IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 31 of 1986

FULL COURT

BEFORE:

Mr. Justice Kneipp

Mr. Justice Connolly

Mr. Justice Vasta

BRISBANE, 12 NOVEMBER 1986

DANIEL EDMUND LEE Collector of Customs for the State of Queensland AND THOMAS GORDON ARCHER

v.

WARREN PERRY ANDERSON

Ex parte: WARREN PERRY ANDERSON

JUDGMENT

MR. JUSTICE CONNOLLY: In this case I am authorised by my brother Kneipp to say that in his view the appeal should be allowed with costs, the conviction and order set aside and that in lieu thereof the complaint should be dismissed. I publish his reasons.

I agree in the order proposed by my brother. I publish my reasons.

I am authorised by my brother Vasta to say that he takes a contrary view and to publish his reasons. I do so.

The order of the Court will be as I have indicated.

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 31 of 1986

FULL COURT

DANIEL EDMUND LEE, Collector of Customs for the State of Queensland, and THOMAS GORDON ARCHER

v.

WARREN PERRY ANDERSON

EX PARTE: WARREN PERRY ANDERSON

KNEIPP J.

CONNOLLY J.

VASTA J.

Reasons for Judgment delivered by Kneipp J., Connolly J., and Vasta J. on 12th November, 1986.

Vasta J. dissenting.

"Appeal allowed with costs. Order that the conviction and order be set aside and in lieu thereof the complaint be dismissed."

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 31 of 1986

FULL COURT

Before the Full Court

Mr Justice Kneipp

Mr Justice Connolly

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DANIEL EDMUND LEE Collector of Customs for the State of Queensland and THOMAS GORDON ARCHER

v.

WARREN PERRY ANDERSON

Ex parte: WARREN PERRY ANDERSON

JUDGMENT: KNEIPP J.

Delivered the Twelfth day of November 1986.

CATCHWORDS:

Counsel: Cooke Q.C. & North for Appellant
Wyville Q.C. & Logan for Respondent
Solicitors: Morris, Fletcher & Cross for Appellant
Australian Government Solicitor for Respondent
Hearing dates: 29th and 30th October, 1986

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 31 of 1986

BETWEEN:

DANIEL EDMUND LEE Collector of Customs for the State of Queensland and THOMAS GORDON ARCHER

AND:

WARREN PERRY ANDERSON Ex Parte: WARREN PERRY ANDERSON

JUDGMENT - KNEIPP J.

At all material times the applicant had in his possession calibre pistol, which he was licensed to carry in New South Wales pursuant to an Act of the legislature of that State On 22nd September, 1985 he flew in a chartered aircraft from Townsville to Papua New Guinea, taking the pistol and some cartridges with him. On 25th September, 1985 be returned in the aircraft to Australia, the point of entry being at Townsville. He brought the pistol back with him In the absence of relevant permits, which he did not have the pistol was both a prohibited export and a prohibited import and the cartridges were prohibited exports.

On arrival at the airport the applicant left the aircraft intending to return to it. He left the pistol on board. He was given a form to fill in for customs purposes. On top left hand side of the form the words "Australian Customs" is printed in large capitals. Down the right hand side of the form, under a heading "Customs" in small capitals, is a series of questions. Beneath each question are boxes beside the words "Yes" and "No", and there is a direction that the questions are to be answered by place ticks in the appropriate boxes. The first question was:—

> "Do you have in your possession goods which may be prohibited for example drugs, dangerous weapons such as firearms; springbladed knives or swordsticks"

The applicant answered No to that question by placing a tick in the No box, and he handed the form to a customs officer.

The interior of the aircraft was inspected by a customs off and he found the pistol, which the applicant had not attemp to conceal. In the result he was charged with four offence namely that -

(a) contrary to section 234(1)(e) of the Customs Act, he produced to a customs officer a document containing a statement which was untrue;

(b) contrary to section 233(1)(b), he imported into Australia a prohibited import, namely the pistol;

(c) contrary to section 233(1)(c) he exported from Australia a prohibited export, namely a number of cartridges;

(d) contrary to section 233(1)(c) he exported from Australia a prohibited export, namely the pistol.

After a trial in the Magistrates Court the Stipendiary Magistrate found that all four charges had been proved. In relation to the second, third and fourth the Stipendiary Magistrate applied Section 19B of the Crimes Act (Commonwealth) dismissing each of the charges without proceeding to conviction. We are not concerned with those matters. In relation to the first charge the applicant was convicted and fined $300-00 and ordered to pay costs. He seeks to have the conviction reviewed, on the ground that he should not have been found guilty, or alternatively that Section 19B should have been applied in relation to this charge also.

The applicant gave evidence on his trial, and he was accepted as a witness of truth by the Stipendiary Magistrate. His evidence as to his reason for answering No to the question in the form was this:—

> "Now you see in the, in that Exhibit 1, in Exhibit 1 there's a box there ... Yes you see at the top of page at the top of the leaflet do you have in your possession goods which may be prohibited, for example dangerous weapons such as firearms. You marked that with a tick in the "No" box?
>
> Correct
>
> Yes. Why did you do that?

> I didn't ... the reason I marked it "No" is I didn't believe that I had a weapon ... or in my possession a weapon which may be prohibited. Because I had a licernce to carry the gun. And I also interpreted it as being for goods that you buy overseas and bring back in with you. And I'd taken this weapon out of the country and brought it back".

In short, he was saying that, for the reasons which he gave he believed his answer to be true. This was plainly accepted by the Stipendiary Magistrate, and it was not in issue before us. But the Stipendiary Magistrate held, to put it in famous terms, that the offence is absolute, proof of mens rea not being required, and he convicted the applicant on that based The question before us is whether he was right.

The relevant offence is created by Section 234(1)(e) of the Customs Act. It is appropriate to set out section 234 in full:—

> Customs Offences
>
> 234. (1) A person shall not -
>
> (a) Evade payment of any duty which is payable;
>
> (b) Obtain any drawback, refund, rebate or remission which is not payable;
>
> (c) Repealed
>
> (d) Make or give any entry which is false in any particular
>
> (e) Make in any declaration or document produced, given, delivered or furnished to any officer any statement which is untrue in any particular or produce, give, deliver or furnish to any officer any declaration or document containing any such statement;
>
> (f) Mislead any officer in any particular likely to affect to the discharge of his duty;

(g) Refuse or fail to answer questions or to produce document

(h) Sell or offer for sale, any goods upon the pretence that such goods are prohibited imports or smuggled goods;

(2) A person who contravenes sub-section (1) is guilty of offence punishable upon conviction -

(a) in the case of an offence against paragraph (1)(a), by

(i) where the Court can determine the amount of the duty goods the payment of which would have been evaded by commission of the offence if the goods had been enter for home consumption on -

(A) where the date on which the offence was committed known to the Court - that date; or

(B) where that date is not known to the Court - the on which prosecution for the offence was instituted a penalty not exceeding 5 times the amount of that duty and not less that 2 times that amount; or

(ii) where the Court cannot determine the amount of that duty, a penalty not exceeding $50,000;

(b) in the case of an offence against paragraph (1)(b), by a penalty not exceeding 5 times the amount of drawback refund, rebate or remission that was obtained by the commission of the offence and not less than 2 times the amount;

(c) in the case of an offence against paragraph (1)(d), (e), (f), by a penalty not exceeding $5,000; or

(d) in the case of an offence against paragraph (1)(g), (h) to be a penalty not exceeding $1,000.

Penalty: $1,000.

Of course if section 234(1)(e) is read literally an offence is committed if a statement is made which is in fact untrue irrespective of the state of mind of the maker: and it has been so interpreted over many years. It has

appeared in the same form in the Customs Act since 1901, and was considered 1902 by Hood J. in Stephens -v- Robert Reid and Company Limited (28 V.L.R. 82). The question was whether the defendant Company was liable for an untrue statement innocently made by an employee. His Honour quoted the famous passage from Sherras-v-De Rutzen (1895) 1 Q.B. 918, which in substance states the propositions that there is a presumption that mens rea element of every offence, but that the presumption may be overborne where, inter alia, the statute is concerned with acts which are "not criminal in any real sense, but which are acts which in the public interest are prohibited under a penalty". Hood J. held that section 234(1)(e) was provision of that description, being designed for the protection of the revenue; that the offence was therefore one of absolute obligation; and that the defendant was liable. Customs Act is not now used, if it ever was used, for purely fiscal purposes. It is used for; among other purposes the protection of public health or safety; but of course there are many decisions in which it has been held liability for offences created by legislation dealing with those subjects is imposed in the public interest and is absolute.

A similar view of section 234(1)(e) was taken by Power J. Irving -v- Gallagher ((1903) St.R.Qd. 121), His Honour apply an earlier decision of the Full Court, Irving -v- Gagliarde (6 Q.L.J. 155) which was concerned with a provision which made it an offence to make a false entry for customs purposes.

In Ex Parte Falstein; Re: Maher (49 S.R. N.S.W. 133) the reasoning of Hood J. was adopted and applied in relation to offences created by S. 234(1)(c) (since repealed) and S. 234(1)(d). In Sternberg -v- R (61 C.L.R. 646) the High Court was concerned with S. 241(1)(d), which relates to false entries. The argument centered around the contents of the form which had been used, but in the course of his judgment Dixon C.J., with whom the other members agreed, appears to taken the view (at p. 653) that the offence created by Section 241(1)(d) is absolute. The same

view was taken in Davidson -v- Watson (28 A.L.J. 63); but it seems that the law was not really argued in that case or in Sternberg. In fraser -v- Beckett -v- Stirling ((1963) N.Z.L.R. 480) the Court of Appeal held that a provision relating to prohibited imports created an absolute offence. That decision, the decision of Hood J. in Stephens -v- Robert Reid and Co. Ltd., and what was said by Dixon C.J. in Sternberg were all referred to with obvious approval in the judgment of the Privy Council in Patel -v- Comptroller of Customs ((1966) A.C. 356), where it was again held that an offence of making a false entry was absolute.

In the result there is not any decision of an appellate court on the effect of Section 234(1)(e). But the decision of Hood J. has stood for many years and has been consistently approved. There are decisions in the High Court and in the Privy Council that the offence created by Section 234(1)(d) is absolute. I cannot see any good ground for distinguishing between the effects of Section 234(1)(d) and of Section 234 (1)(e).

For the applicant reliance was placed on two recent decision of the High Court; Cameron -v- Holt (142 C.L.R. 342) and He Teh -v- The Queen (59 A.L.J.R. 620). They have become very well known, and I need not refer to them in detail. It seem fair to say that they would suggest that more weight should be placed on the presumption that mens rea is require than has been placed on it in the past. In the first a great deal of reliance was also placed on the language of the provision in question, and the latter was concerned with an offence which is quite different from and much more serio than any of the offences created by Section 234(1).

Notwithstanding that, I would have no hesitation, having regard to the approaches adopted in the judgments, in holding that mens rea must be proved on a charge under Section 234(1)(e), it not for the weight of authority to the contrary. If there is to be any departure from that authority, I think that the departure should be in the High

Court and not in this Court. I think that the applicant's first argument fails.

As to the second ground, the Stipendiary Magistrate, as has been, applied S. 19B of the Crimes Act in relation to the second, third and fourth offences. Given the circumstances, and the applicant's good character I think that that he was plainly right in doing so. The only reason which he gave for refusing to do the same in respect of the first charge was that "I feel that was a fairly simple questionnaire and should have been answered correctly". I may remark in passing that an analysis of the questions, combined with a perusal of relevant regulations, will show that the document is not nearly so simple as it may appear to be at first blush. But the reasons for the applicant's failure to answer the question correctly were precisely those which led to his committing the other offences. They were his mistaken belief as to the effect of his licence and his mistaken be that what he was doing did not constitute exporting or importing. It seems to me, therefore, that logically one could not attach any greater degree of culpability to the first matter than to the others, and I think that the Stipendiary Magistrate erred in the exercise of his sentencing discretion in dealing with them differently. In my opinion the order nisi should be made absolute, the conviction and sentence should be set aside; and there should be an order dismissing the charge.

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FULL COURT

Before the Full Court

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DANIEL EDMUND LEE Collector of Customs for the State of Queensland and THOMAS GORDON ARCHER

v.

WARREN PERRY ANDERSON

Ex parte: WARREN PERRY ANDERSON

JUDGMENT: CONNOLLY J.

Delivered the Twelfth day of November 1986.

CATCHWORDS:

Counsel: Cooke Q.C. & North for Appellant
Wyville Q.C. & Logan for Respondent
Solicitors: Morris, Fletcher & Cross for Appellant
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Ex parte: WARREN PERRY ANDERSON

JUDGMENT - CONNOLLY J.

Delivered the Twelfth day of November 1986.

On 20th June, 1986 the appellant was convicted before the Magistrates Court at Townsville on a complaint that, contrary to s. 234(1)(e) of the Customs Act 1901 (Cth.) as amended he produced to an officer of customs on 25th

September, 1985 at Townsville an Australian Customs and Quarantine Passenger Statement containing a statement which was untrue. The particular in which the statement was alleged to be untrue is revealed by two averments in the complaint the first being that he had answered "No" to the printed question: "Do you have in your possession: goods which may be prohibited for example, drugs, dangerous weapons such as firearms, springbladed knives or swordsticks". It was further averred and it is not disputed that at the relevant time he had in his possession a .38 calibre Smith & Wesson pistol. The appellant was fined $300.00 and ordered to pay $33.00 costs of Court and $400.00 professional costs in default two months' imprisonment.

The appellant is a property director and pastoralist. His pastoral interests include a property of 1.5 million acres by the name of "Tipperary Station" in the Northern Territory. He had been by charter aircraft to the western districts of Papua New Guinea for the purpose of advising the Minister for Primary Industry of that country on the possibility of starting up a cattle industry. The area in question is distinctly unsettled and the appellant was visiting the border region between Papua New Guinea and West Irian Jaya. Accordingly he took with him his. 38 pistol, which he is licensed to carry in his state of residence, New South Wales, together with ammunition for the pistol. He had done so on the advice of the residents of Papua New Guinea whom he went to visit. The appellant was accepted by the Magistrate as a witness of truth and, doubtless for that reason, the Stipendiary Magistrate dismissed, without proceeding to conviction, charges of exporting the pistol and its ammunition on 22nd September, 1985 and importing the same pistol on 25th September. What appears to have occurred is that after landing at Townsville on the return flight on 25th September, the appellant disembarked and completed the statement in question. A customs officer searched the aircraft and found the pistol. The appellant's reason for answering the question as he did was twofold. First he did not believe

that the pistol was prohibited as he had a licence to carry it in his state of origin; and second, he did not consider it to be an import.

The Magistrate accepted him as an honest witness and said that his behaviour all along had been consistent with his having no intention of hiding anything. He also accepted that the appellant believed that he was not breaking the law and that he attributed to his pistol licence more rights than it actually conferred. He was however not satisfied that the belief was a reasonable one in all the circumstances. He obviously disapproved of the multiplicity of charges in the circumstances; and while he considered that the charges of exporting and importing had been made out beyond reasonable doubt, he exercised his discretion under s. 19B(1) of the Crimes Act (Cth.) to dismiss the charges. However on the charge of producing a document containing a statement which was untrue he expressed the view that it was a very simple question and that it was answered wrongly. As will appear, on analysis the question is by no means simple and the Magistrate seems, with all respect, not to have considered whether there is any mental element involved in this charge; and, if there be a requirement of mens rea, whether the respondents had succeeded in establishing it.

It is contended for the respondents that s. 234(1)(e) is an offence of strict liability and that no element of mens rea is involved. It will be convenient to deal with this contention immediately. Section 234(1) reads as follows:—

"234(1) A person shall not -

(a) Evade payment of any duty which is payable;

(b) Obtain any drawback, refund, rebate or remission which is not payable;

(d) Make or give any entry which is false in any particular;

(e) Make in any declaration or document produced, given, delivered or furnished to any officer any statement which is untrue in any particular or produce, give, deliver or furnish to any officer any declaration or document containing any such statement;

(f) Mislead any officer in any particular likely to affect the discharge of his duty;

(g) Refuse or fail to answer questions or to produce documents;

(h) Sell or offer for sale, any goods upon the pretence that such goods are prohibited imports or smuggled goods."

The first general observation I would make is that many of the offences, as a matter of ordinary understanding, involve a mental element. Thus to evade payment involves an element of intention. To obtain a drawback, refund, rebate or remission probably imports an element of deliberation. To mislead would seem to import a similar element. Refusal to answer questions is obviously deliberate while failure in this connection may be thought to be at least equivocal. Sale or offer for sale upon a pretence obviously involves guilty knowledge. On the other hand para. (d) is open to the literal reading that if the entry be in fact untrue the paragraph is satisfied and the same may be said in relation to para. (e). As to that paragraph however the second limb makes it an offence to produce a document though made by someone else and that is a powerful factor in favour of mens rea : Cameron v. Holt (1980) 142 C.L.R. 342 at p.346 per Barwick C.J. One thing at least is clear, the mere fact that some of these provisions on their face involve a mental element does not mean that mens rea is not required in relation to the others. In He Kaw Teh v. The Queen (1985) 59 A.L.J.R. 620 guilty knowledge was held to be an element of s. 233B(1)(b) and (c) of the Customs Act although the statement of the offences did not include any such word as "knowingly" which would reveal the intention of parliament that the importation had been knowing or intentional and that

although s. 233B(1)(d) made it an offegace to be knowingly concerned in the importation of certain prohibited imports.

A provision such as s. 234(1)(e) must be read "in the light of the general principles of the common law which govern criminal responsibility:" He Kaw Teh at p. 621 per Gibbs C.J. The learned Chief Justice continues:—

> "The relevant principle is stated in Sherras v. De Rutzen [1895] 1 Q.B. 918 at 921, as follows:
>
> '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.'"

His Honour proceeded to acknowledge a period over which there had been in Australia a weakening of the presumption. I shall set the passage out. It is of particular importance in this case, in which the Commonwealth places emphasis, quite understandably, on decisions which antedate the decision of the High Court which seems to me to mark a return to the earlier view, namely Cameron v. Holt. What Gibbs C.J. said was this:—

> "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 (1941) 67 C.L.R. 536 at 540; Bergin v. Stack (1953) 88 C.L.R. 248 at 261. However, the principle stated in Sherass v. De Rutzen has more recently been reaffirmed in the Judicial Committee and the House of Lords (Lim Chin Aik v. The Queen [1963] A.C. 160 at 173; R. v. Warner [1969] 2 A.C. 256 at 272 and Gammon Ltd. v. A.-G. of Hong Kong [1984] 3 W.L.R. 437 at 441; [1984] 2 All E.R. 503 at 507) and in this Court: Cameron v. Holt (1980) 142 C.L.R. 342 at 346, 348."

Whether the presumption of the common law that guilty knowledge is an essential ingredient is displaced depends upon a number of factors. The first is, of course, careful

regard to the language in which the offence is formulated and the context in which it is found in the statute. I have already discussed this to some extent. Some of the paragraphs of s. 234(1) clearly import a mental element whereas paras. (d) and (e) do not in terms call for or involve a guilty mind on the one hand and do not exclude such a requirement on the other. So far as para. (e) is concerned the fact that it is an offence to produce a declaration which is untrue, which I take to mean no more than incorrect, in any particular even though the person producing the statement may not be the maker thereof, strongly suggests to my mind that if the common law rule is to be applied there are strong reasons for requiring guilty knowledge on the part of the person producing it. Quite apart from this however the tendency towards human error is so notorious that one should be reluctant to impute to the parliament the intention of making criminal any statement in writing which proves, on close examination, to be incorrect in some particular although the maker had no guilty intention.

A second factor to be considered is the subject matter and perhaps the most weighty consideration here is the seriousness with which the parliament views the offence as reflected in the penalties which it has imposed. Penalties for the offences under s. 234(1) vary considerably, the heaviest being for breaches of para. (a). Where duty is evaded substantial penalties are involved. As I have already indicated, the word "evade" to my mind clearly imports a guilty state of mind. The same thing may be said of para. (b) which deals with the obtaining of payments which are not due and for the breach of which again substantial penalties are imposed. Offences against paras. (d) and (e) do not attract the lowest of the penalties but they do involve substantial fines.

Finally there is the question whether the imposition of strict liability will assist in the enforcement of the law. In this connection Gibbs C.J. cites a passage from Lim Chin Aik v. The Queen (supra) at p. 174:

> "'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 ... 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 legislature imposed strict liability merely in order to find a luckless victim.'"

If the Customs Act and Regulations presented situations in which clear cut and obvious answers could be furnished by those to whom questions are directed I should find this lastmentioned consideration a powerful one. No doubt in many areas it is possible for those questioned about matters regulated by the Customs Act to answer in a way which is both informed and accurate in all respects. But this cannot be said to be the invariable position. Indeed, in relation to prohibited imports the law is in some respects bewildering.

By Regulation 3 of the Customs (Prohibited Imports) Regulations the importation into Australia of the goods specified in the first schedule is prohibited absolutely. This schedule deals with goods the importation of which is prohibited absolutely and the word "goods" is not defined. However it occurs constantly in the regulations and in the schedule and it is clearly a word of the widest import for it extends to printed material and film. See Regulation 4A. There is obviously no reason why the word should not embrace articles of clothing and objects of utility such as luggage and the like. It is not however the first schedule but the second which for present purposes poses the most serious problems. This deals with goods the importation of which is prohibited unless the permission in writing of the Minister has been granted. See Regulation 4(1). It includes confectionary, the consumption of which would, in the opinion of the Minister, be injurious to the health of a person consuming it. As one has no way of knowing what the mind of the Minister for the time being may be at the moment of importation it would seem to be impossible to answer one way or another whether an item of confectionary

was or was not a prohibited import. The same may be said of goods which in the opinion of the Minister, are of a dangerous character and a menace to the community. What however is to be said of goods to which, or to the coverings of which, there is applied a representation of the Arms, a flag or a seal of the Commonwealth or of a State or Territory of the Commonwealth or a representation so nearly resembling these emblems as to be likely to deceive? The language is plainly wide enough to extend to items of clothing such as t-shirts, ties, scarves and the like and items of utility such as rucksacks adorned with a representation of the flag of the Commonwealth or a State. It is notorious that Australians abroad, especially young Australians often display such items. Perhaps they are not intended to bring them home? But they have no choice about their passports and it may well be that a passport, emblazoned as it is with the Arms of the Commonwealth, is a prohibited import unless the permission in writing of the Minister to bring it into the country has been granted. Faced with such marvels, I can only conclude that, to put it no higher, the context of the Act and Regulations is not of such limpid clarity that the parliament could be thought to have intended the hapless citizen who falls into error in answering a question in this area to be regarded as committing an offence unless it is shown that error was accompanied by a guilty mind.

As Gibbs C.J. observed in He Kaw Teh it can be a matter of some difficulty to decide exactly what mental state is imported by the requirement of mens rea. In this case however the provision with which the Court is concerned sufficiently resembles that under consideration in Cameron v. Holt for an answer to be returned with some confidence. That case dealt with s. 138(1)(d) of the Social Services Act 1947 (Cth.) which provided that a person who made or presented to an officer of the Department of Social Security a document false in any particular should be guilty of an offence. It was held that the Crown must establish that the defendant knew that the statement which he was presenting to the officer was false in the

particular charged. See per Barwick C.J. at p. 346 and per Mason J. at p. 348. The appellant, as I have said, gave two reasons for answering the question as he did. His veracity is not in question and was accepted by the Stipendiary Magistrate. As to the first, his reliance on the fact that he was licensed to carry the weapon in New South Wales, it is important to remember that we are not dealing with a defence of honest and reasonable mistake of fact. I do not think that reliance on a New South Wales licence could amount, in the circumstances to a mistake of fact, but it is by no means incredible as a foundation for a state of mind which is not consistent with guilty knowledge. His second reason was that he did not consider himself to be importing the weapon.

In relation to the second reason the Commonwealth strongly contended that the question which was answered incorrectly did not specify prohibited imports but merely related to goods which may be prohibited. However, when asked to what goods the question was in fact directed, the respondents could only point to the second schedule to the regulations and that, as has been seen, deals with prohibited imports. In any case, a citizen is entitled to assume that an officer of the Commonwealth who interrogates him does so in relation to something which is the business of the department in question. The Magistrate considered that the appellant's belief in this respect was not reasonable and, while reasonableness need not be shown where guilty knowledge is an element: He Kaw Teh at p. 624 per Gibbs C.J., it bears on the likelihood of appellant's entertaining the belief that he was not importing the weapon, it merits some discussion.

We were not referred to any authority on the question of whether goods which form part of the personal effects of their owner are exported when he takes them with him on leaving the country temporarily or imported when he brings them back on his return. It may be assumed for present purposes that goods which are brought into the country for the first time even though in the possession of their owner

and not in the course of trade are imported, though many would find this strange. It is possible that the immigrant imports the shirt on his back but, in my opinion, it is by no means certain. The decided cases all deal with goods brought in the course of trade. Thus Wilson v. Chambers & Co. Pty. Ltd. (1926) 38 C.L.R. 131 decided that a consignment of paint had been imported when brought into port aboard ship for the purpose of being discharged. The question there was whether importation was complete without the goods being landed, Isaacs J. saying that goods are imported when they are in fact brought from abroad into Australian territory, and the carriage is ended or its continuity in some way in fact broken. This decision was applied by the High Court in The Queen v. Bull (1974) 131 C.L.R. 203, Barwick C.J. deciding that importation occurs when the goods are brought within the limits of a port. In this his Honour had the concurrence of Menzies, Gibbs, Stephen and Mason JJ. It is I think not irrelevant for present purposes that Barwick C.J. at p. 213 identified the constitutional powers which support the Customs Act as being, in relation to the duties of customs, the power to make laws with respect to taxation and, in relation to the prohibition of importation, the power to make laws with respect to trade and commerce with other countries. The goods in question in Bull were a consignment of cannabis approaching the port of Darwin. Again Lyons v. Smart (1908) 6 C.L.R. 143 dealt with goods unlawfully brought into the country in the course of trade. When Gibbs C.J. in He Kaw Teh at p. 621 says that to import simply means to bring into the Commonwealth from abroad he is speaking in the context of the bringing in of goods in the course of trade as his references to Lyons v. Smart and Bull indicate. It is not necessary to a decision of this case to reach a concluded opinion on the point but, it can at least be said that the common understanding of ordinary people that they do not export their clothing and personal effects when temporarily leaving the country and that they do not import them when returning may well be correct.

It was strongly contended for the Commonwealth that the case was governed by the decision of the High Court in Sternberg v. The Queen (1953) 88 C.L.R. 646. In that case special leave to appeal was sought against a conviction under s. 234(1)(d) for making an entry which was false, the particular relating to the value of the goods for duty. Dixon C.J. at p. 653 said that where knowledge belongs to the importer and the authorities have none, it has been traditional to require a positive statement on which the assessment of duty may proceed. At the same page his Honour said that it appeared to be a clear provision making it an offence to enter goods by an entry which in any particular was contrary to fact. Webb and Kitto JJ. concurred. I am not altogether clear that the point was expressly decided, for special leave appears to have been refused on a discretionary basis also. Dixon C.J. referred to the very long course of the proceedings extending through three courts and said that even if he had some doubt as to the correctness of the conviction he would not think that it was for the High Court to intervene simply because points of law might be raised. The decision is not referred to in Cameron v. Holt although it was cited in argument. For the historical reason given by Dixon C.J. it may be that customs entries stand on a different footing from statements the subject of s. 234(1)(e). Be that as it may, it seems to me that the decision in Cameron v. Holt governs this situation rather than Sternberg. That a distinction may be drawn between statements in the customs entry and other statements is supported by Patel v. Comptroller of Customs [1966] A.C. 356 at p.363.

In my opinion, therefore, the respondents having failed to establish that the appellant knew that the answer in question was false, the appeal should be allowed and the conviction quashed. I should add that should I be wrong in thinking that mens rea is required for a conviction under s. 234(1)(e), I agree with Kneipp J., whose judgment I have had the advantage of reading, that no distinction should have been drawn between this and the other charges and that, in all the circumstances, the discretion under s.

19B(1) of the Crimes Act should have been exercised in the appellant's favour.

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 31 of 1986

Before the Full Court

Mr. Justice Kneipp

Mr. Justice Connolly

Mr. Justice Vasta

BETWEEN.

DANIEL EDMUND LEE Collector of Customs for the State of Queensland and THOMAS GORDON ARCHER

AND:

WARREN PERRY ANDERSON

Ex parte: WARREN PERRY ANDERSON

JUDGMENT - VASTA J.

Delivered the 12th day of November, 1986.

CATCHWORDS:

CUSTOMS ACT s. 234(e) - production of untrue statement - whether mens rea is an ingredient of offence.

Counsel: N.M. Cooke Q.C. & D. North for Appellant
L. Wyvill Q.C. & J.A. Logan for Respondent
Solicitors: Morris Fletcher & Cross for Appellant
Australian Government Solicitor for Respondent
Hearing date: 29th October, 1986.

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JUDGMENT - VASTA J.

Delivered the 12th day of November, 1986.

This is an appeal brought pursuant to s. 209 of the Justices Act 1886-1983 against a conviction under s. 234(1)(e) of the Customs Act 1901 (C'wealth). The specific charge was that:—

> "On or about the 25th day of September, 1985 at Townsville Warren Perry Anderson did, contrary to s. 234(1)(e) of the Customs Act 1901 as amended, produce to an Officer of Customs a document, to wit an Australian Customs and Quarantine Passenger Statement, containing a statement which was untrue in a particular ..."

The subsection under which this offence is founded must be looked at in the context of the whole section which provides:—

> "Customs offences
>
> 234. (1) A person shall not -
>
> (a) Evade payment of any duty which is payable;
>
> (b) Obtain any drawback, refund, rebate or remission which is not payable;
>
> (d) Make or give any entry which is false in any particular;

(e) Make in any declaration or document produced, given, delivered or furnished to any officer any statement which is untrue in any particular or produce, give, deliver or furnish to any officer any declaration or document containing any such statement;

(f) Mislead any officer in any particular likely to affect the discharge of his duty;

(g) Refuse or fail to answer questions or to produce documents;

(h) Sell or offer for sale, any goods upon the pretence that such goods are prohibited imports or smuggled goods."

The penalties provided for a breach of the various subsections vary, in that for a breach of paragraphs 1(d),(e) or (f) a penalty not exceeding $5,000 may be imposed whereas in the case of an offence against paragraph 1(g) or (h) the maximum penalty is $1 000.

The appellant had flown in a chartered jet to Papua New Guinea on business and had in his possession a 38 calibre pistol for which a licence had been issued in New South Wales. There was no suggestion that he had this weapon in his possession for any sinister purpose. On his return to Australia, he landed in Townsville and was asked to fill in a form which is headed "Australian Customs". On the front of the form there is a note which reads:—

"PLEASE READ CAREFULLY AND COMPLETE THE STATEMENT OVERLEAF"

The statement overleaf asks under the heading:—

CUSTOMS

"Please as applicable

Do you have in your possession

Goods which may be prohibited for example, drugs, dangerous weapons such as firearms, springbladed knives and swordsticks.

YES NO

Do you have in your possession

more than 250 grams of tobacco products per adult

...

...

...

YES NO ”

Immediately thereunder, the form has another heading - QUARANTINE

Further questions are there set out with a provision to tick the appropriate box YES OR NO.

The form which the appellant handed to the Customs Officer had a tick in the box marked “NO” to the question whether he had in his possession “goods which may be prohibited for example, drugs, dangerous weapons such as firearms, springbladed knives and swordsticks”.

Subsequently Customs Officers made a search of the appellant's aircraft and the firearm in question was found. Also found was some ammunition for the pistol. In addition to being charged with the offence under s. 234(1)(e), the appellant was charged with having imported the gun and the ammunition. That importation was constituted by his flying out of the country with the firearm and bringing it back into the country. The Stipendiary Magistrate found these latter offences proved but exercised his power under s. 19(B) of the Crimes Act which provides for a dismissal of the charge. No appeal is brought in relation to these orders.

The argument on behalf of the appellant is that the Stipendiary Magistrate accepted Anderson as an honest witness. In these circumstances, since the evidence before

the Court was to the effect that the appellant did not believe that the pistol in his possession was one of a range of goods "which may be prohibited", the prosecution had not proved the necessary mens rea. The question therefore simply is whether this section requires proof of mens rea as an element or whether the liability under the section is strict.

This section has previously been the focus of attention by the Courts. Soon after Federation, Hodges J. in Stephens v. Robert Reid and Company Limited (1902) 28 V.L.R. 82 had to consider an identical provision in the Customs Act. At p.87 His Honour observed:—

> "I do not think that it can be laid down as by any means a universal proposition that no criminal or quasi-criminal proceeding can be taken under an Act of Parliament without establishing a mens rea, or that a mens rea is an essential to the establishment of every criminal offence under an Act of Parliament. In each case we have to examine the particular words of the statute. We have also to consider the subject-matter of the Act and its object and, by an examination or a consideration of those matters, to determine whether the Legislature meant a wicked mind to be an essential ingredient in the offence. First, looking at the particular language used, sec. 234 does not say that no person shall wilfully or knowingly or fraudulently make in any document a statement which is untrue; but, omitting all words of such a character as would point to mens rea being an ingredient in the offence, says simply, 'no person shall make in any document produced to an officer any statement which is untrue'. That language is plain, simple, and direct - so plain that 'he who runs may read'."

In Irving v. Gallager (1903) St.R.Qd. 121 at 125 Power J. referred to Irving v. Gagliardi (1895) 6 Q.L.J. 155 and referred to the words used by Griffiths C.J. who at p. 157 observed:—

> "In construing these provisions it is necessary to remember that it is the general scheme of Customs and Revenue Acts to make an offence consist in the mere doing

> of an act without regard to the intention of the person who does it."

Power J. accepted this as an accurate proposition and held that the breach of s. 234(e) of the Customs Act which proscribed the making of an entry respecting certain goods was complete upon the making of the untrue declaration without there being any necessity to prove intention.

The High Court in Sternberg v. The Queen (1953) 88 C.L.R. 646 considered s. 234(d) of the Customs Act which provided that:—

> "/No person shall -
>
> ...
>
> (d) make any entry which is false in any particular."

The argument in that case was that the principal could not be guilty of being concerned in the commission of the offence under the subsection by virtue of an agent making a false entry in a document. That was because the agent himself was not guilty of the offence since in making the entry, the agent did not commit himself to the absolute truth of the particulars stated but only to his belief that the particulars stated were correct. At p. 653 Dixon C.J. with whom Webb and Kitto JJ. agreed observed:—

> "Section 234(d) is really the only provision of the Act which is in question. It appears to me to be a clear provision making it an offence to enter goods by an entry which in any particular is contrary to fact. If the view contended for were correct, the only fact which could be wrong would be the belief of the person concerned; the belief would extend over the whole entry and there is only one belief in which he could be wrong and that is the belief in the correctness of entry.
>
> The document on which the argument must depend is the form of entry itself. I myself prefer the view that the entry consists of two parts; (1) the entry containing the particulars, and (2) the declaration which verifies the entry. I think that you cannot carry from the document

> which verifies the entry into the entry itself any qualifications as to the facts stated in the entry."

Similar views were expressed in Ex parte Falsteln; re Maher & Anor. (1949) 49 S.R.N.S.W. 133 where at p. 142 Jordon C.J. observed:—

> "There is no doubt that in respect of a thing which is criminal by the common law, a person is not criminally liable unless he does the thing himself or is an accessory, aider or abettor, or accomplice of someone else who does it, and, if he does the thing himself he is not criminally responsible in the absence of mens rea, that is, if he did not know that all the facts constituting the ingredients necessary to make the act criminal were involved in what he did. Prima facie, these rules are applicable also to things which are not criminal by the common law but have been made penal and criminal by statute. But in the case of offences of the latter type the law has been greatly obscured by a readiness on the part of judges to assume the role of legislators and discover in penal statutes implications of intention to impose vicarious liability and to penalise acts done in the complete absence of guilty knowledge, notwithstanding that the Legislature has abstained from expressly excluding the rules of the common law. In the result it is seldom possible to know with any degree of certainty whether by a penal statute vicarious liability is imposed or mensrea is excluded, unless the particular point in the particular statute has been the subject of an authoritative decision..."

His Honour was examining the effect of s. 234(c) and (d) of Customs Act and at p. 143 he observed that:

> "In R. v. Australasian Film Limited (1921) 29 C.L.R. 195 where charges were laid under s. 234(a), (d) and (e) it was conceded and taken as obvious that under s. 234 individuals are liable for the acts of their agents done in the course of their employment, and the Court went further and expressed the view that a principal is liable under s. 241 for intent to defraud on the part of his agent. It was said too, referring to s. 234 that 'the duty laid down is speaking generally, the furnishing of true information with respect of goods liable for duty'. It was decided nearly a half a century ago by Hodges J.

in Stephens v. Robert Reid and Company Limited (1902) 28 V.L.R. 82 - a case cited in R. v. Australasians Film Limited (supra) - the proof of the existence of mens rea is not essential to the establishment of an offence under s. 234(e)."

Davidson J. at p. 150 observed:—

"Counsel's contention that mens rea was a necessary ingredient of the offence and that the requisite proof was absent cannot be supported. The principle has been stated frequently that whilst evil intent or knowledge of wrongfulness of an act must prima facie appear to establish a criminal offence, that presumption is liable to be displaced by the words of the statute creating the offence or by the subject with which it deals. The circumstances where this exception may be found are in charges affecting the revenue, or adulteration of food, and also where acts affecting the public interest are prohibited under pecuniary penalty: Sherras v. De Rutzen [1895] 1 Q.B. 918 at 921. Generally, the test to be applied is, where in the classes of legislation mentioned the statute contains an absolute prohibition on the doing of an act, knowledge and intent are irrelevant but even then sometimes the absence of guilty knowledge may be a defence ... The present case, however, falls directly within the scope of the decision in a Victorian case which has remained unquestioned for upwards of 40 years: Stephens v. Robert Reid & Co. Pty. Ltd.... "

At p. 152 Street J. said:—

"Prima facie, of course, proof of a guilty mind is usually an essential matter to be established before any man can be convicted of an offence; but the presumption that an evil intention is a necessary ingredient in the proof of any offence may be displaced by the language of the statute under which the offence was created, and it is necessary therefore to have consideration to the language in question in the present Act. Without reviewing the sections in detail, I think this matter is concluded by the decisions in Stephens v. Robert Reid & Co. Ltd. (supra) and Dawson v. Jack. These were both decisions of a single Judge but Ientirely agree with the reasons given in each of the judgments, and, while not binding upon this Court, I am content to rest my own decision on those judgments. Both cases were heard and

> decided in 1902, they have never been overruled nor disapproved, and I think they completely cover the facts of this case and are authority for the proposition that, in prosecutions such as those now under consideration, it is not necessary to establish mens rea against the appellant."

In Pattel v. Controller of Customs (1966) A.C. at 356 the Judicial Committee of the Privy Council quoted with approval portion of the judgment of Dixon C.J. in Sternberg v. The Queen (supra) and also accepted the propositions stated in Stephens v. Robert Reid & Co. (supra).

The appellant did not cite any of these authorities during the course of his argument but in reply it was submitted that Sternberg v. The Queen may be distinguishable on the basis that it dealt with s. 234(d) and not with s. 234(e). I am of the view that this distinction is not valid. Although the particular subsection under consideration was (d) the observations concerning the absence of any necessity to prove mens rea applied generally to s. 234.

In the alternative, it was argued that Sternberg v. The Queen should not be now considered to be good law in the light of the more recent decisions of the High Court in Cameron v. Holt (1979-1980) 142 C.L.R. 342 and more recently in He Kaw Teh v. The Queen (1985) 59 A.L.J.R. 620 (1985) 60 A.L.R. 449.

Cameron v. Holt (supra) was concerned with s. 138 of the Social Services Act 1947-1973 which is in the following terms:—

> "138. (1) person shall not -
>
> (a) make, whether orally or in writing, a false or misleading statement -
>
> (i) in connexion with, or in support of, a claim, whether for himself or for any other person;

(ii) to deceive an officer doing duty in relation to this Act; or

(iii) to affect the rate of a pension, allowance, endowment or benefit payable under this Act;

(b) obtain payment of a pension, allowance, endowment or benefit under this Act, or of an instalment of such a pension, allowance, endowment or benefit, which is not payable;

(c) obtain payment of a pension, allowance, endowment or benefit under this Act, or of an instalment of such a pension, allowance, endowment or benefit, by means of a false or misleading statement or by means of impersonation or a fraudulent device; or

(d) make or present to an officer a statement or document which is false in any particular.

Penalty: One hundred dollars or imprisonment for six months."

In my view Cameron v. Holt is distinguishable from the present matter. At p. 348 Mason J. observes:—

> "This is not a case 'where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice whether they participate or not' (Sweet v. Parsley (1970) A.C. p. 162). But Mr. Murphy for the applicant argued that because the subject section was aimed at the protection of the revenue by penalising those who make or participate in the making of false claims for social welfare benefits it should be inferred that the Parliament intended to create absolute offences involving no element of mens rea. Even if the language of subsection (1) were not in itself an answer to this argument, as I think it is, I do not consider the argument to be well based. In a context in which Parliament creates criminal offences relating to the making of false claims for social welfare benefits and prescribes a penalty which is not insubstantial, it is not to be inferred in the absence of some indication to that affect, that mens rea is unnecessary. Rather it is

> to be inferred that mens rea is an essential element in the criminal offences which the statute creates."

The situation is quite different with regard to this section of the Customs Act 1901-1973. While the Act was referred to in the old cases as legislation protecting the revenue it is now much more than that. These days the Customs Act also governs the importation of dangerous and undesirable goods. In that sense it is a statute which regulates particular activity involving potential danger to public health, safety and morals. It is important that in the proper administration of the Act that there be absolute truth of facts declared and accordingly the section requires more than an honest belief in the truth of the facts stated. The only common consideration present in the Social Securities Act which was under examination in Cameron v. Holt is the protection of the revenue.

In He Kaw Teh v. The Queen (1985) 60 A.L.R. 449 the High Court had to consider the question whether an offence under s. 233B(1)(b) and (c) of the Customs Act 1901 (C'wealth) required proof of mens rea. The High Court held that there is a presumption that mens rea is an essential ingredient in every offence including offences created by statute. Gibbs C.J. (with whom Mason J. agreed) and Brennan J. stated that in deciding whether the Parliament intended to display such a presumption one could have regard to the words of the statute, the subject matter with which the statute deals and whether such a construction will assist in the enforcement of those provisions.

I see nothing inconsistent in the concept that one section of the Customs Act requires the proof of the ingredient of mens rea whilst other sections of the Act requires no such proof. Some of the circumstances which have to be taken into account in ascertaining whether Parliament intended to displace the presumption of mens rea includes the consequences that flow from a conviction of the particular offence. Under s. 233B(1)(b) the maximum penalty is life imprisonment. Gibbe C.J. discusses the nature of the offence created by s. 233B(1)(b) and

concludes that those offences are indeed truly "criminal". At p. 453 he observes:—

> "A convicted offender is exposed to obloquy and disgrace and becomes liable to the highest penalty that may be imposed under the law. It is unlikely that the Parliament intended that the conseguences 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."

Whilst the penalties provided for under s. 234 are substantial, it cannot be said that the conviction for the production of a false declaration is a "criminal" conviction. It is significant to note that while the penalties are substantial there is no provision for imprisonment for a breach of any one of the subsections of s. 234 of the Customs Act. It may be explicable on the basis that the Legislature has taken cognizance of the fact that the Courts have held that this section imposes strict liability. As Jordan C.J. observed in Ex Parte Falstein, Re Maher (supra) at p. 143:—

> "The Customs Act has been amended on innumerable times since the decision in R. v. Australian Films (1921) 29 C.L.R. 195 and nothing has been done to indicate that it does not accord with the intention of the Legislature."

Whilst the monetary penalty provided for in s. 138 of the Social Services Act 1947-1973 is $100, an alternative punishment is imprisonment for six months. This, in my view, is a most important distinguishing feature between the present case and Cameron v. Holt (supra).

In my view then, mens rea is not an essential ingredient of an offence under s. 234(1) of the Customs Act 1901-1973.

Accordingly, I would hold that the Magistrate was correct in finding the appellant guilty of the offence brought under s. 234(1)(c).

I turn therefore to the alternative argument on behalf of the appellant concerning penalty. It was submitted that the Magistrate erred in not exercising his powers under s. 19(B) of the Crimes Act with respect to this offence as he had done with regard to the other offences. He did observe that there were extenuating circumstances with regard to the offences of importing the pistol and the ammunition. Those extenuating circumstances include the fact that it was not a firearm which was imported in the sense that it was brought into the country for the first time. Those same extenuating circumstances do not exist in relation to the offence under s.234(1)(e). In that event the Stipendiary Magistrate was entitled to make a distinction between that, offence and the others and he was addressed concerning the tariff of penalties imposed upon convictions for offences under that section. In my view the fine of $300 is appropriate in the circumstances and I would not disturb that order.

I would discharge the order nisi with costs to be taxed.