

21/80

SUPREME COURT OF SOUTH AUSTRALIA

HOLT v CAMERON

King CJ, Mitchell & Legoe JJ

19 September 1979

(1979) 22 SASR 321; 38 FLR 226; 27 ALR 311; 1 A Crim R 402

CRIMINAL LAW – MENS REA IN STATUTORY OFFENCES – DEFENCE OF MISTAKE OF FACT – BURDEN OF PROOF – MENTAL ELEMENT WHERE "FALSE" AND "MISLEADING" USED IN STATUTE: SOCIAL SERVICES ACT 1947 (CTH), S138(1)(d).

Sub-section (1) of s138 of the *Social Services Act 1947* (Cth) is as follows—

"138. (1) A person shall not

(a) make, whether orally or in writing, a false or misleading statement—

(i) in connexion with, or in support of, a claim, whether for himself or for any other person.

(ii) to deceive an officer doing duty in relation to this Act; or

(iii) to affect the rate of a pension, allowance, endowment or benefit payable under this Act;

(b) obtain payment of a pension, allowance, endowment or benefit under this Act, or of an instalment of such a pension, allowance, endowment or benefit, which is not payable;

(c) obtain payment of a pension, allowance, endowment or benefit under this Act or of an instalment of such a pension, allowance, endowment or benefit by means of a false or misleading statement or by means of impersonation or a fraudulent device; or

(d) make or present to an officer a statement or document which is false in any particular.

Penalty: Five hundred dollars or imprisonment for six months."

The defendant was charged that he presented to an officer a document which was false in a particular contrary to s138(1)(d) of the *Social Services Act 1947*. The document in each case was an application for continuation of unemployment benefit. In each application the appellant answered "No" to a question: "Have any of the events listed in Note A on the back of this form occurred in the period mentioned above?" One of the events in Note A is: "If he ceased to live with his wife or de facto wife or becomes widowed or divorced". The appellant had in fact ceased to live with his de facto wife at the relevant time. The special magistrate took the view that *mens rea* was not an element of the offence created by s138(1)(d), but that the defence of honest and reasonable belief in the truth of the answer was available. He found that the appellant did not have any belief in the truth of his answer and that in fact he had not read the form properly or applied his mind to the subject matter of the question which he answered incorrectly. In those circumstances he found that the defence of honest and reasonable belief could not operate to exonerate the appellant and convicted the defendant. The special magistrate, however, stated that he was "by no means satisfied that the defendant in answering "No" to Question 8 in each instance, had any dishonest intent". This finding raised squarely for decision the question whether *mens rea* was an element of the offences charged or whether the protection of those who might innocently infringe was left to the common law defence of honest and reasonable belief in facts which, if true, would render the conduct innocent.

HELD: Allowing the appeal against conviction on the "mens rea ground" only.

(1) Per King CJ (Mitchell J agreeing): There is a presumption that *mens rea* is an essential ingredient of every offence. Per Legoe J: The fundamental rule is that a person cannot be convicted unless he has a guilty mind.

(2) Per King CJ (Mitchell J agreeing): The above presumption can be displaced by statute; the elements of a statutory offence must be determined by reference to the statute which creates it.

Statement in *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at p162; (1969) 1 All ER 347 at p361; 53 Cr App R 221; [1969] 2 WLR 470; per Lord Diplock, applied.

(3) Per curiam: On the proper interpretation of s138(1)(d), in its context, *mens rea* is an element of the offence in question, and even if the defendant has acted unreasonably it must be shown that he acted "dishonestly" (per King CJ and Mitchell J) or with "guilty mind" (per Legoe J).

R v Erson [1914] VicLawRp 20; (1914) VLR 144; 20 ALR 46; 35 ALT 117, considered.

Per King CJ (Mitchell J agreeing; Legoe J to similar effect):

When the words "false" and "misleading" are found together in a penal statute, they carry a distinct flavour of dishonesty.

Per King CJ (Mitchell J agreeing): The *mens rea*, which is an element of the offence is knowledge of the falsity of the statement or at least reckless indifference as to its truth or falsehood.

(4) *Per curiam*: On the facts, the special magistrate was justified in finding that the appellant had no belief in the truth of his answer.

[Upon appeal see: *Cameron v Holt* [1980] HCA 3; (1980) 143 CLR 108; 28 ALR 155; (1980) ALJR 54 at p166; MC39/1980. Appeal dismissed.]

KING CJ: The crime with which this appeal is concerned is a creature of the statute. Its elements must be determined by reference to the statute which creates it. The manner in which the mental element is to be ascertained from the statute was expounded by Wright J in *Sherras v de Rutzen* (1895) 1 QB 918 in a famous *dictum* at 921; (1895-9) All ER Rep 1167 at 1169; 11 TLR 369:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

It is beyond question that if *mens rea* is not an element of the offence, the common law defence of honest and reasonable mistake is nevertheless available: *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. There could be no question of strict liability. The section does not, of course, indicate expressly whether *mens rea* is an element in the offence or whether, on the other hand, the protection of those who infringe its provisions innocently is left to the common law defence of mistake. The intention of the legislature must be gathered by implication from the words and subject matter of the statute. The first step in attempting to ascertain what Parliament must have intended, is to determine the difference in the legal effect of the competing views in relation to the offence under consideration.

Some emphasis was placed during argument on the question of onus of proof. I think that the view of the law which has found acceptance in this court is that even where *mens rea* is not an element but the defence of mistake applies, the ultimate persuasive burden of negating honest and reasonable mistake, assuming that there is evidence which fairly raises the issue, is on the prosecution. Whether *mens rea* is an element to be proved by the prosecution or mistake is a defence to be excluded by the prosecution, the persuasive onus rests with the prosecution. True there is an evidential burden on the defendant to adduce evidence or at least point to evidence, which fairly raises the issue of mistake. Generally this will have to come from the defendant who alone can speak of his belief.

It seems to me that in practical terms, putting aside refinements and distinctions, the difference between the effect of the competing views as to the section is that if *mens rea* is an element of the offence, there must be dishonesty; if it is not, and the defence of honest and reasonable mistake of fact must be relied on, unreasonableness is sufficient. The real question to be considered is whether an intention can be gathered from the statute that dishonesty is not necessary and that unreasonableness is sufficient for guilt to attach.

I return to the section itself. The word "false" is capable of meaning merely "incorrect" or "inaccurate" and the word "misleading" is capable of meaning "innocently misleading". But when the two words are found together in a penal statute, as they are in s138(1)(a), they carry a distinct flavour of dishonesty. The three *placita* of sub-s(1)(a) all carry at least a hint of deliberate purpose and the second expressly refers to deception. The offence of which the appellant was convicted is found in the same section as other offences which likewise possess the flavour of dishonesty. In the case of the offence in para. (c) the phrase "false or misleading statement" is found in association with "impersonation or a fraudulent device", words clearly connoting fraud.

I think that the *mens rea* which is an element of the offence is knowledge of the falsity of the statement or at least reckless indifference as to its truth or falsehood.

LEGOE J: In my opinion s138 in particular s138(d), requires proof of the defendant's guilty

mind. I say this by the simple application of the ordinary meaning of the words of the sub-section read as a whole. I do not consider that the overall scheme of the Act nor any classification of this legislation is an act for the protection of the public, and in particular the public purse, makes any difference to the requirements of guilty mind. Clearly it is legislation of this type. Just as clearly it is a statutory offence which incorporates all the ingredients of the general criminal law.

The forms used for the purposes of application under this Act are a further indication that the prosecution must prove the guilty mind of the defendant charged with making a document which is false in any particular. Note E on the back of the document states under the heading "False or Misleading Information" the following:

"Social Services Act provides for penalties for false or misleading information"

In my opinion this form and the structure of the form clearly indicate that the persons who are required to use such forms in making their applications must be shown to have the relevant guilty mind when the answers in the form have been inserted in such a way so as to render that person liable for making a document which is false in any particular.
