37/77

SUPREME COURT OF VICTORIA

GOLDWATER v ROSE

Harris J

22 March 1977

CRIMINAL LAW – CUSTOMS ACT PROSECUTION – STATEMENT IN A CLAIM FOR DRAWBACK DOCUMENT – STATEMENT THAT GOODS WOULD NOT BE RELANDED IN AUSTRALIA – TERMS "RELAND" AND "DRAWBACK" CONSIDERED – AVERMENT CONSIDERED – AVERMENT OF INTENT AND AN AVERMENT OF FACT – NO CASE SUBMISSION UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CUSTOMS ACT* 1901-1975, S234(e); *CUSTOMS REGULATIONS* 1969, R129(2), 134(2).

The information against the defendant was that he had committed an offence under s234(e) of the *Customs Act* 1901-1975 – "making in any declaration on a document produced to an officer, any statement which is untrue in any particular...."
The subject document a "Claim for Drawback" produced to a customs officer declared that certain goods would not be relanded in Australia and therefore the claimant was entitled to drawback on exportation of the goods. The goods – watch movements – were to be exported to Hong Kong. Solicitor for the informant indicated he relied on averments contained in the information one of which was that the defendant knew that the said goods were on his instructions to be relanded in Australia.
At the close of the prosecution case defence counsel submitted that the word "relanding" meant only a "relanding" where the goods had left Australia and were then landed again in Australia before they reached a foreign shore, and he further submitted there had been an exportation of the goods to Hong Kong and a re-importation of those goods from Hong Kong, and consequently no offence had been established by the prosecution.
In reply, solicitor for the informant submitted that the evidence established that the goods had been imported into Australia from Switzerland, duty had been paid on them at 45 per cent of the value of the duty, the goods had been shipped to Hong Kong and drawback claimed on them, and that the said goods, at the request of the firm for which the defendant worked, were shipped back to Australia and duty paid on them at the rate of 71 per cent on the value for duty. The solicitor submitted that "relanding" meant merely landing again in Australia with the defendant's knowledge, and that he was guilty of the offence. The solicitor further submitted that "relanding" was wider in meaning, but included, such terms as "re-importing"; that there was no decided case or definition of the terms, and they should bear their ordinary meaning. The Magistrate dismissed the information. Upon Order Nisi to review—

HELD: Order absolute. Order set aside. Remitted to the Magistrates' Court to be further heard in accordance with law.

1. The word 'relanded' means: "An amount paid back from a charge previously made especially a certain amount of excise or import duty paid back or remitted when the commodities on which it has been paid are exported; originally, the action of drawing or getting back a sum paid as duty."

2. The word 'relanded' does not have a technical or restricted meaning in the *Customs Regulations* and it is to be given the meaning which it has as an ordinary English word. There is no reason for applying any special method of construing the words into legislation because it is customs legislation. The court's task is to ascertain what its meaning is in its context, and the conclusion is that it has its ordinary meaning of landing again or bringing back to land again. As the statement that is required under Regulation 134(2)(b)(ii) is limited to a statement that to the best of the knowledge, information and belief of the declarant, the goods are not intended to be relanded in Australia, the regulation is only designed to exclude from claims for drawback, cases where the declarant either knows that the goods are to be brought back to Australia, by being re-imported from another country, or for some other reason, or be is unable to state affirmatively that they are not to be brought back again.

3. The averment that the defendant knew that the goods were to be relanded in Australia was an averment of fact. It was not an averment of intent; it was an averment of what was the fact as to the state of the defendant's knowledge from which the court could conclude that the statement in the claim for drawback was untrue where it was stated that the goods would not be relanded in Australia. Consequently, the informant was entitled to rely upon both averments and that those averments and the documentary evidence established a *prima facie* case. That material established that the defendant produced the claim for drawback to an officer of Customs, that the claim contained a statement that the goods would not be relanded in Australia and that the defendant knew that the said goods were on his instructions to be relanded in Australia.

4. Accordingly, at the conclusion of the informant's case, the informant had established a *prima facie* case, and that there was a case for the defendant to answer. Consequently, the view which the Magistrate adopted of the meaning of the word in the Regulation was incorrect, and that he ought not to have dismissed the information.

HARRIS J: This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne which was made on 23 June 1976. The Magistrate who constituted the court had before him an information which was laid by Leo Victor Goldwater, Collector of Customs, against Broderick Rose. The information was that the defendant had committed an offence under s234(e) of the *Customs Act* 1901-1975. Section 234(e) of the Act is in these terms:

> "No person shall—
> (e) make in any declaration or document produced to any officer any statement which is untrue in any particular or produce or deliver to any officer any declaration or document containing any such statement."

The penalty is stated as $1,000, which means that that is the maximum penalty.

The wording of the information is in these terms:

> "The information of the said Leo Victor Goldwater, Collector of Customs in the State of Victoria, by William Rock Pocock, an officer of Customs in Melbourne in the said State, a person authorised by the said Leo Victor Goldwater to institute this prosecution in his name, who saith and pursuant to s255 of the said Act 1901-1975 avers that the said defendant between 20th day of March 1971 and 14th day of April 1971 at Melbourne in the said State did contrary to s234(a) of the said Act make in a document, to wit, a Claim for Drawback, produced to an officer a statement, to wit 'that the goods will not be relanded in Australia' which was untrue in a particular and the informant further avers—
> (1) that the said document was produced to an officer of Customs;
> (2) that the defendant knew that the said goods were on his instructions to be relanded in Australia."

The form of the information comes about by virtue of various provisions of the *Customs Act*. It will be necessary to refer to those provisions in so far as they are to be found in s255 at a later stage.

At the hearing before the Magistrate a solicitor of the Commonwealth Crown Solicitor's Office appeared to conduct the prosecution and the defendant was present. He pleaded not guilty and he was represented by counsel. The informant called William Rock Pocock, who gave evidence about investigations that had been made at the premises of Rose & Sons Importers where the defendant was employed, and he produced a number of documents. Those documents included a claim for drawback. The document was dated 5th April, 1971. It read so far as is material:

> "Claim - Rose & Sons Importers; Agent – self; Cheque Payee Details: Name – Rose & Sons, Importers: Address – Sugden Place, Melbourne, Postcode 300: Total amount of drawback claimed – $906.92. See reverse site of claim for import end export address. The goods will be packed for export or in the case of original containers will be delivered for export from the under mentioned premises at 2 p.m. on 23/3/71."
> (No premises are then stated in the following line.) The declaration goes on: "Export Vessel – airfreight; Expected sailing date – 23/1/71."

Then follows the actual declaration: "I, F. Rose, the authorised agent of the claimant make this statement that to the best of my knowledge and belief the goods have been/will be exported and will not be relanded in Australia ..." and that the claimant is entitled to drawback on exportation of the goods and no previous claim has been made. Then it bears a signature and on the back as particulars of goods on which drawback is claimed there is set out the description of certain watch movements. The export particulars are also set out indicating that the goods were to be exported to a company in Hong Kong.

When Mr Pocock's evidence had concluded, the informant's case was closed. The solicitor for the informant indicated that he relied on the evidence of Mr Pocock including the documents tendered in evidence and that he also relied on the averments contained in the information.

What happened then was that defence counsel made a submission to the Magistrate which I understand, although this is not expressly stated, to have been a submission that there was no case to answer. The submission was to the effect that the word "relanding" meant only a relanding where goods had left Australia and are then landed again in Australia before they reach

a foreign shore, and counsel for the defendant further submitted that in this case there had been an exportation of the goods to Hong Kong and a re-importation of those goods from Hong Kong, and consequently he submitted that no offence had been established by the prosecution. I have somewhat rephrased the submission as set out in the affidavit, but it seems to me that I have now stated what was the original tenor of the submission made.

The solicitor for the informant replied, and he submitted that the evidence established that the goods had been imported into Australia in October 1969 from a company in Switzerland, that duty had been paid on them at the rate of 45 per cent on the value for duty, that the goods were shipped to Hong Kong and drawback claimed on them, and that the said goods at the request of the firm for which the defendant worked were shipped back to Australia and duty paid on them at the rate of 71 per cent on the value for duty. The solicitor submitted that "relanding" meant merely a lending again in Australia, that the goods in this case were to be landed again in Australia with the defendant's knowledge, and that he was guilty of the offence. The solicitor further submitted that "relanding" was wider in meaning than, but included, such terms as "re-importing". He said that to the best of his knowledge there were no decided cases and no definitions of the terms "relanding" and "re-importing" and they should bear their ordinary meaning. At the close of that submission the Magistrate then dismissed the information.
The affidavit in support of the order nisi says that he gave his reasons for that order. What is set out as constituting those reasons is this passage:

> "The substance of the reasons was that in this case the goods had been properly exported to Hong Kong and properly imported back into Australia. He said that 'relanded' must mean something different to 'relanding' and that relanded means where for some reason the export did not come to its natural fruition. He further said that relanded did not cover but meant something less than reimportation."

The order nisi to review was granted on four grounds. They are these:

> (1) that on the evidence the Stipendiary Magistrate should have been satisfied that the goods were relanded in Australia with the knowledge of the defendant and that the defendant knew they were to be relanded when he made the Application for Drawback in relation to those goods:
> (2) that the Stipendiary Magistrate misdirected himself as to the meaning of the word 'relanded' in regulation 134(2)b of the *Customs Regulations*;
> (3) that on the evidence the defendant ought to have been convicted of the offence alleged in the information;
> (4) that the Stipendiary Magistrate should have found as a matter of law that the alleged offence was committed."

At the hearing before me Mr Myers of counsel has appeared for the informant to move the Order nisi absolute, and Mr Gaffey has appeared for the defendant to show cause why the order nisi should not be made absolute.

The application which the defendant made on behalf of his employers was for a drawback of customs duty which had been paid. Section 168 of the *Customs Act* provides that the regulations may make provision for and in relation to allowing drawback of duty paid on goods imported into Australia.

There is a definition of drawback in s4(1) of the Act, but the definition is limited to saying that "'Drawback' includes bounty or allowance." The expression is one which has been in use for almost 300 years. The work which is usually known as the *Oxford Dictionary*, that is, the *New English Dictionary*, gives as the second meaning of the word and this is the meaning which is relevant in this context:

> "An amount paid back from a charge previously made especially a certain amount of excise or import duty paid back or remitted when the commodities on which it has been paid are exported; originally, the action of drawing or getting back a sum paid as duty."

The date of the first reference given for this meaning is 1697. A similar description of what a Drawback is contained in *Halsbury*, 4th Edition, Volume 12, paragraph 563 where it is stated that:

> "Drawback is a repayment of, or in respect of, the duties previously paid on imported goods, and is allowed on the exportation or shipment as stores of the goods, or articles incorporating them, or of

> goods produced or manufactured from them in the United Kingdom. Drawback is allowable only on such goods and in such circumstances as the law provides."

So that what the application was for, was for a repayment by the Customs authorities of the amount of duty which had been paid when the watch movements had been imported into Australia.

The regulations do make provision for the payment of drawback. The regulations are to be found in the *Customs Regulations*. Those regulations, as included in the regulations by the amendments contained in Statutory Rule number 152 of 1969, provide by regulation 129 sub-regulation (2):

> "Subject to these Regulations, drawback on imported duty may be paid on the exportation of imported goods to which this regulation applies."

The regulations then make particular provisions for various types of goods. It is not necessary to refer to those matters. Regulation 164 sub-regulation (2) begins by stating:

> "Drawback of import duty is not payable on the exportation of goods:"

Then are set out in paragraphs (a), (b) and (c) the matters in respect of which drawback is not to be payable. Paragraph (b) is in these terms:

> "(i) unless the person making the claim for drawback stated on the claim—
> (i) that the goods on the exportation of which drawback was being claimed were to be exported; and
> (iii) that to the best of the knowledge, information and belief of that person, those goods are not intended to be relanded in Australia."

Previously, the *Customs Act* had itself contained a section which referred to the circumstances under which drawback would be allowed. These were contained in ss170 to 174 of the Act. Those sections were repealed in 1959. Section 173 was in these terms':

> "The person claiming drawback on any goods shall make a declaration upon the debenture that the goods have been exported and have not been relanded and are not intended to be relanded."

Certain other matters were then set out in the section.

The use, in English law, of the expression "relanded" and the requirement in the United Kingdom that there should be a declaration that the goods were not intended to be relanded is shown by another passage in the paragraph in *Halsbury* to which I have already referred. The paragraph includes a statement to the effect that no drawback is "payable unless the person entitled to it or his agent, has made a declaration that the conditions on which it is payable have been fulfilled." The footnote to that statement refers to a section in the *Customs and Excise Act* 1952, but then goes on to say this:

> "The declaration is to be in such form and manner and contain such particulars as the Commissioners may direct. (S267(2)(b); in practice, the declaration is to the effect that the goods have been actually exported and have not been and are not intended to be, relanded in the United Kingdom, and is endorsed on the drawback 'debenture' (the traditional name for the document otherwise similar to a cheque by means of which drawback is paid)."

Perhaps, while I am referring to *Halsbury*, I may make one further reference to this work. In paragraph 556 under the heading "Drawback of import duties", it is stated that:

> "The Treasury has power to provide by order that drawback on exportation is to be allowed as respects import duty paid on the importation of goods of any description specified in the order. Drawback may be so allowed either for a period specified in the order or without a limit or period. In considering whether drawback should be allowed or should be wholly or partly discontinued, the Secretary of State must act on the principle that it ought not to be allowed unless it will promote the export trade of the United Kingdom and is in the national interest."

Then the paragraph goes on to refer to other matters to which the Secretary of State has to have regard. I read that because the reference to the promotion of the export trade does, I think, give a clue to the reason why persons who have paid import duty are allowed, by the legislation, to recover that duty when the goods are exported again.

It would seem that the object is, in some way, to promote the export trade by encouraging persons to or, at all events, by not discouraging persons from, bringing goods into this country when the intention is that the goods should be sent on elsewhere, or are to be used in this country as a raw material for the manufacture of goods which are to be exported.

The controversy during the hearing of this order to review has centred around what is the proper meaning of the word "reland", as used in the regulations. Counsel have not referred to any authorities in which the word has been construed in Customs legislation, and the submission has been put to me that no such authorities could be discovered, notwithstanding the researches of counsel and those instructing them.

On behalf of the informant, Mr Myers has submitted that the word is an ordinary English word and that its ordinary meaning is to land again or to bring back to land again. If it is to be given to that meaning, then goods are relanded within the meaning of the *Customs Regulations* if, having been sent out of Australia or, at all events having left the shore or the land of Australia, they are again brought back to Australia, wherever they have been after they had left the Australian shore or the Australian land.

Consequently, it would cover the case where goods had been placed on board ship in an Australian port and then, for some reason, had been taken off the ship before the ship left port and had been put on shore once more. It would also cover the case where the ship left the Australian port with the goods and then, for some reason such as the perils of the sea, the ship returned to an Australian port and the goods were put back on shore again. It would also cover a case such as this one was supposed to be in the court below, namely, where the goods were actually sent to a foreign country and landed in that country, but then, were subsequently transported from that country back to Australia again, and once more, put onto Australian land. If the word is to be given its ordinary English meaning, then it would follow that it would cover all those examples, and there may be other examples as well.

Mr Gaffey has put it that the word should receive a restricted meaning. In substance, what he has put is that it should be restricted to the case where the goods are placed on board ship or, I suppose, on board an aircraft, and then before the ship or the aircraft leaves the country, they are then put back on shore again. But he would also have it that it would cover the case where, although the ship or aircraft left Australia, it put back into an Australian port or airport again without having reached any foreign destination. He has explored the history of the use of the word and brought to light some interesting material as the result of his researches. It was indeed as a result of his researches that the origin of the word "drawback" was unearthed. What Mr Gaffey's researches showed was that the word "relanded" was used in English mercantile law in connection with the situation where goods had been placed on board a ship and then were taken off that ship again. Thus in the case of *Tindall and Others v Taylor* (1854) 4 E & B 219 at p227, Lord Campbell CJ said this:

> "We entirely agree to the law as laid down by Lord Tenterden in his Treatise (8th ed.) p595 and in *Thompson v Trail* (2 Car. at p334) when applied to a general ship, that 'a merchant, who has laden goods cannot insist on having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him.

The passage then goes on to deal with the problem that was before the court. The problem was one that related to the obligation of the consignor under the contract of affreightment, and I am not concerned with that. But what was said to be significant was the use of the expression "relanded" in the passage in the judgment. The passage is repeated in a later edition of the work which was originally Lord Tenterden's work. "Abbott on Shipping", the 14th Edition, published in 1901 at page 865. Reference is also made to it in "MacLachlan on Merchant Shipping", 7th Edition, 1932, p360 where it is stated:

> "If once the cargo be on board, the shipper cannot have the goods relanded without paying the freight for them, and giving up the bills of lading already signed, or at least tendering an indemnity against all the consequences of not performing the contract therein contained, unless the cargo was loaded under a deception practised by the ship owner, or conditions not stipulated before are afterwards insisted on by him."

What Mr Gaffey put was that, because it was shown that the word had a usage in a mercantile law contract and, particularly, in mercantile law relating to overseas trade, the conclusion should be that the word has a meaning in the customs field which was similarly restricted.

The cases referred to and the authorities referred to do show that the word was used in mercantile law to describe the particular state of facts which occurred when goods were placed on board ship and then taken off again (apparently before the voyage had even commenced). It is obviously enough the appropriate word to use for such a situation. It is also, as it seems to me obvious enough that, in such a situation (i.e. where the goods had in fact been relanded in that sense, or where it was intended that they should be relanded), the revenue authorities would not be prepared to allow a drawback of import duty which had been paid because under those circumstances import duty would become payable again. I was disposed to think that there was some substance in that point of view. If the matter could have been taken further to show that this use of the word was really restricted to describing that kind of situation and that some different expressions were used to describe, for instance, the situation where a ship left an English or Australian port and then returned because of, say, the perils of the sea before it had reached its destination, or if some other expressions were used to cover the case where the goods had been exported and arrived in a foreign country and then were reimported into England, I would have been disposed to think that the word "relanded" had been used to cover the limited kind of situation which is referred to in the authorities that I have referred to.

But on reflection and on hearing Mr Myers further in reply, I have come to the conclusion that there is no reason why the word should be restricted in that way. The mere fact, that the word was used in those authorities to describe that particular type of situation does not lead me to the conclusion that when the word is used in the *Customs Regulations* it is to be restricted to that kind of case. Indeed, that would be a very restricted kind of meaning because it would seem really to exclude the case of the ship that left an Australian port and got on to the high seas and then returned to an Australian port by reason of the perils of the sea, though, of course, where the ship returned for a reason such as that, it would be unlikely that, before it left with the goods the exporter could have intended that the goods be relanded. At all events, the cases I was referred to do not deal with that situation.

Having considered the Regulations and listened carefully to the arguments of counsel, I have come to the conclusion that the word does not have a technical or restricted meaning in the Regulations and that it is to be given the meaning which it has as an ordinary English word. I do not see any reason for applying any special method of construing the words into legislation because it is customs legislation. I think the court's task is to ascertain what its meaning is in its context, and the conclusion I have come to is that it has what I regard as its ordinary meaning of landing again or bringing back to land again. As the statement that is required under Regulation 134(2)(b)(ii) is limited to a statement that to the best of the knowledge, information and belief of the declarant, the goods are not intended to be relanded in Australia, the regulation is only designed to exclude from claims for drawback, cases where the declarant either knows that the goods are to be brought back to Australia, by being re-imported from another country, or for some other reason, or be is unable to state affirmatively that they are not to be brought back again.

Consequently I have come to the conclusion that the view which the Magistrate adopted of the meaning of the word in the Regulation was incorrect, and that he ought not to have dismissed the information.

I mentioned earlier that the proceedings below were conducted on the basis that it was supposed or assumed that the evidence before the court disclosed that these goods had been exported to Hong Kong and then had been re-imported from Hong Kong to Australia. Mr Myers said that the material does not, in fact, enable that conclusion of fact to be drawn, and Mr Gaffey did not suggest that it did, and as I understand the situation the documents which deal with the goods do not enable that conclusion to be arrived at. Thus, the proceedings below went off on a misconception of the situation, so that, in fact the Magistrate did not have a proper evidentiary foundation upon which he could apply the restricted construction of Regulation 134(2)(b)(ii)

In my opinion, the situation as it existed at the close of the informant's case was just as the solicitor for the informant put it, namely, that there was the evidence of Mr Pocock and the

evidence constituted by the averments. It is not necessary to refer to Mr Pocock's evidence, but it is necessary to refer to the Averments. No problem arises with regard to the first averment, but the second averment is that the defendant knew that the goods were on his instructions to be relanded in Australia. If the informant is entitled to rely upon that as an averment of fact, then it is a fact from which the court could properly conclude that the statement in the claim that the goods would not be relanded in Australia was untrue.

Section 255 of the *Customs Act* which authorises averments to be made in Customs informations refers to a number of matters. I is only necessary to refer to sub-(4)(a). It provides:

> "The foregoing provisions of this section shall not apply to—
> (a) an averment of the intent of the defendant;"

Mr Gaffey submitted to me that the second averment was an averment of the intent of the defendant. What he put was that really it was an averment that the defendant intended that the goods would be relanded in Australia. I do not agree with that submission. In my opinion, the averment that the defendant knew that the goods were to be relanded in Australia is an averment of fact. It is not an averment of intent, it is an averment of what was the fact as to the state of the defendant's knowledge.

It adds the further fact that the defendant had given instructions for the relanding of the goods in Australia. The matter might have been stated with greater particularity, but that is not the point. In my opinion, it is an averment of fact from which the court could conclude that the statement in the claim for drawback was untrue where it was stated that the goods would not be relanded in Australia. Consequently I am of the view that the informant was entitled to rely upon both averments and that those averments and the documentary evidence established a *prima facie* case. That material established that the defendant produced the claim for drawback to an officer of Customs, that the claim contained a statement that the goods would not be relanded in Australia and that the defendant knew that the said goods were on his instructions to be relanded in Australia.

In my opinion, that was sufficient to establish a *prima facie* case of a breach of s234(e). In my opinion, it was not essential for the informant to establish that the goods had in fact been relanded. It may be noted that the form of the statement in the claim for drawback is not in the same terms as Regulation 134(2)(b)(ii), where what is required is a statement that to the best of the knowledge, information and belief of the claimant, the goods are not intended to be relanded in Australia, but, in my opinion, that does not affect the conclusion I have expressed. Perhaps I should just add that some attempt was made to put it that, because the word "relanded" was used in the averment, it became an averment of law and not of fact and that that was not permissible. I do not regard the fact that the very word of the regulations is used in the averment as necessarily leading to the conclusion that the averment must be one of law. At all events, in this case I do not regard the use of that word as leading to the result that the averment is an averment of law. Consequently, I find that at the conclusion of the informant's case, the informant had established a *prima facie* case, and that there was a case for the defendant to answer.

Because I regard the proceedings as having been disposed of below in that way, it follows that it would be wrong to deprive the defendant of the opportunity of giving evidence or of putting other material before the Magistrate, before a conviction was recorded. In other words, the matter cannot be dealt with now by substituting for the dismissal of the information an order that the defendant be convicted. The matter will have to be sent back to be further heard by the Magistrates' Court at Melbourne.

The result is that I will make an order nisi absolute on grounds (1) and (2), but not on grounds (3) and (4). For the reasons which I have given, the order of the court is:

1. Order nisi made absolute on grounds (1) and (2).
2. Order below set aside, including the order for costs.
3. Order that the information be remitted to the Magistrates' Court at Melbourne to be further heard in accordance with law.
4. Order that the defendant pay the informant the sum of $200 costs. I grant the defendant an indemnity certificate under the provisions of the *Appeal Costs Fund Act.*