



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 401

BETWEEN:

INFINITY HEMP BERMUDA

Applicant

-and-

(1) H.M. CUSTOMS

1st Respondent

(2) THE BERMUDA POLICE SERVICE

2nd Respondent

(3) THE ATTORNEY GENERAL

3rd Respondent

Before:

Hon. Chief Justice Hargun

Appearances:

**Mrs Simone Smith-Bean, Smith Bean & Co, for the
Plaintiff**

**Mrs Shakira Dill-Francois, Deputy Solicitor General,
for the Respondents**

Date of Hearing:

16 October 2019

Date of Judgment:

14 November 2019

JUDGMENT

Introduction

1. In these judicial review proceedings Kwan Smith (“Smith”) and Andre Marshall (“Marshall”) trading as Infinity Hemp Bermuda (“the Applicant” or “Infinity”) complain, as set out in the written submissions, of illegal confiscation and retention of imported hemp products by the Bermuda Police Service (“the Police”). The original relief sought was (a) a declaration that no such hemp products imported by the Applicant be confiscated and held without cause; (b) an order setting out the definition of Cannabis Sativa CBD for purposes of differentiating between Cannabis illicit substance with content of THC; (c) a declaration that all hemp products are importable; and (d) an order that HM Customs refund all customs duties and pay damages and costs associated with this application.
2. At the hearing of this matter the position was clarified that the Applicant was essentially seeking the return of the seized products by the Police and refund of the customs duties in respect of products not delivered to the Applicant but retained by the Police.

Factual Background

3. According to the affidavit of Smith, Infinity was established as a trading organisation in August 2016 as a wholesale distributor of hemp products. The business was established in the knowledge that the importation of hemp products was not prohibited by any relevant statutory provisions. Indeed the position had been clarified by the relevant regulatory bodies. In a letter dated the 17 January 2018, the Assistant Collector of customs provided the Applicant with a letter setting out this position and stated:

“I write to confirm that, effective 17 January 2018, the Customs Department will no longer detain for inspection any imported hemp

products purchased in the United States, Canada or the European Union (subject to proper declaration and duty payment).

In this letter “hemp products” means goods put up for retail sale containing any part of the industrial hemp plant including hemp seed; cannabidiol (CBD) with THC less than 1%. To the best of my knowledge and belief, all hemp products previously consigned to Infinity Hemp Bermuda have fallen within the above description and have been restored or ordered to be restored to you by the Customs Collectorate”

4. By way of background the cannabis plant (*cannabis sativa* or *cannabis indica*) contains over 80 so-called cannabinoids. The most important and most investigated cannabinoid is tetrahydrocannabinol (THC). This is the substance that is responsible for the psychotropic effects of cannabis and its importation is prohibited under section 4 of the Misuse of Drugs Act 1972. Another important cannabinoid that occurs in large quantities in the plant is cannabidiol (CBD). Unlike THC, it does not possess any psychoactive action. It interacts with various receptors and evidently also reduces the psychotropic effect of THC. Part II of the Fourth Schedule of the Pharmacy and Poisons Act 1979 allows any person to obtain CBD with THC of less than 1% from a registered pharmacist at registered pharmacies. The Applicant has made arrangements to sell the CBD to Northshore Pharmacy Ltd for onward sale to consumers.
5. When the hemp products are imported, customs duty is paid to HM Customs before the goods are released to the Applicant. Commencing around March 2018 after HM Customs had levied the duty on certain shipments of the hemp products imported by the Applicant, the products were seized by the Bermuda Police suspecting that the importation may be in breach of the Misuse of Drugs Act 1972.

6. According to the affidavit of DC Swaby the Bermuda Police Service, Drugs Unit, is conducting a drug importation investigation concerning the activities of Smith and Marshall and he confirms that the shipments which have been seized by the Bermuda Police are part of that investigation. DC Swaby says that the packages were seized, processed and exhibited as per evidential procedures. He says that during processing most of these packages had a laboratory report, however the text was printed in a foreign language. Contents of these packages were exhibited and subsequently submitted to the Government analyst to be analysed.
7. On 18 of October 2018, DC Swaby received a summary of results from Senior Government Analyst, Nadine Kirkos, comprising of drug analysis of the packages seized from HM Customs belonging to the Applicant. The results showed that one of the packages consigned to Infinity contained cannabis with a THC level of 11%.
8. On Wednesday, 7 November, 2018, Smith was arrested at the Hamilton Police Station by Detectives in the Specialist Investigations Department on suspicion of importing of controlled drug. He was processed, and interviewed under caution. On Thursday, 8 November 2018, Marshall was arrested at the Hamilton Police Station on suspicion of importation of controlled drug and likewise was processed, and interviewed under caution.
9. Further enquiries revealed, according to DC Swaby, that the Applicant had also imported Heimat hemp/tobacco cigarettes, and had sold them to various convenience stores throughout Bermuda. Those stores being, Point Mart, Belvins, The Mini Market, Henry's Pantry Liquor Store, Churchill's Limited and Serpentine Liquors. The packaging of the Heimat cigarettes contain writing in a foreign language, and no translation in English. These actions, it is alleged, are contrary to the stipulations of a Recognised Commercial Importer of Pharmaceuticals and in contravention of the Tobacco Act 2015.

10. According to DC Swaby, further enquiries with the Department of Health confirmed that neither Smith nor Marshall have a licence to import tobacco. DC Swaby says that in the circumstances he had reasonable grounds to believe that Smith and Marshall may have committed offences under the Tobacco Act 2015.

11. Nadine Kirkos confirms in her affidavit that requests were made by the Bermuda Police Service to determine the THC concentration in the sample. Initial THC analysis was performed in August 2018 and the cannabis was found to contain 11% THC. Once the level was found to be at that concentration, all previous submissions were resubmitted to the laboratory by the Police for THC testing.

12. Nadine Kirkos explains that the laboratory does not routinely perform quantitation analysis for cannabinoid composition of cannabis or cannabis derived products. The main reason, according to Miss Kirkos, is that THC is notoriously unstable and is affected by storage conditions. She maintains that it has to be understood that the THC content when measured on a given day and time is a snapshot of the concentration on that given day and time, unless the storage conditions have been controlled. The result of these tests for THC concentration showed a concentration of less than 1% all the samples tested. However, Ms Kirkos explained that although the material, when resubmitted, had a THC level of less than 1%, it is likely the level would have been higher if it had been analysed during the initial submission.

13. As a result of this advice, DC Swaby confirms that the investigations into the actions of Smith and Marshall by the Bermuda Police Service are still continuing and accordingly they continue to retain the products seized by them at HM Customs. The Police Service has confirmed to the Court that the products seized is potentially evidence to be used in potential criminal charges to be laid against Smith and Marshall.

14. Nadine Kirkos also confirms that the submissions of cigarettes were a mixture of tobacco and plant material.

The initial seizure of the materials

15. The relevant issue to be considered here is whether the power to seize goods by the Police was exercised on a proper basis and for proper purpose. The primary issue here to consider is whether the Police could take the view that there was reasonable suspicion that the importation of the products in question possibly constituted breach of section 4 of the Misuse of Drugs Act 1972. The issue of reasonable suspicion was considered by the Supreme Court of Canada in *R v Chehil* [2014] 2 LRC 408 where Karakatsanis J. analysed the concept in following terms:

“[25] The reasonable suspicion threshold respects the balance struck under s. 8 by permitting law enforcement to employ legitimate but limited investigative techniques. This balance is maintained by subsequent judicial oversight that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis for interfering with an individual’s reasonable expectation of privacy.

[26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In Kang-Brown, Binnie J. provided the following definition of reasonable suspicion, at para. 75:

The “reasonable suspicion” standard is not a new juridical standard called into existence for the purposes of this case. “Suspicion” is an expectation that the targeted individual is possibly engaged in some

criminal activity. A “reasonable” suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

[28] The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime. In spite of this reality, properly conducted sniff searches that are based on reasonable suspicion are Charter -compliant in light of their minimally intrusive, narrowly targeted, and highly accurate nature: see Kang-Brown, at para. 60, per Binnie J., and A.M., at paras. 81-84, per Binnie J. However, the suspicion held by the police cannot be so broad that it descends to the level of generalized suspicion, which was described by Bastarache J., at para. 151 of A.M., as suspicion “that attaches to a particular activity or location rather than to a specific person”.

16. The facts appear to be that some of the products which were imported looked as though they were cannabis and whilst they had a laboratory report, the text was printed in a foreign language. After it tests by the government analyst, one sample was found to contain 11% THC. The Applicant also imported Heimat hemp/tobacco cigarettes and the packaging of these cigarettes contained writing in a foreign language and no translation in English. These actions appear to be

contrary to the stipulations of a Recognised Commercial Importer of Pharmaceuticals and breach of the Tobacco Act 2015. As Smith and Marshall did not have a licence to import tobacco, DC Swaby considered that he had reasonable grounds to believe that they may have committed offences under the Tobacco Act 2015. The fact that the cigarettes in fact contained tobacco appears to have been confirmed by the Government Analyst. In the circumstances, it seems to me that the police officer had reasonable grounds for believing that offences might have been committed both under section 4 of the Misuse of Drugs Act 1972 and under the Tobacco Act 2015.

17. Indeed counsel for the Applicant accepted in argument that the Police Officers were entitled to inspect the imported products in question including testing the products if necessary. Counsel complained that after the inspection had been completed and the necessary tests carried out all the products should have been returned to the Applicant as the final tests of the CBD materials showed that in all samples the THC content was less than 1%.

The failure to return the imported materials

18. The Police Service has not returned the products seized and the failure to return is justified on the ground that the seized products potentially constitute evidence in potential criminal proceedings against Smith and Marshall. The affidavit of DC Swaby confirms that the investigations are ongoing and the possibility remains that Smith and Marshall may be charged with a criminal offence and the material seized may constitute evidence in relation to those criminal proceedings.
19. Counsel for Smith and Marshall argues that given that the latest tests in relation to the CBD materials have found less than 1% THC in all the products, it is difficult to see on what basis her clients could be charged with a criminal offence under the Misuse of Drugs Act 1972. In my view, this submission ignores the expert evidence of the Government Analyst, Nadine Kirkos, to the effect that THC is

notoriously unstable and is affected by storage conditions and it remains a possibility that the THC content would have been higher if it had been analysed during the initial submission. Counsel for Smith and Marshall submitted that such a scenario was highly improbable. However, this is a matter for expert evidence and I am not inclined to reject the expert evidence of the Government Analyst in the absence of expert evidence to the contrary.

20. In the circumstances, I am bound to conclude that the Police Officers are entitled to retain the CBD products and the Heimat hemp/tobacco cigarettes until their investigations concerning any potential criminal charges against Smith and Marshall have been completed. It follows that this Court is unable to grant the relief sought by the Applicant and this application for judicial review must be dismissed.

21. The Court is also unable to order HM Customs to refund the duty paid on the seized items as the duty is paid on landed goods. The items in question have been imported by the Applicant albeit after importation they have been seized by the police.

22. Finally, it is worth restating the current position in relation to the importation of hemp products:

(1) As the letter from the Customs Department dated 17 January 2018 confirms it is lawful to import hemp products purchased in the United States, Canada or the European union and for this purpose “hemp products” means goods put up for retail sale containing any part of the industrial hemp plant including hempseed; or cannabidiol (CBD) with THC less than 1%. Any person in Bermuda, including the Applicant, is lawfully entitled to import hemp products.

(2) In the event hemp products should be seized by the Police for inspection and testing, the seized products should be returned to the importer as soon as possible after the Police determines not to proceed with any criminal proceedings.

(3) In the event the Police determines not to proceed with any criminal proceedings against Smith and Marshall in relation to the seized products, the products should be returned to them promptly.

23. I shall hear any application for costs, if necessary.

Dated this 14 November 2019

NARINDER K HARGUN
CHIEF JUSTICE