

36/78

SUPREME COURT OF SOUTH AUSTRALIA

JOHN C MORISH PTY LTD v LUCKMAN

King J

10, 23 May 1977

(1977) 16 SASR 143; (1977) 30 FLR 88 (Noted 1 Crim LJ 214)

CRIMINAL LAW – PROVISION OF *CRIMES ACT* EMPOWERING DISMISSAL OF CHARGE BY COURT OF SUMMARY JURISDICTION WITHOUT PROCEEDING TO CONVICTION – WHETHER PROVISION APPLICABLE TO A CORPORATION: *CRIMES ACT*, 1914-1973 (CTH.)(NO.12 OF 1914- NO.33 OF 1973) S19B.

CUSTOMS OFFENCE – OFFENCE COMMITTED IN CONSEQUENCE OF HONEST BUT CARELESS MISTAKE – APPLICATION TO CUSTOMS OFFENCES OF STRICT LIABILITY OF PROVISION OF *CRIMES ACT* EMPOWERING COURT OF SUMMARY JURISDICTION TO DISMISS CHARGE WITHOUT PROCEEDING TO CONVICTION: *CUSTOMS ACT* 1901-1975 (CTH.)(NO.5 OF 1901- NO.77 OF 1975), S234.

1. *Prima facie* 'person' includes corporation and there is no reason to suppose that the legislation intended to restrict the power to avoid the stigma of conviction to cases involving natural persons. Section 19B applies to corporations as well as to natural persons.

2. The Customs Act is an Act for protecting the revenue. The information is to be supplied by persons who presumably know the facts to persons who presumably know little, if anything more than they are told. The fair and equal collection of the revenue depends, to a large extent, upon the accuracy of the information given. It is necessary to make people careful in statements they make and in information they give. Incorrect information innocently given, and not discovered, may, and will in some cases, lead to the loss of revenue, and to the benefit of the person whose information was not correct; and the legislature may well say that untrue statements innocently made, when discovered, must be paid for, both to balance the loss in cases in which a mistake has not been discovered and also to make people careful as to the information they give. I am of opinion that this section 234 was intended to penalize mistakes.'

3. The Magistrate was right to give weight to this legislative purpose in considering whether to apply the provisions of s19B(1)(c) in this case. Whether the legislative purpose of penalizing mistakes as well as frauds is decisive in a particular case will depend upon all the circumstances, but it cannot be said that the learned Special Magistrate was in error in treating it as a relevant consideration.

4. The Magistrate found that Mr Morish was careless. He said in his remarks on penalty:

'It seems to me that in all the circumstances this matter has arisen because Mr Morish, the director, was not as careful as he should have been in checking the documents which he sent on to Lapp International, his agent for the purpose of clearing customs.'

That finding was not challenged. In these circumstances, having regard to the evident legislative purpose, the Magistrate was quite correct in refusing to exercise his discretion to dismiss the charge without proceeding to conviction. The appeal is therefore dismissed.

KING J: This is an appeal by a defendant against a conviction and order whereby a Special Magistrate sitting as a Court of summary jurisdiction at Adelaide convicted the defendant for that it on or about the eighth day of August, 1975, at West Beach presented a document purporting to be a genuine invoice, which was not in fact a genuine invoice, contrary to s234(c) of the *Customs Act* 1901-1975 (Cth.) and further imposed a fine of \$200 together with \$4 court fees, and further ordered that the defendant pay the cost of the prosecution fixed at \$130.

The contention for the appellant before me was that the learned Special Magistrate should have dismissed the charge without proceeding to a conviction pursuant to s19B(1)(c) of the *Crimes Act*, 1914.

At the outset I must deal with an argument put forward by counsel for the respondent that s19B of the *Crimes Act* 1914 does not apply to a corporation. Section 19B(1) is as follows:

'Where—

- (a) a person is charged before a court of summary jurisdiction with an offence against a law of the Commonwealth;
- (b) the court is satisfied that the charge is proved but is of opinion, having regard to
 - (i) the character, antecedents, age, health or mental condition of the person;
 - (ii) the extent, if any, to which the offence is of a trivial nature; or
 - (iii) the extent, if any, to which the offence was committed under extenuating circumstances, that it is expedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the person on probation,
 the Court may, without proceeding to conviction, by order—
- (c) dismiss the charge; or
- (d) discharge the person upon his giving security with or without sureties, by recognizance or otherwise to the satisfaction of the court that he will be of good behaviour for such period, not exceeding three years, as the court thinks fit to order and will appear for conviction and sentence when called on at any time during that period.'

Section 22 of the *Acts Interpretation Act* 1901-1973 of the Commonwealth provides that unless the contrary intention appears 'person' shall include a body corporate as well as an individual.

The argument for the respondent was that a contrary intention is implicit in the language of s19B and in the context in which it is found. Counsel argued that the purpose of s19B was reformatory and that it envisaged the reform of a natural person.

The section was inserted in the Act in 1960 and I gather from its language and from other sections enacted at the same time that an important purpose of the legislature in enacting the section was to provide the court with further means of encouraging reformation of natural persons. I do not, however, read it as being restricted to that purpose. It is also a means by which a court may avoid attaching the stigma of conviction to a defendant who has committed a breach of the law in circumstances which make it just or expedient that the stigma of conviction should be avoided. This consideration applies to corporations as well as to natural persons. Certain of the grounds upon which the court may act, namely age, health and mental condition, apply only to natural persons. The other grounds mentioned in the section apply as well to corporations as to natural persons. The power to discharge on recognizance can apply to a natural person but the power to dismiss the charge is capable of application to both. *Prima facie* 'person' includes corporation and I see no reason to suppose that the legislation intended to restrict the power to avoid the stigma of conviction to cases involving natural persons. In my view, s19B applies to corporations as well as to natural persons.

The first ground of appeal is that 'the learned Special Magistrate was in error in finding that it was not open for him to apply the provisions of s19B(1)(c) of the *Crimes Act* 1914 (Cth.)'. In his remarks on penalty the learned Special Magistrate said:

'Notwithstanding that, I agree with Mr Gray that the matters set out in s19B(1)(b) are applicable equally to a company as they are to an individual. I have given careful consideration as to whether or not I should apply the provisions of that section and I have no hesitation in saying that were it not a prosecution under the *Customs Act* I would without hesitation do so. It seems to me, however, that the *Customs Act* is designed to penalize people simply as it were, and I am satisfied that this has been so in this case, because of an error. I do not think in the circumstances and in the light of the legislation and the decisions applicable to this legislation that s19B of the *Crimes Act* can properly be invoked in favour of the defendant.'

I think that this passage shows that the learned Special Magistrate understood that s19B of the *Crimes Act* applied to this offence as to other offences against the laws of the Commonwealth and that he exercised a discretion having regard to 'the circumstances' and the policy of the *Customs Act* as he understood it. If the first ground of appeal is intended to convey that the learned Special Magistrate thought that as a matter of law s19B(1)(c) of the *Crimes Act* did not apply to this offence, it is not made out.

The second ground of appeal was that 'the learned Special Magistrate was in error in concluding that s19B(1)(c) of the *Crimes Act* 1914 (Cth.) did not apply to an offence under s234(c) of the

Customs Act 1901-1975 (Cth.) with equal force and effect as to any other relevant legislation.' The learned Special Magistrate considered that the offence had been committed as a consequence of an honest but careless mistake on the part of Mr Morish, whom he described as 'the principal director of the defendant company'. In exercising his discretion against dismissing the charge without conviction, he undoubtedly attached considerable importance to what he considered to be the policy of the *Customs Act* to penalize people simply as it were. I think that the learned Special Magistrate intended to convey by that expression the considerations expressed by Hodges J in *Stephens v Robert Reid & Co Ltd* when considering whether the offence created by s234(e) was an offence of strict liability. Hodges J said:

'It is an Act for protecting the revenue. The information is to be supplied by persons who presumably know the facts to persons who presumably know little, if anything more than they are told. The fair and equal collection of the revenue depends, to a large extent, upon the accuracy of the information given. It is necessary to make people careful in statements they make and in information they give. Incorrect information innocently given, and not discovered, may, and will in some cases, lead to the loss of revenue, and to the benefit of the person whose information was not correct; and the legislature may well say that untrue statements innocently made, when discovered, must be paid for, both to balance the loss in cases in which a mistake has not been discovered and also to make people careful as to the information they give. I am of opinion that this section 234 was intended to penalize mistakes.'

I think that the learned Special Magistrate was right. I think that the learned Special Magistrate was right to give weight to this legislative purpose in considering whether to apply the provisions of s19B(1)(c) in this case. Whether the legislative purpose of penalizing mistakes as well as frauds is decisive in a particular case will depend upon all the circumstances, but it cannot be said that the learned Special Magistrate was in error in treating it as a relevant consideration.

The final ground of appeal is that 'the learned Special Magistrate was in error in failing to exercise his discretion not to convict the defendant in the circumstances of this case'. The discretion to dismiss the charge without proceeding to conviction is the Magistrate's discretion. It is for him to exercise this power or to refrain from exercising it, as he thinks fit. His exercise of this discretion of his refusal to exercise it can only be challenged if he has proceeded upon a wrong principle or has failed to have regard to relevant considerations or has taken into account extraneous considerations. Counsel argued that if the learned Special Magistrate had given proper weight to the relevant considerations, he must have exercised the discretion in favour of dismissing the charge without proceeding to conviction. I do not think that this is so. The offence is one of strict liability and the legislature therefore must contemplate that conviction and punishment may follow an unintentional offence. Conviction and punishment may even follow an offence committed as a result of an unavoidable mistake. But that is not the present case. The learned Special Magistrate found that Mr Morish was careless. He said in his remarks on penalty:

'It seems to me that in all the circumstances this matter has arisen because Mr Morish, the director, was not as careful as he should have been in checking the documents which he sent on to Lapp International, his agent for the purpose of clearing customs.'

That finding was not challenged. If it were necessary for me to do so, I would say that in these circumstances, having regard to the evident legislative purpose, the learned Special Magistrate was quite correct in refusing to exercise his discretion to dismiss the charge without proceeding to conviction. The appeal is therefore dismissed.