38/01; [2001] VSC 45

SUPREME COURT OF VICTORIA

SELECTRIX PTY LTD v HUMPHRYS

Hedigan J

9, 12 February, 1 March 2001 — 159 FLR 348

STATUTORY INTERPRETATION – CLASSIFICATION OF OFFENCE – IMPORTING AN OZONE DEPLETING SUBSTANCE WITHOUT A LICENCE – WHETHER SUCH OFFENCE INVOLVES ABSOLUTE OR STRICT LIABILITY – FINDING BY MAGISTRATE THAT OFFENCE WAS ONE OF STRICT LIABILITY – FINDING THAT PROSECUTION REBUTTED DEFENCE OF HONEST AND REASONABLE MISTAKE – CONVICTION IMPOSED – WHETHER MAGISTRATE IN ERROR: *OZONE PROTECTION ACT* 1989 (CTH), S13(1).

Section 13(1) of the *Ozone Protection Act* 1989 (Cth) ('Act') provides that a person must not import an HCFC unless the person holds a controlled substances licence. Without being licensed, SP/L imported a number of cylinders of a gas which required the necessary licence. SP/L acted on the basis of advertising by a competitor. The magistrate found that the offence was one of strict liability but ruled that SP/L's belief was not reasonably grounded and found the charge proved. Upon appeal—

HELD: Appeal dismissed.
1. It was open to the magistrate to conclude that SP/L's belief was not reasonably grounded and find that the defence of honest and reasonable belief had been negatived by the prosecution beyond reasonable doubt.

2. *Obiter*. The legal presumption that *mens rea* is an essential ingredient in every serious offence may be displaced by the words of the statute creating the offence or the subject matter with which it is concerned. The Act falls into the category of public safety legislation that is intended to protect all Australians. The potential risk to public health and the environment arising from uncontrolled importation of HCFCs is self-evident. Other relevant factors include the language of s13(1), the monetary penalty and the licensing procedure pointing to a regulatory offence. Having regard to all of these factors, the offence created by s13(1) of the Act is an absolute liability offence.

HEDIGAN J:

1. The matter before me is an appeal by the plaintiff company against a conviction and fine imposed by the Magistrates' Court of Victoria on 3 August 2000 whereby the appellant was convicted of an offence under s13(1) of the *Ozone Protection Act* 1989 in that on 12 October 1999 the company imported hydrochlorofluorocarbons ("HCFCs") without holding a controlled substances licence under the *Ozone Protection Act* 1989. The company was fined $4,000 with $4,500 costs.

2. Section 13(1) of the *Ozone Protection Act* 1989 ("the Act") essentially provides that a person "must not manufacture, import or export an HCFC ... unless the person holds a controlled substances licence that allows the person to do so." It is not in dispute that the motor car refrigerant being imported contained hydrochlorofluorocarbons. In the proceeding before the Magistrate a considerable number of witnesses were called. There was also tendered in evidence a record of interview between the Federal Police officers investigating the relevant event on 9 December 1999. The appellant Selectrix imported, exported and manufactured various technical industrial products. One of them, the relevant product, was a gas used for refrigerant in motor cars. It appears as a substance called FR12. It was advertised by BOC Gases and used generally within the car refrigerant industry. According to the record of interview, BOC Gases was a competitor with Selectrix which was not deterred by that fact. It noted and acted upon the BOC advertisement in a trade journal. According to the BOC advertisement FR12 was fully accredited as environmentally acceptable, which statement was treated by Mr Stuckey (the CEO of Selectrix) as an assurance that it was environmentally acceptable.

3. The Magistrate had the assistance of detailed submissions concerning the applicable legal principles in relation to the facts raised by the evidence. It appears that some time earlier there had been importation by Selectrix of a non-prohibited substance (R134A) which was not an

ozone-depleting substance and in respect of which the licence required by FR12 was not required. This simply was because FR12 contains prohibited substances and R134A did not. The evidence indicated that the appellant Selectrix had ordered FR12 from a United States distributor, Stonehill Trading. The appellant engaged a Customs Agent All Freight International to act on behalf of the appellant for the purpose of clearing the importation (which was 118 cylinders of the gas). It would appear that All Freight made inquiries of Customs as to the appropriate tariff duty code that should be assigned to the imported substance. As I understand it, based on my reading of the evidence, it was the tariff duty code that determined the appropriate rate of duty to be charged on the imported goods. In any event, the imported product was cleared through Customs and delivered to the defendant which then advertised the sale of the gas. That was in competition with BOC, whose advertisement about it had influenced the purchase of the gas by the appellant. It appeared that it was BOC which noticed the advertisement and in effect reported Selectrix to Environment Australia, the former Environment Protection Authority. That organisation then initiated the investigation, with Australian Federal Police support, leading to seizure of the goods and the charges.

4. A substantial body of evidence was called including evidence from a chemist employed by Australian Customs (Mr Bawden), a Customs Broker working at the time for All Freight (one Dunsmuir), Dr Fraser, Chief Research Scientist from CSIRO with respect to atmospheric matters, Mr Stafford, another licensed Customs broker employed by All Freight, Ms Krista Hanci and Ms Kathryn Collins, both policy officers employed with Environment Australia (a Commonwealth emanation) and the informant Andrea Humphrys of the Australian Federal Police. The case was heard over a period of not less than three days and, in addition to the evidence, detailed submissions, both in writing and orally, were made to the Magistrate. Having read his Worship's reasons with some care, I do not doubt that he had a firm grasp and understanding of the issues which were involved in this proceeding, although, as will appear, I am unable to agree with some of the legal perspectives which persuaded him at the time. Those issues included consideration of the question as to whether the offence created by s13(1) was one of absolute liability, or one in respect of which *mens rea* was an element and whether or not it was an offence in respect of strict liability (a lesser liability than absolute liability) as identified in *Chiou Yaou Fa v Morris*[1] and, more critically, in *Ag Aw Teh v R*[2] (hereinafter called *Teh*). It will be necessary, in view of submissions made to me by counsel to refer later to *Teh* but it might be said without much dispute that in that case (a case of a charge of possession of a prohibited import, heroin) the High Court recognised a tripartite categorisation of statutory offences, based upon the mental ingredient necessary. These were analysed by Asche J in *Choi Yaou Fa* and summarised in this way, as cases in which

> "(1) *Mens rea* applies in full;
>
> (2) the offence might be one of strict liability so that the prosecution does not have to rebut *mens rea* in proving the *actus reus* but, if the evidence raises a likelihood of honest and reasonable mistake, the prosecution must rebut that beyond reasonable doubt; and (3) that the offence creates absolute liability."

It is not in dispute the charges may be such that *mens rea* in the strict sense is not an element e.g. *Allen v United Carpet Mills Pty Ltd & Anor*[3] where charges were laid under s39(1) of the *Environment Protection Act* 1970 in effect forbidding pollution of waters under the Act. Nathan J in that case, concluded that s39(1) of the *Environment Protection Act* created the offence of absolute liability to which a defence of honest and reasonable mistake was not available.

5. In the case before me, it should be said, no such concession was made by Mr Ross QC who with Mr Gillespie-Jones appeared for the appellant, he contending that traditionally recognised *mens rea* applied and that the Magistrate had made a "fatal error" in not recognising and acting on this. It should be said that the questions formulated by the Master (to which I will shortly refer) on the application by Selectrix did not identify this claimed blemish by way of a specific question.

6. The proceeding had advanced in a relatively unusual way in that an issue as to the admissibility of some of the evidence (as seems to appear, the contest being on the basis that evidence was illegally obtained) was treated, almost from the outset, as evidence taken on the *voir dire*. Why that should have to have been so when the tribunal was the judge of both fact, law and admissibility is not clear to me. It led to a debate at that time as to whether or not this offence was one of absolute liability, requiring no intention, this being treated in effect as a

discrete and preliminary question. This course was a matter for his judgment. It had the effect of fragmenting the calling of the evidence and treated the absolute liability issue as one separate from a consideration of other possible categorisation of the necessities of proof of the offence. It had, however, the virtue of dealing with that issue which, had it been decided differently, in effect terminated the issue of guilt. The consequence was that this aspect was all dealt with on the first day of the hearing (19 July 2000) and led to the Magistrate on 3 August 2000 making a ruling on this having heard a number of witnesses, whose evidence (notwithstanding the ruling), thereafter enured to form part of the evidence in respect of the charge subsequently considered on the basis of strict liability. In the course of considering whether or not the offence created by s39(1) was one of absolute liability, regard was had by the Court to all of the arguable issues, including the fact that there was a monetary penalty only for breach of s39(1) (in respect of an individual maximum $55,000 and, with respect to a company up to a maximum of five times that amount, that is a maximum of $275,000. The submissions in relation to this aspect dealt with the considerations raised by the mainstream cases including *Reg v Bull & Ors*[4]; *Proudman v Dayman*[5]; *Sherras v. DeRutzen*[6]; *Teh*[7]; *White v Ridley*[8]; *Wilson v Gahan*[9].

7. On 3 August 2000 his Worship delivered detailed written reasons dealing with the submission by the defendant that all the prosecution evidence should be excluded and with the issue as to whether or not the offence of importing an HCFC created by s13 of the Act was an offence of strict or absolute liability or in respect of which *mens rea* was an ingredient. His Worship treated this, it seems to me, as a submission of no case (since the defendant called no evidence on the *voir dire*) having regard to the view that arguably ought to be taken of the applicable law. His Worship analysed the principal relevant authorities, including *Teh* and *Wilson v Gahan*. The Magistrate's starting point was that *mens rea* might be an essential element but that conclusion could not be finally reached until other matters were examined. This involved his examination of the language of the Act creating the offence, e.g., the absence of commonplace words such as "knowingly, "knowingly caused", "wilfully" or "without reasonable excuse" used in other sections in the Act, he forming the view that their absence in s13 tended towards rejection of any presumption of *mens rea*. He also considered the subject matter of the statute; the enforcement of the statute; the purpose of the legislation and the penalties.

8. I note that Mr Ross strongly attacked the statement by the Magistrate that it seemed "that opinion in *Teh's* case was evenly divided on whether there was a mental state involved in the act of importing" he contending that that remark betrayed a misunderstanding of the principles involved. However, in my view the Magistrate's reference to *Teh's* case was not meant to be specifically related to the act of importing there involved but the act of importing generally, including the importation of prohibited but insignificant goods. His Worship took the view that, under the rubric of the purpose of the legislation and the penalties imposed, the objective of s13 was to aid in the elimination of the risk to public health and the environment from ozone depletion. It thus fell within the category of provisions which had been traditionally viewed as tending against the necessity to establish against the *mens rea*. Ultimately, he concluded that these considerations led him to the view that Parliament intended the importation of HCFC without a licence to be an offence of strict, rather than absolute, liability. That is, *mens rea* was presumed, but if there was evidence which raised the issue, the person charged could not be convicted unless the Crown persuaded the tribunal that the accused did not act under an honest and reasonable mistake as to the facts. It seemed to me, having regard to his exposition of the issues, particularly his statement immediately prior to reaching this conclusion that "a provision which contains a monetary penalty of the size in this case points towards strict or absolute liability", that the Magistrate appeared to be moving to the absolute liability conclusion. He allowed the evidence he had heard to remain in as part of the corpus of evidence, and permitted the calling of defence evidence. This was the witness Mr Stuckey. At the end of the evidence and counsels' submissions, the Magistrate stated that he had formed the view that Parliament intended the offence to be one of strict liability. He stated that the defence had raised the question of honest and reasonable but mistaken belief as to facts. He rejected this, however. He concluded that the mistake was a mistake of law, but went on to consider, assuming that it was a mistaken belief as to facts, whether it was honestly and reasonably held. He stated that he regarded Mr Stuckey as a "blatantly honest" witness although he later used the phrase "patently honest person" but that he had engaged in careless or negligent behaviour (and presumably therefore unreasonable) in relation to his obligations under the legislation.

9. His Worship appeared to pronounce his findings in two parts, the first part appearing in the transcript of 3 August at page 82 and the second part (already referred to by me) when he was really considering the appropriate sentence. He stated[10] as to his categorization of the offence as one of strict liability:

> "... The relevant state of mind of a defendant is presumed to exist but of the defendant raises on the material, whether it be in the prosecution material or his own, the question as to whether he/she or it had an honest and reasonable belief which was a mistake of fact that if it had existed – that is, if the facts had in reality existed – it would have made innocent the act that the person is charge (of). And it is incumbent on the prosecution to prove the negative of that beyond reasonable doubt. In this case I have no doubt about the honesty of Mr Stuckey, he was blatantly honest, and I have no doubt that a belief of sorts and in my view it's certainly not a mistaken belief of fact. It is a mistaken belief of law ... He did not at the relevant time have any belief as to whether this particular substance that is the subject of the charge contained an HCFC in it. ... when he uses the expression that he "thought the substance was environmentally friendly" that meant to him there were no HCFC in it. If I elevated that into a fact that would make innocent the act that the company through him had indulged in. I would certainly accept that it was honest — that he was honest in holding that belief — but it certainly could not be said that it was reasonable. The basis of his information largely boiled down to this advertising, piece of advertising by a competitor, BOC ... and his reasoning went this way: BOC are the No. 1 in compressed gases in Australia, therefore they knew what they were saying. In this advertising material they say X, Y and Z, therefore I accept that at face value. That seems to me to be a wholly unreasonable way of approaching such an issue as this one, dealing as it is with ozone depleting substances. To rely implicitly upon the claims by a competitor in advertising material, when one well knows that puffery and other sorts of exaggeration occur in advertisements, to rely upon that sort of material explicitly without further ado is in my view an unreasonable way to approach the whole exercise. Even if the issue is properly raised, ... in my view it has been negatived beyond reasonable doubt."

10. The Magistrate therefore convicted the defendant and imposed a fine of $4,000 with $4,500 costs. Selectrix appealed against this decision and the questions formulated by the Master (counsel for the appellant being the only party appearing) were as follows:

> (a) Is a prosecution for an offence under s13(1) of the *Ozone Protection Act* 1989 one where strict liability applies?
>
> (b) The Magistrate having found that the defendant had an honest belief that the nature of the relevant goods were "ozone friendly" did the Magistrate err in convicting the appellant even accepting such belief was unreasonable;
>
> (c) Having regard to the whole of the evidence was it open for a reasonable Magistrate, properly instructed, to find the appellant's mistaken belief was unreasonable?

11. When the matter was argued before me, it was apparent both from written submissions and his oral argument that Mr Armstrong who appeared for the respondent informant intended to (and did) argue that the Magistrate was incorrect in reaching the view that the offence was one of strict liability rather than absolute liability and that, if he had not made an error as to that aspect, then the other issues would not have arisen for decision. Mr Ross accepted the position that the respondent on appeal may seek to uphold the lower court's decision on a basis that would make the decision correct, even though it was not the basis upon which the Magistrates' Court actually proceeded, if it could have reached a decision to the contrary on the relevant point. Thus both parties addressed all of the issues although the questions were devised only with respect to the issues raised by "strict liability". I point out that the question of *mens rea* was not specifically dealt with in the questions. I propose to deal with all of these matters but it is self-evident that if I formed the view that it was open to the Magistrate to conclude that the issue was one of strict liability, and that the prosecution had satisfied him that the appellant had made a mistake of fact but not on reasonable grounds, then his decision would be upheld. This proposition is itself subject to the consideration of the general issue of *mens rea* in relation to the particular offence.

12. The gas that the appellant had imported in 1998 (R134A) from Stonehill was innocuous so far as damage to the environment was concerned. It was in 1999 that Stuckey saw the advertisement for FR12 placed by BOC in the trade magazine. The advertisement (which formed part of the evidence) did not state or imply that FR12 contained HCFC and did not contain any specific material to suggest it was other than environmentally friendly. Mr Ross claimed that

Mr Stuckey had relied upon the cartoon in the advertisement depicting a frog, claimed to be a recognised indicator of an environmentally-friendly product. Stonehill replaced R134A with FR12 in 1999. It was claimed that the BOC ad continued unchanged for some time, fuelling Stuckey's belief that it was not harmful. The case was also put that engagement of All Freight International as Customs Agents had to be taken into account, as such persons must be eminently qualified. It was argued, relying upon some evidence of Stafford, that notwithstanding contact between Mr Dunsmuir of the Customs Agents and the chemist, Bawden, in the Customs Department, nothing dangerous "was flagged". The claim was that once they were landed and cleared through Customs importation was complete and that at the time of importation Stuckey had no belief that any licence was necessary or alternatively believed that the licence was not necessary. The evidence clearly showed, however, and Mr Ross did not argue to the contrary, that Stuckey was aware that some products that were imported might require a licence. It must also be stated that the evidence showed that transport companies shipping gases are provided with documentary material bearing upon the product and in this case (according to the evidence of the witness Dunsmuir) both a Material Safety Data Sheet and a Hazardous Cargo Declaration had been supplied. These were apparently provided to enable the importer or its agents to satisfy themselves as to the nature of the substance being brought in and, if satisfied about it, this might provide a basis for a defence of honest and reasonable belief that the imported substance was not an HCFC in this case.

13. I now turn to counsel's submissions. Both counsel presented their arguments with conspicuous skill. I do not refer to the authorities in detail. One of the problems in the area is that appellate courts have not all spoken with a single voice and the principles are, of course, capable of application to different contexts and, where applicable, must be applied. Both appellant's and respondent's counsel cited and counter-cited various parts of the judgments of Gibbs CJ, Brennan and Dawson JJ in *Teh*.

14. Mr Ross' first submission was that the offence with which the appellant was charged required the prosecution to establish *mens rea* because it involved an act of importing and that the Magistrate had misunderstood *Teh* because he expressed the view that "opinion in *Teh's* case was evenly divided on whether there is a mental state involve in the act of importing". However, as I have already indicated, in my judgment a reading of the Magistrate's reasons as a whole does not support the suggestion that he misunderstood the law in that respect. Other parts of the Magistrate's reasons would indicate that he well understood that knowledge of the wrongfulness of the act was an essential ingredient in every offence but this presumption was liable to be displaced by the words of the statute or the subject matter dealt with. Dawson J thought that it was virtually impossible to conclude that there was no intention to import at the least the container in which the goods were being brought in. Passages relied upon by Mr Ross from the judgments of Gibbs CJ (with whom Mason J agreed) make it clear that their view was that the offence created in *Teh* was an extremely serious one, involving as it did the bringing in of narcotics. However, Gibbs CJ and Mason J were of the opinion that importation does not necessarily connote knowledge or intention. Gibbs CJ described the offence created by s233B(1)(b) as being one of the most serious in the criminal calendar. He stated:

> "It seems improbable that the Parliament would have intended that it might be committed as a result of mere carelessness, although that would be the case if guilty knowledge was not an element, and an unreasonable though honest mistake would not be sufficient to exculpate the accused. It is true that the penalty of life imprisonment provided by the statute is a maximum one and that a Judge who considers that the accused had brought in narcotic goods in an honest but unreasonable belief that his luggage did not contain them would sentence accordingly. Nevertheless, to provide that a sentence of life imprisonment might be imposed for an offence committed merely through negligence would appear to be exceedingly severe. The gravity of the offence suggests that guilty knowledge was intended to be an element of it." (535)

Later, Gibbs CJ stated:

> "I accordingly conclude that the presumption of *mens rea* is required before a person can be guilty of a grave criminal offence is not displaced in relation to s233B(1)(b) of the *Customs Act* and that the prosecution on a charge under that provision bears the onus of proving the accused knew it was importing a narcotic substance."

Mr Ross submitted that because s7 of the Act defined an import as having the same meaning as that under the *Customs Act* that assimilated that aspect of *Teh* to the present case. He claimed

that *mens rea* was always an element of the offence if it involved importation because there was only one form of importation. However, this argument ignores the development of principles upon which the Court acts in determining whether in some cases (whether or not importation is involved) that guilty knowledge is simply not an element (absolute liability) and others where there is a presumption that *mens rea* is required before a person can be found guilty of a grave criminal offence but that the prosecution may rebut it by proving the accused's knowledge, or in some cases it being regarded as one of strict liability avoidable if the offence was committed when the accused honestly and reasonably held a mistaken belief in facts which if true exculpated the accused from any offence. Whilst it is true that s50 of the *Customs Act* 1901 draws no distinction between the meaning of "import" in relation to goods or narcotic substances, other considerations relating to (i) the subject matter, (ii) purpose of the enactment, (iii) the penalties provided, and (iv) the language of the statute itself, are relevant matters to consider. Importation of prohibited products is not the only area in the law in which there is a tension between the legislative objective of dealing with a grave social evil and the principle that the protection of the liberty of the subject commonly involves resistance to the finding of guilt of a breach of the criminal law in the absence of a guilty mind. Brennan J in *Teh* (at 567) stated that:

> "The requirement of *mens rea* is at once a reflection of the purpose of the statute and humane protection for persons who unwittingly engage in prohibited conduct ..."

15. Both counsel appeared to accept that consideration of the United Kingdom authorities had to be tempered by an understanding that the courts of the United Kingdom have not distinguished between absolute liability and strict liability in the more precise way as prevailed in this country. In my view, some of the statements by Brennan J at p584 in *Teh* must be read in the light of the charge there under consideration. His Honour's expressed caution about any expansion of the mental element required for importation must be seen in the light of his illustrated dangers, of such expansion e.g. an innocent passenger bringing home his baggage or an innocent shipping company bringing an assignment of goods being guilty of offences "if narcotic goods had been placed by others in the baggage".

16. I address the first of the questions formulated by the Master, that is, whether the prosecution of an offence under s13(1) of the Act is one where strict liability applies. Both parties accepted that strict liability was there being used in the context of a liability which was not absolute liability, that is, liability regardless of absence of knowledge or *mens rea*. The questions were formulated in the way they were because the Magistrate had rejected the argument of absolute liability and the appellant had no quarrel with that. It therefore was and is necessary to address whether, in these circumstances, it was open to the Magistrate to conclude that the prosecution had established that the defendant did not act under an honest and reasonable mistake of fact that the imported substance was not an HCFC. The Magistrate appears to have concluded that Mr Stuckey was acting honestly at all times. He also appears to have concluded that the mistake that was made was a mistake of law. That is, if he had a belief, his belief was that he did not require a licence in respect of the substance. I will refer to this aspect later. However, the Magistrate went on to consider his conclusion on the assumption that the mistake, if made, was a mistake of fact, namely that Selectrix mistakenly believed that the imported substance was not an HCFC. This involved construing the phrase "environmentally friendly" as the import not being an HCFC.

17. The categorisation of the offence as one requiring strict liability, that is, allowing a defence of honest and reasonable mistake, has the virtue of protecting the so-called luckless victim. Counsel for the respondent suggested such a case might be if Selectrix had ordered a consignment of the earlier R134A gas (not containing an HCFC) but had been supplied with FR12, there clearly would be available a defence of honest and reasonable mistake of fact that the imported substance was not an HCFC. This presumably was put on the basis of contrasting the reasonableness of the conduct of Mr Stuckey in this case with, say, an error made by the supplier.

18. Question 2 appears to raise the question as to whether or not, if the appellant's belief was that the goods were "ozone friendly", that was a mistake of fact reasonably grounded. Leaving aside the honesty aspect, it was accepted that the prosecution was obliged to prove that the defendant did not act under a reasonable mistake of fact, viz. that the imported substance was not an HCFC. The Magistrate so decided. There was no "strict liability" mistake of fact here because Selectrix ordered and received the gas FR12 which was in fact an HCFC. Thus the argument was advanced

that any mistake made was whether it was necessary to obtain a licence for importation of FR12, arguably a mistake of law.

19. Some reliance was placed upon the statements of Dixon J in *Thomas v The King*[11] (a case involving a belief that the prospective wife to a marriage had had a previous marriage dissolved) that if the mistake was as to a question of mixed fact or law it should be treated as an mistake of fact. It would appear that in *Strathfield Municipal Council v Elvy*[12] the view of the New South Wales Court of Appeal is that, in a case of a defence raised to a strict liability offence, not only will a mistake of law not constitute a defence, neither will a mistake on a question of mixed fact and law.

20. In my view, the mistake in this case was in respect of a mixed fact and law issue. The respondent argued that Mr Stuckey's evidence carried the matter no further than a belief that the goods were "ozone friendly". It was put that this was not a mistake as to an exculpatory fact because it was not a mistake as to whether the substance was an HCFC being only a mistake as to the qualities of the substance, e.g. as to a mistake as to whether heroin was harmful. I do not find it necessary to decide this conundrum.

21. The Magistrate considered the issue and expressed his conclusion on the assumption that the mistake was a mistake of fact. He went ahead to consider whether or not there was a reasonable mistake, specifically whether the prosecution had rebutted the presumption that that mistake of fact was reasonable. The Magistrate found that it was established that the appellant's belief was unreasonable. That is, there was no reasonable mistake of fact as to whether the substance imported was an HCFC.

22. The prosecution argued that Selectrix had not formed a belief one way or the other. If that were true, then it would simply be a case of inadvertence to a fact rather than having a mistaken belief about a fact. But the Magistrate specifically addressed the issue that the appellant called upon him to address, namely, that Selectrix had an honest belief as to an exculpatory fact and that that belief was reasonable. The Magistrate found that it was not reasonable and, as the parts of his reasons to which I have referred indicate, he primarily based his conclusion on the BOC advertisement. The Magistrate used the phrase "boiled down to", which seems to me the language of focussing on the main aspect and not necessarily excluding the inclusion by the Magistrate as part of his decision of other connected grounds. Essentially, the Magistrate formed the view that it was unreasonable for Stuckey to have based his conclusions on the advertisement of a competitor and that he should have borne in mind that there might well be misstatements and that the scientific implications were such that he should have exercised more care than that. Mr Ross pressed strongly that the Magistrate appeared to have overlooked the employment of the services of a well qualified Customs Agent and the failure of anything to be raised with his Customs agent by Bawden to suggest any doubt about the imported product. Nevertheless, neither the appellant nor his agent made any direct inquiry of Environment Australia. Selectrix was in possession of the MSDS previously referred to prior to the importation[13] which exhibit contained component information giving sufficient details to enable it to be pursued as to whether FR12 was an HCFC. Although the specifics of it as an HCFC do not appear to me to have been spelled out, there was a reference to "chloro", the key damaging ingredient, which should have rung warning bells. The problem was that Mr Stuckey did not bother to read the document. Moreover, it would appear from the record of interview[14] that there was a family friend who had previously given advice to Mr Stuckey as to the R134A gas that had been imported as not requiring a licence but had not been asked if there any different situation prevailed in relation to FR12. The Magistrate's conclusion that Selectrix, through Stuckey, concentrated wholly on the BOC advertisement and its continued publication appears to me to have been well based on the evidence. In the first place, in the taped record of interview between the federal police officer and Mr Stuckey on 9 December 1999 Mr Stuckey stated that his mistaken understanding that the gas was an ozone friendly gas was "because I'd taken notice of BOC advertising". He did not suggest there was any other source of the belief. Even more significant was his statement when cross-examined before the Magistrate. He stated as follows[15]:

> "Q. You didn't believe that there would be HCFC's in the gas?
> A. Mmm.
> Q. But did you ever believe there would be no HCFC's in the gas?
> A. That's correct.

> Q. All right, that was based solely on the BOC ad. Is that right?
> A. That's right.
> Q. You made no other enquiries either with the family friend again that you consulted on the first occasion?
> A. Yeah, that's right. I didn't make any more inquiries because from the ad it's suggesting environmentally preferred option."

This was arguably enough to dispose of the issue that Mr Stuckey's belief was based on what his Customs broker was doing, (as was suggested by Mr Ross). In that part of the record of interview[16] in which he answered questions about the Customs agent, there was no suggestion by him that he based his conclusions on anything connected with the work of the Customs agent. All of the facts were established in the evidence and were known to the magistrate.

23. In my opinion, it is impossible for me to conclude that it was not open to the Magistrate to take the view, having regard to those facts, that Mr Stuckey's belief was not reasonably grounded. This would be so whether the belief was specifically that it was ozone-friendly, or the absence of any belief that it was not ozone-friendly. In my judgment, this conclusion is sufficient to dispose of this appeal, that is, that it was open to the Magistrate, who, having arrived at a consideration of the strict liability issues and not treating the case as one of absolute liability, found the law for the company, but the facts against it. In my view, the magistrate was correct in reaching the conclusion that he did reach.

24. There were a number of arguments advanced before me on the issue of whether or not the Magistrate was in error in concluding that the offence created by s13(1) of the Act was one of absolute liability, that is, not requiring proof of any intent or *mens rea*. The legal presumption that *mens rea* is an essential ingredient in every serious offence may be displaced by the words of the statute creating the offence or the subject matter with which it is concerned.[17] In *Teh* the High Court considered the criteria that had to be applied in order to determine whether the presumption of *mens rea* had been displaced. These are (1) the words of the statute[18]; (2) the subject matter of the statute[19]; (3) whether the imposition of absolute liability would assist in the enforcement and observance of the relevant statute and its objects[20]; and (4) that in the case where the offence is regulatory (that is for the purpose of regulating social conditions or to promote and maintain the public safety) and the penalty is monetary and moderately sized, the statute is more easily construed as imposing absolute liability[21].

25. Section 3 of the Act sets out its objectives. Fundamentally, these objectives are to erect a system of controls over the manufacture, import and export of substances that deplete ozone in the atmosphere; to provide specific controls in respect of those aspects; to give effect to Australia's treaty and convention obligations and to encourage Australian industry; to replace these substances with appropriate alternative substances and technology. The International Convention and Protocol scheduled to the Act acknowledges the determination of the agreeing parties to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances which deplete it, with the ultimate objective of their elimination. The Act itself seeks to provide for additional controls over and above those required by the protocol in aid of the general objective. The Second Reading speech in the Senate of the Minister claimed that the protection of the ozone layer was one of the Government's highest environmental priorities, requiring urgent action particularly having regard to the implications for Australia placed as it is not far from the Antarctic environment. This statute could not be regarded as being other than concerned with the protection of public health and the environment.

26. With respect to the criterion of the words of the statute, reliance was placed upon the language in other sections of the Act employing words which might reasonably be regarded as importing *mens rea* such as "knowingly", "intentionally" or "without reasonable excuse". The contrast was drawn between the language of s13 and the language in other parts of the Act which specifically denoted defences along those lines.[22] The argument is that if the legislation had intended that s13(1) required proof of a mental element, then words describing such an element would have been included. On the contrary, it is put that their absence is significant.

27. The key argument for the appellant on this aspect was that the phrase "import" in this Act was indistinguishable from "importation" of narcotics in *Teh's* case. The respondent contends that the criminality here is not only considerably less but also indicated to be less by the lower

penalty. See the observations of Nathan J in *Allen v United Carpet Mills & Anor*[23] To my mind, the sparse, indeed minimal, language of the critical section of the statute gives little support to the submission of the appellant.

28. As to the second of the possible criteria, the subject matter of the statute, the question is whether or not such regulatory social and public interest legislation might be regarded as imposing absolute liability.[24] The view of Brennan J[25] was that the purpose of the statute is the surest guide to the mental element required. I conclude that this legislation falls into the category of public safety legislation that is intended to protect all Australians. The potential risk to public health and the environment arising from uncontrolled importation of HCFCs is self-evident.

29. The relevant penalty is solely monetary. Even with the multiplication in the case of corporate responsibility it is moderate. See, also, with respect to issues of absolute liability, the decision of the Full Court of this State in *Welsh v Donnelly*[26], the discussion by Warren J in *Wilson v Gahan*[27] and the view of Nathan J in his reasons in *Allen v United Carpet Mills & Anor*[28] The decision of the Court of Appeal of New South Wales in *Elvy* is distinguishable on the facts. In that case[29] the Court was of the opinion that the public interest considerations there raised did not call for absolute liability construction. The legislative subject matter was, however, substantially different from the Act in this case.

30. It is not necessary for me to re-address the issue of the significance between "import" in s13(1) of this Act as against the "importation of narcotics" in *Teh's* case. It is true to say that it may be a matter of serious and significant debate whether or not it is more dangerous to import ozone depleting substances than importing personally affecting substances such as narcotics. Nothing in the evidence was directed to resolving this debate. The legislature apparently regards the importation of narcotics, as in *Teh*, carrying a life sentence of imprisonment, as being more serious and attractive of a greater penalty than breaches of environment-protecting legislation. It is no part of my function in this case to express any opinion as to that. Further, the activity in question in this case (importation) may be rendered lawful by licensing. That one may apply and obtain a licence for the importation of the relevant products supports the conclusion that this is a regulatory offence[30]. These matters point in the direction of absolute liability.

31. Mr Armstrong argued that the multiplying factor with respect to a breach by a corporation was not an aid to construction in respect to what was a general penalty provision. That is, the fact that the legislature decided by the imposition of a higher maximum in the case of a corporation said nothing about the character of the offence. The basic penalty was moderately sized. Thus he argued the extent of the corporate penalty was directed to no more than attaching the financial resources of corporate defendant which could not be jailed. Thus this was no aid to construction, having regard to the bare penalty.

32. There are many reported cases wherein social regulatory legislation prohibiting conduct in matters of public health, environmental or public safety have been characterized as absolute liability offences. I refer to *Allen v United Carpet Mills Pty Ltd*[31] (water pollution), *Welsh v Donnelly*[32] (exceeding maximum weight in a trailer); *Franklin v Stacey*[33] (driving an unregistered and uninsured motor vehicle); *Kearon v Grant*[34] (exceeding a speed limit); and *Ambrose v. Edmonds-Wilson*[35] (failure to furnish a tax return).

33. All of these matters are powerful considerations pointing to the characterisation of this offence as an absolute liability offence. In my judgment, although it is not necessary for the decision on this appeal, I am of the opinion that the offence created by s13(1) is an absolute liability offence.

34. Accordingly, the appeal is dismissed.

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[1] [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342.
[2] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[3] [1989] VicRp 27; (1989) VR 323.
[4] [1974] HCA 23; (1974) 131 CLR 203; (1974) 3 ALR 171; (1974) 48 ALJR 232.
[5] [1941] HCA 28; (1941) 67 CLR 536.
[6] (1895) 1 QB 918; 11 TLR 369.

[7] Above.
[8] (1978) 140 CLR 342
[9] (1999) VSC 72 (Warren J).
[10] At pp82-83.
[11] [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37.
[12] (1992) 25 NSWLR 745 at 749-751; (1992) 58 A Crim R 352; (1992) 75 LGRA 390.
[13] See the transcript 3 August 2000, pp69-70.
[14] See questions and answers at 83-84, 92-94 and 237-242.
[15] Transcript 3/8/2000 66-67.
[16] Questions 109-123.
[17] Gibbs CJ, Mason J agreeing at 528 and Brennan J at 566-567.
[18] Gibbs CJ and Mason J at 529, Brennan J at 567 and Dawson J at 594.
[19] Gibbs CJ at 529-530, Brennan J at 566 and Dawson J 594-595.
[20] Gibbs CJ and Mason J at 530, Brennan J at 567.
[21] See Brennan J at 567, Dawson J at 595 and see also Warren J in *Wilson v Gahan* [1999] VSC 72 at [9].
[22] See ss18(7), 46(2), 46(3), 62, 63 and 64(1), which employ the language of "knowingly", "recklessly" and "without reasonable excuse".
[23] *Supra*, at 327-328.
[24] See the language of Dawson J in *Teh* at 595 and Gibbs CJ at 530.
[25] At 576.
[26] [1983] VicRp 79; [1983] 2 VR 173.
[27] At [23].
[28] See above.
[29] A case concerning the sale of pornographic material.
[30] See ss13 and 13A.
[31] *Supra*, Nathan J of the Victorian Supreme Court.
[32] [1983] VicRp 79; [1983] 2 VR 173, Full Court of the Supreme Court of Victoria.
[33] (1981) 27 SASR 490.
[34] [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377.
[35] (1988) 48 SASR 514; (1988) 92 FLR 429; (1988) 19 ATR 1217.

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