39/80

HIGH COURT OF AUSTRALIA

CAMERON v HOLT

Barwick CJ, Stephen, Mason, Murphy and Aickin JJ

26 November 1979; 19 February 1980

[1980] HCA 5; (1980) 142 CLR 342; (1980) 28 ALR 490; 54 ALJR 202; noted 54 ALJ 308; 5 Crim LJ 209

SOCIAL SERVICES – OFFENCES – ELEMENTS OF – *MENS REA* – PRESENTING FALSE STATEMENT TO OFFICER – APPLICATION FOR CONTINUATION OF UNEMPLOYMENT BENEFIT – INCORRECT ANSWER IN FORM – WHETHER PROSECUTION MUST PROVE KNOWLEDGE OF FALSITY: *SOCIAL SERVICES ACT* 1947 (CTH), S138.

Section 138(1) of the *Social Services Act* 1947 (Cth) provided:

"A person shall not ... (d) make or present to an officer a statement or document which is false in any particular. Penalty: $500 or imprisonment for six months."

The respondent had been convicted by a Magistrate on charges under s138(1)(d), which alleged that forms filled out by him in applying for a continuation of unemployment benefits contained incorrect answers to a question. However, his conviction was quashed by the Supreme Court of South Australia ((1979-1980) 27 ALR 311; MC21/80), upon the basis that the prosecution had not shown that the respondent in presenting the form had known of the falsity of the statement, nor that the false statement was made with reckless indifference to its truth or falsehood. Upon application for special leave to appeal—

HELD: (i) *Per curiam*: Nothing in the language of s138, read with the rest of the statute, warranted the displacement of the presumption that in creating the criminal offence in s138(1)(d) the legislature intended a guilty intent appropriate to the nature of the offence to be an ingredient of the offence.
***R v Tolson* [1886-90] All ER 26; (1889) 23 QBD 168; 9 WR 709;**
***Sherras v De Rutzen* (1895) 1 QB 918; 11 TLR 369;**
***Hardgrave v R* [1906] HCA 47; (1906) 4 CLR 232; 13 ALR 206;**
***Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37;**
***Lim Chin Aik v R* (1963) AC 160; (1963) 1 All ER 223; (1963) 2 WLR 42;**
***Sweet v Parsley* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470, applied.**

(ii) *Per curiam*: The conclusion reached by the Supreme Court was therefore correct, and the application should be dismissed.

BARWICK CJ: The applicant, an officer in charge of an investigation unit of the Commonwealth Department of Social Security, complained to a Justice of the Peace that the respondent had presented to an officer (i.e. of that Department) a document which was false in a particular contrary to s138(1)(d) of the *Social Services Act* 1947 (Cth) as amended. The complaint related to three separate occasions – 30th November 1977, 14th December 1977 and 11th January 1978, on which a document had been so presented. Section 138(2) of the Act allowed of the inclusion of these separate instances in the one complaint.

2. The respondent was unemployed in August 1977, and applied for unemployment benefits by written application dated 24th August. The respondent was then living in the relationship of husband and wife, with two children whom he was supporting. In consequence, he received unemployment benefits on the footing that he was living with a de facto wife.

3. On each of the three dates with respect to which complaint was made, the respondent had made an application in writing for a continuation of his unemployment benefits. For this purpose, he filled in a form and presented it to an officer of the Department. The form required him to answer all questions which it asks. The last question on the face of the form, question No. 8, is

in the following terms:

> "a. Have any of the events listed in Note A on the back of this form occurred in the period mentioned above.
>
> b. If YES, give details."

Note A, entitled "EVENTS TO BE REPORTED", on the back of the form provides: "A beneficiary must report WITHIN SEVEN DAYS any of the following circumstances": a number of circumstances are listed, of which that against the letter (d) is presently relevant: "If he ceases to live with his wife or de facto wife or becomes widowed or divorced". The respondent on each of the three occasions answered question 8 "No".

4. In fact, during the period covered by the three applications, the woman and the children were not living with the respondent but he was, in fact, maintaining them. The reason the parties were not living together was that they had had a disagreement as to the suitability of the premises in which the respondent resided. Because of her disapproval of them, the woman went to reside elsewhere with the children. However, after the period to which the forms related, the parties overcame their difference and resumed cohabitation along with the children.

5. The respondent filled in the forms at his house and not at the office of the Department at which he presented them. He filled them in without any assistance. The learned special magistrate who heard the complaint was not prepared to accept that the respondent was a person of low intelligence. He thought that his lack of understanding of the forms, which he evinced before the magistrate, was due rather to poor education.

6. The respondent said that he did not read the form carefully, that he read the main questions and that he did not read the printed matter on the back of the forms at all. He said he read questions on the front of the form and that there were no questions on the back of the form to fill in or to read. The magistrate gathered from the defendant's evidence that the respondent did not regard his living apart from his wife as being a separation in the strict sense of that word and that he saw much of his de facto wife and the children during the period they were not living at his house. The magistrate concluded that the respondent had not read the eighth question on the face of the forms.

7. The magistrate was not prepared to accept the view that the forms were signed in mistake so as to afford the respondent a defence in accordance with the decision of this Court in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. He took the view, basing himself upon a decision of the Full Court of the State of Victoria in *R v Erson* [1914] VicLawRp 20; (1914) VR 144; 20 ALR 46; 35 ALT 117, that the terms of s138 were such as to exclude any need for *mens rea*. He also referred to *Goddard v Osborne* (1978) 18 SASR 481; (1978) 35 FLR 122; 21 ALR 189, a decision of the Full Court of the State of South Australia, in which reference was made to *R v Erson*. Accordingly, the special magistrate convicted the respondent on each of the three charges.

8. The respondent appealed to the Supreme Court of South Australia. The Full Court (King CJ, Mitchell and Legoe JJ) allowed the appeal and quashed the conviction (1979) 22 SASR 321; 38 FLR 226; (1980) 27 ALR 311. The complainant now seeks the special leave of this Court to appeal against the decision of the Full Court.

9. The Full Court affirmed the findings of the learned magistrate on the facts. Their Honours were unanimous in their view that, in order to establish an offence under s138(1)(d), the person presenting the form must be shown by the prosecution to have known of the falsity of the statement on which the charge against him was based or that the false statement was made with reckless indifference to its truth or falsehood.

10. There is no doubt that the offence charged is an offence of a criminal nature: the penalty imposed by the statute is considerable, namely, the payment of a substantial money sum or imprisonment. Section 138(1) comprises a series of offences. I agree with the Chief Justice of South Australia when he says that a guilty intent is an ingredient in all the offences created by all the paragraphs of s138(1) which precede par (d).

11. The offence created by par (d) is that of presenting a statement or document to an officer which is false in any particular. Those who may commit the offence are not confined to the person who prepared the statement or document. The offence is presenting the document and no doubt, in my opinion, may be committed by a person who did not make the document but who, probably on behalf of its author or authoress, presented the document to the officer. It is the falsity of the document in some particular which is the gravamen of the offence. In other parts of s138(1) there is use of the expression "false statement" coupled on occasions with the words "or misleading": see sub-pars. (a) and (c). I can see nothing in the language of the section or its subject matter which would warrant the conclusion that a person, not being the maker of the document, who presented it to an officer could be convicted and punished under this section if in fact the document contained a false statement, even though it was quite clear that the person presenting the document was unaware of its contents.

12. Further, there is a presumption – in my opinion, a strong presumption – that in creating a criminal offence the legislature intends a guilty intent appropriate to the nature of the offence to be an ingredient of the offence. This presumption can only be displaced if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence: *Lim Chin Aik v R* (1963) AC 160, at p173; [1963] 1 All ER 223; (1963) 2 WLR 42, affirming the expression of Wright J in *Sherras v De Rutzen* (1895) 1 QB 918, at p921; 11 TLR 369; see also *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at pp162; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470, per Lord Diplock. Not only is par (d) associated with the preceding paragraphs, which, as I have said, in my opinion require the presence of *mens rea*, but there is nothing in the language or in the subject matter of s138, read along with the rest of the statute, which would warrant the displacement of that presumption. Further, the description of the prohibited act lends no support to the view that the mere untruth in fact of the statement is sufficient. Indeed, the use of the word "false" tends in the opposite direction. Accordingly, I agree with the conclusion reached by the Full Court. It was upon the Crown to establish that the respondent knew that the statement which he was presenting to the officer was false in its answer to question 8. The magistrate's finding clearly negatives that proposition.

13. Being of this opinion, there is no need for me to discuss other matters which have occupied the attention of the magistrate and the Full Court. In the first place, I agree with the magistrate that if the respondent was unaware of the terms of question 8 and of the endorsement on the back of the form in relation thereto, it would not have been possible to maintain the defence of mistake. Secondly, the question whether or not the respondent was "separated" from his de facto wife within the meaning of question 8 and Note A (d) need not be resolved. But it is worth observing, I think, that the ambiguity in the word "separated" which I think is present in its use in the form could well be removed, if what is intended by its use is the mere cessation of occupancy of the matrimonial home. Thirdly, it is unnecessary to discuss those cases in which shifting of the burden of proof has been spoken of. It suffices to say that for my own part I agree with Lord Diplock that, after *Woolmington v DPP* [1935] UKHL 1; (1935) AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232, it always remains for the Crown to establish guilt however much during the course of a trial what has been referred to at times as an evidentiary burden of proof has shifted to the accused, that is to say, in cases where the Crown's evidence raises a sufficient *prima facie* case to lead to the expectation, particularly where the facts are in the possession of the accused, that the accused would provide evidence to negate or weaken the case which theretofore has been made by the Crown. But, in the long run, the Crown must establish guilt.

14. I would grant special leave but dismiss the appeal.

STEPHEN J: I have had the advantage of reading the reasons for judgment of the Chief Justice and of Mason J. I would join with Mason J in refusing his application for special leave upon the two grounds which he states: that no more than the application of well settled principles is involved and the decision of the Full Court was plainly correct. The Chief Justice has stated his reasons for affirming the Full Court's conclusion that, to convict of the offence in question, an accused must be shown either to have known of the falsity of the relevant statement or to have made it with reckless indifference. With these reasons I am in full agreement. I also agree with what is said by my brother Mason about the significance of the paragraphs preceding par (d) of s138(1) and about the submission made on behalf of the applicant concerning the protection of the revenue.

2. I would dismiss the application.

MASON J: I would refuse this application for special leave to appeal on two grounds: (1) that the question of construction involves the application of well settled principles of law; and (2) that the decision of the Full Court of the Supreme Court of South Australia was plainly correct.

2. I agree with the Chief Justice that there is nothing in the language or subject matter of s138 (1)(d) of the *Social Services Act* 1947 (Cth), as amended, to displace the presumption that the Parliament intended *mens rea*, in this instance knowledge of the falsity of the statement, to be an ingredient of the offence.

3. I agree with King CJ that the language of pars. (a) and (c) of s138(1) makes it clear that the offences which they create involve the existence of a dishonest intention. In my opinion the language of par (c) is particularly significant. It makes it an offence to obtain various benefits "by means of a false or misleading statement or by means of impersonation or a fraudulent device". In this context "false or misleading" must mean "knowingly false or misleading" so as to reflect the element of dishonesty and fraud which is so plainly expressed by the concluding words of the paragraph. The same meaning should be given to "false" in par. (d) so that the word bears a uniform meaning in pars. (a), (c) and (d). It is appropriate that when the three paragraphs are so construed they should attract the common penalty, by no means small, which is prescribed in respect of each offence created by the sub-section.

4. This is not a case "where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not" (*Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at p162, [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470). But Mr Murphy for the applicant argued that because the sub-section was aimed at the protection of the revenue by penalizing those who make or participate in the making of false claims for social welfare benefits, it should be inferred that the Parliament intended to create absolute offences involving no element of *mens rea*. Even if the language of sub-s (1) were not in itself an answer to this argument, as I think it is, I do not consider the argument to be well based. In a context in which Parliament creates criminal offences relating to the making of false claims for social welfare benefits and prescribes a penalty which is not insubstantial, it is not to be inferred, in the absence of some indication to that effect, that *mens rea* is unnecessary. Rather it is to be inferred that *mens rea* is an essential element in the criminal offences which the statute creates. 5. I would dismiss the application.

MURPHY J: Mr Holt was convicted by a magistrate of having presented to an officer a document which was false in a particular contrary to s138(1)(c) of the *Social Services Act* 1947 (Cth), as amended. The conviction was quashed by the Supreme Court of South Australia (King CJ, Mitchell and Legoe JJ) and the applicant seeks leave to appeal from the judgment which amounted to an acquittal.

2. Section 73 of the *Constitution* gives this Court "jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of the Supreme Court of any State". In my opinion, s73 does not give jurisdiction to hear an appeal from an acquittal on a criminal charge (see *Cox v Hakes* (1890) 15 AC 506; *Secretary of State for Home Affairs v O'Brien* (1923) AC 603; *Benson v Northern Ireland Road Transport Board* (1942) AC 520; [1942] All ER 465); this exception extends to a judgment quashing a conviction based on a jury's verdict, although this Court has held otherwise (see *Attorney-General v Jackson* [1906] HCA 90; (1906) 3 CLR 730; 12 ALR 135; *R v Snow* [1915] HCA 90; (1915) 20 CLR 315; 21 ALR 382; *Lloyd v Wallach* [1915] HCA 60; (1915) 20 CLR 299; (1915) 21 ALR 353). The competence of an appeal in this case was not questioned.

3. Assuming that an appeal does lie, there are two grounds for refusing special leave. The first is that special leave from a judgment of acquittal would be granted only in the rarest circumstances. In *R v Wilkes* [1948] HCA 22; (1948) 77 CLR 511 at pp516-517 Dixon J said:

> "An application for special leave to appeal from a judgment of acquittal is a rare thing. According to the decision of this Court in *Lloyd v Wallach* [1915] HCA 60; (1915) 20 CLR 299; (1915) 21 ALR 353, the terms of the *Constitution* are sufficiently wide to enable us to entertain an appeal from a

> judgment of acquittal. The judgment of acquittal in this case is the judgment of the Supreme Court as a court of criminal appeal and is contrary to the verdict of the jury and not in accordance with the verdict of the jury. We would not, of course, go behind a verdict of not guilty. In *Secretary of State for Home Affairs v O'Brien* (1923) AC 603, the House of Lords construed the *Appellate Jurisdiction Act* 1876 in a way which is not quite consistent with the interpretation which this Court placed upon s73 of the *Constitution*. This Court nevertheless has continued to act upon that interpretation and has entertained applications by the Crown for special leave to appeal from judgments of acquittal given by courts of criminal appeal. We should, however, be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court."

The second is that it would be futile. The Supreme Court's decision was clearly correct. The magistrate convicted although he did not find that Mr Holt had a guilty mind and did so on the basis that a guilty mind was not an ingredient of the offences. I use the vague expression, "guilty mind", without qualification, because it is not necessary in this case to explore the nature of this concept, the history of which shows that the vagueness often conceals different or contradictory ideas (see P Brett, *An Inquiry Into Criminal Guilt* (1963); JLJ Edwards, *Mens Rea in Statutory Offences* (1955); GH Gordon, *Subjective and Objective Mens Rea*, Criminal Law Quarterly, vol. 17 (1975), p355; DR Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, Criminal Law Quarterly, vol. 15 (1973), p160). The general rule of interpretation applies that a guilty mind is an ingredient of criminal offences (see *R v Tolson* [1886-90] All ER 26; (1889) 23 QBD 168; 9 WR 709; *Hardgrave v R* [1906] HCA 47; (1906) 4 CLR 232 at p237; 13 ALR 206; *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279 at pp287, 309; [1938] ALR 37). The offence in question is quite different from those offences found under consumer protection, health and safety legislation where conduct which might injure persons is prohibited irrespective of a guilty mind. Special leave to appeal should be refused.

AICKIN J: I have had the advantage of reading the reasons for judgment prepared by the Chief Justice. I agree with those reasons and his conclusions that special leave should be granted but that the appeal should be dismissed. I have also had the advantage of reading the reasons for judgment prepared by my brother Mason and am in agreement with what he has said as to the construction of the legislation.

ORDER: Application for special leave to appeal refused.
