Mattu v. Canada, (1991) 45 F.T.R. 190 (TD)

Judge:	MacKay, J.
Court:	Federal Court (Canada)
Case Date:	June 04, 1991
Jurisdiction:	Canada (Federal)
Citations:	(1991), 45 F.T.R. 190 (TD)

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Text

Mattu v. Can. (1991), 45 F.T.R. 190 (TD)
MLB headnote and full text

Davinder Kaur Mattu (plaintiff) v. Her Majesty the Queen in right of Canada, on behalf of the Minister of National Revenue (defendant)
(T-675-89)
Indexed As: Mattu v. Canada
Federal Court of Canada
Trial Division
MacKay, J.
June 14, 1991.

Summary:

Customs officials seized jewelry from Mattu upon her return to Canada from India for breaching s. 12 of the Customs Act (importation without declaring the jewelry). The jewelry was forfeited to the Crown subject to the payment of the duty, excise taxes and penalties. Mattu appealed under s. 135 of the Customs Act, claiming the jewelry was exempt from duty as she took it with her to India to be redesigned and, accordingly, there was no importation upon her return to Canada.

The Federal Court of Canada, Trial Division, dismissed the application.

Customs - Topic 2843

Report and entry inwards - Declarations - When required - Mattu failed to declare jewelry on her return to Canada contrary to s. 12 of the Customs Act - Mattu first stated she had no jewelry, then claimed it was personal jewelry taken with her to be redesigned in India - The Federal Court of Canada, Trial Division, stated that

Mattu failed to discharge the onus of proving that the jewelry was taken out of Canada and returned, thereby exempting it from duty - Mattu did not know what changes were made to the jewelry and there was no other evidence to establish that the jewelry seized at Customs was the same jewelry she allegedly left Canada with - The court affirmed the validity of the seizure of the jewelry.

Customs - Topic 2845

Report and entry inwards - Declarations - Requirement of accuracy - The Federal Court of Canada, Trial Division, stated that "the issue of good faith, lack of intent to mislead, or even inadvertent error, in reporting of goods for Customs purposes is not a ground for holding seizure of goods to be invalid where they have been wrongly reported" - See paragraph 26.

Customs - Topic 8324

Offences and penalties - Evidence - Proof - Burden of proof - [See **Customs - Topic 2843**].

Customs - Topic 9101

Appeals - To court - From Minister - Nature of - Section 135 of the Customs Act provided an appeal from the Minister's decision under s. 131 following seizure of undeclared goods - The Federal Court of Canada, Trial Division, stated that s. 135 "provides for a trial de novo in the sense that the court is not limited to consider ation of evidence that was before the Minister. At the same time, as in the case of appeals from other administrative decisions or decisions of quasi-judicial bodies established by statute this court will not readily vary the decision appealed from unless it is persuaded that the Minister or his agents failed to observe a principle of natural justice or failed to act within his or her statutory discretion, or that the decision is based on an error in law, or is based on a finding of fact that is perverse or capricious or without regard to the evidence before the Minister." - See paragraph 27.

Cases Noticed:

Freesman v. Canada, [1982] 2 F.C. 900; 4 C.E.R. 117, refd to. [para. 24].

Gervais v. Canada (1985), 9 C.E.R. 267 (F.C.T.D.), refd to. [para. 26].

Lanctôt (Raymond) Ltée v. Canada (1990), 35 F.T.R. 96; 3 T.C.T. 5244 (F.C.T.D.), refd to. [para. 26].

Gaji et al. v. Canada (1986), 12 C.E.R. 197 (F.C.T.D.), refd to. [para. 26].

Statutes Noticed:

Customs Act, R.S.C. 1985, c. C-52.6, sect. 11 [para. 24]; sect. 12 [para. 3]; sect. 13, sect. 17 [para. 24]; sect. 131(1)(a), sect. 131(2), sect. 131(3), sect. 133(1), sect. 133(2), sect. 135(1) [para. 20].

Federal Court Rules, rule 300(1) [para. 5].

Counsel:

Bikar Mattu, on behalf of the plaintiff;

Kathryn I. Denhoff, for the defendant.

Solicitors of Record:

Davis & Co., Vancouver, B.C., for the defendant.

This appeal was heard on June 4, 1991, at Vancouver, B.C., before MacKay, J., of the Federal Court of Canada, Trial Division, who delivered the following judgment on June 14, 1991.

[1] MacKay, J. : This action, pursuant to s. 135 of the Customs Act , R.S.C. 1985, c. C-52.6, is an appeal from the decision of the Minister of National Revenue made under s. 131 of the Act in relation to certain goods, jewelry, seized from the plaintiff as imported goods not declared and smuggled into Canada by the plaintiff on her return from a trip to India in February 1988.

[2] The decision of the Minister was as follows:

"(a) that there has been a contravention of the Customs Act or the regulations in respect of the goods that were seized;

"(b) that pursuant to s. 133 of the Customs Act , the goods under seizure be returned on receipt of an amount of $2,918.16 to be held as forfeit and upon failure to remit such amount within ninety days from the date of this Notice, that the goods under seizure be forfeit."

[3] The plaintiff claims the goods seized, her personal jewelry, were owned by her prior to leaving Canada, as appears from photographs and an appraisal made of the jewelry before she left Canada and took the jewelry with her. While she admits that her jewelry was taken to be redesigned while she was in India, she claims that essentially they are the same pieces she owned, had photographed and appraised before leaving Canada and which she took with her when she departed Canada. By implication it is said the jewelry items were not imported into Canada in February 1988 so that there was no contravention of s. 12 of the Act and the seizure and the Minister's decision cannot be justified.

[4] On this basis the plaintiff seeks an order setting aside the decision of the Minister, ordering delivery of the goods to the plaintiff or in the alternative their delivery to the plaintiff upon payment of duty on the work and cost of redesigning the jewelry in India.

[5] At the outset of the trial I raised as a preliminary procedural matter the question of representation of the plaintiff who initiated the action on her own behalf without representation by a solicitor. At trial her husband, who is not a solicitor, sought to represent her. I did so in light of court rule 300(1) which provides:

"An individual may act in person or be represented by a solicitor in any proceeding in the court."

The plaintiff's husband, who is fluent in English, indicated that his wife is not at all fluent in English, either in speaking or in understanding, and that he had carried the process up to trial on her behalf. Counsel for the defendant agreed that the husband had represented the plaintiff on two previous occasions before the court, dealing with defendant's motions that the Statement of Claim be struck out as revealing no cause of action which was dismissed, and that the trial be adjourned from the original date set in May. On those occasions the issue of representation of the plaintiff by her husband had not been questioned and counsel for the defendant had no objections to this representation for the plaintiff at trial.

[6] In view of the plaintiff's difficulty in communicating and understanding English or apparently in any language other than Punjabi, the representative role already played by

her husband in preliminaries leading to trial including previous appearances before the court, and in the absence of objection by the defendant, I acknowledged the role of the husband as agent or representative for his wife, the plaintiff, in the interest of justice and in order to avoid delay in dealing with the matter now set, a second time, for trial.

[7] An interpreter, arranged for by the plaintiff and accepted as competent by counsel for the defendant to translate from English to Punjabi and vice versa, was duly sworn as interpreter for the questioning of plaintiff and her witnesses. The interpreter, when not engaged in translation for witnesses and of their testimony given in Punjabi, assisted the plaintiff by describing in Punjabi the proceedings which were conducted in English.

[8] The plaintiff has resided in Canada for about 15 years and is a Canadian citizen. In November 1987, with three children she went to India for a visit. Upon her return on February 8, 1988 seven items of jewelry were seized by Canada Customs during an investigation following her arrival in Canada at Vancouver International Airport, when she had failed to declare this jewelry in declarations completed for customs officers on her arrival.

[9] Prior to her departure for India, on the advice of a friend, who accompanied her, she had gone to a jeweller in Vancouver. There her personal jewelry she intended to take to India had been photographed and appraised. Two photographs were provided to her at the time of her visit as well as an appraisal form which included her name, listed the items of jewelry, all of it in gold, by description, by quality of gold in karats, by weight and by appraised value. The appraisal form was signed by the jeweller on November 10, 1987. Photocopies of the photographs and of the appraisal form were admitted as exhibits as the best evidence available upon the plaintiff's representative indicating that the originals having been sent to the Department of National Revenue in Ottawa and not returned, and these were admitted with consent of counsel for the defendant. In her testimony the plaintiff indicated she had the jewelry photographed and appraised on the advice of a friend and because she intended to have her jewelry redesigned while in India.

[10] The plaintiff's evidence about arrangements to have her jewelry redesigned while in India was not helpful. She testified that her grandmother had made arrangements for this to be done, had taken 2000 rupees from her and her jewelry and had arranged, without the plaintiff being present, for the jewelry to be redesigned. The plaintiff, with other family members, did visit the jeweller to pick up the jewelry and at that time she was given a form by the jeweller, described as a form relating to gold added to her jewelry in its redesign. This, in my view, is not evident from the form itself which describes her and which she signed as "seller" of gold. The jeweller in India did not advise whether gold was added to her jewelry in its redesign and she professed no knowledge of whether any gold was added. She claims not to have understood the form which was printed and completed in English, but she signed it as directed by the jeweller who said they should present it to Customs officers upon her return to Canada if there were any questions about her jewelry. At trial she could not remember when she provided the original of that form to Canada Customs, though she probably did not do so on arrival in Canada but at some later date.

[11] There was no evidence clearly describing the items of jewelry before any of it was redesigned, other than the Vancouver jeweller's appraisal which related to more items than

were here seized. The photocopies of photographs were not clear enough to depict the jewelry in any detail. There was no evidence from the plaintiff about what items were redesigned and no description of the items as changed by redesign. In argument the plaintiff's husband, her representative, suggested that redesign was minor at least in relation to certain pieces of the jewelry, i.e. that a long single strand necklace had simply been changed to a shorter necklace of three strands, and that of four bangle bracelets seized only two had been redesigned to match the other two which were left unchanged. Yet there was no evidence from witnesses or documents on which one could determine what was done in the redesign of jewelry in India, or if gold was added in redesign, and the person who ought to have known, the plaintiff, professed not to know.

[12] Not surprisingly, the plaintiff's evidence of events at Vancouver Airport on the plaintiff's arrival on February 8, 1988, differs in some respects from that of the customs officers called on behalf of the defendant. Where there is significant difference I rely on the evidence of the customs officers who were, in my view, more credible witnesses, clear in their testimony and their recollection of the events that transpired.

[13] The plaintiff's recollection of the first encounter with a customs officer was that the officer, a woman, was probably of Chinese origin, certainly not an East Indian, who spoke to her only in English and who asked, in relation to jewelry, whether she had received any gold jewelry while in India. To this the plaintiff had replied in English that her daughter, accompanying her, had received gold rings as a gift.

[14] The plaintiff had presented this officer with completed customs declaration cards of the sort required of all travellers entering Canada for herself and her three children who accompanied her. On these cards it was indicated that she and each of the children had a total value of goods purchased, received or acquired while outside Canada in amounts of $260, $240, $222, $256 in each case, a total of $978 for all four persons. Her evidence at trial was that these cards, printed in English and French, had been completed on the returning aircraft by a man, a stranger, East Indian in origin, who helped her because she did not understand them. She professed she had not advised him what to put on the forms and had not told him how much to claim as goods acquired outside the country. She did admit that her eldest child, a daughter, then some 10 or 11 years of age was educated in and reasonably conversant with English, but she apparently had not relied upon her for assistance in completing the forms.

[15] The Canada Customs officer serving at the time as primary customs inspector, who was the first customs officer encountered by the plaintiff, was Mrs. Belinder West, a customs officer since 1981. Her task as primary inspection officer was to check passports and customs declarations of persons arriving from outside Canada and to decide whether each should be referred for a secondary examination or should be allowed to go without further examination. She is of East Indian origin or ancestry. She initiated her questioning in English but at one point she asked the plaintiff in Punjabi if she had acquired, received or purchased any jewelry while away. The plaintiff responded in English that the only jewelry acquired was a set of earrings given to her daughter. This was noted on the daughter's card. The plaintiff also said she was conversant in English and preferred to speak English. The officer asked again in English if any jewelry was acquired, purchased or received while away or if the plaintiff had had any jewelry redesigned while away to which the

response was "no". Her card was then coded by the officer as having declared no jewelry, and also for a secondary examination for inspection for jewelry. The officer professed to having asked the plaintiff several times whether she understood her questions and to having given every opportunity for the plaintiff to report her jewelry, and that she found the plaintiff responsive to her questions whether in English or Punjabi. The plaintiff had made no request for an interpreter.

[16] The plaintiff was then directed to a secondary inspection, this time carried out by customs officer Steven Eastman, serving at the time as secondary inspector. With the declaration cards she presented, now as coded by officer West, he asked what was included in the goods declared as having been acquired. Included were items of clothing, shoes, household goods and the pair of earrings given to her daughter but no other jewelry. He says that he examined the baggage which appeared to contain items consistent with the values declared. He noticed that the plaintiff was wearing gold bangle bracelets and he asked about those and any other jewelry. Thereupon the plaintiff showed him photographs of jewelry and the appraisal form completed by the Vancouver jeweller before she had left Canada. Upon his request, the plaintiff then produced the other jewelry items in issue here. Officer Eastman took the photographs, the appraisal form and the jewelry into another room where he noted the following:

(1) the total weight of the items of jewelry produced by the plaintiff differed from the total for similar items listed on the appraisal form;

(2) the plaintiff had four bangle bracelets with her on her return to Canada, though the appraisal and the photographs only included two, a difference the plaintiff subsequently explained by saying she had only two of her four bangles with her when they were appraised in Vancouver in November but had decided to take four with her when she went to India;

(3) A necklace depicted in the photograph was a single strand of gold while that produced by the plaintiff on arrival at the airport on February 8 consisted of three strands.

Officer Eastman admitted the photographs of the jewelry presented to him by the plaintiff were not of good quality and that they did not adequately reveal details of the items depicted.

[17] Eastman called upon his supervisor, a woman, to continue the examination of the plaintiff. The supervisor questioned whether any of the jewelry had been redesigned in India which the plaintiff then, for the first time, confirmed. Eastman also spoke with officer West about the manner of her earlier questioning of the plaintiff and was told of West's questioning in English and Punjabi and the plaintiff's professed desire to discuss matters in English. Eastman did this, he said, to assure himself that there was no reasonable doubt of the plaintiff's understanding of the questions that had been put to her. Having reached that conclusion he advised the plaintiff that in his view the Customs Act had not been complied with by the plaintiff and for this reason her jewelry was seized under the Act .

[18] At that stage the plaintiff requested that her husband, who was expecting to meet her on arrival, be permitted to join her in the Customs area, a request that was refused in

accord with departmental operating policy since the officers were concerned to complete their examination of the plaintiff and since her husband was not at that stage involved in matters under examination. The plaintiff also indicated, for the first time, difficulty in dealing with the English language. At trial she stated she had not then asked for an interpreter but had merely asked that her husband be admitted to the area to assist her.

[19] When the jewelry was seized, the plaintiff was apparently given a seizure receipt dated February 8, 1988 and apparently was later provided with a Statement of Goods Seized (Form K-99) which included evaluations based on appraisal of the goods seized. In her statement of claim the plaintiff alleged that she was not informed of the basis of the evaluation or appraisal, but no evidence was adduced at trial to question the evaluation by Canada Customs.

[20] Thereafter, in accord with procedures under the Customs Act , the plaintiff requested a decision of the Minister, and that decision, dated February 15, 1989 was as noted above. The decision was made pursuant to ss. 131 and 133, pertinent portions of which provide:

"131(1) ... the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide, in respect of the goods or conveyance that was seized or with respect to which a notice was served under s. 124,

(a) in the case of goods or a conveyance seized or with respect to which a notice was served on the ground that this Act or the regulations were contravened in respect thereof, whether the Act or the regulations were so contravened; or

. . . . .

"(2) The Minister shall forthwith on making a decision under subsection (1) serve on the person who requested the decision written notice thereof.

"(3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).

"133(1) Where the Minister decides, pursuant to s. 131, that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that section, and, in the case of a conveyance described in paragraph 131(1)(b), that it was used in the manner described therein, the Minister may, subject to such terms and conditions as he may determine,

(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;

(b) remit any portion of any money or security taken; and

. . . . .

"(2) Goods may be returned under paragraph (1)(a) on receipt of an amount of money of a

value equal to

(a) the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto

(i) at the time of seizure, where the goods have not been accounted for under subsection 32(1), (2) or (5) or where duties or additional duties have become due thereon under ss. 88 to 92, or

(ii) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case; or

(b) such lesser amount as the Minister may direct.

. . . . .

"135(1) A person who requests a decision of the Minister under s. 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action to the Federal Court - Trial Division in which that person is the plaintiff and the Minister is the defendant."

[21] In this case the amount fixed by the Minister's decision to be paid in accord with s. 133(2)(b) is lesser in amount than the maximum that might have been fixed. It was determined in relation to the amount of duties applicable to the appraised value of the jewelry plus an allowance for excise tax and a penalty assessed because the plaintiff was deemed to have attempted to bring the jewelry into Canada without payment of duties lawfully payable.

[22] In argument for the plaintiff it was urged that there was no intent to smuggle the jewelry into Canada without paying duties and that in view of her family circumstances there was no reason for her to do so. Neither factor is relevant to the issue of whether the seizure on behalf of the Minister was warranted.

[23] It was further urged, as noted earlier, that only two of four bangle bracelets had been redesigned and that the changing of a long single strand gold chain to a shorter three strand chain was not redesigning of the jewelry. Yet these claims were not substantiated by testimony of the plaintiff or by other evidence. The plaintiff's failure to report the jewelry that had been redesigned, it was said, arose from her ignorance that redesigned jewelry was considered for customs purposes as new. Finally it was urged that the plaintiff be entitled to recover her jewelry upon payment of the duty assessable on those items that were redesigned after taking into account the allowable limit of goods to be admitted duty free when brought into the country by a returning resident of Canada.

[24] Under s. 11 of the Customs Act every person arriving in Canada is required to present himself or herself to a customs officer and answer truthfully any questions asked by the officer in the performance of his duties. Under s. 12 all goods that are imported are to be reported to a customs officer by a person who has possession of the goods or in whose baggage the goods are carried upon arrival in Canada. The person reporting goods has an obligation to answer truthfully any questions asked by a customs officer about the goods

under s. 13, and s. 17 provides that imported goods are subject to duty from the time they are imported. While certain exemptions from duties are provided, for example, in relation to goods taken out of the country and brought back in by a resident of Canada, the onus of proving the exemption from duties lies on the person claiming exemption: Freesman v. Canada , [1982] 2 F.C. 900; 4 C.E.R. 117. Here that onus was not discharged by the plaintiff who, while admitting jewelry had been redesigned, professed not to know what changes had been wrought and no other evidence was adduced that clearly established that all or any of the items of jewelry seized by Customs officer Eastman were the same as those of the plaintiff appraised in Vancouver before she left for India.

[25] The plaintiff did not report, as she was required to do, that she was importing with her on arrival in Canada, the items of jewelry redesigned in India. When asked by the primary inspection officer, Mrs. West, in both Punjabi and in English, whether she had purchased, acquired or received any jewelry while out of the country, she answered "no" except with reference to a pair of gold earrings received by her daughter. Only after the secondary inspector, Eastman, spoke to her about bangle bracelets she wore but had not declared, and when, after she produced the photographs and Vancouver appraisal, he asked to see other jewelry did she produce the other items. Only after all the items had been examined by Eastman, who noted apparent differences from the items described in the Vancouver appraisal, and after she had been asked specifically whether she had jewelry redesigned in India did she admit that was the case. It was urged for the plaintiff that her lack of facility in English had led to misunderstandings on her part, but in view of the evidence of customs officer West, who had asked in Punjabi about jewelry, and had been told by the plaintiff that she would prefer to speak in English, I am satisfied that whatever the plaintiff's understandings of her responsibilities to report to customs officers were, they did not arise from any language disability that she herself was prepared to acknowledge at the time. It must have been evident to her that she was free, and indeed was encouraged, to speak in her native Punjabi had she desired to do so.

[26] It has been determined that the issue of good faith, or lack of intent to mislead, or even inadvertent error, in reporting of goods for Customs purposes is not a ground for holding seizure of goods to be invalid where they have been wrongly reported: Gervais v. Canada (1985), 9 C.E.R. 267 (F.C.T.D.); Lanctôt (Raymond) Ltée v. Canada (1990), 35 F.T.R. 96; 3 T.C.T. 5244 (F.C.T.D.). In Gaji et al. v. Canada (1986), 12 C.E.R. 197, at p. 198 (F.C.T.D.), Mr. Justice Dubé commented:

"An abundant and consistent line of authority has established beyond any question that goods through customs without being declared may be seized, and that the good faith of the person bringing in the goods, or the fact that they are the personal property of that person, is not a factor. (Authorities cited in a footnote to this passage include: R. v. Sun Parlor Advertising Co., Parr and Adelaide Benton , [1973] F.C. 1055; R. v. Mandev Corp. Ltd. , 33 C.P.R.(2d) 193; R. v. Emilien Letarte , [1981] 2 F.C. 76.)"

[27] Section 135 of the Customs Act does not set out in any detail the requirements or the nature of the appeal that is provided from the decision of the Minister, and those matters were not argued in this appeal. My interpretation of the section is that it provides for trial de novo in the sense that the court is not limited to consideration of evidence that was before the Minister. At the same time, as in the case of appeals from other administrative decisions

or decisions of quasi-judicial bodies established by statute this court will not readily vary the decision appealed from unless it is persuaded that the Minister or his agents failed to observe a principle of natural justice or failed to act within his or her statutory discretion, or that the decision is based on an error in law, or is based on a finding of fact that is perverse or capricious or without regard to the evidence before the Minister.

[28] I am not persuaded that any failure of those kinds is here established and I find no basis to upset the Minister's decision. The action by the plaintiff is thus dismissed, with costs.

Appeal dismissed.

Editor: Steven C. McMinniman/sms

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