REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-01002**

IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY JESSE RYAN MARK ROOPLAL FOR JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF THE JUDICIAL REVIEW ACT 2000

AND

BETWEEN

JESSE RYAN MARK ROOPLAL

Claimant/Applicant

AND

COMPTROLLER OF CUSTOMS AND EXCISE

Defendant/Respondent

Before the **Honourable Mr Justice R. Rahim**

Date of Delivery: January 30, 2020

Appearances

Claimant/Applicant: Mr. J. Singh, Mr. D. Rambally, Mr. K. Taklalsingh and Mr. S. Ramkissoon instructed by Ms. R. Khan

Defendant/Respondent: Mr. G. Peterson SC and Ms. J. Baptiste-Mohammed instructed by Ms. T. Kissoon

Judgment

1. The challenge in this case is to that which the claimant refers to as the policy of the defendant in relation to the application of a particular qualifying test for imported items which it considers falls under the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 (the Act). The subsection prohibits the importation of indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, gramophone records or any other indecent or obscene matter. It is an offence to import any such goods under section 213 of the Act. In this case, the claimant attempted to import what he refers to as a mannequin (the item).

2. There is a further challenge to the process employed by way of the issue of a summons to show cause issued to the claimant for him to demonstrate to the court a reason as to why the item ought not to be seized. It is the argument of the claimant that the burden of proof in forfeiture proceedings lies with the defendant so that the process employed is an unlawful one.

<u>The seizure</u>

3. The material facts are that on December 28, 2018, the item was inspected by Customs and Excise Officer Natasha Harracksingh at the Aviation Business Limited Bond compound Piarco International Airport it having been imported by the claimant through the shipping company UPS and described in the invoice as a plastic mannequin for entertainment. The inspection was conducted in the presence of the claimant and it is the uncontroverted evidence of Harracksingh that upon examination she

observed a life size doll that felt like it was made of silicone with very distinctive features resembling that of a woman. The doll had pubic hair on a very detailed vagina which contained a hole, enlarged breasts with defined nipples and a tool that resembled a pencil with a usb heating rod attached to it. She was informed by the claimant upon her enquiry that the item was to be used for photography in that he intended to dress it up and take photographs.

4. Harracksingh formed the view that the item was prohibited as being an item described at section 45(1)(L) of the Act. She then alerted the officer in charge Franklin Ramnath and of her opinion that the item was not as described in the airway bill and requested his assistance. It is Ramnath's evidence that he then viewed the item in the presence of the claimant and his observations were the same. The item was seized, and a detained package receipt was issued. The claimant was informed of the detention and his right to appeal the decision. The Delivery Note, Airway Bill and Invoices were handed over to Ramnath by Harracksingh and were then in turn handed over to the preventative branch of Customs and Excise at Piarco. It is to be noted that the airway bill attached to the affidavit of Harracksingh carries the description "Plastic Mannequin for entertainment".

5. A more detailed inspection was conducted by Customs and Excise Officer II Suzanne John of the preventative branch who took measurements, made observations and provided many photographs of the item in her affidavit. It is quite unnecessary to set out her highly vivid and extremely detailed description and measurements as it is not an issue in this case that the item is a life sized doll with what purports to be life size female genitalia and features.

The subsequent proceedings

6. John met with the claimant on January 29, 2019 at Customs House Port of Spain according to her, to allow the claimant to identify the item seized and to provide him with an opportunity to explain the purpose and intended use of the item. She informed him of the reason for seizure and detention of the item. The claimant stated that he had hired lawyers and was there to collect the item. John then issued to him a notice of seizure and he declined to be interviewed. On January 31, 2019, the defendant wrote to attorney for the claimant seeking to interview him. The request was eventually refused. By letter of February 4, 2019, the claimant made a notice of claim for the goods. The claimant through his lawyers called upon the defendant to institute court proceedings by letter of February 25, 2019.

7. A summons was issued against the claimant for the importation of a prohibited item contrary to section 213(a) of the Customs Act pursuant to section 45(1)(L) on March 11, 2019. It is the evidence of John that forfeiture proceedings have not been instituted as he was charged for a criminal offence. The inference being that the item can be ordered to be destroyed should he be found guilty. The charges are still pending.

8. The evidence attached to the John affidavit consists of two documents. There is firstly the information number 2601 of 2019 by which the charge has been laid and secondly there is a summons to the claimant issued pursuant to the very charge laid in information number 2601 of 2019. The latter requires the claimant to attend court to show cause as to why the item should not be destroyed. It is with the latter document that issue has been taken in this case.

ISSUES

9. The issues are as follows;

    a. Has the defendant adopted and implemented a policy whereby some goods which fall within a named sub category of goods are considered indecent or obscene when the goods closely resemble male and female genitalia without consideration of the ordinary and natural meaning of the words indecent and obscene as used in the Customs Act.

    b. If so, is the adoption and implementation of such a policy transparent and lawful.

    c. In either case, is the process of the issuance to the claimant of a summons to show cause a lawful process for forfeiture under the provisions of the Customs Act in the circumstances of this case and in particular in light of the laying of an information against the claimant as opposed to forfeiture proceedings.

First issue and second issues: Has the defendant adopted and implemented such a policy and is the application of such a policy unlawful

10. The defendant has deposed (see affidavit of Bernard Nicholas the Deputy Comptroller of Customs at para 6) that there is no such written policy but that the long employed unwritten practice of the defendant has been that any item which closely resembles the male or female genitalia is considered indecent or obscene. It sets out that this is its practice in relation to items "such as adult toys", the possible inference being that the practice does not apply to items used for other purposes such as medical

purposes. At paragraph 12 Nicholas makes it clear that the Act does not speak of adult toys so that the Comptroller of Customs (COC) is called upon to interpret indecent and obscene and not adult toys. He also makes it abundantly clear that it is not the Comptroller's position that all adult sex toys are prohibited goods and that it is only in the case where the adult sex toy falls into the category of that close resemblance to male or female genitals that they are considered indecent or obscene (see paragraph 11 of his affidavit).

11. Further, it is the evidence of Nicholas that as far back as 1981 the Censorship Committee (not a committee of the defendant) issued lists of books and magazines of a pornographic nature which were banned from importation. Pursuant thereto the Customs Division issued circulars to Customs Officers to be guided by same. Copies of said circulars are attached to his affidavit. He deposes that members of the public have access to the email address of the division to make enquires should they be unsure of whether certain items are classified as indecent or obscene. The circulars attached actually go as far back as 1972.

12. The defendant is also guided by a memorandum dated October 2, 2003 under the hand of the Director of Public Prosecutions in relation to advice sought by the then acting COC as to how to proceed in relation to the importation of adult toys. That memo sets out that as a matter of interpretation, the words indecent and obscene ought to be given their natural and ordinary meaning. That the standard imposed does not only apply to matters of a sexual nature but also those which offend against recognized standards of propriety generally with indecent being at the lower end and obscene being at the upper end of the scale. The memo also makes reference to the well known older cases of ***R v Bow Street***

Stipendiary Magistrate (1989) 89 Cr App R 121 and ***R v Anderson*** (1972) 1 QB 304 at 311. Finally, that the cases demonstrate that those words indicate the ambit of the English common law offence of outraging public decency.

13. The evidence of all of the deponents for the defendant demonstrates that in applying the advice provided by the DPP, the defendant has adopted an approach that once the item being imported closely resembles male or female human genitalia, it is considered obscene within the meaning of the Act and is thereby prohibited. (See the affidavits of Suzanne John at paragraph 15 and paragraph 7 of the affidavit of Zaid Mohammed filed in CV 2018 03206 attached to the claimant's affidavit in support of this claim filed on March 11, 2019).

14. It is therefore not in issue that this approach is one which is recommended to and applied by all officers of the defendant. In the court's view therefore it is either that the defendant has moved away from the test of application of the ordinary and natural meaning of the words indecent and obscene on a case by case basis and has created and applied its own internal policy which defines items with male and female genitalia as being obscene regardless of purpose of use or other considerations that are attendant upon the application of the ordinary and natural meaning of the said words or it has for convenience and the assistance of members of the public and other officers, applied a criteria that it considers to have come within the meaning of those words and has reduced that criteria into writing by way of circulars.

15. This in the court's view is the first issue to be decided as the claim is predicated upon the finding by the court that there is a policy in place.

16. For completeness the relevant definitions set out in the authorities and the natural and ordinary meanings of both indecent and obscene as taken from the **Concise Oxford Dictionary Eleventh Edition** are as follows;

"Indecent – not conforming with generally accepted standards of behaviour or propriety, especially in relation to sexual matters.

Obscene – offensive or disgusting by accepting standards of morality and decency. Repugnant"

The remit of the court

17. Throughout these proceedings, it must be borne in mind that the remit of the court is not to make a determination as to whether the item is in fact obscene within the meaning of the legislation. That is not the function of the public law court because to do so would be to usurp the legal function of the Magistrate. The remit of this court is to determine whether the defendant would have failed to apply a policy that accords with the law and the lawfulness of that policy.

Policy or Practice

18. In the court's view, the preponderance of evidence set out above demonstrates adequately that while there has been no written policy, certainly the practice which has been commended and adhered to by the defendant is one which has the effect of policy, it having been followed for several decades. In that regard, on this issue what matters is the substance of the method used by the defendant and not the form. In the court's view

therefore such a practice is akin to and ought to be considered as a policy albeit an unwritten one.

19. In International law, a similar position arises in relation to matters of custom which are considered policy and therefore unwritten law. The word custom generally means a long established practice, considered as unwritten law[1]. Therefore, a custom through long usage may be considered a policy.

20. In ***Sabga v Solomon (1962) 5 WIR 66***, Mc Shine Ag C.J and Peterkin J were prepared to apply the custom of banks in respect of certified cheques to uphold the validity of a cheque.

21. In the case of ***Lett v R (1963) 6 WIR 92***, the Court of Appeal of Trinidad and Tobago[2], refrained, at least, from denying the relevance of customary norms. The appellant was convicted of murdering another woman during a quarrel. Her defence was provocation, on the basis that the woman had called her an old 'mule', meaning a barren woman in dialect. The appellant also contended that the victim was a 'socouyant' who sucked the baby out of her womb every time she became pregnant. While the Court did not refer directly to custom, it was of the opinion that such a situation could have grounded a defence in provocation and had been rightly left to the jury. There was, therefore, an implicit acceptance of the relevance of customary norms in the law, in this case to contradict well-established common law rules that words do not ground the defence of provocation.

[1] **Bracton** f 2b (custom is observed as law in places where it has been approved by usage, and obtains the force of law).

[2] Wooding C J, Hyatali And Phillips JJA

22. The Privy Council decision in ***Cooper and Balbosa***[3] raised serious questions about the legality of the PSEB's role in setting, conducting and marking exams. The Board found that since the Constitution did not provide for the setting up of a Public Service Examinations Board, which was the sole responsibility of the Police Service Commission, the 40-year-old practice by Cabinet to appoint a Public Service Examination Board was illegal.

23. The defendant has argued that there exists no written policy so that there is in fact no policy whatsoever in existence. In the court's view, the submission of the defendant in that regard is predicated erroneously on form and not substance, the latter being the guiding factor as to the existence or not of a policy.

24. That being the case, on the very clear evidence in this case set out above, the court finds that the long established practice of the defendant is in fact an unwritten policy. Further, that in any event, nomenclature as to whether it is a policy or practice makes no difference in the context of the substance of the claim that the actions of the Defendant are unlawful or illegal.

The policy defined

25. The policy is well established by the evidence to be that any item which closely resembles the male or female genitalia is considered indecent or obscene. This appears to be the case notwithstanding the memo of the DPP which appears to define both indecent and obscene in the context of the law. All of the officers who have sworn to affidavits have deposed to

[3] ***Cooper and Balbosa v Director of Personnel Administration and Police Service Commission PC Appeal No 47 of 2005***

this being the position save and except Nicholas who has added the criteria of the contents of the memo of the DPP.

Natural and Ordinary meaning of the words of the statute

26. The issue therefore arises as to whether the definition set out in the policy is overly restrictive. As set out above, the natural and ordinary meaning of the word Obscene is offensive or disgusting by accepted standards of morality and decency and repugnant. This definition admits of and is directly related to applicable societal standards of that which is moral, decent and acceptable. To classify an item as obscene therefore by the simple fact that it closely resembles the male or female genitals would be to ignore the other elements of the definition unrelated to description of the item. These other elements may be the prevailing accepted norms of society at the time or the accepted morality of Trinidad and Tobago society. There is a jurisprudential argument that morals and that which is accepted by society changes as society itself changes.

27. By way of example, quite recently in this jurisdiction there has been an acceptance of same sex relationships, a relationship which would have been considered immoral by many in the past and which some still consider to be so. Similarly, the practice of smoking less than 30 grams of cannabis in private has been decriminalized in this territory quite recently. This again is a matter that may have been considered immoral or certainly unacceptable by this society in the past. So that it is reasonable to presume that a feature of all developing societies is that accepted standards of decency and morals change over time.

28. It follows therefore that what may be seen to have been indecent, immoral or unacceptable or repugnant decades ago may not necessarily be so considered today. In the court's view therefore, the definition of indecent or obscene under section 45(1)(L) of the Customs Act Chap 78:01 is coloured by the date and time in which the section is used and that this is so by design and not by coincidence in a recognition by the legislature that standards or morality and that which is acceptable are not stoic but are in fact dynamic features of societal existence.

29. The Customs Officer who is charged with applying the provision of the Act will have to make a determination as to whether the item which he examines appears to be that which at the lower end does not conform with generally accepted standards of behaviour or propriety, especially in relation to sexual matters in which case it may be indecent or at the higher end whether the item is offensive or disgusting by accepted standards of morality and decency, in which case it may be obscene.

30. The application of a blanket policy that relies solely on the description of an item in that regard may have the effect of removing essential elements of the criteria to be applied by any Customs Officer when acting pursuant to section 45(1) (L) of the Act. In other words, his consideration of whether an item may be prohibited as being obscene or indecent may ignore societal norms and acceptable standards of morality thereby being unduly restrictive and artificial. The application of the section in such a manner would be repugnant to the legislation and would be unlawful.

Unlawfulness

31. Unlawfulness in this case must be examined under two general headings. Firstly, that of the implementation of a policy which has not been published thereby lacking transparency and legal certainty. Secondly, the application of section 45(1)(L) in a manner that would have disregarded fundamental elements of the considerations necessary in applying the provision.

Transparency/ Legality of the policy

32. The claimant submits that the policy is unlawful in that it contravenes the principles of transparency, legality and legal certainty, all overlapping concepts. In so saying he submits that it is unlawful for a public authority to implement, enforce, and prosecute persons in accordance with a policy that is obscure, ambiguous and which has been concealed from the public. In other words, the policy is arbitrary and clandestine. That if the defendant is to operate and implement such a policy, transparency demands that same is published thereby imposing a positive duty on the authority so to do. This is so as the implementation of the policy carries the consequence of affecting the property rights of the individual.

33. The claimant relied on **Gallagher [2019] UKSC 3**, a case concerning the interplay between the right of privacy and retention of personal data for criminal record keeping, where Lord Sumption articulated the principles as follows:

"The accessibility test speaks for itself. ***For a measure to have the quality of law****, it must be possible to discover, if necessary with the aid of*

professional advice, what its provisions are. In other words, ***it must be published and comprehensible****. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree".*

34. In ***R (Gillan) v Commissioner of Police of the Metropolis*** **[2006] 2 AC 307 at page 34,** another case relied on by the claimant, the court framed these principles within the context of the Rule of Law:

> *"The lawfulness requirement in the Convention addresses* ***supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose*** *other than that for which the power was conferred.* ***This is what, in this context, is meant by arbitrariness, which is the antithesis of legality****. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."*

35. The court understands the submission to be that to give effect to such a policy, its promulgation must be done in a manner that informs the public of the decision of the authority to apply the policy. Further, that such a policy must conform with and must not derogate from the criteria set out in the applicable law that confers on the authority the power to act. That such a requirement is a feature of the rule of law principle. This of course ensures that the action of the public authority is not done without public oversight.

36. Attorneys for the defendant have chosen not to address this issue in their submissions focusing instead on a submission that the court ought to dismiss the claim as the substance of the claim amounts to a collateral attack on the jurisdiction of the magisterial proceedings. That submission is in fact no answer to the submissions of the claimant as it is abundantly clear that the claimant has not argued that the goods do not amount to obscene or indecent items. Further and in any event, this court has already

set out above the ultimate issue of obscenity and indecency is one for the magistrate and not one for a public law court.

37. In the court's view, a public authority is entitled to issue or change a policy under which it operates. To be lawful and effectual such a change must be rational and must be made in full view of the public by way of notification and publication thereby affording the public access to the proposed change and knowledge that the change is to be expected. Transparency in the promulgation of the policy is therefore fundamental to the rule of law.

38. However, the absence of transparency on its own will not vitiate the application of the policy unless it can be shown that the policy does not conform with the applicable law within which the public authority is duty bound to act or is ultra vires the powers conferred unto the authority. The distinction lies with the consequences of applicability of the policy in that on the one hand so long as there is conformity with the applicable law there is likely to be no illegality of action on the part of the authority outside the law and on the other hand the contrary may be true where the policy derogates from the statutory duty of the authority. In this way, the issue is one that involves overlapping principles of transparency, rule of law and unlawfulness.

<u>Was the application of section 45(1)(L) unlawful in this case by virtue of the application of the policy in that the policy conflicts with the section</u>

39. To answer this issue there must be scrutiny of the evidence of the defendant with particular attention being paid to the evidence of the Deputy Comptroller Mr. Nicholas. His evidence carries with it features that are somewhat materially different from that of the other officers called by

the defence. Nicholas has made it clear that the practice for at least the last twenty five years has been that in relation to adult toys, any item which closely resembles genitals is considered indecent or obscene. It is to be noted that he has made a distinction between adult toys, a category which he has named but has not defined and other items which in the court's view could reasonably be inferred to be items to be used for medical and other purposes. (See paragraph 8 of his affidavit of July 17, 2019). Nicholas then makes it clear at paragraph 11 of his affidavit that it is not the policy that all "adult sex toys" fall to be considered as being illegal under 45(1)(L) but only those which closely resemble human genitals. This evidence is crucial to the issue in this case as will be demonstrated shortly.

40. The latter bit of evidence as set out above had not been repeated by any of the other defence witnesses. Suzanne John, Customs and Excise Officer II deposed that it has always been the policy, practice and procedure that goods are detained if they closely resemble human genitals. She makes no mention whatsoever of purpose of use as being part of the policy. This is the case similarly with the other witnesses who have given evidence on the issue save and except Nicholas.

41. Purpose of use is of course relevant having regard to the evidence by Nicholas that the policy only applies to what he calls sex toys, itself a vague and undefined category. The evidence of the witness John is that Officer Harracksingh informed her that the claimant told Harracksingh that the item was to be used for the purpose of taking photographs. The detained packages receipt issued by Customs describes the item as STC mannequin for entertainment. The invoice dated December 15, 2018 describes the item as a plastic mannequin for entertainment. The differences in description together with the differences in what each officer considers to

be the policy and the applicability thereof highlights the difficulties inherent in the use of a policy that unduly restricts the criteria set out in section 45(1)(L).

42. The policy is therefore an arbitrary one in the court's view it having imposed a restriction unknown to the law. So too is its application. Further, it is vague in terms as it creates a category which is indeterminate in that the defendant has created a category of items called sex toys that is itself unknown to law and in respect of which he has applied a policy that uses criteria that is unknown to law. Such a policy is applied based on the element of purpose of use and not on whether the item (sex toy or not) is Indecent (does not conform with generally accepted standards of behaviour or propriety, especially in relation to sexual matters) or obscene (offensive or disgusting by accepted standards of morality and decency). In so doing the defendant has applied an unduly restrictive definition which derogates from the law set out at section 45(1)(L). The application of such a policy is therefore not transparent and in keeping with the rule of law.

43. It may well be that the item detained falls within the definition provided by the section but the application of the arbitrary policy has tainted the assessment made by the officers on the day of seizure in that the elements required for detention would not have been considered but the policy would have been slavishly applied.

44. It follows that the application of such a policy is unlawful. In so finding it must be borne in mind that at the time of making an assessment, the officer is not required to by the Act and is not making a finding of fact as

to whether the item is indecent or obscene. That is a matter upon which a judicial officer is required to pronounce in a court of law.

How should the defendant approach such matters in the future

45. It follows that the Customs and Excise Officer charged with the decision as to whether to detain goods on the basis that they fall within the definition set out at section 45(1)(L) will have to possess reasonable and probable grounds for the belief that the item is indecent or obscene in keeping with the natural and ordinary meaning of the words as used in the statute. It is to a large measure a test that incorporates both the objective (having regard to the natural and ordinary meaning of indecent and obscene) and the subjective in that the belief of the officer must be an honest one. This is what forms the proper legal basis for detention pursuant to the Customs Act. Ultimately it is for a court of law to determine whether the item fall within the ambit of section 45(1)(L).

46. The adherence to an arbitrary policy that mandates that the goods are indecent or obscene because they fall into an undefined category of items and closely resemble genitals is in the court's view unlawful as it removes the independence of the assessment of the officer in relation to both the objective and subjective elements of the exercise of the power.

Second Issue: The summons to show cause and the burden of proof

47. The claimant submits that the summons to show cause unlawfully imposes a burden of proof on the defendant to show sufficient cause as to why the goods should not be destroyed when in fact the legislature imposes a process to be instituted by the defendant termed forfeiture. Further, that

the effect of an order of forfeiture would be the destruction of the item although the claimant has not been found guilty of any offence in a court of law.

48. The facts in relation to this issue bears repeating. A summons was issued against the claimant for the importation of a prohibited item contrary to section 213(a) of the Customs Act pursuant to section 45(1)(L) on March 11, 2019. It is the evidence of John that forfeiture proceedings have not been instituted as he was charged for a criminal offence. The inference is that the item can be ordered to be destroyed should he be found guilty. The charges are still pending.

49. The evidence attached to the John affidavit consists of two documents. There is firstly the information number 2601 of 2019 by which the charge has been laid and secondly there is a summons to the claimant issued pursuant to the very charge laid in information number 2601 of 2019. The latter requires the claimant to attend court to show cause as to why the item should not be destroyed. It is with the latter document that issue has been taken in this case.

50. Section **220(1)** of the Customs Act Chap 78:01 set out the process as follows[4]. Where goods are seized, notice must be given in writing

[4] (1) "Whenever a seizure is made, unless in the possession of or in the presence of the offender, master or owner, as forfeited under the Customs laws, or under any written law by which Officers are empowered to make seizures, the seizing Officer shall give notice in writing of the seizure and of the grounds thereof to the master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering it to him personally, or by letter addressed to him, and transmitted by post to, or delivered at, his usual place of abode or business, it known; and all seizures made under the Customs laws or under any written law by which Officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the President may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorised by him, within one calendar month from the day of seizure, gives notice in writing to the Comptroller that he claims the thing seized, whereupon proceedings shall be taken for the forfeiture and

(personally or by letter addressed to the owner); the owner then has one month from the day of the seizure of the goods to give notice of his claim. If he fails to do so then the goods are deemed to have been seized and can be sold or disposed of. The Act therefore places a legal burden on the owner to give notice to the Comptroller within that one calendar month of the date of seizure in writing. So long as such notice is given, the goods cannot be sold or disposed and the onus then lies on the Comptroller to then take proceedings for forfeiture and condemnation (except where the goods are animals or perishable in which case it can be sold and proceeds kept in the event the goods are ordered restored to the owner upon the outcome of forfeiture proceedings).

51. By section **220 (2)**[5] it is apparent that proceedings for forfeiture and condemnation is taken before a Magistrate who may order delivery of the goods to the claimant upon payment of security until determination of proceedings. It is at this stage that the issue of whether the goods have been lawfully detained will fall to be determined by the Magistrate.

52. In the present case however, criminal charges for the importation of a prohibited good has been laid and the item remains in the custody of the defendant as evidence to be used in that criminal trial. Forfeiture proceedings may be brought even in the circumstance where a criminal charge has not been laid but the goods have been detained. The proceedings before the Magistrate on the summons are in substance

condemnation thereof; but if animals or perishable goods are seized, they may by direction of the Comptroller be sold forthwith by public auction, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof"

[5] (2) "Where proceedings are taken pursuant to subsection (1) for forfeiture and condemnation, the Magistrate may order delivery of the aircraft, ship, carriage, goods, animals or things seized to the claimant, on security being given for the repayment to the Comptroller of the value thereof in case of condemnation".

forfeiture and condemnation proceedings but where a criminal charge has also been laid it must follow that the outcome of the forfeiture and condemnation proceedings would have to abide the decision of the court on the criminal charge. Where no criminal charge has been laid, the legislation provides an opportunity for the determination of whether the goods are prohibited by way of the forfeiture and condemnation proceedings before the Magistrate. In that case the legislation confers no presumption in law that the goods are so prohibited, and the burden remains with the defendant to so prove. (See section **220(2)** of the Customs Act which also provides that the Magistrate may in fact order the goods to be returned to the person upon payment of security until the issue of forfeiture or condemnation is determined).

53. The legislation contemplates the position where a person may be found not guilty of the importation of a prohibited good not on the basis that the good does not amount to one that is prohibited but on some other basis. This leaves above the issue of whether the good is a prohibited one pursuant to section 213 of the Customs Act and that will be determined at the hearing of the summons subsequently.

54. The court will therefore make the following order;

    a. It is declared that the implementation of a policy by the defendant that any item considered a sex toy that closely resembles the male or female genitals is prohibited as being indecent or obscene contrary to section 45(1)(L) of the Customs Act Chapter 78:01 upon seizure of the mannequin belonging to the claimant on December 28, 2018 (the said good) as the basis for such seizure is unlawful.

b. The defendant shall deliver the said good to the claimant upon the payment by the claimant of security in the sum of $5,000.00 and the execution of a bond before the Magistracy Registrar of the Arima Magistrate's Court in which the claimant undertakes to produce the good to court for trial in an unaltered state if called upon so to do, or for the purpose of forfeiture and condemnation proceedings.

c. The proceedings on the summons of April 3, 2019 shall abide the outcome of the proceedings on information 2601 of 2019.

d. The defendant shall pay to the claimant the costs of the claim to be assessed by an Assistant Registrar in default of agreement.

Ricky Rahim

Judge