REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. P 068 of 2015

BETWEEN

DARREN BHOLA

[CUSTOMS AND EXCISE OFFICER II]

Appellant

And

CANSERVE CARIBBEAN LIMITED

Respondent No. 1

DARREN NURSE

Respondent No. 2

CINDY GIBBS

Respondent No. 3

PANEL:

R. Narine J.A.

P. Moosai J.A.

M. Mohammed J.A.

APPEARANCES:

Mr. G. Peterson S.C. and Ms. S. Shephard for the Appellant

Mr. J. Singh for the Respondents

DATE DELIVERED: 29th June, 2017

JUDGMENT

Delivered by M. Mohammed, J.A.

I agree with the judgment of M. Mohammed J.A. and have nothing to add.

R. Narine,
Justice of Appeal

I too agree with the judgment of M. Mohammed J.A. and have nothing to add.

P. Moosai,
Justice of Appeal

Introduction:

1. The first respondent, Canserve Caribbean Limited (Canserve) and the second respondent, Darren Nurse (Nurse) were charged with the following offence under the **Customs Act Chapter 78:01** (the Customs Act):

    (i) Making and subscribing a false declaration with respect to a Customs Declaration of Value, contrary to ***section 212(a).***

Canserve, Nurse and the third respondent Cindy Gibbs (Gibbs) were all charged with the following offences under the **Customs Act**:

(i) Importing goods not corresponding to Customs Declarations SFDO A 21884 dated 24/06/09, contrary to ***section 214****; and*

(ii) Importing prohibited goods to wit: 51 WMS gaming machines in container GLDU 071327-6, contrary to ***section 213 (a)*** *and the* ***Second Schedule of the Prohibition (Carriage, Coastwise, Importation and Exportation) Order.***

2. All the charges were heard summarily and together by consent. At the close of the case for the appellant, attorney-at-law for the respondents made a submission of no case to answer, which was upheld by the magistrate. The magistrate proceeded to dismiss the charges against all three respondents. From those dismissals, this appeal originates.

3. This appeal was heard before a panel of three judges since the Court was being invited on behalf of the respondent to either depart from the decision in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**[1] or to qualify and restrain its application. The magisterial appeal in **Feese** was heard before a traditionally constituted panel of two judges.

The Case for the Appellant:

4. On the 10th July, 2009, the appellant, Customs Officer Darren Bhola, went to the Customs and Excise Division (Customs) at Point Lisas where he met Nurse and Gibbs who informed him that they were representatives from Canserve. He also met Mr. Andrews, an employee of the Caribbean Industrial Research Institute (CARIRI), who told him that someone at Canserve contacted CARIRI and requested his presence to examine some gaming machines. Customs Officer Bhola asked Nurse, in the presence of Gibbs, *"Why you have CARIRI here, if you all are expecting office furniture?"* and he made no reply.

5. Customs Officer Bhola and Customs Officer Boodoo then proceeded to the area where the container was located. After verifying the container, Customs Officer Boodoo gave instructions for it to be opened, which was done in the presence of Customs Officer Bhola. Nurse and Gibbs were also present but were further away from the container. Upon the container being opened, Customs Officers Bhola and Boodoo observed that it contained gaming machines and not office furniture as was stated on the invoice. The container was emptied and an examination of its contents revealed, *inter alia*, fifty-one (51) WMS gaming machines, eighty-three (83) Ceronix monitors, two (2) packages containing gaming chits and thirteen (13) boxes containing gaming machine parts. Customs Officer Bhola made a record of all the items at the back of the Customs Declaration form, which was verified by Customs Officer Boodoo who then signed it. Customs

[1] Mag. App. No. 96 of 2009.

Officer Bhola told Nurse and Gibbs that the items found in the container did not correspond with the items listed on the relevant documents given to Customs and they made no reply. He then issued a notice of seizure to Nurse for the fifty-one gaming machines and eighty-three Ceronix monitors. Subsequently, Customs Officer Bhola contacted CARIRI and made arrangements to have an evaluation of the gaming machines, which were stored at the Fernandes Compound in Laventille. He visited the Fernandes Compound and saw the personnel from CARIRI conduct the inspection.

6. On the 14th September, 2009, pursuant to a request from Customs, a team from CARIRI, which included Mr. Nunez, a senior Electronic Engineer, examined ten of the gaming machines to determine the mode of pay-out. A report dated the 18th September, 2009 was prepared as a result of that examination.

7. On the 15th March, 2011, six of the gaming machines were taken to the Container Examination Station in Port of Spain for inspection by representatives of Canserve, and also by Mr. Nunez. Customs Officer Bhola observed an inspection being carried out by Mr. Gerrard Mendez and Mr. Matthew Da Silva on two of the gaming machines. He also observed the inspection of another gaming machine being carried out by an electrical engineer, Mr. Mendez, a technician, Mr. Da Silva and Mr. Nunez. Also present at that Station were Nurse, Gibbs, Mr. Robertson (the Property Keeper for Customs), Ms. Shirley Shepherd and Mr. Fulchan (the attorney-at-law who represented the respondents in the court below).

8. On the 23rd March, 2011, Customs Officer Bhola accompanied Mr. Robertson to a warehouse and in his presence, he removed two plastic bags containing instruction manuals from one of the gaming machines. One of the plastic bags contained manuals instructing the operations of coins and notes while the other plastic bag contained other instructions.

9. Customs Officer Bhola received an initial report on the gaming machines from CARIRI which was prepared by Mr. Andrews on behalf of Canserve. Mr. Andrews also submitted a report to Customs at their request. In order to get an independent opinion on the machines, Mr. Nunez and a senior technician were commissioned to conduct an examination on the gaming machines and a

report was prepared pursuant to that examination. The findings of Mr. Nunez were found to be different from the findings of Mr. Andrews as reflected in his report. Mr. Nunez's report indicated that not only were the gaming machines capable of pay out in terms of coins, but they were also capable of accepting and dispensing coins or tokens. However, Mr. Nunez was unable to test whether those mechanisms worked. According to him, testing the capabilities of the gaming machines was not possible as either the hardware, the software or both, did not allow full functionality.

The Legislation:

10. The offences against the respondents fall within the following sections of the **Customs Act**:

Section 212:

Any person who—

(a) in any matter relating to the Customs, or under the control or management of the Comptroller, makes and subscribes, or causes to be made and subscribed, any false declaration, or makes or signs, or causes to be made or signed any declaration, certificate or other instrument required to be verified by signature only which is false in any particular;

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

shall incur a penalty of one hundred and twenty-five thousand dollars.

Section 213:

Any person who—

(a) imports or brings or is concerned in importing or bringing into Trinidad and Tobago any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the goods are unloaded or not;

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

shall, in addition to any offence for which he may be convicted under any written law, incur a penalty—

(i) on summary conviction in the case of a first offence, to a fine of fifty thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of eight years;

(ii) on summary conviction in the case of a second or subsequent offence, to a fine of one hundred thousand dollars or treble the value of the goods, whichever is the greater, and to imprisonment for a term of fifteen years; and

(iii) on conviction on indictment, to imprisonment for a term of twenty years, and in any case the goods may be forfeited.

Section 214:

Any person who imports or exports, or causes to be imported or exported, or attempts to import or export any goods concealed in any way, or packed in any package or parcel (whether there are any other goods in the package or parcel or not) in a manner

calculated to deceive the Officers of Customs or any package containing goods not corresponding with the entry thereof shall, and notwithstanding sections 248 and 249—

(a) on summary conviction, incur a penalty of fifty thousand dollars or treble the value of the goods contained in such package, whichever is the greater, and to imprisonment for a term of eight years;

(b) on conviction on indictment, be liable to imprisonment for a term of twenty years, and in either case, the goods shall be forfeited.

The Second Schedule of the Prohibition (Carriage, Coastwise, Importation and Exportation) Order:

The importation of any mechanical game, device, or appliance, which, in the opinion of the Comptroller of Customs and Excise, is such as can be used to play at any game of chance for money or money's worth and is not intended for purposes of amusement only.

The Magistrate's Reasons:

11. At the trial, the magistrate upheld a submission of no case to answer made on behalf of all three respondents[2]. The core reasoning of the magistrate was:

(i) The expert evidence was inconclusive as the expert could not get any of the machines to work and therefore there was nothing to prove that the seized goods were prohibited under the Customs Act (the Act). The magistrate took into account the fact that the goods consisted of certain parts and not entire machines in arriving at this conclusion. She placed reliance on the decision in **Ramnarine Maraj v The AG and the**

[2] See the Magistrate's Oral Reasons at pages 317-322 of the Record of Appeal/pages 1-6 of the Transcript of the Proceedings dated the 20th September, 2011 and the Magistrate's Written Reasons at pages 329-330 of the Record of Appeal.

Comptroller of Customs[3]. In that case, certain items, comprising of disassembled parts, were seized pursuant to **section 213(a) of the Customs Act**. The Court of Appeal found that the items, although disassembled and capable of being put together to make the whole item, were not prohibited items and therefore were not regarded as being subject to seizure.

(ii) Upon a physical viewing of the goods, there was no indication that the machines were in working order and that the necessary operational software was in place to make them work. There was no evidence to prove that the goods were so tested and found to be functional as whole machines.

(iii) The respondent, Cindy Gibbs, was merely present when the goods were being unloaded. There was no evidence that she was knowingly concerned with any of the activities for which she was charged.

(iv) That having regard to the decision in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**[4], in matters involving importation of items, there is always the question of mens rea which is necessary to show intention and knowledge of certain things. The magistrate reasoned that although Darren Nurse's signature was found on the Customs declaration form, evidence was required to show that he knowingly made the false declaration and that he was aware that the seized items did not correspond to the items stated on the Customs declaration form. In the absence of such evidence, there was no case made out against the respondent, Nurse.

(v) In relation to the charge of making and subscribing a false declaration with respect to the Customs declaration of value, the magistrate reasoned that it was Nurse's signature that appeared in the Customs declaration form and accordingly, that charge was not made out against Canserve Caribbean Limited. (sic)

[3] CA Civ. No. 54 of 1997.
[4] **Feese** (n 1).

The Appeal:

Ground 1: The Learned Magistrate's decision, that there was no evidence that the goods (namely 51 WMS Gaming Machines) were prohibited goods within the meaning of the Second Schedule of the Prohibition (Carriage, Coastwise, Importation and Exportation) Order is unreasonable or cannot be supported having regard to the evidence.

The Appellant's Submissions:

12. Mr. Peterson submitted that the Magistrate erred in concluding that the seized items did not fall within the **Second Schedule of the Prohibition (Carriage, Coastwise, Importation and Exportation) Order** (the Second Schedule of the Prohibition Order) as prohibited goods. He submitted that the magistrate erred in relying on the decision in **Ramnarine Maharaj v The Attorney General of Trinidad and Tobago and the Comptroller of Customs and Excise**[5]. In that case, the appellant imported certain disassembled car parts which Customs treated as constituting the importation of the assembled items, being four cars. Mr. Peterson sought to distinguish that case from the case at bar and submitted that in the present case, the seized gaming machines were in an assembled state and as such, they fell within the category of prohibited goods as set out in the Second Schedule of the Prohibition Order.

13. According to Mr. Peterson, the evidence as to the nature of the imported machines, as reflected in the report prepared by Lennox Nurse and Hayden Charles, was prima facie proof that the machines imported were in breach of the Second Schedule of the Prohibition Order. In the absence of any evidence to the contrary, the respondents ought to have been called upon to answer the charges against them.

[5] **Ramnarine Maraj** (n 3).

The Respondent's Submissions:

14. Mr. Singh submitted that in order for the appellant to satisfy the elements that the goods were indeed prohibited goods, he had to provide evidence that the machines were gambling machines. The decision in **Ramnarine Maharaj v The Attorney General and the Comptroller of Customs and Excise**[6] was cited as the authority for the proposition that the condition of the machines at the time of importation must be taken into account in determining whether it satisfies the "legality criteria" (sic). In the present case, the appellant sought to rely on the evidence of an expert witness from CARIRI. It was argued that the magistrate was correct in rejecting this expert evidence as it demonstrated that the expert evinced a high level of prevarication in his answers to critical questions under cross-examination. In addition, the expert gave several answers which showed that he was unable to prove that the machines were capable of accepting and dispensing coins or bills. **Section 45 of the Customs Act** provides that machines which are capable of accepting and dispensing bills and coins are prohibited goods. Mr. Singh submitted that the appellant would have been required to prove the following in relation to the seized goods: (a) that it was a mechanical game or device, (b) that it was set in motion wholly or partly by the insertion of a coin or coins and (c) that it was constructed to return to the person inserting the coins, in certain circumstances, a coin or coins of greater total value than that of the coin or coins inserted. Mr. Singh contended that the appellant was unable to prove these constituent elements of the offence as the evidence of the expert was that he could not get the machines to work because they lacked the necessary software.

15. Mr. Singh further submitted that the evidence of the expert ought to be rejected because it failed to meet the requirements for expert evidence in criminal cases laid down by the Privy Council in **Myers, Brangman and Cox v R**[7]. According to counsel, the evidence demonstrated a patent lack of independence and it showed that the witness did not appreciate that he owed a duty to the court and not to the appellant.

[6] **Ramnarine Maraj** (n 3).
[7] [2015] UKPC 40.

The Appellant's Submissions in Reply:

16. Mr. Peterson submitted that the **Second Schedule of the Prohibition Order** provided for the *"opinion"* (sic) of the Comptroller of Customs as to whether the imported game, device or appliance could be used to play any game of chance for money or money's worth and which is not intended for purposes of amusement only. He submitted that in forming that opinion, the Comptroller of Customs, did not only rely on the examination of the goods, which was done by Customs Officers Bhola and Boodoo, but also on the expert opinion of Mr. Lennox Nunez. Mr. Peterson submitted that of significance, is the fact that this expert opinion was tested by the Court and a subsequent report was done, upon the request of the Court. There was no contradictory expert evidence in the case to contradict these expert opinions.

17. In addition, it was submitted that Mr. Nunez, produced his report in accordance with the professionalism expected of an expert. In particular, he stated the material facts that were capable of detracting from his concluded opinion. Mr. Peterson argued that the report was sufficient to be factored into the consideration of the magistrate to ground a prima facie case as to the nature of the goods which were imported by the respondents and that there was no evidence before the magistrate which was capable of undermining the impartiality of the expert. It was clear from the evidence that the respondents were aware that gaming machines were in fact the goods which they had imported.

Analysis and Reasoning:

18. The **Second Schedule of the Prohibition Order** restricts the importation of any mechanical game or device which can be used to play any game of chance for money or money's worth. In arriving at her conclusion on this issue, the magistrate found that there was no evidence to prove that the goods were so tested and found to be functional as whole machines. She also relied on the decision in **Ramnarine Maharaj v The Attorney General of Trinidad and Tobago and the Comptroller of Customs and Excise**[8], which is distinguishable from the case at bar. That case

[8] **Ramnarine Maraj** (n 3).

involved the importation of certain disassembled car parts which were treated by Customs as the assembled items, being whole cars. The Court of Appeal found that the items seized, although disassembled and capable of being put together to make the whole item, were not prohibited. That case can be differentiated from the case at bar as the seized items in question were fully assembled gaming machines as opposed to gaming machine parts.

19. Further, the clear and uncontradicted evidence of Mr. Nunez, as reflected in his report to Customs, was that the seized machines were in fact capable of pay out, in terms of coins and were able to accept and dispense coins or tokens. This was so even though Mr. Nunez was unable to successfully operate the machines. In the absence of any evidence before the magistrate which was reasonably capable of undermining the impartiality of Mr. Nunez, his report was adequate to be taken into consideration by her in finding that a prima facie case was made out against the respondents based on the nature of the goods that were imported by them.

20. On the evidence of Mr. Nunez alone, on the face of it, the seized items fell within the scope of prohibited goods under the **Second Schedule of the Prohibition Order**. The magistrate therefore erred in concluding that the seized items were not prohibited goods.

There is merit in this ground of appeal.

<u>Ground 2:</u> The Learned Magistrate's decision, that section 212(a) of the Customs Act Chapter 78:01 required proof of knowledge is erroneous in point of law.

<u>The Appellant's Submissions:</u>

21. Mr. Peterson submitted that the magistrate imported a requirement of knowledge into **section 212 of the Customs Act** when there was no such element. In doing so, the magistrate erroneously

required the appellant to provide evidence of intention on the part of the respondents in order to prove the charges against them. Mr. Peterson submitted that **section 212(a) of the Customs Act** constituted a strict liability offence which meant that there was no requirement for the appellant to establish knowledge on the part of the persons who made the declaration on the prescribed form. In support of this submission, Mr. Peterson relied on the decision in **Patel v The Comptroller of Customs**[9]. In that case, the court concluded that on a true construction of the relevant section, which is materially similar to **section 212 of the Customs Act**, it created an absolute offence to make any false customs entry which meant that mens rea was not a necessary ingredient of the offence. The court also held that the making of a false entry without an intention to deceive the Customs authorities was not a defence to the charge.

The Respondent's Submissions:

22. Mr. Singh submitted that the charge with respect to the making and subscribing of a false declaration, contrary to **section 212(a) of the Customs Act**, could not be sustained because there was no evidence before the court as to an essential element of the offence. He submitted that the Customs declaration form did not contain a description of the goods and no evidence was led to demonstrate that any of the particulars listed there were false.

The Appellant's Submissions in Reply:

23. Mr. Peterson submitted that the Customs declaration form required the person completing the form to indicate whether there were "any restrictions as to the disposition or use of the goods" being imported. In response to that question, the respondent, Nurse, answered, *"No"* and he also signed the form. It was submitted that Nurse's answer was a false statement as the items imported, gaming machines, were subject to certain restrictions. Further, it was stated on the Customs declaration form that the "net price in currency of the invoice" was US$18,881.10, which referred to the value

[9] [1965] 3 WLR 1221.

of the purported office equipment. According to Mr. Peterson, that statement was also false due to the absence of office equipment and the presence of gaming machines.

24. It was further submitted that the Customs declaration form in question referred to an Invoice, No. 25988, dated the 6th January, 2009, which was provided by Nurse and which identified certain office equipment. Mr. Peterson submitted that the Customs declaration form is submitted together with supporting documents, including invoices, so as to assist the Comptroller of Customs to process the goods for entry. In the matter at bar, the invoice, along with other documents, formed part of a bundle of documents which was tendered into evidence.

Analysis and Reasoning:

25. There are two limbs in this ground of appeal. The first limb raises the issue of whether there was evidence in support of the charge of making and subscribing a false declaration, contrary to section **212(a) of the Customs Act.** The evidence of the prosecution witnesses was that the respondent Nurse, in completing the Customs declaration form which he signed, indicated that there were no restrictions as to the disposition or use of the goods being imported. This amounted to a false statement made by Nurse as the goods imported, namely gaming machines, were in fact subject to certain restrictions. Although the Customs declaration form did not include a description of the goods in question, the invoice referred to in that form (Invoice No. 25988, dated the 6th January, 2009)[10], which was provided by the respondent Nurse, made reference to certain office equipment. The evidence also showed that stated on the Customs declaration form was the value of the goods on the invoice which amounted to US$18,881.10, which referred to the value of the office equipment. This also constituted a false statement since the goods imported were gaming machines and not office equipment. The invoice, along with other documents, formed part of a bundle of documents which was tendered into evidence. We are of the view that on the face of it, there was sufficient evidence against the respondents to support the charge with respect to the making and subscribing of a false declaration.

[10] See the Schedule of the Exhibits at page 31.

26. The second limb of this ground of appeal raises the issue of whether **section 212(a) of the Customs Act** required proof of knowledge.

27. In the Privy Council decision in **Patel v The Comptroller of Customs**[11], an importer was charged with the offence of making a false declaration in a customs import entry, contrary to **section 116 of the Customs Ordinance of Fiji**. That section created a number of offences which were set out consecutively and which were joined by the conjunction "or". In delivering the opinion of the Board, Lord Hodson said that it was plainly required to construe some paragraphs so that no offence would be constituted unless *mens rea* was established and others so as to exclude that mental element. The Board rejected that construction of the section which would have involved the addition by implication of the word "knowingly" before the words "make any false entry", and held that the offence was complete upon proof that the entry was erroneous and that no proof of *mens rea* was required.

Lord Hodson opined:

> *"…the words 'should any person counterfeit, falsify or wilfully use when counterfeited or falsified any document required by or produced to any officer of custom' would not in their Lordships' view be satisfied in the absence of proof of mens rea. It does not however follow that all the phrases in the section must be read in the same way and the making of a false entry may well be in this as in other similar statutes relating to customs absolutely prohibited within the exceptions to the general rule applicable to statutes creating criminal offences. The distinction must be a narrow one in considering the various parts of the section if the conclusion is correct that one cannot "falsify" without a guilty mind but that one can innocently make a "false" entry. Notwithstanding the narrowness of the distinction their Lordships are of opinion that this difficulty must be faced.*
>
> …

[11] **Patel** (n 9).

…

Their Lordships have not overlooked the judgment of the board in Lim Chin Aik v. The Queen. That case concerned the presumption that mens rea is an essential ingredient in every offence and was much relied upon by the appellant but their Lordships find nothing in the judgment of the board delivered by Lord Evershed to lead them to the conclusion that a construction should be placed upon section 116 which involves the addition by implication of the word "knowingly" before the words "make any false entry."

They are of opinion that the decision of the learned judge in giving the opinion of the Supreme Court as to the meaning to be assigned to the word "false" is correct and that on this point the appeal would fail, since the offence of which the appellant was convicted was absolute and no proof of mens rea was required."

28. The wording of **section 212(a)** omits the word "knowingly" before "*makes and subscribes, or causes to be made and subscribed, any false declaration".* Applying **Patel v The Comptroller of Customs**[12], in the absence of the qualifying word "knowingly", all that is required to prove the offence of making and subscribing a false declaration, was proof that the entry in the Customs declaration form was erroneous. The offence under **section 212(a) of the Customs Act** is one of strict liability and no proof of mens rea on the part of the respondents is required. Thus, the magistrate erred in concluding that **section 212(a)** required proof of knowledge.

There is merit in this ground of appeal.

[12] **Patel** (n 9).

It is convenient to deal with Grounds 3 and 4 together as they relate to the same issue, that is, the interpretation of **sections 213 and 214 of the Customs Act**.

<u>Ground 3:</u> The Learned Magistrate's decision that sections 213 and 214 of the Customs Act Chapter 78:01 required proof of knowledge in the circumstances of this case is erroneous in point of law.

<u>Ground 4:</u> The Learned Magistrate's decision, that the charge under sections 213 and 214 of the Customs Act Chapter 78:01 has not been made out and that the Respondents ought not to be called upon to answer is unreasonable or cannot be supported having regard to the evidence.

<u>The Appellant's Submissions:</u>

29. Mr. Peterson submitted that the magistrate wrongly directed herself that **section 214 of the Customs Act** required proof of mens rea.

30. On this issue, the magistrate reasoned:

> *"As regards the Customs declaration under 2:14, again I am of the view that because of the cases of Clarence Walker and…It seems that in any matters of importation, there is always the question of mens rea, and it is necessary in order to prove intention, that you have to have knowledge of certain things."*[13] (sic)

The magistrate went on to say:

> *"…Secondly, and more importantly I think, is the question of mens rea, intention and knowledge, that must be had by these defendants in order to*

[13] See the Record of Appeal at page 319, lines 28-34.

have come contrary to this particular Section of 214 and I again refer to the cases of Clarence Walker and Iveren Lucy Feese, which as we are aware have changed the entire question of …and the offences and making them offences which a certain amount of knowledge must be proven by the Prosecution, in relation to the accused."[14] (sic)

31. It was submitted that the foundation of the magistrate's error was built on the reliance that she placed on the decision in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**[15]. In that case, the Court of Appeal considered several authorities, including the decision in **Glendon De Gale v United Hatcheries Ltd**[16] in which this Court had previously interpreted **sections 213 and 214 of the Customs Act** as creating offences of strict liability. In **Glendon De Gale v United Hatcheries Ltd**., Hamel-Smith, J.A. said at page 17:

> *"In my judgment, therefore, I hold that the requirement introduced into the section by the learned Magistrate was wrong. There was no onus on the prosecution to establish that the respondent knew or ought to have known that the goods in question were in the packages. The offence is one of strict liability and upon proof that the respondent had imported the goods and the entry submitted by or on behalf of it was erroneous the offence was complete. Any construction of the section which would involve the addition by implication of the word "knowingly" cannot, in my view, be sustained."*[17]

32. Mr. Peterson argued that in the decisions subsequent to that in **Feese**, including the decision in **The Comptroller of Customs v Tamash Enterprises Limited**[18], this Court clarified that the decision in **Feese** dealt with **section 213 of the Customs Act** and not **section 214**. It was further submitted that Jamadar J.A., in remarks made in the decision in **The Comptroller of Customs v Tamash Enterprises Limited**, appeared to have restricted the ratio of **Feese** to apply solely to

[14] See the Record of Appeal at page 320, lines 5-17.
[15] **Feese** (n 1).
[16] Mag. App. No. 155 of 1986.
[17] Ibid at paragraph 17.
[18] CA No. 234 of 2009 (Transcript of the Proceedings).

narcotic offences. Mr. Peterson submitted that the decision in **Feese** ought to be restricted to its peculiar factual context, where the offence was linked to narcotics.

33. Mr. Peterson submitted that the offences in question are strict liability offences which means that it is in no way qualified by a requirement of an intention to evade the prohibition. In support of this submission, he relied on the decision in **R v Barbar**[19] (later applied in the Privy Council case of **Simmonds v R**[20]) where the Court of Appeal of Jamaica, in dealing with **section 205 of the Jamaican Customs Act**, found that the offence described therein was a strict liability offence. The provisions in that Act are materially similar to those in the **Customs Act of Trinidad and Tobago**.

34. It was contended that the magistrate placed great emphasis on the fact that there was a discussion between Customs and the respondents as to the "additional duties" to be paid, as a basis for holding that the charges had not been made out against them. It was further contended that any prior erroneous view by Customs that duties ought to have been paid was insufficient to lead to the conclusion that there was no case for the respondents to answer.

35. Mr. Peterson submitted that the magistrate was wrong to dismiss the case against the respondents and ought to have called upon them to answer the charges under **sections 213 and 214 of the Customs Act**. It was further submitted that the magistrate erred in failing to distinguish between the respondents. It was argued that assuming that a prima facie case was not made out against Nurse, there was sufficient evidence from the Customs Officers and the documents tendered into evidence to establish a prima facie case against Canserve.

The Respondent's Submissions:

36. Mr. Singh submitted that the magistrate was correct in applying the principles in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**[21] to her interpretation of **section 214 of**

[19] (1973) 21 WIR 343.
[20] [1998] AC 286.
[21] **Feese** (n 1).

the Customs Act. He argued that the appellant's submission that the decision in **Comptroller of Customs and Excise v Tamash Enterprises Ltd**[22] places a restriction on the application of **Feese** to narcotic offences was a wholly misconceived one. Mr. Singh contended that that case was not authority for such a proposition.

37. It was submitted that the appellant's argument that Customs offences ought to be interpreted as strict liability was flawed. It was further submitted that an interpretation of the offences in **sections 213 and 214 of the Customs Act** as strict liability ignored the fact that the tenor and purport of those statutory offences had changed fundamentally since the decision in **Glendon De Gale v United Hatcheries Ltd.**[23]. Mr. Singh argued that the decision in **Feese** is good law and should not be overruled as it represents good sense in the interpretation of provisions in the **Customs Act** which create very serious offences.

38. Mr. Singh argued that although the appellants relied on several cases as authority for the proposition that these Customs offences in question were routinely found to be offences of strict liability, they failed to acknowledge that the legislative provision under consideration is fundamentally different in scope and punishment from those which were under consideration in those previously decided cases.

39. Mr. Singh submitted that at the time of the decision in **Glendon De Gale v United Hatcheries Ltd.**[24], the offences contained in sections **212-214 of the Customs Act** could have been classified as "regulatory offences". At that time, there was no specific power which authorized the court to disregard the mitigating protective provisions of **sections 248 and 249 of the Customs Act**. These two sections sought to direct imprisonment to that category of offenders who could be classified as habitual offenders. Thus, the provisions sought to give a "free pass" to first time offenders. However, by 2007, the legislature, by several amendments, fundamentally changed the nature of those offences. It was further submitted that the increased penalties for breaches of the **Customs Act** which were introduced over time converted what were previously strict liability provisions to

[22] **Tamash Enterprises Ltd.** (n 18).
[23] **Glendon De Gale** (n 16).
[24] Ibid.

offences which now import mens rea. The legislature drastically increased the penalties from the imposition of a fine to a potential term of imprisonment and forfeiture of the imported goods.

40. Mr. Singh contended that the offences ought not to be construed as offences of strict liability. He relied on the decisions in **Cameron v Holt**[25], **He Kaw Teh v R**[26] and **Sault Ste Marie v R**[27] to support this contention. These authorities demonstrate that the moniker of strict liability offences are usually reserved for minor or regulatory offences.

41. In support of his submission that the offences in question ought not to be construed as offences of strict liability, Mr. Singh also relied on the decision in **Gammon v AG of Hong Kong**[28] where Lord Scarman laid down the following propositions:

    (i) There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;

    (ii) The presumption is particularly strong where the offence is "truly criminal" in character;

    (iii) The presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute;

    (iv) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern and public safety is such an issue; and

    (v) Even where statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be

[25] [1980] HCA 5.
[26] (1985) 157 CLR 523.
[27] (1978) 2 RCS 1299.
[28] [1985] A.C. 1.

effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

According to Mr. Singh, when one takes into account these propositions and apply them to the legislation in the instant case, they weigh heavily in favour of a presumption of mens rea for these offences as they all point towards a construction of the offences as "truly criminal".

42. Mr. Singh argued that the basic premise of the common law in determining whether an offence is one of strict liability or whether it requires proof of knowledge, is that the court would always presume that serious criminal offences require proof of mens rea or evil intent or knowledge of wrongfulness of the action. In support of this argument, he relied on the decision in **Sherras v De Rutzen**[29] where Wright, J opined at page 1169:

> *"The presumption is, that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered…"*

43. It was also submitted that the court ought to exercise a degree of care before displacing the general presumption that where the subject-matter of the statute is the regulation for the public welfare of a particular activity, it could be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The decision in **Lim Chin Aik v The Queen**[30] was relied on in support of this submission.

The Appellant's Submissions in Reply:

44. Mr. Peterson submitted that persons who engage in activities which are governed by the provisions of regulatory statutes ought to implement systems to ensure or improve compliance. He argued

[29] [1895-99] All ER Rep 1167.
[30] [1963] A.C. 160.

that it was unacceptable for a party to merely say that he was unaware. It was further submitted that regulatory statutes ought to be construed as strict liability since it would be impossible for the prosecution to ever discharge a burden of proving that an importer had the requisite intention. This is because the facts and matters to establish that intention are often within the control of the importer.

45. Mr. Peterson accepted the principle in **Sherras v De Rutzen**[31], that there is a presumption that guilty knowledge is generally required in proof of an offence. He submitted however, that the presumption ought to be displaced when the statute in question is regulatory. In support of this, he cited the decision of the Privy Council in **Lim Chin Aik v The Queen**[32]. In that case, Lord Evershed stated at pages 174-175:

> *"Where the subject-matter of the statute is the regulation for the public welfare of a particular activity – statutes regulating the sale of food and drink are to be found among the earliest examples - it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea.*
>
> *But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the*

[31] **Sherras** (n 29).
[32] **Lim Chin Aik** (n 30).

legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in Reynolds v. G. H. Austin & Sons Ltd.11 and James & Son Ltd. v. Smee.12 Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy L.J. in Hobbs v. Winchester Corporation, and of Donovan J. in Rex. v. St. Margaret's Trust Ltd.14 But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended…"

46. Mr. Peterson submitted that another factor to be considered when analysing the issue as to whether mens rea ought to be an essential ingredient in a statute is whether that statute addresses a public welfare offence. He submitted that the offence of importation of prohibited goods is an example of such an offence as the unregulated importation of goods has the potential of affecting public welfare and public safety.

47. It was further submitted that where the statute can be said to be dealing with a "truly criminal offence", then that statute should be held to require proof of mens rea. The decision in **The Queen v Sault Ste Marie**[33] was relied on in support of this submission. In that case, Dickson J. said:

"22. The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish

[33] **Sault Ste Marie** (n 27).

a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

23. In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense yet be branded as a malefactor and punished as such.

…

…

…

58. The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence…"

48. In addressing the issue of whether a statutory provision should be construed as being one of strict liability, Mr. Peterson placed reliance on five propositions laid down by Lord Scarman in the decision in **Gammon v AG of Hong Kong**[34], where the court examined the nature of an offence created to determine whether it was "truly criminal". It was submitted that those propositions have been the guiding measure which has been adopted in numerous subsequent cases in their assessment to determine whether the presumption of mens rea has been displaced.

[34] **Gammon** (n 28).

49. In the decision in **R v Matudi**[35], the Court of Appeal, after consideration of several cases, including **Lim Chin Aik v The Queen**[36] and **Gammon v AG of Hong Kong**[37], held that the customs offence of importing animal meat without a certificate did not require mens rea. At paragraphs 21-22, Scott Baker L.J. said:

> *"21. Having considered the five propositions in Gammon it is then necessary to consider whether the presumption has been displaced in the case of Regulation 21, Lord Nicholls said in B (a minor) at 463H when considering Section 1(1) of the Indecency with Children Act 1960:*
>
> > *'The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. "Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances, which may assist in determining what intention is to be attributed to Parliament when creating the offence.'*
>
> *22. In our judgment the implication is compellingly clear in the present case. There are other paragraphs in the same regulations that expressly impose some mental element whereas Regulation 21 does not and, more importantly, the mischief sought to be prevented is such that the aim of Regulation 21 is likely to be better achieved if the offence is one of strict liability. We would also regard the prohibited act, to use Lord Reid's description in Sweet v Parsley at 149G as a quasi-criminal act, that is one that is not criminal in any real sense but which is in the public interest prohibited under a penalty in contradistinction to a truly criminal act."*

[35] [2003] EWCA Crim. 697.
[36] **Lim Chin Aik** (n 30).
[37] **Gammon** (n 28).

50. Mr. Peterson contended that where Parliament intended that mens rea should be an ingredient of an offence created by an Act, it has so provided. In support of this contention, he relied on dicta of Lord Goff in **Pharmaceutical Society of Great Britain v Storkwain Ltd.**[38] at page 639:

> *"I am unable to accept counsel's submission, for the simple reason that it is, in my opinion, clear from the 1968 Act that Parliament must have intended that the presumption of mens rea should be inapplicable to s 58(2)(a). First of all,* ***it appears from the 1968 Act that, where Parliament wished to recognise that mens rea should be an ingredient of an offence created by the Act, it has expressly so provided****…"* [emphasis added]

51. According to Mr. Peterson, the rationale of Lord Goff in **Pharmaceutical Society of Great Britain v Storkwain Ltd.**[39], that is, *"where Parliament wished to recognise that mens rea should be an ingredient of an offence created by the Act, it has expressly so provided",* represents a line of reasoning which has been consistent through the years. He submitted that this was the basis of the reasoning which Hamel-Smith, J.A. used in his analysis of the provisions of the **Customs Act** in **Glendon De Gale v United Hatcheries Ltd.**[40], which was previously confirmed in **R v Barbar**[41] and subsequently applied in **R v Matudi**[42].

52. Mr. Peterson placed reliance on the decision in **R v Blake**[43] where the court considered the interpretation to be placed on a provision in the Wireless Telegraph Act, 1949. Hirst L.J., in summarising the opposing contentions of both sides, said at pages 967-968:

> *"[Counsel for the appellant] placed strong reliance on the principles laid down in the Gammon case and submitted that the present case did not fall within the exceptions laid down in paras (4) and (5).*

[38] [1986] 2 All ER 635.
[39] Ibid.
[40] **Glendon De Gale** (n 16).
[41] **Barbar** (n 19).
[42] **Matudi** (n 35).
[43] [1997] 1 All ER 963.

On behalf of the prosecution, Mr Davies stressed that s 1(1) is silent on mens rea and that, in consequence, it was properly to be construed as creating an absolute offence, in contrast to the three new sections, 1A, 1B and 1C, with their express use of the word 'knowingly'. Moreover, he submitted that any presumption to the contrary was displaced by the aspects of social concern and public safety addressed by s 1(1), seeing that unauthorised pirate broadcasts frequently interfere with public service communications used by the police, the fire service, and the ambulance service, and also by air traffic control. It was thus important that there should be a strong deterrent and an encouragement to greater vigilance to prevent the commission of the prohibited offence."

On this issue, Hirst L.J. said at page 968:

"The solution to this case, which we have not found easy, clearly lies in the application of the five principles laid down by Lord Scarman in the Gammon *case. In our judgment, since throughout the history of the subsection an offender has been potentially subject to a term of imprisonment, the offence is "truly criminal" in character, and it follows that Mr Levy is correct in submitting that the presumption in favour of mens rea is particularly strong.* ***However, it seems to us manifest that the purpose behind making unlicensed transmissions a serious criminal offence must have been one of social concern in the interests of public safety for the reasons given by Mr Davies****, since undoubtedly the emergency services and air traffic controllers were using radio communications in 1949, albeit in a much more rudimentary form than nowadays…*

Clearly interference with transmissions by these vital public services poses a grave risk to wide sections of the public. We therefore consider that the test laid down in paragraph (4) in Gammon *is met.*

Furthermore we are satisfied that the test in paragraph (5) is also met, since the imposition of an absolute offence must surely encourage greater vigilance on the part of those establishing or using a station, or installing or using the apparatus,

***to avoid committing the offence**, eg in the case of users by carefully checking whether they are on air…"* [emphasis added]

53. Mr. Peterson submitted that the true significance of the increase in the penalties under the relevant sections in the **Customs Act** over time was to underline the deep concern of Parliament to ensure that it detered persons who may be inclined to breach the provisions against importation of prohibited goods. As stated in **R v Matudi**[44] at page 6, ***"…the greater the degree of social danger, the more ready the courts will be to infer that Parliament's intention was to create a strict liability offence."*** [emphasis added]

54. Reliance was also placed on the decision in **Harrow London Borough Council v Shah and Another**[45] where the court held that in the circumstances of that case, the increased penalty for a breach of the statute was far from being a conclusive factor in determining whether the requirement of mens rea ought to be maintained. In that case, Mitchell J. opined at page 306:

> *"…**this offence is plainly not truly criminal in character having regard to the meaning attributed to those words by Lord Reid. It is true that the maximum penalty is considerably more severe than the penalties for the half-way house offences to which I have referred. However, quite apart from the feature of the penalty provision to which I have already referred, the severity of the penalty is very far from being a conclusive factor. In the Gammon case the maximum penalty was three years' imprisonment. Lord Scarman dealt with that feature of the relevant provision in these terms:***
>
> > ***'The severity of the maximum penalties is a more formidable point. But it has to be considered in the light of the ordinance read as a whole. For reasons, which their Lordships have already developed, there is nothing inconsistent with the purpose of the ordinance in imposing severe penalties for offences of strict liability. The legislature could reasonably have intended the severity***

[44] **Matudi** (n 35).
[45] [1999] 3 All ER 302.

as a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the ordinance.' (See [1984] 2 All ER 503 at 511, [1985] AC 1 at 17.)'

Third, equally plain is that this legislation deals with an issue of social concern. More particularly, there is obvious public concern that young people should not have lawful access to a gambling facility which would otherwise be readily available to them in the 33,000 or so retail outlets which sell national lottery tickets. Many of those outlets are premises daily frequented by children. In the context of the first four of Lord Scarman's propositions, I regard the claim that the offence under consideration is an offence of strict liability as being formidable. Lord Scarman's fifth and final proposition is:

'... even where a statute is concerned with such an issue [of social concern], the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.' (See [1984] 2 All ER 503 at 508, [1985] AC 1 at 14.)'

The legislation under consideration is, in my judgment, an excellent example of the sort of legislation contemplated by this proposition. That strict liability attaches to this offence will unquestionably encourage greater vigilance in preventing the commission of the prohibited act."[46] [emphasis added]

55. Mr. Peterson contended that the court could safely continue to hold that the relevant provision of the **Customs Act** ought to be interpreted as creating offences of strict liability since there will be no unfairness to innocent handlers, such as haulage contractors and others engaged in those activities. Mr. Peterson, in relying on the decision **AG of Hong Kong v Tse Hung Lit and Another**[47], submitted that there are defences to the importing/exporting Customs offences and that

[46] Ibid at page 306.
[47] [1986] 1 AC 876, 885.

the statutory provisions are only applicable to those who "arrange and organize the illicit exportation [or importation]" and those who "effect the exportation by actually taking the goods out [or in]". He also relied on the decision in **R v Barbar** where Fox J.A. said at page 363:

> *"The liability imposed by clauses one and two is therefore strict. But an accused could avoid that liability by successfully invoking the principle of mistaken belief (the innocent merchant in Frailey v Charlton ([1920] 1 KB 147…) but not the owner or his agent who is fixed with the responsibility of handling goods by s 224. An accused could also escape by showing that he is within a class of persons whose conduct could not in any way affect the observance of the law (the innocent labourer in Frailey v Charlton…)"*[48]

Analysis and Reasoning:

56. A principal issue raised in this appeal is whether the offences stated in **sections 213 and 214 of the Customs Act** ought to be interpreted as strict liability. This appeal concerns the second limb of **section 214**, that is, the offence in relation to importing or exporting goods not corresponding to the entry thereof, and any discussion of **section 214** hereunder refers only to this second limb.

57. The magistrate, in upholding the submission of no case to answer, placed heavy reliance on the decision in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese**[49]. On this issue, the magistrate reasoned as follows:

> *"As regards the Customs declaration under 2:14. again I am of the view that because of the cases of Clarence Walker and…It seems that in any matters of importation, there is always the question of mens rea, and it is necessary in*

[48] **Barbar** (n 19) at page 363.
[49] **Feese** (n 1).

order to prove intention, that you have to have knowledge of certain things."[50] (sic)

"...secondly, and more importantly I think, is the question of mens rea, intention and knowledge, that must be had by these defendants in order to have come contrary to this particular Section of 214 and I again refer to the cases of Clarence Walker and Iveren Lucy Feese which as we are aware have changed the entire question of ...and the offences and making them offences which a certain amount of knowledge must be proven by the Prosecution, in relation to the accused."[51] (sic)

58. In **Feese**, this Court imported an element of mens rea in **section 213 of the Customs Act**. This represented a departure from the previous position regarding certain customs offences in **Glendon De Gale v United Hatcheries Ltd.**[52]. In that case, this Court examined **sections 213(a) and 214 of the Customs Act** and found that they created offences of strict liability.

59. We wish to say at the outset that we are not in agreement with the appellant's submission that the decision in **Comptroller of Customs and Excise v Tamash Enterprises Ltd.**[53] places a restriction on the application of **Feese**. The suggestion by Jamadar J.A. referred to by Mr. Peterson was not enunciated in a judgment but rather represented a comment made in the midst of hearing legal submissions in the matter. In that case, there was no reaffirmation of the law as stated in **Glendon De Gale v United Hatcheries Ltd**[54] to the effect that **sections 213 and 214 of the Customs Act** created offences of strict liability.

[50] See the Record of Appeal at page 319, lines 28-34.
[51] See the Record of Appeal at page 320, lines 9-17.
[52] **Glendon De Gale** (n 16).
[53] **Tamash Enterprises Ltd.** (n 18).
[54] **Glendon De Gale** (n 16).

The Evolution of the Strict Liability Principle, for Relevant Customs Offences, in Trinidad and Tobago:

60. In the decision in **Ramdwar v Fernandes**[55], **section 205 of the Customs Ordinance**, the equivalent of the present day **section 213 of the Customs Act**, was examined. Furness-Smith C.J. (as he then was) was of the opinion that **section 205** could not be construed as requiring proof of intention. Furness-Smith C.J. went on to say that the prohibition against importation of any of the goods specified in **section 39 of the Customs Ordinance** was absolute and that breach of that part of **section 205** which related to such importation was wholly independent of any proved intention.

61. In **Glendon De Gale v United Hatcheries Ltd.**, the respondent was charged pursuant **to section 214 of the Customs Act** with importing goods contained in several packages which did not correspond to the entry submitted by it for clearance at Customs. In the Respondent's shipment, the appellant had discovered several motors, calculators and other goods concealed in cartons containing eggs. The defence case was that the managing director of the company had no knowledge that any items were concealed in the egg cartons. The magistrate proceeded to dismiss the charge against the respondent on the basis that it had no knowledge that the items on the information were in the egg containers. On appeal, Hamel- Smith J.A. said at page 5:

> *"That finding [of the Magistrate] leads to the real issue in this case. It turns upon the question whether the words of section 214 taken in connection with the general scheme of the Act, should be read as implying that a person, before he can be convicted under the section of importing any package containing goods which do not correspond with the entry thereof must know, or have reasonable means of knowing, that the particular goods were in the package at the time,* ***or whether the section amounts to an absolute prohibition against submitting an incorrect entry, no matter how innocently done, for goods which he has imported.*** *"* [56] [emphasis added]

[55] Mag. App. No. 238 of 1951
[56] **Glendon De Gale** (n 16) at page 5.

62. Hamel-Smith J.A. also noted that sections **213(c), (d) and (e)** contained the word "knowingly", while **sections 213(a) and (b)** did not. He concluded that the omission of the word "knowingly" from **section 213(a)** indicated that the legislature intended that the prohibition against importation of certain goods was absolute. The offence was one of strict liability.

63. In **Customs and Excise Officer Clarence Walker v. Iveren Lucy Feese**[57], the respondent, along with Wayne Harris, was at the Piarco International Airport in transit from Guyana to Britain. A police officer, during a random passenger check, searched the respondent's suitcase and found two wooden picture frames containing photographs of the respondent. Within each of the frames, three plastic packages wrapped with brown tape and containing cocaine were discovered. The packages weighed a total of 1412.8 grams. A third picture frame containing cocaine was also discovered in Harris's suitcase. The respondent was charged with possession of cocaine for the purpose of trafficking under **section 5(4) of the Dangerous Drugs Act Chapter 11:25**, and with two offences under the **Customs Act**, that is, importing certain prohibited goods, namely cocaine, contrary to **section 213(a)** and attempting to export certain prohibited goods, namely cocaine, contrary to **section 154**.

64. In **Feese**, Yorke-Soo Hon J.A. considered the principles expressed in **Sweet v Parsley**[58] and **He Kaw Teh v R**[59], a decision of the High Court of Australia, which the court found to be of high persuasive authority. In the decision in **He Kaw Teh v R**, Gibbs C.J. examined **section 233B(1)(b) of the Australian Customs Act 1901** which is similar in structure to section **213(a) of the Customs Act of Trinidad and Tobago**, the only difference being the **Australian section 233B(1)(b)** applies exclusively to narcotic goods whereas our **section 213** contemplates a wider range of goods, including that of narcotics. In that case, the accused was charged under **section 233B(1)(b) and (c) of the Customs Act 1901**, with the importation and possession of a quantity of heroin found in his luggage after he had disembarked from an international flight. Gibbs C.J. examined the words of the statute and when confronted with the submission that the absence of

[57] **Feese** (n 1).
[58] [1970] AC 132.
[59] **He Kaw Teh** (n 26)

the words "without reasonable excuse" from the subsection meant that absolute liability obtained, he said at paragraph 5:

> *"…[It] would lead to an absurdly Draconian result if it meant that a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment notwithstanding that he was completely innocent of any connexion with the narcotics and that he was unaware that he was carrying anything illicit…."*[60]

Gibbs C.J. went on to say at paragraph 6:

> *"…The importation of and trade in narcotics creates a serious threat to the well-being of the Australian community. It has led to a great increase in crime, to corruption and to the ruin of innocent lives... Offences of this kind, at least where heroin in commercial quantities is involved, are truly criminal... It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so."*[61]

65. Gibbs C.J. also suggested that the higher the penalty for an offence, the more likely mens rea is required. He found that having regard to the serious consequences of committing the offence, it was unlikely that Parliament would have intended that such consequences should be visited on a person who had no intention to commit the offence, or no knowledge that he was committing it. It also seemed improbable that Parliament would have intended that the offence might be committed through mere carelessness or through unreasonable, though honest mistake. Having regard to the gravity of the consequences of the offence, it must have been intended that guilty knowledge would be an element of the offence.

[60] Ibid at paragraph 5.
[61] **He Kaw Teh** (n 26) at paragraph 6.

66. Yorke-Soo Hon J.A. also took into consideration the law in light of the increased penalties imposed by the 2007 amendments to **section 213 of the Customs Act**. That section evolved from one imposing the forfeiture of goods and a five hundred dollar fine to one imposing the forfeiture of goods and a four thousand dollar fine to, at present, one with fines ranging from fifty thousand dollars to one hundred thousand dollars, and accompanying terms of imprisonment from eight to as much as twenty years. On this issue, Yorke-Soo Hon J.A. said at paragraph 25:

> *"...modern attitudes to interpretation indicate that the more serious the offence, the less likely the Court is to interpret the offence as one of strict liability: Sweet v Parsley [1970] AC 132 (drug offence); B v DPP [2000] 2 AC 428 (rape); R v K [2002] 1 AC 462 (indecent assault). The seriousness of a crime is a property which can vary considerably across cultures and over time. It is however universally accepted that the severity of sentence or punishment imposed is an indicator of the perceived seriousness of an offence. In this regard, the incremental increases in penalty for custom offences may be indicative of the amplified abhorrence of the transhipment of certain goods today. Today, the penalty culminates at twenty years imprisonment."*[62]

67. Yorke-Soo Hon J.A. concluded that in light of the seriousness of the offence and the learning in **He Kaw Teh v R**[63], **section 213** ought not to be construed as creating a strict liability offence.

The Method of Evaluation:

68. In our approach to determining whether or not **sections 213 and 214 of the Customs Act** ought to be interpreted as creating offences of strict liability, we have taken into account a number of general, relevant factors. At the centre of the inquiry lies a proper focus on Lord Scarman's five propositions set out in **Gammon v AG of Hong Kong**[64], namely:

    (i) There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;

[62] **Feese** (n 1) at paragraph 25.
[63] **He Kaw Teh** (n 26).
[64] **Gammon** (n 28).

(ii) The presumption is particularly strong where the offence is "truly criminal" in character;

(iii) The presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute;

(iv) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern and public safety is such an issue; and

(v) Even where statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

69. A comparatively recent example of the application of the **Gammon** propositions is contained in the decision in **R v Brown (Northern Ireland)**[65]. The issue in that case was whether **section 4 of the Criminal Law Amendment Acts (Northern Ireland) 1885-1923**, created the offence of having unlawful carnal knowledge of a girl under the age of fourteen years, in which proof that the defendant did not honestly believe that the girl was over the age of fourteen was not required. Under **section 4**, a person convicted was liable to a maximum penalty of imprisonment for life or to be fined or both[66].

On this issue, Lord Kerr, at paragraph 26, said:

> *"The constitutional principle that mens rea is presumed to be required in order to establish criminal liability is a strong one. It is not to be displaced in the absence of clear statutory language or unmistakably necessary implication. And true it is, as the appellant has argued, that the legislative history of an enactment may not always provide the framework for deciding whether the clearly identifiable conditions in*

[65] [2013] UKSC 43
[66] Ibid at paragraph 7.

which an implication must be made are present. It is also undeniable that where the statutory offence is grave or "truly criminal" and carries a heavy penalty or a substantial social stigma, the case is enhanced against implying that mens rea of any ingredient of the offence is not needed."[67]

70. The Supreme Court concluded, notwithstanding the severity of the penalty, that in its statutory context, **section 4** must be interpreted as not requiring proof that the defendant did not know or reasonably believed that the girl was aged fourteen or over. The Supreme Court, in so concluding, rejected the appellant's argument that the **Criminal Law Amendment Act of 1885-1923** did not form a coherent and consistent legislative scheme. In the view of the Court, it was entirely logical that a defence of reasonable belief should be available for the less serious offences prescribed by **sections 5 and 6** but that it should not exist for the more grave offences under **section 4**. The Court also examined the policy considerations which underpinned **section 4 of the 1885-1923 Act**, concluding that the policy was that young girls must be protected and as part of that protection, it should not be a defence that the accused believed the girl to be above the prescribed age. The objective of the section was to make the offender take responsibility for what he chose to do and if he had sexual intercourse with someone who was clearly a child or young person, he did so to his detriment.

71. We have also applied the approach explained in the decision in **Harrow London Borough Council v Shah and another**[68]. In that case, Mitchell J. said that the assessment of whether Parliament has created an offence of strict liability involves more than applying a particular test, or working through a list of clearly and closely defined criteria. There are various aspects to the exercise. However, the starting point in each case is always the same, that is, there is a presumption that included in the ingredients of the offence under consideration is the element of mens rea. In determining whether the presumption has been displaced, we now turn out attention to a number of relevant factors.

[67] **Brown** (n 65) at paragraph 26.
[68] **Shah** (n 45).

The Pertinent Factors:

72. The offences in question deal with issues of social concern namely, smuggling and revenue control, and construing them as offences of strict liability would be effective in helping to promote the objectives of the statute and in helping to promote vigilance in respect of the activities giving rise to those offences: see **Gammon Ltd. v A-G of Hong Kong**[69].

73. The mischief in **sections 213 and 214 of the Customs Act**, which deal with offences in relation to goods imported into or exported from this country, is *inter alia*, the prevention or control of smuggling, which is an especially important factor in today's setting of the ready availability of sea and air transport to practically all corners of the globe. This relative ease of transportation may facilitate transnational crime: see **Glendon De Gale v United Hatcheries Ltd.**[70].

74. In **R v Simmonds**[71], the court considered section **210(1) of the Jamaican Customs Act** which provides:

> *Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at*

[69] **Gammon** (n 28).
[70] **Glendon De Gale** (n 16).
[71] **Simmonds** (n 20).

evasion of any import or export duties of customs, or of the laws and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty of $5000, or treble the value of the goods, at the election of the commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited.

75. In that case, the Judicial Committee of the Privy Council had to determine (i) whether the charge of knowingly harbouring restricted goods in contravention of **section 210 of the Customs Act** required a specific intent that is, with intent to defraud Her Majesty of any duties thereon or to evade any restriction applicable to such goods, and (ii) where in the charge of harbouring restricted goods no specific intent was alleged (a) was the information defective and (b) was the 'conviction bad where the court made no finding and the evidence showed both the non-payment of required duties and an avoidance of the restriction?'.

76. **Section 210(1) of the Jamaican Customs Act,** which was under consideration in **R v Simmonds**[72] and **section 213 of the Customs Act of Trinidad and Tobago**, which we are considering now, are materially similar in that they are both structured in a similar fashion. In **R v Simmonds**, the Privy Council observed that for certain groups of offences under **section 210(1)**, the word "knowingly" did not appear and held that if those parts of the section were read alone, they could be construed as offences of strict liability. The Privy Council also observed that the word "knowingly" was included in other parts of **section 210(1)** and concluded that effect must be given to it, but that there was no reason why "knowingly" should be read into the offences where it did not appear. This was the same approach and essential line of reasoning adopted by Hamel-Smith J.A. in **Glendon De Gale v United Hatcheries Ltd.**[73] where he found that the omission of the word "knowingly" in the offences under **section 213(a) and (b) of the Customs Act of Trinidad and Tobago** made those offences absolute.

[72] Ibid.
[73] **Glendon De Gale** (n 16).

77. On this issue, Lord Slynn of Hadley in **R v Simmonds** said at pages 387-393:

> *"Section 210(1) contains a number of different offences which the Court of Appeal in the present case divided into five groups which in summary are as follows: (1) the first is the importation or bringing into the Island of prohibited goods and of goods the importation of which is restricted; (2) the second is the unloading of prohibited or restricted goods; (3) the third category (which includes the present case) is the knowingly harbouring or keeping of prohibited, restricted or uncustomed goods; (4) the fourth is knowingly acquiring possession of or being in any way knowingly concerned in carrying, removing or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or applicable to such goods; and (5) the fifth is in any way being knowingly concerned in any fraudulent evasion or attempt at evasion of any customs duties, or of the laws and restrictions of the customs relating to the importation, unloading, etc of goods.*
>
> *...*
>
> *...*
>
> *...*
>
> *Since the penalty for all the offences in section 210 is the same, it is understandable that the draftsman put them all together in the interest of brevity. Doing so does, however, produce the question which has arisen in this case: how far, if at all, do the words of intent in group (4) apply to the offences in the other groups and particularly in group (3).*
>
> *It is clear that group (5) is a separate group from the others, the words being 'knowingly concerned in any fraudulent evasion' not simply providing an alternative form of intent to the two forms of intent set out in group (4) (ie with intent to defraud Her Majesty or to evade any prohibition) but constituting an independent offence. These words do not therefore apply to group (3).*

As to the words 'with intent to defraud ... or to evade' it is relevant to consider the structure, the purpose and the history of the legislation.

As to the structure it is to be noted that each group begins with the word 'shall', preceded after the first group by a comma and the word 'or' and it is this which separates the groups. Their lordships do not attach any importance to the fact that a comma is used in this legislation rather than a semi-colon as in the English Act of 1876. The separation by ', or shall' of group (3) from groups (1) and (2) is in their lordships' view prima facie indicative that separate self-contained groups are being defined unless there are words at the end of the subsection which are clearly intended to apply to all groups. That is clearly so for the last few lines beginning 'shall for each such offence incur a penalty' where obviously the word 'or' is not included. The words of intent in what has been called group (4) do not have any express indication that they are to apply throughout, eg 'and in respect of all acts hereinbefore specified with intent to defraud Her Majesty of any duties due thereon'. Prima facie therefore it seems to their lordships that the groups are separate groups.

As the Court of Appeal's classification in the present case shows, the first four groups deal with different stages of the handling of importing goods, in summary: (1) importing, (2) unloading, (3) harbouring or concealing, and (4) acquiring possession or carrying.

On the face of it, these groups are dealt with differently. In the first place in groups (1) and (2) the word 'knowingly' does not appear and if they are read alone then they are offences of strict liability subject to a defence based on Sweet v Parsley [1970] AC 132 being available. There does not seem any valid reason why 'knowingly' should be read into groups (1) and (2). In groups (3) and (4) the word 'knowingly' does appear and effect must be given to it. In group (4) it is clear that, in addition to it being alleged that the defendant did the act knowingly, it must also be shown that he was concerned in carrying, or in any way dealing with, the goods with intent to

defraud Her Majesty of any duties or to evade any applicable prohibition or restriction.

In the second place, there is a difference between the type of goods covered. Groups (1) and (2) deal with prohibited goods or goods imported contrary to a restriction; group (3) deals with 'prohibited, restricted or uncustomed goods'. Group (4) is significantly different. The offence is in carrying or in any matter dealing with 'any goods'. If it stopped there, trade would be stifled. It was therefore necessary and intended to provide a specific mental element to limit the words, ie 'with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods'. Whether these words were intended to apply to the earlier groups is debatable; whether they were necessary in the earlier groups in order to create an offence is plainly not debatable. The limitation to prohibited or restricted goods is already expressly spelt out.

It seems to their lordships that, these offences being directed not only against the bringing in but also against the subsequent dealing with goods which for revenue and economic or other policy reasons it was wished to curtail or prohibit, it could, for good reason, have been decided to adopt a different test for each activity. The primary task is to stop the importing and unloading of goods which are prohibited; it is wholly intelligible that it should have been wished to make this an offence of strict liability. *Moreover section 210(1) provides for the forfeiture of 'all goods in respect of which any such offence shall be committed'. If the legislature has prohibited, or authorised a prohibition of, the importation of specific goods there seems no reason why such forfeiture should be limited to cases where the goods were imported with intent to evade duties or the prohibition. The not unreasonable message is 'if you import at all you commit an offence and you will lose the goods'.*

'Harbouring' or 'acquiring possession' of the goods may take place soon, or a considerable time, after the importation and unloading of the goods. The person, in whose possession the goods are, may have acquired them in circumstances

which gave no indication either as to their nature or as to the fact that they were prohibited or uncustomed goods. It is thus reasonable to limit the offence to those who harbour or acquire possession 'knowingly'. *"*[74] [emphasis added]

78. Further, applying the reasoning of Fox J.A. in **R v Barbar**[75], the objective of **sections 213 and 214** is to regulate and prevent importation, and to ensure collection of duties of customs which are payable. The section is an important part of the machinery established by the government to effect two of its fundamental functions, that is, collection of revenue and control of the economy. Without revenue, a government is impotent. Without control of the economy, a government is powerless to plan for the financial stability of the country. We pause to add that such control, while necessary at all times, becomes even more indispensable during periods of economic challenge. The effective control of importation would break down if the provisions are interpreted in a way which make it necessary to show that an accused had knowledge of the nature of the goods. As such, the conduct prohibited in **sections 213 and 214** are potentially dangerous to these two functions and must therefore attract that higher standard of care, which is the genesis of strict liability. Fox J.A., in interpreting **section 205 of the Jamaican Customs Act** said:

> *"Applying the considerations which have been discussed so far to the provisions of s 205 (1) it would be permissible to think that by the use of the word "knowingly" in clauses three and four, and by its omission in clauses one and two, the legislature intended to impose a strict liability with respect to the activities described in the first part of the section, but that the offences created in clauses three and four required proof of some form of guilty knowledge. The text of the clauses reinforces this conclusion. Clause three contemplates persons who "shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed any prohibited, restricted or uncustomed goods." Clause four deals with persons who,* inter alia*, "shall knowingly acquire possession of any goods". The words "permit", "cause", "suffer" and "procure" plainly import a requirement of* mens rea*."*[76]

[74] **Simmonds** (n 20) at pages 387-393.
[75] **Barbar** (n 19).
[76] Ibid at page 357.

79. The line of reasoning in **R v Barbar**[77] was applied in **Azan (Gassan Elias) and Bashco Trading Company v R**[78], a decision of the Court of Appeal of Jamaica. In that case, Panton J.A., in considering **section 210 of the Jamaican Customs Act**, said:

> *"Of significance is the use of the word "knowingly" in one section of the Act and not in another. A strong presumption is raised up that proof by the prosecution of* mens rea *is required in the first case and not in the second. In my judgment, by the omission of the word 'knowingly' in section 210 as it relates to "importing or bringing into the Island any prohibited goods" the legislature intended to impose a strict liability with respect to those activities. The offences created in section 210 with respect to "knowingly harbour or conceal" would require proof of some form of guilty knowledge.*

80. The Courts are usually reluctant to attempt to glean the intention of Parliament in legislation. However, the effect of the decisions in **Pharmaceutical Society of Great Britain v Storkwain Ltd.**[79], **Glendon De Gale v United Hatcheries Ltd.**[80], **R v Simmonds**[81], **He Kaw Teh v R**[82], **R v Matudi**[83] and **R v Brown**[84], is that when evaluating whether offences such as those in the matter at bar require mens rea or are strict liability, the court has to consider a number of factors, one of which may include the content and structure of the legislation. This process entails attempting to glean the intention of Parliament as revealed in the provisions, structure and the general scheme of the Act. The rationale for doing so is that where Parliament wished to recognise that mens rea should be an ingredient of an offence created by the Act, it usually explicitly so provided.

81. One of the most direct ways of signifying that an offence of mens rea is intended, is by inserting the words "knowingly" or "intentionally" into the relevant section of Act. In **Glendon De Gale v**

[77] **Barbar** (n 19).
[78] [2007] 6 JJC 1503.
[79] **Storkwain** (n 38).
[80] **Glendon De Gale** (n 16).
[81] **Simmonds** (n 20).
[82] **He Kaw Teh** (n 26).
[83] **Matudi** (n 35).
[84] **Brown** (n 65).

United Hatcheries Ltd.[85], a case decided in the year 1992, Hamel-Smith J.A. at page 11 observed that in **section 213 of the Customs Act**, as it was then worded, the word "knowingly" was used in sub-sections (c), (d) and (e) but not in (a) and (b). Hamel-Smith J.A. found that the omission of the word "knowingly" in the offences under (a) and (b) made those offences absolute.

82. Of interest, in this regard, is the comparatively recent decision of the Court of Appeal of Trinidad and Tobago in **Customs and Excise Officer Azard Khan v Bobby Ashram Sanhai and Glen Mulchansingh**[86]. It is to be noted that the reasoning in this decision is somewhat difficult to reconcile with the decision in **Feese**[87]. In **Customs and Excise Oficer Azard Khan v Bobby Ashram Sanhai v Glen Mulchansingh**, the respondents were charged under section **213(e) of the Customs Act** for the offences of being (i) knowingly concerned in a fraudulent attempt at evasion of import duty and taxes due on a consignment of computer parts and accessories and (ii) knowingly concerned in a fraudulent attempt at evasion of the laws and restrictions of the customs relating to the delivery of goods. Weekes J.A., considered the construction of **section 213 of the Customs Act** as a whole and said at paragraphs 32-34:

> *"32. Section 213 of the Customs Act is a penal section. The fourth and fifth clauses, (d) and (e) can be distinguished from the foregoing three since they are introduced by the word 'knowingly'.* ***In the Jamaican case of R v George Barbar, the Court of Appeal, in interpreting S 210 of the Customs Act (similar to our S 213), held that the legislature by using the word 'knowingly' required proof of guilty knowledge whereas no such knowledge was required where the word was omitted. This difference has been considered important****.*
>
> *33.* ***According to Fox JA in Barbar (supra), 'the highest significance which may therefore be given to the use of the word 'knowingly' in one section of an act and not in another is that a strong but not a conclusive implication is raised up that proof by the prosecution of mens rea is required in the first case and not in the second. Where the difference occurs not in two separate sections, but in the same***

[85] **Glendon De Gale** (n 16).
[86] Mag. App. No. 36 of 2015
[87] **Feese** (n 1).

section, the implication receives added force'. *In R v Richard Simmonds and George Luesingh, the Jamaican Court of Appeal applied the case of Barbar (supra).*

34. We find the thinking of Fox JA, to be persuasive. Our S 213 contains a number of clauses, some containing the word "knowingly" and others without. Surely, there must be some distinction to be drawn between them in terms of the mental element required to found the offence*... "*[88] [emphasis added]

83. In 2007, **section 213 of the Customs Act** was amended, significantly increasing the penalties for the offences under that section. This increase in penalties was one of the factors subsequently relied on in the 2011 decision of **Feese**[89], in finding that **section 213** created offences requiring mens rea. However, at the time of those amendments to the present day, **section 213 (a) and (b)** remains the same as in 1992, when interpreted in **Glendon De Gale v United Hatcheries Ltd.**[90], the word "knowingly" being omitted from those sections. This is a powerful indicator that Parliament intended that, notwithstanding the increase in penalties in **section 213**, the offences under **section 213(a) and (b**) should remain strict liability offences. This is more so because other parts in that section ((c) (d) and (e)) have the word "knowingly" included. In a manner which is broadly analogous to the deeming provision of the dangerous drugs legislation, those who run afoul of these sections of the **Customs Act** under review, cannot be heard to say that they did not have any "knowledge". Such an assertion may be easy to advance but difficult to refute. The "net" of criminal liability for those offences must necessarily be tightly drawn so as to send the core policy message that those who are involved in importation of goods and in the making of relevant declarations to Customs, have far reaching, positive obligations. These obligations must be scrupulously adhered to in order to promote the primary objectives of the Customs legislation which are the control of smuggling and the generation of revenue.

84. The overall legislative scheme of the relevant Customs legislation under consideration is a coherent and consistent one. **Section 213 of the Customs Act** sets out different categories of

[88] **Khan and Mulchansingh** (n 86) at paragraphs 32-34.
[89] **Feese** (n 1).
[90] **Glendon De Gale** (n 16).

offences. The Customs and Excise Division has jurisdiction over a relatively narrow set of offences. For those offences which stand at or near the centre of the frontal violation of the legislation and which defeat its core purpose, such as the category of offences under **section 213 (a) and (b)**, it is logical and rational that those offences should be construed as being of strict liability. It is therefore unsurprising that the word "knowingly" is omitted from **section 213(a) and (b)** as the offences under those sub-sections concern the importation and exportation of prohibited goods and the importation of goods not corresponding to the relevant customs declaration form. Those offences can be said to go to the root of the mischief intended to be addressed by the Act, that is, the prevention and control of smuggling.

85. For the offences **under section 213 (c), (d) and (e),** a mental element is clearly signified by the use of the word "knowingly". The category of offences under these sub-sections include 'harbouring' and 'acquiring possession' of goods which do not inevitably form an integral part of the offences of importing and unloading prohibited goods as those under **section 213 (a) and (b)**. As explained by Lord Slynn of Hadley in **R v Simmonds**[91], 'harbouring' or 'acquiring possession' of the goods may take place soon, or a considerable time after the importation and unloading of the goods. Further, the person, in whose possession the goods were found, may have acquired them in circumstances which gave no indication either as to their nature or as to the fact that they were prohibited or uncustomed goods. Accordingly, these offences do not directly go to the root of the mischief intended to be addressed by the legislation and, because of their elasticity, it is only constitutionally fair and proportionate that there be the requirement of a mental element for those categories of offences.

The Result of the Evaluation:

86. For these reasons, we are of the view that the ratio of Hamel-Smith J.A. in **Glendon De Gale v United Hatcheries Ltd.**[92] remains good law today.

[91] **Simmonds** (n 20).
[92] **Glendon De Gale** (n 16).

87. We are of the view that the increased penalties for a breach of the Customs offences under **section 213**, although it is a formidable consideration, is not a conclusive factor in determining whether the requirement of mens rea ought to be maintained. The severity of the maximum penalties must be considered in light of the Act read as a whole: see **Gammon Ltd. v A-G of Hong Kong**[93]and **Harrow London Borough Council v Shah and Another**[94]. We agree with the submission of Mr. Peterson that Parliament sought to increase the penalties under the **Customs Act** over time so as to deter persons who may be inclined to breach the provisions against importation of prohibited goods.

88. It is also noteworthy that the "absurdly draconian" result, of which Gibbs C.J. spoke in **He Kaw Teh v R**[95], was against the background of a Customs offence which related exclusively to narcotics. There can be no gainsaying that narcotic offences are not regulatory in nature and that they are in many cases "truly criminal", as Gibbs C.J. described them. It is also telling that under the relevant legislation in **He Kaw Teh v R**, an offender was liable to a maximum penalty of imprisonment for life. This is an exceedingly severe penalty. The relevant penalties in Trinidad and Tobago under the Customs legislation, although quite substantial, do not fall into this extremely severe category.

89. In so far that there has been some suggestion that the reasoning in **Feese**[96] ought to be confined to narcotics offences but not necessarily to other types of offences, we do not agree that this would constitute a viable solution. Adopting this approach would lead to an inconsistent interpretation of the legislation, dependent on the nature of the prohibited substance.

90. In the application of the strict liability principle, any resultant apparent harshness can be moderated by an appropriate, rationalised, harmonised and well-coordinated Customs prosecution policy. Furthermore, as was said by Lord Bridge of Harwich in **AG of Hong Kong v Tse Hung Lit and Another**[97] at page 886, the "criminal net" should only be cast as widely as is necessary. In addition,

[93] **Gammon** (n 28).
[94] **Shah** (n 45).
[95] **He Kaw Teh** (n 26).
[96] **Feese** (n 1).
[97] **Tse Hung Lit** (n 47).

section 223 of the Customs Act also provides an avenue for relief to an offender in that the President, in exercising his powers under the Act, can direct the waiver of the proceedings or mitigate or remit the fine or penalty. As well, **section 224 of the Customs Act** provides that an offender, upon admitting guilt in the prescribed form, can request that the offence be dealt with by the Comptroller of Customs, who, subject to approval from the Minister, may impose a fine, penalty and forfeiture, excluding that of imprisonment, or mitigate or remit any fine or penalty. These provisions demonstrate that any rigors associated with a strict liability interpretation can be mitigated.

91. More far reaching and significant than the matters adverted to in paragraph 87, is that in performing the sentencing function, courts have a wide latitude to alleviate any undue harshness which may ensue as a consequence of a strict liability interpretation of the relevant sections. The courts, in performing their sentencing function, are a critical "check and balance" to ensure that the sentence imposed properly, fairly and proportionally reflects the particular circumstances of the offence and of the offender.

92. It is important to underscore that the operation of the strict liability principle does not mean that certain types of defences are not available (see **R v Barbar**[98] and **AG of Hong Kong v Tse Hung Lit**[99]). Examples of these defences include the following:

    (a) Where the defendant is operating under a mistaken belief, for example, the "innocent merchant" in **Frailey v Charlton**[100] but not the owner or his agent who is fixed with the responsibility of handling goods; or

    (b) A defendant who is within a class of persons whose conduct could not in any way affect the observance of the law (for example, the "innocent labourer" in **Frailey v Charlton**[101]). In **AG of Hong Kong v Tse Hung Lit**, Lord Bridge of Harwich said at pages 885-886, *"It*

[98] **Barbar** (n 19).
[99] **Tse Hung Lit** (n 47).
[100] [1920] 1 K.B. 147.
[101] Ibid.

seems entirely appropriate that those responsible for arranging the exportation of goods, as well as those who directly perform the act of exportation, should be responsible for ensuring that any appropriate licence has been obtained and should be held criminally liable in the absence of such a licence. But what of others who merely play a physical part in the sequence of events which leads to exportation? ***The road haulage contractor who brings goods from the warehouse to the dockside and the stevedoring firm which loads the goods on board the ship know full well that the goods are to be exported, but are in no position to give and do not purport to give any authority to the ship owner to effect the exportation. Yet, if the Attorney-General's construction of the language of the legislation is adopted, they too must be held to have caused the goods to be taken out of Hong Kong and will act at their peril unless they ensure in every case that the appropriate export licence has been obtained. Their Lordships fully appreciate the necessity in such a community as Hong Kong for the authorities to exercise strict control over imports and exports, but can discern no good reason why it should be necessary, in order to make such control effective, that the criminal net should be cast as widely as it would be if the construction urged by the Attorney-General were accepted.*** *"*[102] [emphasis added]

93. It should be carefully noted that the concept of mistaken belief referred to in paragraph 92 (a) above is not entirely synonymous with and is somewhat narrower than the defence of mistake of fact/mistaken belief which applies in criminal law. However, it is not within the domain of this judgment to elaborate any further on this issue in the abstract. As cases arise, dependent upon their precise factual contexts, there will be the need for elaboration in due course.

94. In light of the foregoing, we are of the view that the presumption of mens rea has been displaced, thereby making the offences of importing prohibited goods and importing/exporting goods not corresponding with the relevant entry, under **sections 213 and 214 of the Customs Act,** strict liability offences. The isolated factor of the progressive strengthening of the penalties under that section does not overshadow and overwhelm the cumulative effect of the other factors considered at paragraphs 68-85 above. In addition, **He Kaw Teh v R**[103] is capable of being distinguished as

[102] **Tse Hung Lit** (n 47) at pages 885-886.
[103] **He Kaw Teh** (n 26).

outlined in paragraph 88 above, having regard to the type of criminal offence that was there under consideration as well as the extreme seriousness of the maximum penalty that was there involved. Further, as the decision in **R v Brown**[104] illustrates, the factor of the seriousness of the penalty, while undoubtedly important, is not necessarily conclusive for the purpose of evaluating whether the offence is one of strict liability or not.

Application of the Strict Liability Principle to the Evidence in the Case:

95. The Court of Appeal in **Feese**[105] did not have the benefit of the very extensive and exhaustive arguments on both sides that we have had in the case at bar. We must respectfully disagree with and disapprove of the decision in **Feese** where it was held that **sections 213 and 214 of the Customs Act** required proof of knowledge or mens rea. As a panel of three judges sitting in this magisterial appeal, unanimous on the issue, we respectfully depart from that position and are of the view that the ratio of Hamel-Smith J.A. in **Glendon De Gale v United Hatcheries Ltd.**[106] remains a valid one.

96. The magistrate erred in finding that **sections 213 and 214 of the Customs Act** required proof of knowledge and in concluding that the charges against the respondents under those sections had not been made out. Accordingly, the respondents ought to have been called upon to answer the charges against them.

There is merit in this ground of appeal.

[104] **Brown** (n 65).
[105] **Feese** (n 1).
[106] **Glendon De Gale** (n 16).

<u>Ground 5:</u> The Learned Magistrate exceeded her jurisdiction when she relied on the purported contents of a correspondence that was not tendered into evidence by any of the parties to the proceedings [section 132(b) of the Summary Courts Act Chapter 4:20].

<u>The Appellant's Submissions:</u>

97. Mr. Peterson submitted that the magistrate, in arriving at her decision that there was no case to answer, placed reliance on a letter that was not tendered into evidence. That letter purportedly represented correspondence from Republic Shippers, the company responsible for shipping the container in which the gaming machines were found, explaining an error in shipment. The letter was referred to in the cross-examination of the appellant and the magistrate found that the contents of the letter could not be properly referred to without the letter being produced in evidence.

98. It was submitted that the magistrate placed heavy reliance on the fact that there was correspondence sent to Customs and the fact that there was some consultation between the appellant and the respondents in arriving at her conclusion that there was no breach of **section 214 of the Customs Act**. It was further submitted that the correspondence referred to and the consultation did not in any way militate against the prima facie case which was established against the respondents. There was evidence as to the contents of the letter, the existence of which could not destroy a prima facie case. The Magistrate had no admissible material before her in order to determine whether the letter, referred to by the attorney-at-law for the respondents in the court below, had the effect of undermining a prima facie case.

<u>Analysis and Reasoning:</u>

99. Mr. Peterson submitted that the magistrate exceeded her jurisdiction when she relied on the purported contents of a correspondence that was not tendered into evidence by any of the parties to the proceedings.

100. In the cross-examination of Customs Officer Bhola, counsel for the respondents in the court below referred to the correspondence in question[107]. The magistrate found that the contents of that correspondence could not be properly referred to without the letter being produced in evidence. However, in her oral reasons for upholding the submission of no case to answer, the magistrate went on to refer to the correspondence. On this issue, the magistrate said:

> *"As well as in relation to this particular matter and it was admitted that correspondence had been sent … what was contained in the container, and from the evidence I saw also that that correspondence was accepted and further consultation was had between the Customs and the defendants."* [108]

101. The magistrate therefore placed reliance on the correspondence in question without that correspondence having been tendered into evidence. The magistrate had no admissible material before her so as to conclude whether the correspondence had the effect of undermining a prima facie case. We agree with Mr. Peterson's submission that the magistrate erred in law when she relied on the purported contents of the correspondence that was not tendered into evidence.

We find merit in this ground of appeal.

<u>Ground 6:</u> The Learned Magistrate's decision is erroneous in point of law, in that the Magistrate erred in upholding a no case submission [section 132(h) of the Summary Courts Act Chapter 4:20].

<u>The Appellant's Submissions:</u>

102. Mr. Peterson submitted that the Magistrate erred in her assessment of the case when she treated all the charges as "inextricably bound". He submitted that the charge under **section 212 of the Customs Act** is a separate and distinct charge from those charges under **sections 213 and 214**. It

[107] See the Record of Appeal at page 171, lines 10-14
[108] See the Record of Appeal at page 320, lines 18-23

was argued that a person can import goods which are not prohibited but he might, notwithstanding that fact, make a false declaration to Customs. According to Mr. Peterson, the Magistrate ought to have considered each of the charges separately and her failure to do so caused her to fall into error in dismissing all of the charges against all three respondents at the stage of the submission of no case to answer.

On this issue, the magistrate in her reasons said:

> *"But I want to say that 2:13, 2:12 and 2:14 seems to be inextricably bound, when it comes to these matters. Therefore I am of the view that even in this particular instance, I am not convinced or satisfied Mr. Nurse ought to answer even this charge… So in all of these cases I have accepted the no case submission and I am dismissing all of them."*[109]

103. Mr. Peterson submitted that although the Magistrate found that there was evidence that Nurse did in fact sign the Customs declaration form, the no case submission in respect of him was upheld. He submitted that Nurse ought to have been called on to answer the charges against him.

The Respondent's Submissions:

104. Mr. Singh submitted that Canserve ought not to be held to be criminally liable for the offences charged because the appellant failed to show that the agents of the company were in a position where they could have been said to be the "controlling mind" of the company. It was further submitted that the appellant ought to have produced the by-laws of the company to show that the acts of the officers ought to be imputed on the company. There was no evidence showing the capacity in which Nurse had acted and his role in the company and accordingly, the appellant failed to satisfy the test laid down in **Tesco Supermarkets Ltd. v Nattrass**[110].

[109] See the Record of Appeal at page 321, lines 27-33
[110] [1972] AC 153

105. With respect to the respondent Gibbs, Mr. Singh submitted that there was no evidence, other than mere presence at the opening of the container, which could support the charges brought against her. He argued that Gibbs' mere presence on the scene when the container was opened did not satisfy the evidential burden or threshold placed on the appellant. Further, he argued that there was no evidence led that could implicate Gibbs as a participant in the commission of the offences charged.

106. Mr. Singh also submitted that the appellant failed to prove that the respondent Nurse participated in any way in the commission of the offences charged in any culpable manner and as such the appeal against him ought to be dismissed. He argued that the only document bearing the signature of Nurse was the Customs declaration form. This form was the basis of the false declaration charge and the appellant failed to lead any evidence of any false particulars on that form.

The Appellant's Submissions in Reply:

107. Mr. Peterson submitted that the proceedings were properly before the court against Canserve and as such, the magistrate ought to have called on it to answer the prima facie case. The company was named on the documentation before the court as the importer of the gaming machines. It was submitted that Canserve fell within the definition of importer under the Customs Act and this was sufficient for the magistrate to call upon the company to answer the charges against it.

108. Mr. Peterson also submitted that based on the evidence lead by the appellant, the respondent Gibbs was someone "beneficially interested in the goods at the time of importation". She was interviewed by Customs Officer Bhola and never distanced herself from the importation of the gaming machines. Accordingly, Gibbs fell within the definition of "importer" in the **Customs Act** as someone interested in the goods at the time of its importation.

Analysis and Reasoning:

109. We agree with Mr. Peterson's submission that the magistrate erred in finding that all the charges against the respondents were inextricably bound. The charges under **section 212 of the Customs Act** dealt with the offence making of a false declaration which is unconnected to the charges under **sections 213 and 214** which concern offences related to the importation of goods. Those two categories of offences are also distinct in that they require proof of different elements in order to prove the offence.

110. Further, the prosecution evidence revealed that the respondent Nurse appeared to have signed the Customs declaration form. This meant that the offences of making a false declaration and of importing prohibited goods were properly before the court against him and he ought to have been called on to answer the charges.

111. On the issue as to whether the proceedings were properly before the court against the respondents Canserve and Gibbs, regard must be had to the definition of "importer" in the **Customs Act**, which states:

> *"'importer' includes the owner or any other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the Officers, and also any person who signs any document relating to any imported goods required by the Customs laws to be signed by an importer."*

112. The respondent Canserve was the company named as the importer of the seized goods on the relevant Customs documents which were before the court. We are of the view that Canserve fell within this definition of importer under the **Customs Act**, being the owner of the goods at the time of importation, and this was sufficient for the magistrate to call on the company to answer the charges against it.

113. With respect to the respondent Gibbs, we are not persuaded by Mr. Peterson's submissions that she ought to have been called upon to answer the charges against her as a person beneficially interested in the goods at the time of importation. We agree with Mr. Singh's argument on this issue. Although Gibbs was present when the containers containing the seized goods were opened, and although she was interviewed by Customs Officer Bhola and never distanced herself from the goods in question, this was insufficient to satisfy the evidential burden placed on the prosecution. Further, there was a lack of evidence that was capable of implicating her as a participant in the commission of the offences in question.

114. The magistrate erred in failing to consider each of the charges separately which lead to her decision to dismiss all of the charges at the stage of the submission of no case to answer. We also find that the magistrate erred in upholding the submission of no case to answer in respect of the respondents Nurse and Canserve. The proceedings were properly before the court against both Nurse and Canserve and as such, the magistrate ought to have called upon them to answer the charges against them.

115. We find merit in part of this ground of appeal, that is, the magistrate erred in finding that the charges against the respondents were inextricably bound and therefore erred upholding a submission of no case to answer in respect of Nurse and Canserve. We do not find merit in Mr. Peterson's argument that the magistrate erred in upholding the submission of no case to answer in respect of Gibbs.

The "Halfway House" Approach:

116. During the course of the proceedings, an issue arose as to whether the Halfway House approach ought to be adopted and the Court requested further submissions on this issue. By the term "Halfway House" in the context of strict liability offences, this is taken to mean offences where there is no requirement for the prosecution to prove the existence of mens rea as the commission of the prohibited act prima facie makes out the offence, leaving a defence to an accused person to avoid liability by proving that he took all reasonable care.

117. In the Canadian decision in **Sault Ste Marie v R**[111], Dickson J. adopted a distinction between offences requiring mens rea, offences of "strict liability" and "absolute" offences. The distinction between the last two categories of offences related to the existence or absence of a common law defence of absence of fault. Dickson J. at paragraph 37 said:

> *"It is somewhat ironic that Woolmington's case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities."*

118. After analysing the policy arguments in favour of and against absolute liability, in which he found the arguments against to have greater force, Dickson J. affirmed the need for a halfway house and said at paragraph 28:

> *"The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives: (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy… There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent."*

[111] **Sault Ste Marie** (n 27).

Dickson J. at paragraph 60 concluded that there were compelling grounds for the recognition of three categories of offences rather than the traditional two. These were:

(i) *Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence;*

(ii) *Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event [The "Halfway House" Approach]; and*

(iii) *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*

Dickson J. went on to say at paragraph 61:

> *"Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will*

be primary considerations in determining whether the offence falls into the third category."

At paragraph 57, Dickson J. said:

"It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that both the concept of absolute liability and the creation of a jural category of public welfare offences are the product of the judiciary and not of the legislature. The development to date of this defence, in the numerous decisions I have referred to of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine."

119. The case of **Sault Ste Marie v R**[112] was adopted in New Zealand in the decisions in **Civil Aviation Department v MacKenzie**[113] and **Millar v MOT**[114].

120. In the Australian decision in **He Kaw Teh v R**[115], the Court affirmed the existence of the presumption of mens rea and the continued existence of the "Halfway House" in cases where the presumption is displaced. However, the court held that where such displacement occurs, the defence approach no longer applied. Instead, the defendant only had to raise the issue of the possible existence of his exculpatory belief. It would then fall on the prosecution to show beyond reasonable doubt that he did not honestly hold that belief or, if he did, that it was not held on reasonable ground.

[112] Ibid.
[113] [1983] NZLR 78.
[114] [1986] NZLR 660.
[115] **He Kaw Teh** (n 26).

The Appellant's Submissions:

121. Mr. Peterson in his oral arguments submitted that there were no jurisprudential restrictions preventing the Court from developing the common law along the way of the "Halfway House". He submitted that the "Halfway House" approach would leave Customs with the authority to "police" the importation and exportation of goods and it would also alleviate the risk of unfairness to the "purely innocent importer".

The Respondent's Submissions:

122. Mr. Singh in his written submissions argued that the "Halfway House" position ought not to be adopted in Trinidad and Tobago. He submitted that the principles of criminal law in this jurisdiction are largely left to implication in penal statutes and to modify the entire corpus of the criminal law was a matter for Parliament and not the Court. In the alternative, Mr. Singh submitted that the Australian approach referred to in paragraph 120 above ought to be adopted.

Analysis and Reasoning:

123. We agree with the submissions of Mr. Singh, that the "Halfway House" position ought not to be adopted in this jurisdiction. The Halfway House approach seeks to impose a reverse burden on a defendant to prove that he took all reasonable care. In our view, adopting a principled approach, the alteration of such pivotal principles of criminal law and in particular, the imposition of a reverse burden of proof, ought to be a matter for Parliament to consider and not for the courts to develop incrementally as a matter of common law.

Disposition:

124. We have found merit in most of the grounds of appeal and submissions of the appellant as identified during the course of this judgment. For the reasons explained above, the appeal is allowed in respect of the respondents Nurse and Canserve only and the relevant orders of dismissal of the magistrate are set aside. The order of dismissal in respect of Gibbs is affirmed.

Retrial:

125. We now turn to the guiding principles on the issue of ordering a retrial.

In the decision of **Reid v R**[116], the Privy Council noted factors which should be considered in deciding whether to retry a case, namely:

(i) The seriousness and prevalence of the offence;

(ii) The expense and length of time involved in a fresh hearing;

(iii) The ordeal suffered by an accused person on trial;

(iv) The length of time that would have elapsed between the offence and the new trial; and

(v) The strength of the case presented by the prosecution.

It was noted that this list is not exhaustive. It was otherwise held that it is in the interest of justice and the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by a judicial officer in the conduct of the case.

[116] (1978) 27 WIR 254.

126. On the issue of a retrial, we consider the following:

(a) The offences are not particularly old, having arisen in July, 2009;

(b) The offences are serious; and

(c) The offences are prevalent,

127. Upon weighing up all of these factors, the balance comes down decisively in favour of ordering a retrial.

A retrial is accordingly ordered before another magistrate.

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R. Narine, J.A.

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P. Moosai, J.A.

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M. Mohammed, J.A.