SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sheehan* [1999] QCA 461
PARTIES:	**R** **v** **SHEEHAN, Stephen William** (Appellant)
FILE NO/S:	CA No 133 of 1999 DC No 420 of 1998 DC No 421 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Roma
DELIVERED ON:	9 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 1999
JUDGES:	McMurdo P, Pincus JA, Thomas JA
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	AVIATION – OFFENCES IN RELATION TO AVIATION - Operation of aircraft for charter without Air Operator's Certificate – appeal against conviction *Civil Aviation Act* 1988 (Cth), s 27(2)(b), s 29 CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – BURDEN OF PROOF – Whether judge erred in reversing onus of proof as to authorisation to conduct flight – reversal of onus by statutory provision – application of s 15D *Crimes Act* *Crimes Act* 1914 (Cth), s 15D *Attorney-General (Hong Kong) v Lee Kwong-Kut* [1993] AC 951, applied *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, applied *Dowling v Bowie* (1952) 86 CLR 136, applied *Henshaw v Mark & Ors* (1997) 95 ACrimR 115, considered *May v O'Sullivan* (1955) 92 CLR 654, applied *R v Field* CA No 428 of 1996, 29 November 1996; [1996] QCA 477, considered

R v Golding [1973] WAR 5, considered
Rook v Maynard (No 2) (1994) 123 ALR 677, considered
Satterley v Palmer [1947] SASR 346, considered
Woolmington v Director of Public Prosecutions [1935] AC 462, applied

CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – BURDEN OF PROOF – DEFENCES – Whether honest and reasonable mistake of fact applied – whether applicant bore onus and to what standard – whether s 15D *Crimes Act* provides a statutory exception to the normal onus required regarding mistake of fact – whether mistake of law or fact

He Kaw Teh v The Queen (1985) 157 CLR 523, followed
Strathfield Municipal Council v Elvy (1992) 25 NSWLR 745, considered
Thomas v The King (1937) 59 CLR 279, followed

CONSTITUTIONAL LAW – IMPERIAL, COLONIAL, STATE AND COMMONWEALTH CONSTITUTIONAL RELATIONSHIPS – GENERALLY – SOVEREIGNTY – Whether *Civil Aviation Act* invalid because of break in Australian sovereignty

Joosse v ASIC (1998) 73 ALJR 232; [1998] HCA 77, applied
McClure v Australian Electoral Commission [1999] HCA 31, followed

COUNSEL: The appellant appeared on his own behalf
Mr G R Rice for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **McMURDO P AND THOMAS JA:** The appellant was convicted after a four day trial on 15 March 1999 in the District Court at Roma of one count of operating an aircraft in Australian territory for a prescribed commercial purpose otherwise than as authorised by an Air Operator's Certificate under s 27(2)(b) *Civil Aviation Act* 1988 (Cth) on or about 25 October 1996.

[2] The appellant who represents himself appeals against his conviction on a number of grounds.

The facts

[3] The particulars provided of the offence were that on 25 October 1996 the appellant in a flight between Longreach, Queensland and Moree, New South Wales, piloted an aircraft, namely a Cessna 210 for a prescribed commercial purpose (charter) otherwise than as authorised by an AOC.

[4] The appellant conducted a business, Crossroads Aviation, as an air charter operator at Longreach. A charter flight conducted by McAlister Airways carrying passengers from the Northern Territory to Moree in New South Wales was interrupted at Longreach due to mechanical difficulty. The pilot contacted the appellant from a Yellow Pages telephone book entry and made arrangements for the appellant to fly the passengers from Longreach to Moree for $2,300. The appellant did this; neither he nor Crossroads Aviation held an Air Operator's Certificate (AOC).

[5] Mr Neil Enders, a Civil Aviation Safety Authority Investigator, gave evidence that he had no record of any AOC issued to the appellant or to Crossroads Aviation; at the time of this offence it was common for a pilot or company to operate under the authority of another pilot or company's AOC; this procedure has ended since the passing of Civil Aviation Ordinance 82.3 late in 1998.

[6] The appellant gave evidence; he admitted making the flight as set out by the prosecution but claimed he was operating under the authority of an AOC issued to Alpine Aviation. His claim was supported by a letter apparently dated 1 June 1996 from the proprietor of Alpine Aviation stating:

> "To whom it may concern. This note is to certify that Crossroads Aviation has permission to operate under the provisions of the Air Operator's Certificate issued to Alpine Aviation."

The original letter has the date missing in part; a photocopy shows the date "1.6.96"; the "6" in 96 appears overwritten and may be a "5" changed to a "6".

[7] The proprietor of Alpine Aviation Mr Ben Buckley gave evidence for the defence by telephone link; he said he had written the letter. In cross-examination he agreed that Alpine Aviation had no AOC after 30 June 1996 and consequently no AOC at the relevant time. There was no financial arrangement or any practical connection between Mr Buckley and his company Alpine Aviation and the appellant and his company Crossroads Aviation; both the appellant and Mr Buckley have a mutual interest in Aircraft Licence Holders and Associates Reform Movement (ALHARM).

The onus and balance of proof as to authorisation

[8] The appellant submits the trial judge erred in reversing the onus of proof requiring the appellant to demonstrate that the flight had been conducted under the authority of an AOC.

[9] Section 15D *Crimes Act* 1914 (Cth) provides:

> "Where under any law of the Commonwealth any act, if done without lawful authority, or without lawful authority or excuse, or without permission, is an offence against that law, the burden of proving that the act was done with lawful authority, or with lawful authority or excuse, or with permission (as the case may be), shall be on the person accused."

[10] Subsections 29(1) and (2) of the *Civil Aviation Act* 1988 ("the Act") make it an offence to fly an aircraft in contravention of Part III of the Act; the contravention

here was to pilot an aircraft without the authorisation of an AOC under s 27(2)(b) of the Act.

[11] Section 27(2)(b) of the Act provides:

> "Except as authorised by an AOC, ...
>
> (b) an aircraft shall not operate in Australian territory; ...".

The trial judge ruled that s 15D *Crimes Act* 1914 (Cth) had the effect that the onus was upon the appellant (defendant) to prove lawful authority or excuse on the balance of probabilities.

[12] There seem to be no cases directly on point. In *R v Field*[1] this Court dealt with an appeal against conviction for the offence of operating a charter flight otherwise than in accordance with an AOC under s 29(1)(b) of the Act. The court noted that "[t]he jury was told that the onus was on the prosecution to prove beyond reasonable doubt that the flight was not an instructional flight, and that, if it had a reasonable doubt concerning whether the flight was an instructional flight, it must acquit." The issue of the onus and standard of proof of authorisation was not a matter raised for the consideration of the court and this case is really of no assistance one way or the other.

[13] In *Rook v Maynard (No 2)*[2] when construing the effect of s 15D *Crimes Act* 1914 (Cth) on s 76B(1)(a) of that Act, Zeeman J found that s 15D is to be applied to provisions, no matter how they are framed or what words they employ, which have the effect of proscribing an act done without lawful authority, or without lawful authority or excuse or without permission.

[14] In *Satterley v Palmer*[3] Mayo J found that s 21C *Crimes Act* 1914-1941 (Cth), which was in similar terms to the current s 15D, applied to a charge under s 30 *Crimes Act* 1914-1941 (Cth), (without lawful authority taking property out of the possession, custody or control of the Commonwealth).

[15] Similarly in *R v Golding*[4] the Western Australian Court of Criminal Appeal held that s 21C of the *Crimes Act* 1914-1941 (Cth) applied to s 233B(1)(d) *Customs Act* 1901-1968 (Cth) which prohibited cannabis imports unless "the permission in writing of the Minister to import the goods has been granted".

[16] On the other hand in *Henshaw v Mark & Ors*[5] s 15D *Crimes Act* 1914 was held not to apply to the issue of "reasonable excuse" under s 11 *Public Order (Protection of Persons and Property) Act* 1971 (Cth). The section provided that a person who trespassed on premises "without reasonable excuse" was guilty of an offence. Miles CJ held that "reasonable excuse" did not come within s 15D of the *Crimes Act* 1914

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1 CA No 428 of 1996, 29 November 1996; [1996] QCA 477.

2 (1994) 123 ALR 677.

3 [1947] SASR 346.

4 [1973] WAR 5.

5 (1997) 95 A Crim R 115.

(Cth) and was an element of the offence which the prosecution must prove beyond reasonable doubt.

[17] The common law position as to the onus of proving exemptions from criminal liability was usefully stated by Dixon CJ in *Dowling v Bowie*[6]. Dowling was convicted under s 141 *Licensing Ordinance* 1939-1952 (NT) of selling liquor to a "half-caste" within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947 (NT). The appellant contended he believed the person to whom he sold liquor was exempted from the Ordinance under s 3A of the Ordinance. The respondent claimed that where a statute defines the grounds of liability it imposes, and then introduces in a distinct provision a matter of exception or excuse, it lies upon the party seeking to come within the exception or excuse to prove the facts which bring the case within it. Dixon CJ said:

> "The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification. ... The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation, excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it."[7]

The court noted the exempt status of the person to whom liquor was supplied would be difficult for the defendant to establish and concluded that the onus was on the prosecution to show that the person to whom liquor was sold was not exempt under s 3A, and honest and reasonable mistake of fact was open as a defence to the charge.

[18] The classic statement of the onus of proof in criminal cases was set out by Viscount Sankey LC in *Woolmington v Director of Public Prosecutions*:[8]

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and *subject also to any statutory exception*." (Our emphasis)

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6 (1952) 86 CLR 136; *Vines v Djordjevitch* (1955) 91 CLR 512, 519-520 and see *Nominal Defendant v Dunstan* (1963) 109 CLR 143 and *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 257-258.

7 (1952) 86 CLR 136 at 139-140.

8 [1935] AC 462 at 481.

[19] These principles were affirmed by the High Court in *May v O'Sullivan*[9]:

> "*Unless there is some special statutory provision on the subject,* a ruling that there is a *'case to answer'* has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end." (Our emphasis)

[20] It is clear that onus and standard of proof may be altered by statutory provision.

[21] Further consideration was given to the issue in *Director of Public Prosecutions v United Telecasters Sydney Ltd*[10] where Brennan J (as he then was), Dawson and Gaudron JJ said:

> "The rule laid down in *Woolmington v Director of Public Prosecutions,* that the burden of proving every element of an offence charged rests at all times upon the prosecution, was expressed to be 'subject to ... the defence of insanity and subject also to any statutory exception'. It is made clear in *Reg v Edwards* and *Reg v Hunt* that the statutory exceptions referred to are not confined to those which expressly cast the burden of proof upon the accused (see, eg, *Crimes Act* 1900 (NSW), s. 417), but extend to cases in which an intention to do so is necessarily implied. Such cases will ordinarily occur where an offence created by statute is subjected to a proviso or exception which, by reason of the manner in which it is expressed or its subject matter, discloses a legislative intention to impose upon the accused the ultimate burden of bringing himself within it. That burden may, of course, be discharged upon the balance of probabilities. Whilst it is convenient to speak in terms of provisos or exceptions, the legislative intent cannot be ascertained as a mere matter of form. The Court of Appeal in *Reg v Edwards* viewed the statutory exceptions as limited to:
> 'offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.'
>
> In *Reg v Hunt* even this formulation was said by the House of Lords not to be exhaustive. Each case must turn upon the construction of the particular enactment."

[22] In *Attorney-General (Hong Kong) v Lee Kwong-Kut*[11] Lord Woolf who delivered the Privy Council's judgment said:

> "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of

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9 (1955) 92 CLR 654 at 658.

10 (1990) 168 CLR 594 at 600-601.

11 [1993] AC 951 and see, for example, *Bywaters v Delves,* (SCWA), 1435 and 1493 of 1990, 12 April 1991.

> an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence."[12]

[23] These cases demonstrate that ultimately whether or not the onus shifts to a defendant will turn on the construction and subject matter of the legislation, here, s 15D *Crimes Act* 1914 and s 27(2) of the Act.

[24] Section 3A of the Act states that:

> "The main object of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents."

[25] The offence the subject of this appeal falls within Part III of the Act which deals with the regulation of civil aviation.

[26] Division 2 of Part III of the Act provides for an application for an AOC in an approved form[13]; this must be lodged with a copy of the current flight manual for every type of aircraft covered by the application[14], operations, training and checking and dangerous goods manuals.[15] The issuing of an AOC is clearly dependent upon safety issues.[16]

[27] Section 29(2) of the Act provides for a penalty of imprisonment not exceeding two years by contravention of the Act including a contravention of s 27(1)(b). Section 4G *Crimes Act* 1914 (Cth) provides that offences against a law of the Commonwealth punishable by imprisonment for a period in excess of 12 months are indictable offences unless the contrary intention appears. Although s 4J(1) allows for summary prosecution of such an offence, this offence was dealt with on indictment in the District Court before judge and jury.

[28] The AOC is an authorisation akin, for example, to a licence to sell liquor, although it is not a pilot's licence; its issue is to assist in securing safe civil aviation; if the appellant has the authorisation of an AOC it is a simple matter for him to establish it. These factors and the principles established in the cases we have mentioned cause us to have no hesitation in concluding that the words "Except as authorised by an AOC" in s 27(2) of the Act bring into play s 15D *Crimes Act* 1914 (Cth); s 27(2) of the Act is a law of the Commonwealth under which operating an aircraft if done without lawful authority is an offence; the burden of proving that the

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12 [1993] AC 951 at 969.

13 s 27AA.

14 s 27AB(1).

15 s 27AB(2).

16 See for example s 28.

operation of the aircraft was done with lawful authority is on the appellant. The standard of that proof is on the balance of probabilities.

The applicability of honest and reasonable mistake of fact

[29] The next issue raised, although not a ground of appeal, is whether honest and reasonable mistake of fact has application to the charge and if so where does the onus lie and what is the standard of proof.

[30] The appellant's evidence at trial raised this issue; he claimed he was authorised to fly by the AOC issued to Mr Buckley and Crossroads Aviation and, by inference, were he not authorised, he honestly and reasonably believed he was authorised to fly by this AOC.

[31] In *Maher v Musson*[17] the High Court held that a person charged with having custody of illicit spirits under the *Distillation Act* 1901-1931 (Cth) was entitled to be discharged if he proves that he neither believed nor had reason to believe that the spirits were illicit. Dixon J said:[18]

> "... authority appears to me to support the view that the absolute language of the statute should be treated as doing no more than throwing upon the defendant the burden of exculpating himself by showing that he reasonably thought the spirits were not illicit."

[32] It should be noted this decision preceded *Woolmington*. The High Court gave consideration post-*Woolmington* to whether honest belief on reasonable grounds was a defence to a charge of permitting an unlicensed person to drive a motor vehicle on a road under s 30 *Road Traffic Act* 1934-1939 (SA) in *Proudman v Dayman.*[19] Dixon J said:

> "There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that the honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also.
>
> Doubtless over a wide description of legislation the presumption in favour of its application is but a weak one ... But it still remains a presumption, and in relation to s 30 there appears to be no sufficient reason for treating it as rebutted.
>
> The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he

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17 (1934) 52 CLR 100.

18 At 105.

19 (1941) 67 CLR 536.

> had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt."[20]

[33] In *Zarb v Kennedy*[21] the High Court found that honest and reasonable mistake of fact applied to an offence of failing to present for service under the *National Service Act* 1951-1968 (Cth), s 51(1).

[34] The High Court considered the applicability of the defence of honest and reasonable mistake of fact to an offence of the sale of liquor without a licence authorising such sale under the *Licensing Act* 1928 (Vict) in *Bergin v Stack*[22]. Fullagar J said at 261:

> "... although today, in the case of such statutory offences as that created by s 161, any presumption that guilty knowledge is an element in the offence must be taken to be at best a very weak presumption, it seems generally to be held, in the absence of express provision or clear implication to the contrary, that an affirmative answer is made to a charge of such an offence if the defendant proves that he honestly and reasonably believed in the existence of facts which would make his act innocent."

[35] These cases suggest that where honest and reasonable mistake of fact is open, the onus is on the defendant to establish the claim on the balance of probabilities.

[36] In England the courts have followed a similar path when discussing the application to statutes of *mens rea*, of which honest and reasonable mistake of fact is often considered to form a part.[23] See *Lim Chin Aik v The Queen*[24] where the Privy Council approved *Brend v Wood*[25]*:*

> "It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."[26]

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20 At 540-541.

21 (1967) 121 CLR 283; see also *McCrae v Downey* [1947] VLR 194.

22 (1953) 88 CLR 248.

23 See *He Kaw Teh v The Queen* (1984-1985) CLR 523, Brennan J (as he then was) at 570-571; *Bank of New South Wales v Piper* [1897] AC 383, 389-390.

24 [1963] AC 160.

25 (1946) 62 TLR 462.

26 At 473.

[37] In discussing the application of *mens rea* to s 40 of the Buildings Ordinance, in *Gammon Ltd v A-G of Hong Kong (P.C.)*[27] the Privy Council stated the following propositions of law:

> "(1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) 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; (5) even where a 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." [28]

[38] The High Court has more recently considered the application of *mens rea* to serious offences under the *Customs Act* 1901 (Cth) in *He Kaw Teh v The Queen*[29] and reviewed the High Court's earlier approach to the onus of proof as to honest and reasonable mistake of fact. Gibbs CJ, with whom Mason J (as he then was) agreed, said:

> "The relevant principle is stated in *Sherras v De Rutzen*[30], as follows:
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> 'There is a presumption 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.'
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> There has in the past been a tendency in Australia to regard this presumption as only a weak one, at least in the case of modern regulatory statutes: *Proudman v Dayman*[31], *Bergin v Stack*[32]. However, the principle stated in *Sherras v De Rutzen* has more recently been reaffirmed in the Judicial Committee and the House of Lords (*Lim Chin Aik v The Queen*[33]; *Reg v Warner*[34] and *Gammon*

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27 [1985] AC 1.

28 At 14.

29 (1985) 157 CLR 523.

30 [1895] 1 QB 918 at 921.

31 (1941) 67 CLR 536 at 540.

32 (1953) 88 CLR 248 at 261.

33 [1963] AC 160 at 173.

34 [1969] 2 AC 256 at 272.

> *Ltd v Attorney-General (Hong Kong)*[35]) and in this Court: *Cameron v Holt*[36]. The rule is not always easy to apply. Its application presents two difficulties - first, in deciding whether the Parliament intended that the forbidden conduct should be punishable even in the absence of some blameworthy state of mind and secondly, if it is held that *mens rea* is an element of the offence, in deciding exactly what mental state is imported by that vague expression."[37]

[39] Gibbs CJ later notes:

> "There has developed a principle that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not required as an element of an offence."[38]

After considering *R v Tolson*,[39] *Bank of New South Wales v Piper*[40] and *R v Sault Ste. Marie*,[41] Gibbs CJ adds that if it was unnecessary to prove guilty knowledge, s 233B(1)(b) of the *Customs Act* 1901 (Cth) (importation of prohibited imports) has the effect that an accused is entitled to be acquitted if he acted with the honest and reasonable belief that his baggage contained no narcotic goods; the onus of proving the absence of such belief lies on the prosecution,[42] distinguishing *Proudman v Dayman* and overruling on that issue *Maher v Musson*, *Dowling v Bowie*, *Bergin v Stack*, and *R v Reynhoudt*:[43]

> "... it has now become more generally recognised, consistently with principle, that provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake: see *Iannella v French*;[44] *Kidd v Reeves*;[45] *Mayer v Marchant*[46]."[47]

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35 [1985] AC 1 at 12-13.

36 (1980) 142 CLR 342; Barwick CJ at 346 and Mason J (as he then was) at 348; *mens rea* applies to s 138(1)(d) *Social Services Act*.

37 At 528.

38 At 532.

39 (1889) 23 QBD 168 at 181.

40 [1897] AC 383 at 389-390.

41 [1978] 2 SCR 1299.

42 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534-535.

43 (1962) 107 CLR 381 at 395-6; 399-400.

44 (1968) 119 CLR 84 at 110-111.

45 [1972] VR 563 at 565.

46 (1973) 5 SASR 567.

47 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534-535.

[40] Gibbs CJ concluded that s 233B(1)(b) requires that the prosecution bear the onus of proving the applicant brought the suitcase into Australia knowing it contained heroin.[48]

[41] Brennan J agreed with that conclusion:

> "1. There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.
> 2. There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either - (a) knows the circumstances which make the doing of that act an offence; or (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent. ...
> 4. The prosecution bears the onus of proving the elements referred to in (1) and (2) beyond reasonable doubt except in the case of insanity and except where statute otherwise provides."[49]

[42] Dawson J reached a similar conclusion:

> "… the position is different with statutory offences containing no mental element to be proved as an ingredient of the offence. There if the offence is not one of absolute liability, honest and reasonable mistake survives by implication as a basis of exculpation. It is therefore understandable why it continues to be referred to as a defence: it must normally be raised by the accused upon evidence adduced by him. ...
> There is, however, no justification since *Woolmington v Director of Public Prosecutions* for regarding the defence of honest and reasonable mistake as placing any special onus upon an accused who relies upon it. ... The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."[50]

[43] In the present case, the offence was tried on indictment in the District Court by judge and jury. It is punishable by up to two years imprisonment. Although the

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48 At 545.

49 At 582.

50 At 592-593.

Act is regulatory and despite the Act's interest in public safety (which it is not suggested was compromised on the facts of this case) and the quasi-criminal rather than criminal nature of the offence, it seems unlikely, in the absence of express words, that Parliament intended that the offence set out in s 27(2)(b) of the Act should be one of absolute or strict liability; honest and reasonable mistake of fact is able to provide a defence to the charge.

[44] *He Kaw Teh* is clear, persuasive and binding authority in Australia that at common law the onus is ordinarily on the prosecution to negative the defence of honest and reasonable mistake of fact, once raised, beyond reasonable doubt.[51] This rule is subject to statutory exception;[52] the next issue is whether a statutory exception has application here. The appellant claimed honest and reasonable mistake related to authorisation. As has been determined earlier in these reasons, s 15D of the *Crimes Act* 1914 (Cth) places the burden of proving authorisation on the appellant; by necessary implication s 15D provides a statutory exception to the normal onus of proof in respect of honest and reasonable mistake of fact as to authorisation under s 27(2)(b) of the Act; the onus was therefore on the appellant to establish honest and reasonable mistake of fact as to authorisation on the balance of probabilities.

[45] The learned trial judge correctly so ruled; carefully informed the appellant of the effect of that ruling, and adequately left the matter for the jury's consideration. The jury's verdict means that they necessarily were not satisfied on the balance of probabilities that the appellant had made out his claim that he was entitled or honestly and reasonably believed he was entitled to fly the plane under a current AOC issued to Mr Bentley and Alpine Aviation. There was ample evidence to justify the verdict; an examination of the letter relied upon by the appellant as giving him authorisation has the date removed; a photocopy shows the date as "1.6.96" however the "6" has been overwritten and may well have been changed from a "5"; Mr Bentley agreed that he did not have a current AOC at the relevant time. The appellant's evidence went no further than claiming that he made the flight with authorisation under Mr Bentley's AOC, a practice common in the aviation industry at that time. There has been no error in or miscarriage of justice arising from the judge's directions to the jury as to honest and reasonable mistake of fact.

Mistake of fact or mistake of law

[46] The respondent has submitted that the mistake that the appellant claims he made was a mistake of law and not a mistake of fact and therefore can provide no defence to the appellant.

[47] Assuming the appellant's version (that he honestly and reasonably believed he conducted the charter under the authorisation of Mr Buckley's and Alpine Airways'

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51 Cf the position in Queensland under s 24 *Criminal Code* and see *Brimblecombe v Duncan* [1958] Qd R 8 where the prosecution is required to disprove s 24 *Criminal Code* beyond reasonable doubt even in respect of regulatory offences, unless its application is excluded by statute; this differs from the common law position (see Philp J at 12).

52 *Woolmington* at 658; *He Kaw Teh* at 5, 28 and 582; *Gammon* at 14.

AOC) to be true, it is arguable whether this was a mistake of fact or of law or both. In *Thomas v The King*[53] Dixon J (as he then was) said:

> "... in any case, in the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law."[54]

[48] We are prepared to assume for present purposes that there was a mistake of fact, noting that grounds have been mentioned by Pincus JA for holding that it was a mere mistake of law. On the footing that it was a mistake of law the only error which occurred was against the Crown and the appellant was given the advantage of acquittal on an additional basis. On the footing that it was a mistake of fact, no error occurred at all.

Other grounds of appeal

[49] The appellant had a large number of additional grounds of appeal none of which are meritorious.

[50] He has rehashed the tired argument that the proceedings below ought to have been removed into the High Court under s 40 *Judiciary Act* 1903 (Cth) submitting that the Act was invalid on constitutional grounds because of a sovereignty break in Australia and because of irregularities in having treaties registered as international arrangements. This argument was rejected by Hayne J in *Joosse v ASIC*[55]. The validity of that decision is not affected by *Sue v Hill*[56]; see *McClure v Australian Electoral Commission.*[57] The argument was rightly rejected by the trial judge.

[51] The appellant sought leave to amend his grounds of appeal to add a further ground claiming that he was denied legal representation and this resulted in injustice. Upon questioning during the appeal, the appellant said he had not applied for legal aid as he knew he was ineligible. An examination of the record below and the appellant's performance in this Court demonstrates that he is articulate and persistent. He was given every opportunity by the trial judge to properly put his arguments and was assisted by the judge in as much as this was proper. He further submits that under s 69(3) *Judiciary Act* 1903 "any person committed for trial for an offence against the laws of the Commonwealth may at any time within 14 days after committal and before the jury is sworn apply to a Justice in chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his or her defence." The appellant conceded at the appeal that he made no such application. In the circumstances he can hardly complain that he was not legally represented. In any case the record does not suggest that any injustice was done by his lack of representation; the trial was not a complex one and the appellant was well seized of

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53 (1937) 59 CLR 279.

54 At 306.

55 (1998) 73 ALJR 232. See also *Re Joosse and Anor* [1999] HCA 17 per Gaudron J.

56 [1999] HCA 30.

57 [1999] HCA 31.

the issues. The learned trial judge at one stage asked the appellant to consider whether he would not be better off legally represented to which the appellant replied "I'm not able to have legal representation"; he made no request for legal representation at that stage.

[52] The appellant complained that adjournments he requested were not given. For example, on the second day of the trial the appellant asked for an adjournment until the next sittings as he claimed he had a unnamed barrister who was prepared to do the case unpaid if a lengthy adjournment were granted. His Honour understandably declined to grant such a lengthy adjournment, noting "You are perhaps demonstrating to the jury some familiarity with court proceedings and with cross-examination in general". He has not demonstrated any injustice as a result of the refusal of his requests for an adjournment on this or any other occasion.

[53] The appellant complains that the judge wrongly referred to the AOC as being akin to a driver's licence, and the primary judge erred in telling the jury the meaning and effect of an AOC. The learned trial judge gave no direction in the terms claimed by the appellant. He fairly reminded the jury that the appellant's defence was that the flight was conducted on the authority of an AOC issued to Alpine Aviation; that if an AOC is compared to a driver's licence which cannot be transferred to another such an explanation may seem strange; that Mr Enders gave evidence for the prosecution agreeing that it was common in the aviation industry for a person or company to fly under the protection or authority or authorisation issued to another, although this has since been altered by legislation which post-dated the alleged offences. His Honour then correctly told the jury that an AOC is not transferrable.[58] The issue was left for the jury to determine. There can be no fair complaint about this direction.

[54] The appellant claims that the trial judge ruled that the appellant was not permitted to address the jury on points of law. No such ruling was made by the trial judge.

[55] The appellant claims he was prejudiced by the conduct of the trial in a temporary courtroom in a hotel at Roma while building work was done at the courthouse; the jury did not have a proper view of him whilst he conducted his defence and were deprived of the opportunity of observing his demeanour. No objection to the venue or conduct of the case was made during the trial even though the appellant was not reticent in voicing his complaints on a wide range of other matters. He claims that from time to time he was not able to hear the judge; the record demonstrates that on such occasions he informed the judge of this and the statement, question or answer was repeated until the appellant was satisfied. The appellant has not demonstrated any resulting injustice.

[56] Finally the appellant claimed in his grounds of appeal the trial judge was biased against him. He has not put forward any grounds whatever to justify a claim of bias or perceived bias.

[57] We would dismiss the appeal.

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[58] See s 27(8) the Act.

[58] **PINCUS JA:** I have read the joint reasons of the President and Thomas JA.

[59] The essential point sought to be litigated by the appellant below, unfortunately obscured by a great deal of irrelevant discussion, was that the appellant was, or thought he was, authorised to operate on the occasion in question under an AOC issued to Alpine Aviation. That the appellant was not in truth so authorised was absolutely clear, so the question became whether the appellant should be acquitted on the ground that he mistakenly thought the operation was covered by the Alpine Aviation AOC. But there was no defence of mistake for the jury's consideration if the mistake was one of law only. In my respectful opinion that was so here; if the jury accepted, or had a doubt in their minds as to the truth of, all that the appellant said about the AOC he relied on, that could not affect his guilt since the only mistake was as to the legal effect of that AOC: *Horne v Coyle; Ex parte Coyle* [1965] Qd R 528, *Khammash v Rowbottom* (1989) 51 SASR 172. In *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 at 749-750, Gleeson CJ, with whom the other members of the New South Wales Court of Criminal Appeal agreed, quoted with approval the following statement of the law, made by Handley JA, which I reproduce without including the authorities on which it is based:

> "It is beyond argument that a reasonable but mistaken belief can only furnish an excuse where the mistake is one of fact … Otherwise the general principle applies that ignorance of the law is no excuse … Accordingly, a belief or assumption that the acts in question are lawful either because they are unregulated, or because the requirements of the law have been satisfied, cannot excuse in cases such as this. Nor can inadvertence excuse either. The only excuse is the existence of an actual or positive belief, based on reasonable grounds, in the existence of some fact or facts which, if true, would make the act in question innocent …".

In the present case it is in my opinion not possible to identify any fact or facts which might have been mistakenly believed by the appellant and which if true would have exculpated him. If he thought the AOC on which he relied authorised the journey he took, he was simply wrong in law.

[60] Subject to these observations, I agree with the joint reasons of the President and Thomas JA and agree that the appeal must be dismissed.