

19/87

SUPREME COURT OF QUEENSLAND

LEE v ANDERSON; *ex parte* ANDERSON

Kneipp, Connolly and Vasta JJ

29, 30 October, 12 November 1986

[1987] 2 Qd R 170; 85 FLR 154; (1986) 70 ALR 575; 23 A Crim R 68

CRIMINAL LAW – CUSTOMS OFFENCE – PRODUCING DOCUMENT CONTAINING UNTRUE STATEMENT – WHETHER *MENS REA* REQUIRED TO BE PROVED: CUSTOMS ACT 1901 (CTH.), S234(1)(d), (e).

Section 234(1) of the *Customs Act* 1901 (Cth) ('Act') provides (insofar as relevant):

"A person shall not—

(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.

Penalty: \$1000."

Per Kneipp J: Having regard to the approaches adopted in the recent judgments of the High Court, *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202 and *He Kaw Teh v R* [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, one would have no hesitation in holding that *mens rea* must be proved on a charge under s234(1)(e) of the Act. However, a departure from the weight of authority to the contrary is not appropriate and accordingly, *mens rea* is not required for a conviction under s234(1)(e) of the Act.

Per Vasta J, Connolly J dissenting: *Mens rea* is not an essential ingredient of an offence under s234(1) of the Act.

Stephens v Robert Reid & Co Ltd [1903] VicLawRp 14; (1902) 28 VLR 82; 23 ALT 242;

Sherras v De Rutzen [1895] 1 QB 918; 11 TLR 369;

Irving v Gallagher [1903] St R Qd 121;

Ex Parte Falstein; Re Maher (1949) 49 SR (NSW) 133; 66 WN (NSW) 52;

Sternberg v R [1953] HCA 15; (1953) 88 CLR 646;

Fraser v Beckett & Sterling (1963) NZLR 480;

Patel v Comptroller of Customs [1965] 3 WLR 1221; [1965] 3 All ER 593; [1965] UKPC 27; [1966] AC 356, followed;

Cameron v Holt [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202; and

He Kaw Teh v R [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, distinguished.

KNEIPP J: [After setting out the facts, the Magistrate's decision, and the provisions of s234(1) of the Act *His Honour continued*]: ... [578] Of course, if s234(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 in 1902 by Hood J in *Stephens v Robert Reid & Co Ltd* [1903] VicLawRp 14; (1902) 28 VLR 82; 23 ALT 242. 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 QB 918; 11 TLR 369, which in substance states the propositions that there is a presumption that *mens rea* is an element of every offence, but that the presumption may be overcome 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 s234(1)(e) was a 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. The *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 s234(1)(e) was taken by Power J in *Irving v Gallagher* [1903] St R Qd 121, His Honour applying an earlier decision of the Full Court, *Irving v Gagliardi* (1895) 6 QLJ 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* (1949) 49 SR (NSW) 133; 66 WN (NSW) 52 the reasoning of Hood J was adopted and applied in relation to offences created by s234(1)(c) (since repealed) and s234(1)(d). In *Sternberg v R* [1953] HCA 15; (1953) 88 CLR 646 the High Court was concerned with s241(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 CJ, with whom the other members agreed, appears to have taken the view (at p653) that the offence created by s241(1)(d) is absolute. The same view was taken in *Davidson v Watson* (1953) 28 ALJ 63; but it seems that the point was not really argued in that case or in *Sternberg*. In *Fraser v Beckett & Sterling* [1963] NZLR 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 & Co Ltd*, and what was said by Dixon CJ, in *Sternberg* were all referred to with obvious approval in the judgment of the Privy Council in *Patel v Comptroller of Customs* [1965] 3 WLR 1221; [1965] 3 All ER 593; [1965] UKPC 27; [1966] AC 356, where it was again held that an offence of making a false entry was absolute.

[579] In the result, there is not any decision of an appellate court on the effect of s234(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 s234(1)(d) is absolute. I cannot see any good ground for distinguishing between the effects of s234(1)(d) and of s234(1)(e).

For the applicant, reliance was placed on two recent decisions of the High Court, *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202 and *He Kaw Teh v R* [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. They have become very well known, and I need not refer to them in detail. It seems fair to say that they would suggest that more weight should be placed on the presumption that *mens rea* is required 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 serious than any of the offences created by s234(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), were 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. [*His Honour then dealt with the question of the sentence*].

VASTA J: [*After setting out the nature of the charges, the provisions of section 234(1) of the Act, the evidence, the disposition, and authorities referred to by Kneipp J, His Honour continued*]: ... [590] In my view *Cameron v Holt* is distinguishable from the present matter. Mason J observes (CLR at p384; ALR at p494):

"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* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470). 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 sub-s(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 effect, 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. 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 R* (*supra*) (1985) 60 ALR 449 the High Court had to consider the question whether an offence under s233B(1)(b) and (c) of the *Customs Act* 1901 (Cth.) 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 CJ, (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.

[591] 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 require 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 s233B(1)(b) the maximum penalty is life imprisonment. Gibbs CJ, discusses the nature of the offence created by s233B(1)(b) and concludes that those offences are indeed truly "criminal". At p453 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 consequences 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 s234 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 sub-sections of s234 of the *Customs Act*. It may be explicable on the basis that the legislature has taken cognisance of the fact that the courts have held that this section imposes strict liability. As Jordan CJ observed in *Ex Parte Falstein; Re Maher, supra*, at p143:

"The *Customs Act* has been amended on innumerable times since the decision in *R v Australasian Films* [1921] HCA 11; (1921) 29 CLR 195; 27 ALR 297 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 s138 of the *Social Services Act* 1947 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 s234(1) of the *Customs Act* 1901. Accordingly, I would hold that the magistrate was correct in finding the appellant guilty of the offence brought under s234(1)(c).

[His Honour then dealt with the question of the sentence].