22/80

SUPREME COURT OF QUEENSLAND – COURT OF CRIMINAL APPEAL

R v GARDINER

Stable SPJ, Hoare and Demack JJ

20, 21 August, 8 October 1979

[1981] Qd R 394; (1979) 42 FLR 71; 27 ALR 140; 1 A Crim R 265

CUSTOMS OFFENCES – ELEMENTS OF OFFENCES – CRIMINAL LAW – STATUTORY OFFENCES – ONUS OF PROOF – *MENS REA* – REASONABLE EXCUSE – MISTAKE – IMPORTING – POSSESSION – PRACTICE AND PROCEDURE – TRIAL – JUDGE – QUESTIONING OF ACCUSED BY TRIAL JUDGE – WHETHER JUDGE SHOWED BIAS AGAINST ACCUSED – FORM OF INDICTMENT – STATUTORY INTERPRETATION – "COURT" – "WITHOUT REASONABLE EXCUSE ... TO WHICH THIS SECTION APPLIES": *CONSTITUTION* (CTH) S80; *CUSTOMS ACT* 1901 (CTH) SS233B, 235; *JUDICIARY ACT* 1903 (CTH) S68(1).

G. was charged with importing and possessing a quantity of heroin. 27 packets of heroin were found inside G's clothing. G. gave evidence that he did not know nor suspect that the substance he was carrying was a narcotic substance or that his possession of it was in contravention of the law. G. submitted that the trial judge was in error in directing the jury that in respect of both counts G. bore the persuasive onus in respect of his defence. Also, the judge rejected a submission that as the prosecution offended s80 of the *Constitution* it rendered the prosecution of no proper legal effect. During the hearing, the trial judge questioned G. closely on some of his evidence. It was submitted that the trial judge in effect cross-examined G. at considerable length to the extent of one-fifth of the total recorded cross-examination. Upon appeal—

HELD: Appeal dismissed.
1. Per Stable SPJ and Hoare J (Demack J dissenting). The legislature has made it reasonably clear in s233B(1)(c) and (ca) of the *Customs Act* 1901 that if a person is in fact proved to have been in possession of the prohibited imports referred to, then the onus is cast on him of proving on the balance of probabilities a reasonable excuse for that actual possession. 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 would be unlikely to be made by traffickers, the legislature intended to create the offence by proof of the actual importing or attempting to import. Accordingly, it was not necessary for the trial judge to state that there was an onus cast on the prosecution of either establishing *mens rea* on the part of G. or of excluding the operation of the defence of ignorance or mistake of fact.

2. Per the Court: In respect of the submission that the *Customs Act* requires that there must be a conviction on the substantive offence and then a determination as to the trafficable quantity, such a requirement does not infringe s80 of the *Constitution*. The provisions of s235 of the *Customs Act* provides for particular sentences depending upon the facts as ultimately determined by the court. It is clear that it is the responsibility of the sentencing judge to determine the facts when sentencing provided that his determination does not conflict with the jury's verdict. A trial on indictment does not cease to be a trial by jury because of the provisions of s235 of the *Customs Act*.
***R v King* [1979] VicRp 43; [1979] VR 399; (1978) 24 ALR 227; (1978) 38 FLR 245, followed.**

3. Per the Court: As to whether a trial judge interferes unduly in a criminal trial must necessarily be considered as a matter of degree. However a trial judge is always entitled to question a witness, whether he be a witness for the prosecution or for the defence, not only to clear up ambiguities but also for the purpose of testing his evidence, if the judge has reason to believe that the evidence is or may not be in accordance with the truth. In the present case there was no miscarriage of justice brought about by the intervention of the trial judge in questioning the accused in the course of his evidence.

STABLE SPJ: In my view the appeals should be dismissed. I agree with the reasons about to be published by my brother Hoare.

HOARE J: An indictment was presented against John Robson Gardiner charging him:

> (1) That you did import into Australia prohibited imports to which s233B of the *Customs Act* 1901 as amended applied to wit narcotic goods consisting of a quantity of a narcotic substance, namely

heroin, being not less than the trafficable quantity applicable to that narcotic substance.

(2) That you did without reasonable excuse have in your possession prohibited imports to which s233B of the *Customs Act* 1901 as amended applied to wit narcotic goods consisting of a quantity of a narcotic substance, namely heroin, which said prohibited imports had been imported into Australia in contravention of the said Act the said heroin being not less than the trafficable quantity applicable to that narcotic substance.

Counsel for the accused moved to quash the indictment and demurred. After hearing argument the learned trial judge disallowed the motion to quash the indictment and overruled the demurrer. The accused appeals to this court on the following grounds:-

"(1) That the learned trial judge erred in law in rejecting a motion to quash the indictment and in overruling a demurrer to the indictment in that the indictment being for offences against section 233B of the *Customs Act* 1901 (Cth) and in that procedurally Section 235 of the said Act being procedurally adjunct to section 233B such section 235 properly interpreted offends section 80 of the *Constitution* of the Commonwealth of Australia and thereby renders the prosecution of the said indictment of no proper legal effect.

(2) That the learned trial judge erred in law in directing the jury that in respect of both counts on the indictment the accused bore the persuasive onus in respect of his defence.

(3) That the learned trial judge unduly participated in the questioning of the appellant on the trial to the extent that the trial was unfair and prejudicial to the appellant."

The determination of the first ground of appeal depends upon the correct application of s80 of the *Constitution* of the Commonwealth of Australia which provides:

"The trial on indictment of any offence against any law of the Commonwealth shall be by jury ..."

The argument for the appellant on ground 1 was largely developed from the article by John Willis in 52 ALJ 502. Counsel submits that ss233B and 235 of the *Customs Act* in effect have created two separate offences, one of importing narcotic substances into Australia *simpliciter* and the other, the far more serious offence of importing narcotic substances in excess of the trafficable quantity or not less than the trafficable quantity. He submits that while s235 on its face may purport to be a sentencing section it is also a procedural provision. He submits "the higher sentencing ranges cannot be used except on indictment and in the special case outlined in s235(4) and it is only subject to this question of 'trafficable quantity' and commercial use or purpose". He submits that s235 in effect lays down procedures for both the substantive offence and the determination of the sentencing range. He submits that by reading the two sections together the offence of the importation of a "trafficable quantity" is made a distinct offence.

He submits that what the *Customs Act* requires is that there first be a conviction on the substantive offence created by s233B(1) and then there must be a subsequent determination by the "court" in relation to trafficable quantity. He submits that the requirement for such steps in the trial constitute an infringement of s80 of the *Constitution* and points out that s80 requires the trial to be by jury and not merely part of the trial. Counsel refers to *R v King* [1979] VicRp 43; [1979] VR 399; (1978) 24 ALR 346; (1978) 38 FLR 245 and submits that the Victorian Full Court was wrong in holding that s80 of the *Constitution* was not infringed.

Section 564 of *Queensland Criminal Code* provides, *inter alia*:

"If any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment."

Accordingly, in Queensland (if not elsewhere) by the operation of s68(1) of the *Judiciary Act,* it is necessary that if the provisions of s235(2)(c) of the *Customs Act* are intended to be invoked then it is necessary that this "circumstance of aggravation" be stated in the indictment. This is also the case in Western Australia (see *Davis v R* [1978] WAR 237; (1978) 45 FLR 340; (1978) 20 ALR 227; *Eastham v R* (1978) WAR 86).

The Victorian Full Court in *R v King* [1979] VicRp 43; [1979] VR 399; (1978) 24 ALR 346 at 354; (1978) 38 FLR 245, held that the expression "the court" in s235(3) is the judge or magistrate

who passes sentence on the offender and it is for the sentencing judge to determine the facts, when sentencing, provided that his determination does not conflict with the jury's verdict, and it would seem that the court applied a similar meaning to the expression "the court" in s235(2)(c).

For the purpose of determining this ground of appeal I think one could assume in favour of the appellant that the construction placed on ss235 (2)(c) and 235(3) by the Victorian Full Court is the correct one. I cannot see any valid reason for treating the provisions of s235 of the *Customs Act* as being other than a section which provides for particular sentences depending upon the facts as ultimately determined by the court. It is clear that it is the responsibility of the sentencing judge to determine the facts when sentencing provided that his determination does not conflict with the jury's verdict.

If a maximum sentence under s233B had been provided equivalent to the maximum in s235(2)(c) of the *Customs Act*, then the amount of narcotic substance involved would be a most material fact for the sentencing judge to take into account. In that event the sentence actually imposed by the trial judge would be imposed by his, in effect, finding the facts as he sees them provided of course, that his determination does not conflict with the jury's verdict. I am not persuaded that the position is any different when the legislature has made express provisions in relation to the sentence as contained in s235 of the *Customs Act*. Accordingly I do not consider that a trial on indictment ceases to be a trial by jury because of the provisions of s235 of the *Customs Act*.

I turn now to the second ground of appeal. The learned trial judge in effect directed the jury that with regard to both counts in the indictment the jury would have to be satisfied beyond reasonable doubt of all the elements of the offences, including that the substance which was found inside the accused's clothing, which he admitted was found there, was in fact heroin, a substance from which a narcotic substance could be obtained, that he had it in his possession and with respect to importation that he had brought it from a foreign country. There was no challenge as to these directions. However, the accused had given evidence in which he put forward an explanation as to what 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.

The trial judge in effect directed the jury that if they were satisfied on the balance of probability that the accused honestly and reasonably believed that the state of affairs was as sworn by him, then they should acquit, but if they were not so satisfied then they should convict. Counsel submits that the commission of both of these offences is not complete unless the jury are satisfied beyond reasonable doubt that the accused person had knowledge that what he was carrying was a narcotic substance and in the alternative that once an explanation of ignorance of what the accused was carrying is raised in the trial, then the rule laid down in *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232 requires that the ignorance raised be excluded by the Crown beyond reasonable doubt.

Thus counsel's argument is, on two bases, first that in effect the Crown must prove *mens rea* or alternatively that once ignorance or mistake of fact is raised, as it undoubtedly was raised by the evidence of the accused, then the Crown bears the onus of excluding the operation of that "defence". So far as concerns the second charge in the indictment the points canvassed by counsel for the appellant were fully considered and dealt with by the New South Wales Court of Criminal Appeal in *R v Bush* (1975) 24 FLR 346; (1975) 1 NSWLR 298; 5 ALR 387. *R v Kennedy* (1979) 25 ALR 367, is a recent decision of the New South Wales Court of Criminal Appeal (Case No. 59/1979). Street CJ, with whose reasons O'Brien J agreed, observed (25 ALR at 373-4). Until such time as the High Court decides otherwise or the legislature intervenes, the law on this topic is to be taken to be that stated in *R v Bush.*

I am content to adopt the reasoning of Nagle J delivering the judgment of the New South Wales Court of Criminal Appeal in *R v Bush*. In my opinion the legislature has made it reasonably clear in s233B(1)(c) and (ca) that if a person is in fact proved to have been in possession of the prohibited imports referred to, then the onus is cast on him of proving on the balance of probabilities a reasonable excuse for that actual possession.

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 would 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.

It is true that paras (a), (c) and (ea) of s233B(1) expressly refer to onus of proof whereas there is no reference to onus of proof in paras (b) or (d). Thus it can be argued that the legislature inferentially 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 an absolute prohibition on all dealings with such goods. Thus I would construe the legislation as, in effect, imposing such a prohibition. On the other hand, having regard to the normal concept of physical possession which would (for example) include goods which may be contained in some way in another receptacle, rather different considerations apply.

In these circumstances it is appropriate that there be express provision to meet the situation of what may be regarded as amounting in law to de facto possession, but in circumstances in which the possession may fairly be excused, whether because of ignorance of the presence of the narcotic goods contained in a large receptacle or because of other circumstances which could fairly excuse the de facto possession. It seems to me that it is to meet such situations that the legislature has included the provisions as to onus of proof contained in paras (a), (c) and (ca) of s233B(1), i.e. to allow a defence based on possible innocent, though actual possession. Their inclusion in no way indicates any intention to indicate a different approach as to onus in regard to drugs laid under paras (b) and (d).

I am not persuaded that the trial judge should have summed up in a way which cast 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. As to the third ground of appeal, the learned trial judge certainly questioned the accused closely on some of his evidence. Counsel submits that the learned trial judge in effect cross-examined the accused at considerable length – to the extent of one-fifth of the total recorded cross-examination of the accused and that his intervention "was not just an intervention in order to clear up any possible ambiguities but intervention of an interrogatory kind which, by its implication and its structure, attacked the version of events as given by the accused".

As to whether a trial judge interferes unduly in a criminal trial must necessarily be considered as a matter of degree. However a trial judge is always entitled to question a witness, whether he be a witness for the prosecution or for the defence, not only to clear up ambiguities but also for the purpose of testing his evidence, if the judge has reason to believe that the evidence is or may not be in accordance with the truth. I am well satisfied that there was no miscarriage of justice brought about by the intervention of the trial judge in questioning the accused in the course of his evidence. In the result, in my opinion, the appeal fails.

[DEMACK J delivered a separate judgment]
