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SUPREME COURT OF SOUTH AUSTRALIA

KELTON v UREN and HARRIS

Jacobs J

29 January, 17 February 1981

(1981) 27 SASR 92; 81 ATC 4,119; 52 FLR 232; 11 ATR 534

TAXATION – PROSECUTIONS AND PENALTIES – FAILURE TO FURNISH RETURNS – SENTENCING – WHETHER MAGISTRATE COULD MAKE AN ORDER THAT TAXPAYER FURNISH RETURN WITHIN A PERIOD OF TIME AND ALSO DISMISS CHARGE – WHETHER OPEN TO MAGISTRATE TO FIND THAT THE CHARGES WERE TRIVIAL – USE OF S19B *CRIMES ACT* (CTH) BOND: *INCOME TAX ASSESSMENT ACT* SS225, 246; *CRIMES ACT* 1914-1966 (CTH), S19B.

These were two appeals which were by consent heard together. Uren received a notice to furnish a return, but was having some difficulty in working out the affairs of a partnership and a deceased estate and did not do so. He knew that he could apply for an extension of time, but simply allowed the matter to go by default. Harris was the director of a company whose return of income had not been furnished. By virtue of a notice given to him under s252(1)(j) he became liable to furnish the return. He passed the notice to his accountant, but there was some misunderstanding over the accountant's fees and Harris gave the matter no more thought. The company in fact had not traded during the period for which the return was due. Both taxpayers pleaded guilty to a charge of failing to comply with a requirement to furnish an income tax return in breach of s223(1). In each case the special magistrate purporting to act under s19B of the *Crimes Act* 1914-1966 (Cth), "having regard to the defendant's antecedents and character and the trivial nature of the offence", dismissed the complaint without conviction. In the case of Uren, an order was also made in purported pursuance to s225 of the *Income Tax Assessment Act*, that the outstanding return be lodged within a period of three months. In Harris's case the return had been lodged on or about the day when the complaint was heard. In both cases an appeal was lodged on the basis that the penalties were manifestly inadequate, or alternatively, that the magistrate had no power to dismiss the charges in view of s246 of the *Income Tax Assessment Act*.

HELD: Appeals allowed. Convicting and imposing sentences:
1. The power to make an order under s225 only arises upon conviction and therefore the order, with a dismissal of the charge, was inconsistent.

2. Section 246 had no operation except upon conviction, and since the magistrate had not convicted the minimum requirement did not apply.

3. Before s19B of the *Crimes Act* can be properly invoked there must be something that clearly distinguishes the circumstances of the offence under consideration from the typical offence, or circumstances of an unusual nature personal to the defendant. In both cases there was nothing exceptional which could render the breach of the section as "trivial". In relation to the character and antecedents of the defendants, all that could be said was that they had no previous convictions which alone was insufficient, having regard to the scope and purpose of the legislation, to lead to a dismissal of the charges. In both cases a conviction was recorded and a penalty imposed. Uren was fined $50 and Harris $20.

***Cobiac v Libby* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257, referred to.**

JACOBS J: I was at first disposed to think that the appellant might call in aid s246 of the Act, which provides that no minimum penalty imposed by this Act shall be liable to reduction under any power of mitigation which would, but for this section, be possessed by the court. By parity of reasoning with the decision of the High Court in *Cobiac v Libby* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257, however, I feel bound to hold that s246 has no operation except upon conviction, for it is only upon conviction that a penalty is to be imposed. (Compare *Acts Interpretation Act* 1901-1973 (Cth), s41,)

Section 246, however, is a clear statutory indication that the penalties prescribed by the Act are intended to be imposed and, while it is not possible to exclude the operation of s19B of the

Crimes Act, there must be something that clearly distinguishes the circumstance of the offence under consideration from the typical offence, or circumstances of an unusual nature personal to the defendant, before that section can be properly invoked in dealing with this particular offence. The history of the way in which the penalty provisions of the legislation have been applied by the courts, to which further reference will be made later, suggests that such cases must be very rare indeed.

However that may be, there is clearly nothing in the circumstances of the present offences which could justify them in being characterized as "trivial". No doubt the offence constituted by a breach of s223 may not in itself be a serious offence, compared with other offences punishable by law, but that is not the test of triviality. There must be something which clearly distinguishes the particular breach of the section under consideration from what may be regarded as a typical breach of the section. In applying that test, it must be remembered that the substance of the offence is not the failure to furnish a return, for the Act does not impose a general obligation to furnish a return. It imposes that obligation only upon notice, and it is non-compliance with the notice that constitutes the offence.

Viewed in that way, it is quite impossible to say that there are any circumstances of extenuation in either of these cases. The Commissioner did not rely upon the statutory notice authorized by s161 of the Act, but also served supplementary notices on each of the defendants personally. If there is any real difficulty about compliance, the Commissioner has power to grant an extension upon application, but no such application was made. Even then, the Commissioner allowed a substantial time to elapse after the expiry of the time for lodging a return prescribed by the notice, before instituting proceedings. The plain fact of the matter is that both respondents, as they freely admit, took no steps, or no effective steps, to comply with the notice; there is not even an element of forgetfulness.

When one turns to the other limb of s19B of the *Crimes Act*, under which the learned special magistrate purported to act, all that can be said about the character and antecedents of the defendants, in support of the order, is that neither defendant was known to have any previous convictions, but that, standing alone, can scarcely be sufficient, more particularly when one has regard to the scope and purpose of this legislation. It is a fiscal measure, which imposes obligations and burdens upon the whole community, and it would defeat the purpose of the legislation if the courts were to condone the neglect of those obligations, and possible avoidance of the burdens, in the case of a first offender, simply because he is a first offender. More particularly is that so when administrative steps have been taken, prior to prosecution, to remind a defaulter of his obligations.

The appellant has placed before me a comprehensive record of prosecutions for this offence. Although such a record cannot be decisive of any particular case, it amply confirms the application by the courts of the principles under discussion. The records cover almost all possible combinations of circumstances, distinguishing cases in which the return had or had not been furnished at the date of the hearing (as the case may be), cases in which the disclosed income was taxable or non-taxable, cases in which the defendant had or had not been previously convicted – the vast majority are first offenders and with different combinations of all these variables. The records cover over 350 cases which came before the courts between August and December 1980 and in every case there has been a conviction and a monetary penalty imposed, even in the cases which might properly be regarded as the least serious, eg where a first offender has lodged the return at the date of the hearing, and it discloses a non-taxable income.

There is, of course, quite a wide variation in the fines imposed, as one would expect, within the permitted range, but the courts have consistently and, in my view properly, taken the view that those who default in their obligations under this Act, after receiving due notice, ought not to escape conviction and a mandatory fine as dictated by s246. There is nothing in the circumstances of the present cases that would justify a different or more lenient approach. The appeals will accordingly be allowed, the orders of dismissal set aside, and in lieu thereof there will in each case be a conviction.
