05/88

SUPREME COURT OF VICTORIA

DEPUTY COMMISSIONER OF TAXATION v EIGHTH OUPAN PTY LTD and ANOR

O'Bryan J

4 March 1988 — (1988) 19 ATR 965

EVIDENCE – BURDEN OF PROOF – PROOF OF EXCEPTION – WHETHER "JUST CAUSE OR EXCUSE" EXCULPATORY WORDS – WHETHER EVIDENTIARY BURDEN ON DEFENDANT – MEANING OF "JUST CAUSE OR EXCUSE": *INCOME TAX ASSESSMENT ACT* 1936, SS224, 264.

Section 224 of the *Income Tax Assessment Act* 1936 ('Act') provides: (see now *Taxation Administration Act* 1953, s8C.)

> "Any person who refuses or neglects to duly attend and give evidence when required by the Commissioner ... shall, unless just cause or excuse for the refusal or neglect is shown by him, be guilty of an offence."

1. The words "just cause or excuse" are exculpatory and impose an evidentiary burden on a defendant seeking to take advantage of the exception. Accordingly, a Magistrate was in error in treating the absence of a just cause or excuse as an element of the offence.
***Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136; [1952] ALR 1001, applied.**

2. *Obiter*. In the context of the Act, the phrase "just cause or excuse" means that some substantial reason must be shown for the defendant to be excused from some requirement.

O'BRYAN J: **[1]** Two orders nisi to review decisions of the Melbourne Magistrates' Court on 9th December 1985 were heard together. In each case the applicant laid an information for an offence against s224 of the *Income Tax Assessment Act* 1936 by each defendant. Section 224 provides:

> "Any person who refuses or neglects to duly attend and give evidence when required by the Commissioner or any officer duly authorized by him, or to truly and fully answer any questions put to him by, or to produce any book or paper required of him by the Commissioner or any such officer, shall, unless just cause or excuse for the refusal or neglect is shown by him, be guilty of an offence."

[2] The information laid in respect of Eighth Oupan Pty Ltd concerned the issue and service of a notice pursuant to s264 of the Act on 3rd August 1984 requiring the proper officer of Eighth Oupan Pty Ltd to attend at Room V, Ground Floor, 270 King Street, Melbourne on 4th September 1984 at 10.30 o'clock in the forenoon to produce books, documents and papers. The information laid in respect of Sixth Ravini Pty Ltd concerned a notice pursuant to s264 issued on 27th July 1984 requiring the proper officer of Sixth Ravini Pty Ltd to attend at the same place and the same time on 28th August 1984 to produce books, documents and papers. Section 264 provides:

> "(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority—
> (a) not relevant;
> (b) to attend and give evidence before him ... and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto."

On the date specified in the notice the proper officer of each defendant did not attend as required by the notice. However, on 17th August 1984 (in the case of Eighth Oupan Pty Ltd) and on 24th August (in the case of Sixth Ravini Pty Ltd), a letter in the same terms was written to the Deputy Commissioner of Taxation by a director of the respective company. The terms of the letter is important to the issues in these proceedings. The letter said:

> **[3]** "Re: Section 264 Notice
> Reference is made to the Notice issued under Section 264 of the *Income Tax Assessment Act*. The Company is conscious of its obligations under the Act and has no intention of acting other than in

> accordance with law. However, the Company has been advised to seek from you information regarding the purpose of the inquiries so that it may be satisfied that they are properly authorised by Section 264 and that it (i.e. the Company) would not, in replying, be breaching its fiduciary obligations and its duty of confidentiality to a number of persons, including the Beneficiaries of the various Trusts. Your reply is awaited. In the meantime, it is assured that the Notice is "adjourned". This letter should not be taken as in any way conceding the validity of the whole or any part of the said Notice."

Each letter was received by the applicant in the ordinary course of post but was not replied to before the date of hearing specified in each s264 notice. At the hearing the informant relied upon averments contained in the information as *prima facie* evidence of the matters averred to prove the charge (s243 of the Act). At the close of the prosecution case it was made clear to the Court that the defendant contested that it "did without just cause or excuse refuse or neglect by its proper officer to attend" on the date and at the place specified in the notice. A director of each defendant, one Leon Gorr, was called and gave evidence in each case. A number of documents and letters brought into existence subsequent to the date specified in s264 notice were tendered against the objection of counsel for the **[4]** informant. I shall not identify the documents because it is now accepted that the only relevant evidence was of matters which occurred before the date specified in the s264 notice.

Mr Gorr's evidence related to a number of reasons why the defendant in each instance did not attend on the specified date. These reasons may be summarised as follows:

> 1. That the defendant was concerned that the s264 notice might have been issued for an improper purpose.
>
> 2. That the defendant had sought legal advice as to the validity of the notice and whether it had to attend.
>
> 3. That the defendant presumed the hearing date would be adjourned since it received no reply to the letter set out above.

At the conclusion of the evidence legal submissions were made to the learned Magistrate by counsel for each party. The learned Magistrate then delivered reasons for dismissing the information, at the conclusion of which he said: "I am not satisfied beyond reasonable doubt that he failed to attend without just cause or excuse".

The order nisi was granted on three grounds:

> 1. That there was no evidence or no sufficient evidence to support the order.
>
> 2. That the Magistrate erred in law in holding that he had to be satisfied beyond reasonable doubt that the Respondent did not attend without just cause or excuse.
>
> 3. **[5]** That the Magistrate erred in law in determining that the reasonableness of the Respondent in its actions subsequent to the service of a notice pursuant to Section 264 of the said Act and dated the 27th day of July 1984 constituted just cause or excuse for the refusal or neglect referred to in Section 224 of the said Act.

Mr Brett of counsel for the applicant submitted that the learned Magistrate erred in law in holding that the informant was required to prove beyond reasonable doubt that the defendant failed to attend without just cause or excuse. Mr Finkelstein, one of Her Majesty's counsel, who appeared with Mr Hammond for each defendant, properly conceded that the learned Magistrate wrongly imposed a burden upon the informant to prove that the defendant did not have just cause or excuse for not attending as required by the notice.

Clearly, this is so. Section 224 does not require the informant to prove as an element of the offence the proviso. The words "unless just cause or excuse for the refusal or neglect is shown by him", impose a burden upon a defendant because the words are exculpatory. The relevant common law doctrine was expressed by Dixon CJ in *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136 @ 139; [1952] ALR 1001:

> "...where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it."

[6] Cf. *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491; [1949] ALR 144: *Everard v Opperman* [1958] VicRp 62; [1958] VR 389; [1958] ALR 847. A defendant seeking to rely upon the proviso is only required to prove on the balance of probabilities "just cause or excuse for the refusal or neglect". Should a defendant prove on the balance of probabilities just cause or excuse for his refusal or neglect to duly attend and give evidence, the *prima facie* evidence of matters averred in the information namely, that the proper officer of the defendant refused or neglected to attend without just cause or excuse, would be rebutted and the elements of the offence would not be proved beyond reasonable doubt. *R v Hush; Ex parte Devanny* [1932] HCA 64; (1933) 48 CLR 487. The learned Magistrate wrongly failed to regard the proviso as imposing an evidentiary burden upon the defendant. Instead he regarded as an element of the offence the absence of just cause or excuse. In these circumstances ground 2 of the order nisi is made out.

A question next arises whether the orders in the Court below should be set aside and the informations remitted for rehearing. Mr Finkelstein submitted that on the evidence produced another Magistrate, acting reasonably, would be required to find on the balance of probabilities that the defendant had just cause or excuse to neglect or refuse to attend the hearing and would dismiss the informations. Mr Brett argued the converse, that another Magistrate would be required to find the charges proved. **[7]** I have reached the conclusion that this matter must return to the Court below to be reheard by another Magistrate. It is not open to this Court to determine finally what is essentially a question of fact or of mixed fact and law. The proviso to s224 provides a defence, proof of which depends upon contested facts and inferences drawn from facts. I am unable to uphold Mr Finkelstein's submission because the test to be applied is objective and requires one to determine what "cause or excuse" the defendant had to neglect or refuse to attend the hearing.

In *ex parte Cocks* (1882) 21 Ch D 397 the Master of the Rolls, Sir George Jessel, in construing the expression "unless the Court for some just cause otherwise orders" in the *Bankruptcy Act* 1869, s14, held that:

> "The word 'just' does not add much weight though it may add a little. It means that some substantial reason must be shown."

More recently, in the context of social security legislation, in *Crewe v Anderson* [1982] 1 WLR 1209, Lord Denning drew a distinction between 'reasonableness' being 'good cause' but not necessarily 'just cause'. 'Just cause' was held to require an objective basis for throwing onto the unemployment fund in the UK the payment of unemployment benefit by a person voluntarily leaving his employment. The High Court considered s264 in *Federal Commissioner of Taxation v ANZ Banking Group Ltd* [1979] HCA 67; (1978-79) 143 CLR 499; 52 ALJR 73. The learned Acting Chief Justice Sir Harry Gibbs, as he then was, observed that:

> "If a bank were charged with a contravention of s224 the burden would lie on the prosecution **[8]** to establish that the documents which were not produced were of the kind mentioned in s264(1)(b). If that were proved, the bank would escape conviction if it proved that it had just cause or excuse for its refusal or neglect, and it would no doubt have just cause or excuse if it had an honest belief (or at least an honest and reasonable belief) that the documents were not of that kind."

This passage was *obiter* as the Court was not directly concerned with s224. Moreover, no consideration was given to the meaning of the word 'just' in the proviso. In its ordinary meaning 'just' means: 'based on right; rightful; lawful' (*The Macquarie Dictionary*). In the context of this legislation, in my opinion, some substantial reason must be shown for the defendant to be excused from attending the hearing. A great deal of time was taken up in the Court below with an issue of whether the s264 notice might have been issued for an improper purpose and/or whether the notice was valid. No-one could dispute that the defendant was entitled to seek legal advice concerning the validity of the notice before the date specified in the notice. The circumstance that the defendant believed, honestly and reasonably, that the notice might be invalid immediately before the date specified in the notice might constitute substantial reason to fail to attend the hearing. But his neglect or refusal to attend without either appearing to seek an adjournment or instituting legal proceedings in a Court of competent jurisdiction to stay the hearing would also be taken into account. The crux of the issue before the Magistrates' Court relevant to whether the defendant had just cause or **[9]** excuse not to attend will also involve careful consideration of the letter earlier reproduced and the reasonableness of the assumption stated therein "that the Notice is adjourned". No further communication took place between the parties before 24th August. The

state of mind of Mr Gorr and the reasonableness of his state of mind following upon the letter are matters proper to be determined by a Magistrate upon a rehearing. Should the defendant fail to satisfy a Magistrate that he had a substantial reason not to attend, a case of refusal or neglect would be established by the averment, in my opinion, and it would matter not whether the failure to attend was occasioned by a refusal or a neglect.

The order in each case will be that the order nisi is made absolute. The order in each case dismissing the information is set aside. Order in each case that the information be remitted to the Melbourne Magistrates' Court for rehearing before another Magistrate according to law.
