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SUPREME COURT OF VICTORIA — FULL COURT

R v PARSONS

Young CJ, Starke and King JJ

27 June 1983

[1983] VicRp 109; [1983] 2 VR 499; (1983) 53 ALR 568; (1983) 71 FLR 416

CRIMINAL LAW – IMPORTING HEROIN – WHETHER CROWN HAS TO PROVE *MENS REA* – DESIRABILITY OF FOLLOWING PREVIOUS DECISIONS IN FEDERAL MATTERS DISCUSSED – MEANING OF "IMPORTING": *CUSTOMS ACT*, S233B(1)(b).

Section 233B(1)(b) of the *Customs Act* provides:
"Any person who imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies, shall be guilty of an offence."

P. was convicted of importing a prohibited import namely, heroin, contrary to s233B(1)(b) of the *Customs Act*. The heroin had been found in a pair of shoes – belonging to a friend of P. – packed in P's baggage. P. said that her friend had packed her suitcase, and that she did not know that any heroin had been put into her baggage. The trial was conducted on the basis *mens rea* was an element of the offence which the Crown had to prove; P. was convicted and subsequently sought leave to appeal to the Full Court.

HELD: Appeal allowed.
Per curiam:
1. It is desirable that the Full Court of Victoria follow decisions of the Full Court of other State Supreme Courts exercising Federal jurisdiction.

2. In *R v Gardiner* 42 FLR 71; (1979) 27 ALR 140; 1 A Crim R 265, the Full Court of Queensland held that in order to prove an offence against s233B(1)(b), the Crown is not obliged to prove *mens rea*.

Young CJ and King J, Starke J dissenting:
3. *R v Gardiner* should be followed; therefore it was unnecessary in the present case for the Crown to prove *mens rea*.

Per curiam:
4. "Importing" in this case was complete by the time the Customs officers opened P's suitcases.

5. As there were confusing and misleading aspects about the way in which the trial was conducted, there should be an order for a new trial.

YOUNG CJ: *[After setting out the facts and the Judge's summing up His Honour continued]:* ... **[8]** It will be apparent from what I have so far said that the trial was conducted upon the basis that *mens rea* was an element of the offence which the Crown had to prove. If that view were correct, the Judge's directions to the jury were, I think, so confusing as to justify and require the conviction to be quashed and a new trial to be ordered. In **[9]** particular, the direction by the learned trial Judge concerning constructive knowledge or the existence of the substance would be incorrect.

The answer, however which is made by the Crown is that *mens rea* is not an element of the offence charged and that therefore the direction by the learned Judge was too favourable to the applicant and, consequently, there has been no miscarriage of justice. This proposition when advanced was somewhat surprising in view of the basis upon which the trial had been conducted. However, notwithstanding that fact, the proposition must, I think, be considered. The question whether the Crown is obliged to prove *mens rea* depends upon the proper construction of the section under which the applicant is charged. That section is s233B(1)(b).

[His Honour then set out the relevant part of the section, and continued]: As a starting point it may be observed that the maximum sentence for the offence with which the applicant **[10]** was charged

and of which she was found guilty is life imprisonment. It might, therefore, be expected that very clear words would be found in the statute indicating that the offence was one of strict liability. So far from finding such words, the section seems to me to suggest the contrary.

Section 233B was introduced into the *Customs Act* by Act No. 36 of 1910. Sub-section (1) created certain offences in five lettered paragraphs. In two of them, each of which is concerned with the possession of prohibited imports the offence is created if a person has prohibited imports in his possession without reasonable excuse, proof whereof shall lie upon him. In that respect the paragraphs were not different from those which I have just read. The reversal of the onus of proof by the words in parenthesis and the words "without reasonable excuse" might be thought to suggest that, in the paragraph in which the offence of importing is created, the onus would be on the Crown to prove the offence and the usual presumption that *mens rea* was an element of the offence would apply. Since 1910 the section has been amended upon a number of occasions, but the essential structure has not altered so far as the distinction to which I have drawn attention is concerned. The penalty has been increased from a maximum of two years to a maximum life imprisonment.

It is, however, unnecessary to consider further the proper construction of the section because the precise point has already been determined by the Full Court of Queensland in *R v Gardiner* 42 FLR 71; (1979) 27 ALR 140; 1 A Crim R 265. In that case the accused was charged with importing heroin contrary to s233B(1)(b). He evidently gave evidence at the trial "in which he put forward an explanation as to what **[11]** had led to the importation and he claimed in effect that he did not know and did not suspect that the substance which he was carrying was a narcotic substance or was a substance the possession of which or the importation of which was in contravention of any law of the Commonwealth." (p148). "The trial judge in effect directed the jury that if they were satisfied on the balance of probabilities that the accused honestly and reasonably believed that the state of affairs was sworn by him, then they should acquit, but if they were not so satisfied then they should convict." It was argued that this was a misdirection and that the Crown must prove *mens rea* or alternatively that once ignorance or mistake of fact is raised, the Crown bears the onus of excluding the operation of that defence.

The Full Court of the Supreme Court of Queensland sitting as a Court of Criminal Appeal (Stable SPJ and Hoare J, Demack J dissenting) held that in order to prove an offence against s233B(1)(b) the Crown is not obliged to prove *mens rea* or to exclude the operation of the defence of mistake of fact. The reasons for judgment of Hoare J, in which Stable SPJ concurred, contained the following passages, at pp151-2):

> "... So far as concerns the first charge in the indictment, having regard to the subject matter of the legislation, namely narcotic goods, and the virtual impossibility of proving the state of mind of an importer of narcotic goods in the absence of admissions which could be unlikely to be made by traffickers, while there is much to be said to the contrary, it seems to me that the legislature intended to create the offence by proof of the actual importing or attempting to import. cf. *Sherras v de Rutzen* (1895) 1 QB 918; 11 TLR 369, per Wright J at p921)."

A little later:

> "It is true that paras (a) (c) and (ca) of s233B (1) expressly refer to onus of proof **[12]** whereas there is no reference to onus of proof in paras (b) and (d). Thus it can be argued that the legislature intended that the onus of proof lie on the prosecution. However, having regard to the nature of the prohibited imports, viz. narcotic goods, it is perfectly appropriate that there be absolute prohibition on all dealings with such goods. Thus I would construe the legislation as, in effect, imposing such a prohibition."

A little later again:

> "... I am not persuaded that the trial judge should have summed up in a way which casts the onus on the prosecution of either establishing *mens rea* on the part of the appellant or of excluding the operation of the defence of ignorance or mistake of fact."

A question arises, therefore, whether we should follow this decision or whether we should examine the question for ourselves. If we were to examine it for ourselves I do not know whether I should reach the same conclusion as that reached by the majority of the Queensland court. In Demack J's dissenting opinion however, His Honour said, in connection with another aspect of

the case (at p158):

> "Where a Commonwealth Act is being applied by State courts, it is, in my opinion, wholly undesirable for different interpretations to be applied by the courts of different States."

See also *R v Daher* (1981) 40 ALR 70 at p73 per Street CJ; *Zibillari v R* [1981] WAR 40; (1980) 50 FLR 274; (1980) 31 ALR 693 at p695; (1980) 3 A Crim R 161 per Burt CJ, and at p703 per Brinsden J. In *R v Abbrederis* 51 FLR 99; (1981) 36 ALR 109; (1981) 3 A Crim R 366; [1981] 1 NSWLR 530 Street CJ said at NSWLR p542:

> "Having reached the conclusion that the decision of the Full Court of Victoria in *R v Van Swol* [1975] VicRp 5; [1975] VR 61; (1974) 4 ALR 386; (1974) 27 FLR 353, does not correctly state the construction of par (ca), a question arises as to what course should be followed. It is of significance to recognize that the decision was reached by the ultimate State appellate court and unless and until such time as this decision is departed from by the Full Court of Victoria or the High Court, it will bind absolutely all single judges and inferior courts in Victoria. Despite the **[13]** forebodings of the prophets of doom to the effect that the existing State court system is less than appropriate to furnish the forum for construing Commonwealth legislation, the suggestion being that ... inconsistencies in the administration of the law, I have no difficulty whatever in perceiving that the decline of precedent is fully adequate to cope with these risks. As a matter of precedent this Court is not, of course, bound by the decision of the Full Court of Victoria. But I have not the slightest doubt that, where a Commonwealth statute has been construed by the ultimate appellate court within any State or Territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other States and Territories so long as it is permitted to stand unchanged either by the court of origin or by the High Court. The risk of differing interpretations amongst the States is thus negated and in practical terms, a uniform application of Commonwealth laws throughout Australia is assured."

I entirely agree in what Street CJ says and that it would be highly undesirable for one State Full Court to place a different interpretation upon a Commonwealth statute from that placed upon it by the Full Court of another State. If *R v Gardiner* 42 FLR 71; (1979) 27 ALR 140; 1 A Crim R 265 had been decided by a different division of this Court, we should undoubtedly follow it in the present case: Cf. *R v Bonollo* [1981] VicRp 63; [1981] VicRp 63; [1981] VR 633 at pp634, 643-645 and 669-671; (1980) 2 A Crim R 431. We are not, of course, technically bound to apply the same principles with reference to a decision of the Full Court of another State, but if it be desirable, and I believe it is, that State Courts should give a consistent meaning to a Commonwealth statute, I think we should in such a case treat a decision of the Full Court of another State which is directly in point in the same way as we would treat a decision of our own Court. Accordingly I think that we should follow *R v Gardiner* in this Court and hold that it was unnecessary for the Crown to prove *mens rea*.

[14] The question remains whether if we adopt that course we should dismiss the appeal. Although it is open to the Court to refuse an application for leave to appeal where notwithstanding a misdirection there has been no miscarriage of justice, I find myself unable to be satisfied that, notwithstanding the much more onerous position that the applicant would have faced if the trial had been conducted, as it should have been, in accordance with *R v Gardiner*, there was no miscarriage of justice. The summing up and what occurred after the jury retired was so confusing and the introduction of the notion of constructive knowledge of the existence of the prohibited substance so misleading that I think it would be better if the applicant were retried and the jury's attention directed to the correct issues in the case.

There is one other matter to mention. It was argued that the jury had not been properly instructed as to the meaning of "import" and that it would have been open to them to conclude that the importing of the heroin had not been completed when the applicant's suitcases were opened by Custom officers. Reference was made to *Forbes v Traders' Finance Corporation Ltd* [1971] HCA 60; (1972) 126 CLR 429; [1972] ALR 653; (1971) 45 ALJR 668 and *R v Bull* [1974] HCA 23; (1974) 131 CLR 203; (1974) 3 ALR 171; (1974) 48 ALJR 232. I think that His Honour's direction on the meaning of import was sufficient and that whatever may be the full connotation of the word "imports", the importing in this case was certainly complete by the time the Customs officers opened the applicant's suitcases. For these reasons I would grant the application and order a new trial.

Solicitors for the applicant: Ellinghaus, Weill and Lindner.
Solicitor for the Crown: BJ O'Donovan, Crown Solicitor, for the Commonwealth.