for a retrial.

34. In the light of the discussion above, the Board also dismisses Mr Guthrie's submission that the test of whether there is a "serious irregularity" for the purposes of section 96(5) is whether the irregularity in question has rendered the trial "a nullity". Such a reading would deprive the provision of its intended effect and cannot be supported. The correct interpretation is that the finding that there was a "serious irregularity" is the threshold condition giving rise to a power as described in the last phrase, which is to "declare the trial to be a nullity and order a retrial". The word "nullity" does not qualify or inform the interpretation of the phrase "serious irregularity", which is free-standing both conceptually and as a matter of the drafting of the provision.

35. Nor does the Board consider that any significant assistance is to be derived from consideration of amendments to the Criminal Appeal Act introduced in 2013, concerning appeals from the Supreme Court to the Court of Criminal Appeal, on which Mr Guthrie also sought to rely.

36. Therefore, the Board affirms the guidance it gave in *Dosoruth* regarding the interpretation of section 96(5). As is explained below, the Board considers that there was a "serious irregularity" (within the meaning of section 96(5)) in the trial of the accused in the present case, with the consequence that the Supreme Court had jurisdiction to order a retrial under that provision.

37. The Board also considers that, quite apart from section 96(5), the Supreme Court had jurisdiction under section 82(1) of the Constitution to order a retrial in this case since there was a serious, that is material, irregularity in the trial in the Intermediate Court. As the Board made clear in *Dosoruth*, section 82(1) affords a distinct basis of jurisdiction for the Supreme Court to order a retrial in the course of the criminal proceedings, without any need for a separate constitutional action to be brought under section 17 of the Constitution. The Board cannot accept Mr Guthrie's submission that an ordinary statute, such as the 1888 Act, can have the effect of removing or cutting down this jurisdiction which is conferred on the Supreme Court by the Constitution, which has a higher normative status.

38. On his appeal to the Supreme Court, the respondent did not refer to section 82(1) of the Constitution and nor did the court. However, in the Board's view, since that provision conferred jurisdiction on the Supreme Court to order a retrial in the circumstances of this case, it could not be said that the court acted in excess of its jurisdiction just because no reference was made to the provision itself.

(2) Unfairness

39. Mr Lagesse and Mr Seeburrun complain that the hearing in the Supreme Court was unfair in two respects. First, they say that during the hearing their counsel were given the impression in the course of exchanges with the court that it accepted the arguments which were presented by them in relation to the merits of the appeal, so that it was unfair for the court to reach a contrary view when it delivered judgment.

40. The Board does not consider that this complaint is made out. The Board has examined the transcripts of the hearing with care. At no point did the judges say in unqualified terms that they accepted the submissions presented on behalf of Mr Lagesse and Mr Seeburrun. Importantly, the court did not stop their counsel in the course of making submissions for them, which would have been the critical step which indicated that it accepted their submissions and needed to hear no more. Counsel at all times appreciated that they had to present full argument for their clients and did so. It is often the case that judges may express views in the course of a hearing as a way of testing the arguments on both sides, but it is well understood that such indications are entirely provisional (unless a judge actually stops counsel from presenting further argument, because he is fully persuaded and needs to hear no more) and judges are expected to reflect on the arguments they have heard and to form their final views at or after the end of submissions. The Board is satisfied that the judges in the Supreme Court did not go further than this. There was no unfairness.

41. Secondly, Mr Lagesse and Mr Seeburrun complain that there was a fundamental shift between the hearing in the Intermediate Court and the hearing in the Supreme

Court in the case presented against them. The Board does not agree. Examination of the transcripts of both hearings shows that the prosecution was consistent in arguing that the ostensible arrangement between Mr Lagesse and Mr Seeburrun was a sham and that Mr Lagesse was the true importer of the car, who had the relevant obligation to pay import duty at a non-concessionary rate. The magistrate fell into error by overlooking this way in which the prosecution put its case and instead wrongly characterising its case as based upon the operation of Part C 3(9)(b)(i) after Mr Seeburrun had imported the car, and in particular whether he could be said to have disposed of the car to Mr Lagesse within the meaning of that provision. There was no change in the prosecution's case between the two hearings. In both courts the prosecution's case was that the appearance that Mr Seeburrun was the owner and importer of the car was a sham, and that the true owner and importer was Mr Lagesse. The thrust of the prosecution's case on the appeal to the Supreme Court was that the magistrate had failed properly to grapple with this case as presented by the prosecution, and it was that submission of the prosecution that the Supreme Court accepted.

(3) The merits of the prosecution's appeal to the Supreme Court

42. It is common ground that there should be the same outcome on this appeal in relation to counts 1 and 2, so the Board will focus on count 1. For present purposes it is sufficient to set out the relevant part of section 158(1) of the Customs Act:

> "(1) Every person who -
>
> (a) evades or attempts to evade payment of any duty, excise duty or taxes which are payable;
>
> … shall commit an offence."

43. Under the Excise Act, the importer of a motor vehicle into Mauritius is required to pay duty on it. Part C 3 sets out the concessionary rate of duty for a returning citizen and the conditions under which the concession is applicable. For present purposes, the relevant paragraphs of Part C 3 are as follows. Part C 3(1) specifies to what motor vehicle the concession applies:

> "One motor vehicle or motorcycle proved to have been imported by the returning citizen of Mauritius who is coming back to settle permanently in Mauritius, provided that the conditions specified in paragraph (2) are satisfied."

The conditions specified in Part C 3(2) include at sub-paragraph (b)(ii) that the importer provides a declaration that:

> "… he has purchased the motor vehicle or motorcycle outside Mauritius prior to the date of his return to Mauritius."

Part C 3(9)(b)(i) provides:

> "(9) Where a person has been granted concession on a motor vehicle or motorcycle under paragraph (1), (3), (6) or (7), he shall -
>
> …
>
> (b) be liable to pay the full amount of the excise duty and value added tax, representing the concession granted, plus a penalty of 10% thereon where -
>
> (i) he sells, pledges or otherwise disposes of the motor vehicle or motorcycle within four years of the date of its importation; …"

44. It is clear from these provisions in Part C 3, in particular, that the concession is only intended to be available where the returning citizen is the owner of the motor vehicle in question as a matter of substance and is the person who is the importer, again as a matter of substance. The Supreme Court proceeded on the basis that this was the correct interpretation of Part C 3 and was right to do so.

45. As explained above, the prosecution's case throughout has been that Mr Seeburrun was not the true owner of the car and was not in reality the person who imported it. In the Board's view, the Supreme Court was right to hold that the magistrate in the Intermediate Court failed properly to address that case in his judgment and, in particular, that he failed to carry out an adequate examination of the evidence to assess whether that case was established or not.

46. The Supreme Court was right to hold that, on a proper understanding of the prosecution case, there is a serious issue requiring proper examination at a trial that Mr Lagesse was the true owner and importer of the car and that the ostensible arrangement between him and Mr Seeburrun was a sham. It appears well arguable that the debt to which the promissory note referred could never have been repaid by Mr Seeburrun. Mr

Guthrie for Mr Lagesse was constrained to accept as much. Even if it were said that the expectation was that Mr Seeburrun might sell the car at the end of the four year period referred to in the promissory note, it appears that Mr Seeburrun would not have been able to repay the sum purportedly due from the proceeds of such a sale, because the car would inevitably have depreciated in value to a significant extent. Further, Mr Seeburrun had no prior ties with Mr Lagesse, so it is not clear why he would wish to lend this very valuable item of property to Mr Lagesse for his free use. The effect of him doing so was that Mr Seeburrun had neither the use of the money purportedly lent to him by Mr Lagesse nor the use of the asset bought with that money. And if this was the true arrangement, why had it been thought appropriate to draw up the draft lease? In the circumstances, there was a seriously arguable case presented by the prosecution that the reality was that Mr Lagesse had purchased and imported the car for himself, which was the reason he was prepared to provide the money for the purchase price and to bear the cost of importing, insuring and taxing it, and that Mr Seeburrun recognised that as between him and Mr Lagesse it was Mr Lagesse who had the right to exercise ownership.

47. The Supreme Court was therefore right to conclude that there had been a "serious irregularity" during the trial in the Intermediate Court, within the meaning of section 96(5) of the 1888 Act. It followed that it had a discretion to declare the trial a nullity and order a retrial.

(4) The Supreme Court erred in ordering a retrial without inviting submissions on the issue of a retrial

48. The Board notes the wide terms of the respondent's notices of appeal to the Supreme Court and considers that the parties could perhaps have been expected to anticipate that an order for a retrial was a possibility. However, as events transpired, neither the respondent nor any of the accused had made submissions directed to whether there should be a retrial and the Supreme Court did not ask for such submissions before it gave judgment.

49. Whether there should be a retrial or not was a highly significant matter. Since none of the parties had made submissions on that question, it is the Board's view that the Supreme Court erred in proceeding to exercise its discretion to order a retrial without inviting representations from them. The Supreme Court could not assume that it already had full notice of all possible relevant factors and could not assume that the parties were indifferent as to whether there should be retrial or not. Justice required that the parties be given the opportunity to present argument to the court on that question before the court made its order.

50. The position on the appeal to the Board is that the parties have known since the Supreme Court made its order that a retrial is in issue. Mr Lagesse and Mr Seeburrun seek to have that order set aside and so have known for a considerable time that the onus is on them to explain why the order was inappropriate. However, apart from pointing to the considerable time that has elapsed since the alleged offence, they have not identified any good reason to suggest that the order made by the Supreme Court was incorrect.

51. Allowing for difficulties of detection and other factors, it is an unavoidable feature of the criminal process that there may sometimes be a considerable lapse of time after an alleged offence before a trial takes place. Delays may also inevitably arise where there is an appeal such as in the present case. The factor of delay by itself does not mean that it is unjust to proceed with a trial, if it is fair to do so and there is a reasonable explanation for the delay which has occurred. The public interest in upholding confidence in the due administration of justice may require that a trial should take place even after a considerable passage of time, provided fairness can be achieved. In most cases, including this one, the existence of a reasonable explanation for a delay means that the right under section 10(1) of the Constitution for an individual charged with a criminal offence to be tried within a reasonable time is not infringed.

52. In this case, the Supreme Court thought that it would be fair and in the public interest for there to be a retrial. Even though uninformed by submissions from the parties about that, the view of the local court on such a question carries weight.

53. In the Board's judgment, in the circumstances a retrial is the fair and appropriate way forward and the decision of the Supreme Court should be upheld. Most of the relevant evidence is derived from contemporaneous documentation and there are extensive written records of the accounts given by the accused to the police prior to being charged and affidavit evidence prepared by them prior to the trial in the Intermediate Court. It is not unreasonable to expect the accused to face a retrial with the benefit of this extensive material to hand. Mr Guthrie and Mr Duval did not point to any matter which could outweigh the public interest in securing the due administration of justice in this case. On the other hand, Mr David Perry QC for the respondent took the Board to press reports which indicated that there is public concern about abuse of the returning citizen import concession. Public confidence in the due application of the law in a case of this kind, where there was a serious irregularity in the original trial, will best be promoted by a retrial.

54. The Board sees no merit in remitting the question of whether there should be a retrial to the Supreme Court for further consideration, as there is no significant prospect that it would come to a different conclusion. On the other hand, there are good reasons why the Board should decide for itself now that the order for a retrial should be upheld, since that will minimise any further delay in securing a just resolution in relation to

these criminal charges. The requirement under section 10(1) of the Constitution that an accused be tried within a reasonable time points in favour of the Board taking this course.

Conclusion

55. By the agreement of the parties, the appeal is allowed to the extent of modifying the order for a retrial to remove count 5, so that it is limited to counts 1 to 4. Apart from that, for the reasons given above, the Board dismisses the appeal.