39/86

SUPREME COURT OF VICTORIA — FULL COURT

R v SAAD

Murray, McGarvie and Hampel JJ

6 December 1985 — [1985] 19 A Crim R 170

CRIMINAL LAW – DRUG OFFENCE – POSSESSION OF PROHIBITED IMPORTS – DEFENCES AVAILABLE – HONEST AND REASONABLE MISTAKE – REASONABLE EXCUSE: *CUSTOMS ACT* 1901 (Cth.) S233B(1)(ca).

On a charge of being in possession of prohibited imports contrary to s233B(1)(ca) of the *Customs Act* 1901 (Cth.), the offence is committed only if the supposed offender knows that the object possessed is or is likely to be a narcotic substance. An offender whose suspicions are aroused that the object is probably narcotic goods, but who refrains from making any enquiries for fear that he may learn the truth is to be treated as knowing that the object was narcotic goods.

***He Kaw The v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 59 ALJR 620, 60 ALR 449; 15 A Crim R 203; principles stated by Brennan J applied.**

HAMPEL J: (with whom Murray and McGarvie JJ agreed) *[set out the grounds of appeal, the facts and parts of the trial judge's direction to the jury and continued]*: … **[6]** As those directions complied with the formulation of the law in such cases as *R v Ditroia & Tucci* [1981] VicRp 28; (1981) VR 247, and if anything were more favourable to the accused, in my view, ground 4 of the application cannot be sustained. In July of this year however, the High Court handed down its judgment in the case of *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, in which the question of what state of knowledge had to be established in the accused in relation to the charge of possession under the *Customs Act* was considered.

Mr Faris of counsel who, with Mr Parsons, appeared for the respondent before us, rightly conceded that if the correct statement of the law is as formulated by Brennan J in *Teh's case*, then the jury was wrongly directed. This of course is the issue raised by ground 3. While this is not the appropriate occasion to seek to make an exhaustive analysis of what principle emerges from the decision of the High Court in *Teh's case*, which should be applied in directing juries in cases of offences charged under s233B(1)(ca) of the *Customs Act* 1901, I consider that we should give some guidance to trial judges in Victoria because doubt has been expressed as to the correct direction which should now be given as a result of that decision. I think that the task of resolving this problem should not be left to trial judges involved in the numerous pressures of a criminal trial. Until the doubt is authoritatively determined for this jurisdiction by a decision of the High Court or a further decision of this court, in my opinion directions should be given by trial judges in Victoria in accordance with the **[7]** principles stated by Brennan J.

Under that principle the offence is committed only if the supposed offender knows that the object possessed is or is likely to be a narcotic substance. Within that principle an offender whose suspicions are aroused that the object is probably narcotic goods, but who refrains from making any enquiries for fear that he may learn the truth, is to be treated as knowing that the object was narcotic goods. This concept was discussed by Gibbs CJ, with whom Mason J agreed. The alternative view as to the principle which emerges from the High Court decision is that stated by Dawson J. The view of Dawson J was that a supposed offender who has custody or control of an object which is in fact narcotic goods, was to be treated as being in possession of narcotic goods if he knew of the presence of the object, although he did not know that the object was narcotic goods.

In suggesting that one alternative view should be followed rather than the other in charging juries, I am not in this decision finally selecting between them. The form of direction which I

commend is the one which is most favourable to an accused person and the one which appears to have attracted the greater support from the judges of this court who have considered the question when sitting as a Court of Criminal Appeal.

I consider that the directions proposed will impose no disadvantage to accused persons, will seldom in practice affect the outcome of a trial and will avoid the **[8]** waste inherent in appeals and new trials if a wrong view of the law is expressed in a direction which is less favourable to the accused than that which may ultimately appear to be the correct direction. The High Court remitted the matter in *R v He Kaw Teh* to this court, which on 14th August 1984 directed a new trial. In referring to the decision of the High Court, Young CJ, with whom Fullagar and Nathan JJ agreed, stated that the effect of that decision in terms was consistent with the principle stated by Brennan J (see p3 of the unreported decision of *Teh* in this court.)

The question was considered also in *R v Kural* [1986] VicRp 67; [1986] VR 673; (1985) 81 FLR 432; (1985) 17 A Crim R 316, a decision of this court on the 21st November 1985. Crockett J declined to express a preference between the principles stated respectively by Brennan J and Dawson. O'Bryan J regarded the principle stated by Brennan J as also supported by Gibbs CJ and Mason J and as correct. Vincent J expressed his own preference for the principle of Brennan J, but regarded the existing state of authority as supporting the principle stated by Dawson J. Overall therefore there has been support in this court for the principle as stated by Brennan J. *[His Honour then dealt with a matter not relevant to this Report].*
