

51/93

SUPREME COURT OF VICTORIA

KENNEDY v SYKES

Nathan J

14 December 1992 — (1992) 24 ATR 546; 93 ATC 4,012

CRIMINAL LAW - INCOME TAX - DECLARATIONS SIGNED BY EMPLOYER - FALSE IDENTITIES IN DECLARATIONS - ATTEMPT TO MISLEAD TAXATION COMMISSIONER - AIDER AND ABETTOR - REQUIREMENT FOR - "KNOWINGLY CONCERNED IN" - MEANING OF - WHETHER POSITIVE ACT OF ENCOURAGEMENT REQUIRED - WHETHER CHARGES PROVED: TAXATION ADMINISTRATION ACT S8U; CRIMES ACT 1914 (CTH), S5.

S., an employer, signed two Declarations for the Taxation Commissioner which contained the names of employees under false identities. S. was charged with being knowingly concerned in the falsification of the identities of the employees with the intention of misleading the Commissioner. At the hearing, the magistrate dismissed the charges holding that he could not be satisfied beyond reasonable doubt that S. had suggested or encouraged the employees to work under false names. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for the fixing of penalty.

1. The prosecution was required to prove that as an aider and abettor within s5 of the *Crimes Act 1914 (Cth)* S. was directly or indirectly knowingly concerned in the commission of an offence. That is, that S. was aware that his act would play a part in the misleading of the Commissioner. "Knowingly concerned in" goes beyond mere knowledge of an event; it requires some participation in the event. Whilst it was necessary for the prosecution to prove that S. was aware of the misleading or deceptive character of the enterprise, it did not have to prove some positive act of encouragement or suggestion on the part of S.

2. In the circumstances, S. was much more than passingly concerned in the enterprise to mislead the Commissioner. His signature applied to the declaration forms was an essential and not an insignificant ingredient in the enterprises. Accordingly, the magistrate should have found the charges proved.

NATHAN J: [1] *The Taxation Administration Act 1953* of the Commonwealth (the Tax Act) makes it an offence to falsify or conceal the identity of persons with the intention of deceiving or misleading the Taxation Commissioner. Section 8U as appropriately edited reads:

"A person who—

(a) falsifies or conceals the identity of ... a person with the intention:

(c) (of) deceiving or misleading the Commissioner ... is guilty of an offence."

The Commonwealth *Crimes Act 1914* (the *Crimes Act*) extends to those persons who aid or abet the commission of an offence under the Tax Act. By its s5, again as appropriately edited, it reads:

"(1) Any person who aids, abets, counsels, or procures or by any act or omission is in any way directly or indirectly knowingly concerned in ... the commission of any offence against any law of the Commonwealth ... shall be deemed to have committed that offence."

Pursuant to these provisions the appellant (Kennedy) laid two informations against the respondent (Sykes) which were heard by the magistrate sitting at Oakleigh and dismissed. The informations, which I can consider together, charged Sykes with being knowingly concerned in falsifying the identity of Trevor Walles (Walles) by employing him under the names of Trevor White and Sandra White through a firm (Len Sykes Cleaning Services) which in turn was operated by Sykes Nominees Pty Ltd with the intention of deceiving the Commissioner. The second information in the same terms related to the [2] employment of a Paul Dalais under the names of Marjorie Renee, Andre Renee, Phillippe Le-Frant and Rose Le-Frant. This is an appeal from the magistrate's order dismissing the informations, the questions of law raised are as follows:

(a) In the circumstances was it essential to the proof of the charges of being knowingly concerned in the falsification of the identity of the employees that Sykes suggested or encouraged the said employees to work under false names? The answer is No.

(b) In all the circumstances was it open to find proved the element of the charges concerning the falsification of identity, that Sykes permitted the employees to work under names which were to his knowledge falsified by those employees with the intent by them to deceive the Commissioner? The answer is Yes.

(c) Whether any reasonable magistrate could have concluded on all the evidence before him that Sykes had not committed the offence as charged having concluded that both Walles and Dalais had been employed to his (Sykes) knowledge under false names. The answer in the circumstances is No.

I can now turn to the evidence. Both Walles and Dalais swore they had falsified their identities whilst employed by Sykes for the purposes of deceiving the [3] Commissioner of Taxation. Sykes conceded that he was at all times the owner and operator of the business entities which employed Dalais and Walles. Walles also swore that he had a conversation with Sykes who told him that if he worked under his correct name he would be required to pay tax but if he worked under a different name that could be avoided. He then did so. Dalais conceded that he had been charged under the Tax Act and required to pay a penalty. Dalais gave similar evidence but added he had completed an application for employment form at the behest of one of Sykes' managers but subsequently Sykes himself had asked him for two further false names in order to split his income and avoid tax. The defendant himself gave evidence, and also called his manager who swore that he had received a direction from Sykes not to employ persons under false names and Sykes denied having the conversation referred to by Walles. Sykes swore that he was not aware that this manager had requested Dalais to supply further false names. However Sykes did concede that a form prepared by and for the Taxation Office and headed "Income Tax Instalment Declaration" (the Declarations) which were made out in all the names of the false identities were signed by him in the portion of the form reserved "For employers use only - signature of employer". He admitted the signature L. Sykes was his.

The magistrate delivered his reserved decision on 29 May 1992. He said there were two crucial questions to be answered. Firstly, did Sykes have knowledge of the falsification and secondly, was he concerned therewith? The magistrate said he needed to examine all the evidence and noted that Sykes had said that at no time did he say to [4] either Walles or Dalais that they must use false names. The magistrate observed that Sykes's manager conceded that both Walles and Dalais used false names but Sykes had not suggested this course nor encouraged it. The magistrate said he was satisfied that the evidence of Dalais implicated the manager. The magistrate commented that Dalais may have been the person responsible for alerting the Taxation Commissioner about the alleged offences. On the question of knowledge the magistrate said there was a significant amount of evidence which led him to conclude without doubt, that Sykes knew that both Walles and Dalais had been employed by him under false names. As to the matter of being "concerned" the magistrate said he had some doubt about the evidence of both Walles and Dalais but that Sykes had been less than honest in his evidence and his manager had told several untruths.

The magistrate said the problem for the court was that it could not be satisfied beyond reasonable doubt that Sykes had suggested or encouraged the employees to work under a false name and he referred to *R v Tannous* 88 FLR 97; (1987) 10 NSWLR 303; (1987) 32 A Crim R 301; (1988) 51 ALR 403, a New South Wales Court of Criminal Appeal decision, which he said held that mere knowledge or inaction in the face of the falsity was not enough to be "concerned in" it. The magistrate then went on to find that he was not satisfied the defendant had encouraged Walles or Dalais to use false names and, accordingly, dismissed the charges. In my view and with respect to the magistrate he applied a wrong and too limited a test and adverted to inappropriate and non-applicable authority. Reprise of the words of the *Crimes Act* is essential. An aider or abettor [5] is any person who "by any act or omission is in any way directly or indirectly knowingly concerned in ... the commission of the offence". In my view the expression taken as a whole and also as appropriately parsed is embracive in scope and nature. The concept of the verb "to concern" is, in the section widened and qualified by the adverbs which precede it. The magistrate was wrong to find that some positive act of encouragement or suggestion was required in order to be captured by this section.

I will deal first with the syntax and then turn to the proper authorities which support this view. The phrase in the *Crimes Act* relating to "any act or omission" is followed without punctuation by the descriptive words to which I have referred. The various adverbs "directly, indirectly and knowingly" are conjoint and cumulative and thus combine together to create the concept of "concern" in the broadest of ambits. The concern can be expressed either by act or omission. It is a concern, which adverbially, may be displayed directly or indirectly. It is a concern which is to be knowingly had. The adjectival phrase relating to the concern "in any way" also acts to broaden the scope of the phrase. It is not as if the concept of concern is restricted by its immediately preceding adverb "knowingly". The concern is one which is "in any way directly or indirectly known about". I observe it would be difficult to conceive of the English language being used in a more encompassing way in order to amplify the operation of the past participle "concerned".

I return to the authorities. In my view the magistrate misdirected himself in thinking that *Tannous's* [6] case 88 FLR 97; (1987) 10 NSWLR 303; (1987) 32 A Crim R 301; (1988) 51 ALR 403 was directly applicable. Lee J who gave the judgment of the court was concerned with the *Customs Act* 1901, of the Commonwealth, which provided that any person who aids etc. or is in any way knowingly concerned in the importation of prohibited imports shall be guilty of an offence. The magistrate here, erred in considering that the phrase "knowingly concerned in" as recited in this Act was applicable to the facts before him. The phrase in the *Crimes Act* which widens the ambit of the section "in any way directly or indirectly" is absent from the *Customs Act* s233. Of this section Lee J said:

"... s233B(1)(d) (of the *Customs Act*) is thus not strictly an aiding and abetting section such as s5 of the *Crimes Act* which was considered in *Walsh v Sainsbury* [1925] HCA 28; (1925) 36 CLR 464; 31 ALR 343; *R v Goldie Ex parte Picklum* [1937] HCA 65; (1937) 59 CLR 254; [1938] ALR 25 and *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198 at p306; [1949] ALR 992".

Lee J went on to observe at 307:

"If one were dealing with a true aiding and abetting section such as the *Crimes Act* (Commonwealth) s5 one would need to find proof of the principal offence before there would be any consideration of the position of the aider and abettor."

Lee J went on to consider *Ashbury v Reid* (1961) WAR 49, a decision of the Full Court of the Supreme Court of Western Australia which dealt with the local *Forestry Act* but which was cast in identical terms to the *Crimes Act*. Of that case he had this to say:

"Ashby involved a true aiding and abetting section in much the same terms as the *Crimes Act*, s5. Virtue J delivering the judgment of court gave the words the meaning taken from the *Oxford Dictionary* namely 'to have to do with, to have part in', 'to be implicated or involved in', and 'to have to do with something especially something culpable'. The question which a court should ask itself in determining whether an act or omission on the part of the individual comes within the terms (of the local W.A. Act) is whether on the facts it can [7] reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connection between him and the offence."

Lee J said:

"In my view the above quotation correctly establishes the meaning of the expression 'knowingly concerned in' and is wholly in accordance with the common law that a person cannot become criminally involved in an act made unlawful by mere knowledge or inaction on his part. Some act or conduct on his part is necessary."

He then said:

"I agree with counsel for the appellant when he submits that a mere state of mind which merely amounted to the appellant being interested in or concerned 'about' the venture, for whatever reason, would not be sufficient to constitute the concern of which the section speaks. The 'concern' to which the section speaks is not a concern personal to the appellant in the sense of being in his mind but is a concern which can be demonstrated objectively by reference to his association, whatever it may be, with the importation. It must be shown that he is 'concerned in' not just 'concerned about' the importation."

Insofar as Lee J dealt with the truncated phrase "knowingly concerned", and adopted *Ashbury v Reid* in my view he was correct. The degree of implication to be "concerned in" goes beyond the mere knowledge of an event and requires some participation in the event. However, as I have already observed the degree of implication required under the *Crimes Act* is one which can be direct or indirect and expressed "in any way". *Tannous's case* is simply not authority for the propositions propounded by the magistrate in this case. More apposite is *Ashbury v Reid* to which I have already referred and *Yorke v Lucas* 158 CLR 667; (1983) 49 ALR 672. The latter case, as with *Ashbury v Reid* concerned a section in identical terms as the *Crimes Act*. As to the necessary *mens [8] rea* of an aider and abettor, the Federal Court rehearsed with approval a New South Wales Court of Criminal Appeal decision *R v Glennon* (1970) 91 WN (NSW) 609; [1970] 2 NSW 421 and *Johnson v Youden* (1950) 1 KB 544; (1950) 1 All ER 301 which was upheld in *Churchill v Walton* (1967) 2 AC 224; [1967] 1 All ER 497. The Federal Court accepted the following proposition propounded by Lord Goddard CJ in *Johnson's case*:

"Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that the offence has been committed because he may not know that the facts constitute an offence and ignorance of the law is not an offence."

The Federal Court proceeded to despatch the issue of the wilful blindness of the offender viz. p677:

"Shutting one's eyes to the obvious, or deliberately failing to obtain knowledge by making reasonable enquiry in circumstances where the defendant suspects the existence of a fact which may be revealed upon enquiry, may render a person liable as an aider and abettor – passive acquiescence may suffice where the aider or abettor has the capacity to control the principal offender and is present when the offence is committed, but fails to exercise that right although aware that the conduct of the principal offender must have involved a breach of law."

This court rehearsed with approval *Glennon's case* already referred to, and *Du Cros v Lambourne* (1907) 1 KB 40. In my view the term "concerned in" is one of general import, recourse to individual cases should be cautious. In *Phim Kim Phreu Lan* (1990) 46 A Crim R 402 the New South Wales Court of Criminal Appeal dealt with an offender who had imported heroin into this country in his intestines. Subsequently he was found to have an enema with him. In dealing with the trial judge's charge about being [9] "concerned in" the importation of heroin contrary to the *Customs Act* Gleeson CJ speaking for the court said this:

"The part played by the person accused of being knowingly concerned must be played before or during the importation, including before or during all that is involved in such importation. He must be implicated or involved in the sense of having something to do with the importation and the importation includes all that is incidental or proximate to the act of importation ... merely to stand by with knowledge of an importation and do nothing is not to be concerned in it but to wait or stand by with knowledge with a view to doing something to facilitate the importation or to do something connected with the importation would amount to be knowingly concerned in the importation."

Christos Mifadopoulos (1988) 36 A Crim R 137 was a similar case concerning the importation of cannabis. The New South Wales Full Court ruled that a jury would be misdirected if a mere interest or anxiety on the part of the accused could be said to have amounted to being knowingly concerned with a wrongful importation. The expression "knowingly concerned" required proof that the accused person had engaged in an act or admitted to an act in such a way which implicated him or involved him in the offence, that is, which shows a practical connection between him and the offence. Mere knowledge would not have been sufficient. As I have already observed the *Customs Act* does not contain the words of extension "directly or indirectly". Accordingly the application of these cases to the *Crimes Act* must be taken with caution. See also *Haddad* (1988) 33 A Crim R 400.

Nevertheless insofar as the notion of being "concerned in" something required a degree of commitment to an enterprise or more particularly involvement or implication with an enterprise, then those authorities are [10] of some assistance. In this case, Sykes was much more than passingly "concerned in" the enterprise to mislead the Commissioner. His signature applied to the Declaration forms was an essential and not an insignificant ingredient in the enterprise of misleading the Commissioner. It is obvious that where a person plays an essential part in the

venture of deception or to mislead, no matter how slight or momentary that part may be, and whether by action or inaction that person becomes "concerned in" the venture. As I have already observed that phrase is preceded by an adverb "knowingly". In my view, and having had recourse to the authorities, this requires the Crown to establish that the person involved in the venture was aware of its misleading or deceptive character or objective. It does not require proof that the actor be aware of all the mechanical details of the venture or the identity of all participants. If he or she is aware of the general nature of the transaction, that the part played by him or her whether by positive act or omission will assist the misleading or deception then, in my view the requirement of being knowingly concerned in is satisfied.

The qualifications of an aider or abettor as defined by s5 of the *Crimes Act* are that the person should be aware of the fact that his or her activity or inactivity will play a part in the achievement of an objective which is directed toward misleading or deceiving another person. It is not necessary that the assistance be vital or critical to the success of the venture nor that the objective of which the actor is aware may be only part of a larger transaction, neither must the actor be aware of all the participants in [11] the scheme. The attachment to the venture may either be express or by conscious omission wilful blindness, action or inaction. The degree of attachment to the scheme is that which a reasonable man would say is one which implicates and connects the person in the venture.

In my view the magistrate, having found as a positive fact that Sykes knew Walles and Dalais had been employed by him under false names and he then went further, as the employer to sign the Declarations addressed to the Commissioner, the magistrate should have proceeded to find the defendant guilty. Having arrived at those findings of fact it was not necessary to proceed to find some positive act or suggestion which produced the falsity. The "passive acquiescence" adopted by Sykes in permitting the false Declarations to be prepared was "indirect" but knowing participation in the venture to deceive the Commissioner. Sykes also became involved "directly" and "knowingly concerned" when he signed the Declarations either knowing them to be false, or if blank, then to be falsely completed.

Within the parameters of the *Yorke v Lucas* decision, Sykes wilfully blinded himself to the results of his complicity. Declarations signed by him were for the purposes of the Taxation Commissioner and for no other. They were not relevant so far as the internal conduct of his business was concerned. They were made out for and on behalf of his employees *vis-à-vis* their obligation to the Taxation Commissioner. These Declarations were not made for the purposes of obtaining a false, or obscuring, a true identity. They were addressed to and created for the purposes of the Taxation Commissioner. Sykes knew them to [12] be false and he must have known the falsehood with which he connived, was for the purposes of deceiving or misleading the Commissioner. They could have had no other purpose. No other conclusion is possible nor is it necessary to establish that there was some positive financial or other benefit accruing to Sykes by conniving at the falsehood. Incidentally it may be said, although it is not an ingredient in the offence, financial benefit did attach to those persons employed under a false name.

In my view the magistrate erred in imputing into the concept of "being indirectly or directly knowingly concerned in the commission of an offence" a requirement that some act of encouragement or suggestion was necessary. He found that Sykes knew he employed persons using false names and found that Sykes continued to employ them, knowing of their false identities subscribed to by him in Declarations to the Commissioner, which he signed. These acts and omissions had the consequence of involving him "in" the offence. His acts and omissions were both direct and indirect and there is no doubt about the state of his knowledge.

The conclusion must be the appeal should be allowed. I will hear counsel as to the appropriate orders.

APPEARANCES: For the appellant Kennedy: Mr R Maidment, counsel. A Geary, Solicitor to the Commonwealth DPP. For the respondent Sykes: Mr GB Johnston, counsel. Maddock Lonie & Chisholm, solicitors.