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SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v KENNEDY

Street CJ, O'Brien and Roden JJ

19, 20 April, 19 July 1979 — (1979) 37 FLR 356; 25 ALR 367

CRIMINAL LAW – POSSESSION OF HEROIN – FOUND IN A SUITCASE POSSESSED BY DEFENDANT – WHETHER OFFENCE ONE OF STRICT LIABILITY: *CUSTOMS ACT* 1901 (CTH), S233B.

The appellant was apprehended at Sydney International airport with a suitcase containing a large amount of heroin. The appellant appealed against conviction and sentence. He challenged, amongst other things, the direction the trial judge gave in accordance with the decision of the NSW Court of Criminal Appeal in *R v Bush* (1975) 24 FLR 346; (1975) 5 ALR 387; (1975) 1 NSWLR 298 that the offence was in essence one of strict liability, citing the judgments of the High Court in *Williams v R* [1978] HCA 49; (1978) 140 CLR 591; (1979) 22 ALR 195; 53 ALJR 101.

The Crown case was that the appellant flew from London to Sydney with a suitcase identical to that with which he was apprehended. By arrangement at Kuala Lumpur, the co-accused, Carter, boarded the plane with the suitcase containing the heroin. At Sydney airport the appellant collected Carter's suitcase and presented it as his own. Evidence was given of the street value of the heroin involved.

The defence case was that the appellant made a mistake as to the suitcase collected at Sydney airport. The appellant disagreed with the evidence of Customs officers that he had denied knowledge of and failed to identify Carter. Evidence in reply was given of telephone communication between Carter and the appellant immediately prior to the flight from London.

In summing up to the jury, the trial judge characterized the defence assertion that it was not true that the appellant had denied knowing Carter as meaning that the Customs officer witnesses had "put their heads together to invent the evidence and have come to court, taken an oath and have given fabricated and false evidence". He was charged with possession without reasonable excuse of prohibited imports which were reasonably suspected of having been imported into Australia in contravention of the *Customs Act* 1901 (Cth), s233B(1)(ca).

HELD: per Street CJ (OBrien J concurring) —
1. (a) Until such time as the High Court decides otherwise or the legislature intervenes, the law on the nature and extent of the mental element in possession for the purpose of s233B(1) of the *Customs Act* 1901 (Cth) is to be taken to be that stated in *R v Bush*, *supra*.
_____ *R v Rawcliffe* 32 FLR 252; (1977) 1 NSWLR 219, followed.

(b) If the appellant had in his custody an object, no matter how mistaken he might be as to its identity, origin or nature, over which he intended to exercise exclusive physical control, then he was in possession of it for the purposes of s233B.

Per Roden J (dissenting): The rule in *R v Bush*, *supra*, as approved in *R v Rawcliffe*, *supra*, was not applicable here because —
(a) in this case the defence raised a question of mistake;
(b) proof of an intention to pick up and carry the Kuala Lumpur suitcase (as against the London suitcase) was necessary to establish possession of it. The rule in *Bush* did not throw the onus of proof on the mistake issue in this case upon the defence.

2. The ingredient in the offence that the goods were reasonably suspected of having been imported in contravention of the Act can be proven by testimony of the fact of suspicion. However it is open to the Crown to point to objective facts and conduct from which the jury might conclude that there was such a suspicion and that it was a reasonable suspicion.

3. The evidence of telephone calls was relevant and admissible as tending to establish the existence of a relationship of immediately prior communication between the appellant and Carter. This was material on the issue of whether or not the appellant made a mistake when he picked up Carter's suitcase.

4. Evidence of the value of the heroin was admissible as going to the issue of mistake. Clearly the heroin had some value and thus little prejudice could be caused by testimony as to its actual value being admitted as evidence of part of the overall circumstances.

STREET CJ: This is an appeal against conviction and sentence. The appellant was tried before Judge Hicks on a charge that on or about 20 May 1978 at Sydney he "did without reasonable excuse, have in his possession prohibited imports to which s233B of the *Customs Act* 1901 applied, to wit narcotic goods consisting of a quantity of heroin being not less than the trafficable quantity applicable to heroin which are reasonably suspected of having been imported into Australia in contravention of the said Act".

It was the Crown's case that on 19 May 1978 the appellant boarded Qantas Flight 2 in London on a journey to Sydney. He had with him amongst his luggage a blue suitcase containing clothing and personal effects. This suitcase had both a combination numeral lock as well as a pair of catches lockable by a conventional key.

The aircraft made a scheduled landing during the course of the journey at Kuala Lumpur. At this airport a man named Dennis Carter boarded the aircraft for a journey to Sydney. He had with him a blue suitcase identical in appearance and locking devices with the suitcase that the appellant had booked on to the plane when he boarded it in London. In fact Carter's suitcase contained 9.893 kg of 45 per cent pure heroin. There was evidence at the trial that this heroin, when broken down and split into capsules or foils for sale to a user would have had a value of $5,193,825; that value was computed on the basis of a price of $35 per capsule. Alternatively, if sold in bulk in half pound or pound lots, it would have had a value of approximately $1,425,960.

When the aircraft reached Sydney the baggage was removed from the aircraft in the ordinary course. Whilst it was passing through the basement area of the International Terminal, before coming up the chute on to the carousel for collection by passengers, a trained dog reacted to the suitcase that had been booked on to the aircraft by Carter. The dog handler communicated with one of the Customs officers on the carousel floor and the heroin suitcase was kept under observation upon and after its arriving at the carousel by a Mr Sommerton. Mr Sommerton also noticed amongst the luggage coming up from the aircraft to the carousel area the identical looking blue suitcase that the appellant had booked on to the aircraft in London.

A little later Carter was seen to approach the carousel and to pick up the heroin suitcase. He appeared to examine the luggage tag on that case, after which he returned it to the carousel placing it in an upright position. Carter was then seen to examine the luggage tag on the identical looking blue suitcase (that which the appellant had booked on to the plane in London) and, after removing it from the carousel, he placed it on the floor a little distance away.

Shortly afterwards the appellant approached the carousel. He appeared to examine the tag on the heroin suitcase. He then picked it up and took it towards the gate where the Customs marshal was standing directing passengers on the course to be followed by them whilst proceeding through Customs with their luggage.

When it came to the appellant's turn in the queue to pass through the marshal's gate Sommerton intercepted him and asked him to come to an examination barrier. The appellant at that time was carrying the blue heroin suitcase together with a brown suitcase, a black brief case and a brown brief ease. On reaching the examination barrier he was asked to open the blue suitcase. He undid the two catches with a key that he took from his brown brief case. He then attempted to open the combination lock with the figures 303 to which he said that he had set it. He then said "this can't be my case". He produced two passenger's portions of luggage tags and then said "this is not my case".

Mr Sommerton invited Kennedy to accompany him to find his suitcase. The appellant returned to the carousel area and picked up the other blue suitcase (that which he had booked on to the plane in London).

The two men then returned to the examination station. The appellant unlocked the catches of the suitcase he had just picked up using the same key as had operated the catches on the heroin case. He set the combination lock to 303 and it opened. At this stage the heroin case had not been opened, but Mr Sommerton, by depressing the top of the heroin case had forced a quantity of powder out from the vicinity of its hinges.

The appellant consistently asserted his innocence and maintained total absence of connection with the heroin suitcase. It was his claim throughout, from his first conversation with Mr Sommerton at the examination barrier, on through to his unsworn statement at the trial, that he had mistaken the suitcase that he picked up for the one that he had originally booked on to the aircraft in London.

It is common ground that his Honour's directions on the aspect of possession followed the decision of this court in *R v Bush* (1975) 24 FLR 346; (1975) 5 ALR 387; (1975) 1 NSWLR 298. Mr Faris, who appears for the appellant, has contended that the decision in *R v Bush* should be reconsidered in that it erroneously excludes any element of guilty knowledge in the concept of possession. Mr Faris has also contended, in the alternative, that *R v Bush* does not cover a case such as the present where the accused asserts that the object, in this instance the suitcase, was mistakenly taken by him into his custody.

In *R v Bush*, *supra*, Nagle J, delivering the judgment of the court, said (5 ALR at 415; (1975) 1 NSWLR at 324):

> "We consider, therefore, that, in the context in which it is found, and having regard to the purposes already mentioned which the legislative provision is intended to effect, possession in s233B(1)(c) means no more than *de facto* possession of the narcotic goods concerned in the sense in which we have considered that expression, and that the mental element involved extends no further than the intention inherent in *de facto* possession of such goods, namely, the intention to have exclusive physical control of some article which is in fact narcotic goods or of some article or some place wherein such goods are in fact carried or contained or located. It is not inherent in that mental element that an accused should know, or suspect, or have reason to suspect that an item in his *de facto* possession is narcotic goods. Accordingly, if narcotic goods are found in some bag or garment, or in some package or container, or in some room or place, over which he had the exclusive physical control appropriate to *de facto* possession, he has them in his possession for the purposes of s233B(1)(c). A claim by him that those goods were slipped into his bag or garment or were inserted into the package or container or planted in his room or other place without his knowledge, or suspicion, or reason for suspicion, are matters which he may establish to the tribunal of fact as, according to the circumstances, providing a reasonable excuse for such possession.

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 the passage I have quoted from *R v Bush*.

I turn to Mr Faris's alternative argument, namely that *R v Bush* is to be distinguished in a case where the issue raised involves a mistake as to the identity of the article that the accused has in his custody. In the present case it was said that the Crown, in proving that the appellant was exercising *de facto* possession of the suitcase in the sense indicated in *R v Bush*, had the onus of negativing any mistake on the part of the appellant in the identity of the suitcase itself. His Honour refused to give any such direction and held that mistake was relevant and admissible as a true defence, proof whereof, according to the civil standard, would lie upon the appellant.

I am of the view that his Honour was correct in thus ruling upon the relevance of the issue of mistake.

Although in other contexts mistake might vitiate possession, in the context in which the word "possession" appears in s233B, the approach authoritatively laid down in *R v Bush* does not permit any such refinement. It could hardly have been made clearer in *R v Bush* that the section is to be construed as relating to an objective state of affairs. If the accused has in his custody an object that, no matter how mistaken he might be as to its identity, origin or nature, he intends to exercise exclusive physical control over, then he is in possession of it for the purposes of s233B.

The next ground of appeal involves a challenge to a ruling by the trial judge in the following terms: "I do not think it is necessary for any witness to formally say that he had a reasonable suspicion (that the goods were imported into Australia in contravention of the *Customs Act*) provided there are facts proved from which a suspicion could arise and, in my view, there are clearly such facts proved."

The appellant's submission is that a witness ought to have given evidence stating expressly that he suspected the heroin of having been imported in contravention of the Act. It

would then be a matter for the jury to evaluate this oral statement of suspicion and to determine in all the circumstances whether it was reasonable for such suspicion to be held. But, whilst an expressed oral statement of suspicion would be admissible, this is not the only, nor, indeed, is it necessarily the best, evidence that a suspicion was entertained. It would be open to the Crown to point to objective facts and conduct from which the jury might conclude that there was a suspicion that the goods were imported in contravention of the Act, as well as that the suspicion was reasonable. Objective evidence of contemporaneous conduct could well be a more satisfactory and convincing basis upon which a jury could find a state of suspicion than an oral assertion to this effect by a witness at the trial.

In the present case the evidence, including particularly the admission by the appellant, established the fact of this heroin having been imported. There is nothing to suggest that it would be other than reasonable for any person having at the relevant time an awareness of the circumstances to suspect the existence of this fact. Within the range of persons who were concerned on behalf of the Customs at the initial and subsequent stages of this particular narrative, one can expect to find a range of differing, but individually reasonable, states of mind regarding the goods. The dog handler, for example, knew for certain that the suitcase had been imported; a belief or suspicion on his part that the importation was in contravention of the Act was evidenced by his observation of the reaction of the dog and the steps taken in consequence thereof by the dog handler. Mr Sommerton's state of mind could, from his actions, well have been regarded by the jury as having hardened from suspicion at the moment he first received a message originating from the dog handler up to firm belief, or even certainty, by the time he brought the appellant into his office to face contact with Carter. At the time the appellant was carrying the heroin suitcase from the carousel to the examination barrier the inference to be drawn from Mr Sommerton's conduct was irresistible — he suspected the contents of the suitcase of having been imported in contravention of the *Customs Act*.

Grounds 6, 7 and 8 involve challenges to the admitting of evidence regarding certain telephone calls.

In rebutting the appellant's defence that he made a mistake when he picked up the heroin suitcase at Mascot the Crown called evidence with a view to establishing that communications had been made between the appellant and Carter shortly prior to Carter embarking on this flight. This evidence by the Crown was said to have added significance in the light of Crown evidence (disputed by the appellant) that the appellant lied when he said at the Sydney Airport that he did not know Carter both when shown his passport photograph and when brought face to face with him in the interview room.

In my view it was relevant and admissible for the Crown to set out to establish the existence of a relationship of immediately prior communication between the appellant and Carter. This provided a circumstantial background against which the jury could evaluate and determine the validity of the appellant's claim that he made a mistake when he picked up the heroin suitcase that Carter had booked on to the aircraft. The context in which the telephone call evidence is to be evaluated is that on 15 May 1978 Carter booked into a hotel at Kuala Lumpur. He checked out on 19 May when he boarded the aircraft for the trip to Sydney. His account at the hotel was paid by a man named K. Wilson.

On 17 May the appellant telephoned from London to Wilson's home in Australia. On the same day he made three other overseas calls from London. One was to a telephone number that was unidentified except that the number was found on a piece of paper in Carter's home in Sydney when it was searched, in a context suggesting that it was Wilson's telephone number in Kuala Lumpur. Another call was a person-to-person call to Wilson at Kuala Lumpur which was unanswered. A third telephone call was a person-to-person call to Wilson in Penang.

On the following day, 18 May, the day he departed from London on the journey to Sydney, the appellant made a further telephone call to Kuala Lumpur to the same telephone number as his unconnected person-to-person call to Wilson on 17 May.

Also on 18 May Carter made a person-to-person call to the appellant at a hotel in London where the appellant had stayed on two previous occasions in February and April 1978. This call

was not connected to the appellant who had in fact stayed at another hotel on this particular visit to London, booking out on 18 May 1978.

These telephone calls were part of a body of circumstantial evidence relevant to the existence or otherwise of a relationship between the appellant and Carter. Included amongst this evidence was the finding at the appellant's flat when it was searched by narcotics officers of an envelope on a bedside table in the main room on which was written the telephone number of Carter's home at Jannali. The appellant admitted that that number was written in his handwriting. There was also found in the brown briefcase being carried by the appellant when he arrived at Sydney a small notepad on the top page of which was written, again in handwriting admitted by the appellant to be his, Carter's telephone number at Jannali.

I shall not state in any further detail the elements relied upon by the Crown as providing a basis for the jury to conclude that there was, at the relevant time, some association between the appellant and Carter. This was undoubtedly material on the issue of whether or not the appellant made a mistake when he picked up Carter's suitcase.
