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SUPREME COURT OF NEW SOUTH WALES — COMMON LAW DIVISION

WALSH v SCHUBERG & ANOR

Finlay J

6 September 1985

CRIMINAL LAW – *MENS REA* – STATUTORY OFFENCE – EVASION OF TAXI-CAB FARE – EXCULPATORY PROVISIONS AVAILABLE – WHETHER *MENS REA* A NECESSARY INGREDIENT OF OFFENCE.

W. hired a taxi-cab, but failed to pay the fare of $17.25 at the end of the journey. W. said she had no money and asked the taxi driver to collect the fare 3 days later. The taxi driver refused, and referred the matter to the Police. W. was charged pursuant to the *Transport (Public Vehicles) Regulations* of 1930 (NSW) in that, upon demand, she failed to pay the prescribed fare in relation to the hire of a public vehicle to wit a taxi-cab. At the hearing, W. elected not to give evidence nor take advantage of her entitlement to an acquittal under reg 141 by proving to the court's satisfaction that "the occurrence ... was the result of accident, or could not have been avoided by any reasonable efforts, on (her) part." The magistrate found the charge proved, expressing the view "that this is an absolute offence, there is no *mens rea* appropriate to the case". Upon application to quash the conviction—

HELD: Application refused.
(1) There is a presumption that *mens rea* is an essential ingredient in every offence; but that presumption is liable to be displaced both by the words of the Regulation creating the offence and by the subject-matter with which it deals.
***He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 59 ALJR 620; 60 ALR 449; 15 A Crim R 203; noted 10 Crim LJ 139; (1985) *Bar News*, Summer, 14, applied.**

(2) In the present case, having regard to the words of the Regulations (particularly the exculpatory provisions in Reg 141) and the nature of the offence, the presumption of *mens rea* as an essential ingredient of the offence was displaced.

FINLAY J: *[After setting out the nature of the application, the facts supporting the charge and the details of the conviction, His Honour continued]:* ... **[3317]** The *Transport (Public Vehicles) Regulations* of 1930 under the *Transport Act* 1930 include the following regulations:

> "Hirer to pay fare
> 58(1): Upon demand, after termination of a hiring, the hirer of a taxicab, private hire car or van, shall pay the prescribed fare ...
> "Penalties 140:
> Any person who—
> (a) fails to comply with any of the provisions of these regulations, or
> (b) offends against or commits a breach of any of these regulations, or
> **[3318]** (c) fails to comply with any order, notice, direction, requirement or request made in pursuance of these regulations,
> (d) wilfully makes any false or misleading statement or wilfully furnishes any false or misleading information in or with respect to any nomination under s154 of the Act,
> shall be liable to a penalty not exceeding $100."
>
> "Acquittal in certain cases 141:
> No person shall be guilty of a breach of any of these regulations if he proves to the satisfaction of the Court hearing the case that the occurrence which is the subject of the case was the result of accident, or could not have been avoided by any reasonable efforts on his part."

Mr Johnson, on behalf of the plaintiff, submits that where an information is laid alleging facts constituting a breach of Reg 58 it is necessary for the prosecution to prove, possibly at the time of hiring and certainly at the time of the demand for the prescribed fare after termination of the hiring that the hirer knew that she would not be able to pay the prescribed fare upon demand. He submits that to that extent there is a mental element so that the offence is not one of absolute liability. He submits that the magistrate erred in holding:

> "that this is an absolute offence. There is no *mens rea* appropriate to the case."

He submits that the magistrate made a fundamental error in law amounting to such a misdirection that the relevant facts were not determined. He says that the plaintiff elected not to give evidence after the magistrate so held and that the conviction based upon such a misdirection amounted to a miscarriage of justice. He submits that a statutory prohibition should be granted in these circumstances. (*Ex parte Wetherburn: Re Mills & Anor* (1935) 53 WN 103 at 105 per Stephen J.)

Since the decision of the learned magistrate, the High Court of Australia has on 11th July 1985, handed down its judgment in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 59 ALJR 620. In that case directions by a trial judge that "guilty knowledge" did not have to be proved by the prosecution in relation to charges under s233B(b) and (c) of the *Customs Act* 1901 were held by the High Court not to be in accordance with Parliament's intention and the law. Although there were significant differences among the members of the court as to the precise degree of *mens rea* which the prosecution had to prove.

For the purposes of the case before me Mr Heagney on behalf of the first defendant conceded that there is a presumption that *mens rea* is an essential ingredient in every offence, but he submits that in respect of the subject legislation, the presumption is displaced both by the words of the regulation creating the offence and by the subject matter with which it deals.

The general principles of the common law governing criminal responsibility were referred to in *He Kaw Teh's case* by Gibbs CJ at p621 as follows:

> "The relevant principle is stated in *Sherras v de Rutzen* [1895] 1 QB 918 at 921; 11 TLR 369 as follows:
>
> > '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'."

The Chief Justice observed at p622:

> "The rule is not always easy to apply. Its application presents two difficulties – first, in deciding whether the Parliament intended that the forbidden conduct should be punishable even in the absence of some blameworthy state of mind and secondly, if it is held that *mens rea* is an element of the offence, in deciding exactly what mental state is imported by that vague expression."

Mason J agreed with the reasons in the judgment of the Chief Justice. Wilson J also used the same starting point from what he called "The much quoted statement of Wright J" referred to above. Brennan J referred to the same passage stating, "That statement has not been doubted" and went on to say:

> "Recently in *Gammon Ltd v AG of Hong Kong* [1985] AC 1; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439 Lord Scarman delivering the judgment of the Judicial Committee stated five propositions (at p14):
>
> '(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;
>
> (2) the presumption is particularly strong where the offence is "truly criminal" in character;
>
> (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the state; (my emphasis);
>
> (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
>
> (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act'."

Brennan J said in respect of the fourth proposition that it seems to be too categorical an approach to what is after all a question of statutory interpretation, adding:

> "It is not possible to decide that *mens rea* can be excluded only where the subject matter answers a given description (even so general a description as 'an issue of social concern'), without regard to the whole of the statutory context."

Dawson J at p650 said:

> "Rules of construction must give way to actual expressions of legislative intent but almost invariably in the context such indications as there are require guilty intent as an ingredient of an offence rather than the contrary. Where some word such as 'knowingly' or 'wilfully' is used in the description of an offence there is no difficulty in concluding that guilty intent is required. However the absence of words such as these even if the words appear in the description of offences created elsewhere in the enactment does not mean that an offence is intended to be absolute."

His Honour there referred again to the passage of Wright J in *Sherras v de Rutzen* cited above and continued:

> "Resort must then be had to the subject matter or character of the legislation. Attempts have been made to categorise those offences which have been regarded as absolute but the result is only helpful in a broad sense and the recognised categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue particularly if the penalty is monetary and not too large may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their behaviour accordingly."

In this case the subject matter with which the statute and regulations deal is public transport. Regulation 58, requiring the hirer to pay the **[3320]** taxicab fare, is a regulation facilitating the smooth running of the taxicab industry as one part of public transport. The breach of that regulation is, by virtue of Reg 140, made an offence but the maximum penalty is not some "absurdly Draconian" one, but a monetary one not exceeding $100. Nevertheless the hirer is subject on breach of the regulation to be dealt with by arrest or by being served with a summons under the *Justices Act*. If it were not for Reg 141, in my view, *mens rea* would be presumed to be an essential ingredient in the offence constituted by a breach of the regulation.

However, the legislature has expressly provided that no person shall be guilty of a breach of the regulations if he proves to the satisfaction of the court hearing the case (which of course requires satisfaction on the balance of probabilities).

> "that the occurrence which is the subject of the case was the result of accident or could not have been avoided by any reasonable efforts on his part."

Mr Johnson has suggested that "accident" in Reg 141 means motor vehicle accident. I see no reason whatsoever to construe the word "accident" in such a manner, nor to construe it narrowly. The phrase "the occurrence .... was the result of accident" clearly encompasses a happening which was unintended by the person charged. The addition of the words "or could not have been avoided by any reasonable efforts on his part" was obviously intended by the Legislature to widen the circumstances in which a person charged is entitled to be acquitted of a breach of the regulations.

Having regard to the words of the regulations and the nature of the offence in my view the informant in the subject case was not required to prove that the plaintiff had an evil intention. In other words the presumption of *mens rea* as an essential ingredient of the offence charged was in this case displaced. I do not see the learned magistrate as doing any more than acknowledging this when he said "that this is an absolute offence, there is no *mens rea* appropriate to the case".

The learned magistrate would, of course, have been aware that by virtue of Reg 141 the plaintiff would be entitled to be acquitted if she proved to his satisfaction that:

> "The occurrence ... was the result of accident, or could not have been avoided by any reasonable efforts on his part."

There was no evidence at the close of the informant's case which could so satisfy the

learned magistrate. Presumably the plaintiff's legal representative was aware of Reg 141 when his client elected not to give evidence and subsequently not to appeal but to seek a statutory prohibition fundamentally depending on the submission that *mens rea* is an essential ingredient of the subject offence.

It follows that there was no error of law made by the learned magistrate which precluded the plaintiff from putting whatever she wanted before the court. I dismiss the summons and order the plaintiff to pay the costs.

[Judgment reprinted, with kind permission, from Petty Sessions Review (NSW) *Vol. 7. No. 10. p3316.]*
