

29/87

SUPREME COURT OF VICTORIA — FULL COURT

LUCKMAN v STODDART

Crockett, O'Bryan and Vincent JJ

10 September 1987

CRIMINAL LAW – CUSTOMS PROSECUTION – GOODS IMPORTED – VALUE UNDERSTATED – CHARGES PROVEN – OFFENDER RELEASED ON RECOGNIZANCE WITHOUT CONVICTION – APPLICATION FOR FORFEITURE OF GOODS – WHETHER COURT HAS POWER TO GRANT APPLICATION: CUSTOMS ACT 1901, SS234(1)(d), (e), 244, 245, 247, 262.

Where a defendant is found guilty of offences under s234(1)(d) and (e) of the *Customs Act 1901* (Cth.) in connection with understating the value of imported goods, the Court has power under the provisions of the *Customs Act 1901* to order condemnation of the goods as having been forfeited to the Crown notwithstanding that the court (without convicting) adjourns the charges upon the defendant's entering into a recognizance.

THE COURT: [1] The respondent was the importer of a number of pieces of antique furniture from England in respect of which [2] duty under the *Customs Act 1901* was payable. The furniture had apparently been secured from two different sources, one lot having been purchased from a business named "The Carpenters Tale" and the other lot from a business named "Pat Thackwell Antiques". Following the discovery that in the appropriate Customs declarations the value of these goods had been understated between 50 and 60 per cent, the respondent was charged with offences under s234(1)(d) (making false entries) and s234(1)(e) (making untrue declarations) of the *Customs Act 1901*.

The matters came before a stipendiary magistrate on the 10th April 1986. At the conclusion of the hearing, at which the respondent pleaded not guilty, the magistrate found the following allegations proved:-

"1. The respondent on or about the 18th day of August 1983 at Melbourne in the said State did contrary to s234(1)(d) of the *Customs Act 1901* make an Entry, to wit the Entry given the lodgment number C32300033, with respect to a quantity of furniture, which Entry was false in that the value for duty in respect to the goods specified on the said Entry was understated.

2. The respondent on or about the 18th day of August 1983 at Melbourne in the said State did, contrary to s234(1)(e) of the *Customs Act 1901* produce to an officer a document namely an invoice from "The Carpenter's Tale" containing a statement or statements which was or were untrue in that the prices shown on the said invoice were understated.

3. The respondent on or about the 18th day of August 1983 at Melbourne in the said State did, contrary to s234(1)(d) of the *Customs Act 1901* make an Entry to wit the Entry given the lodgment number C32300047 with respect to a quantity of furniture, which Entry was false in that the value for duty with respect to the goods specified on the said Entry was understated.

[3] 4. The respondent on or about the 18th day of August 1983 at Melbourne in the said State did contrary to s234(1)(e) of the *Customs Act 1901* produce to an officer a document namely from "Pat Thackwell Antiques" containing a statement or statements which was or were untrue in that the prices shown on the said invoice were understated."

However he did not proceed to conviction and ordered that the information be adjourned for a period of 12 months upon the respondent's entering into a recognisance in the sum of \$500.00 pursuant to s19B of the *Crimes Act 1913* (Commonwealth), and upon the respondent's undertaking to make a donation of \$1000 to the Windana Society Incorporated an organisation concerned with the rehabilitation of drug users, and to produce evidence of the making of such payment to the Australian Government Solicitor, no later than 5th October 1986. The respondent was also ordered to pay \$2,500 costs.

The present applicant then sought an order for the condemnation of the goods which the magistrate refused to make. In so doing, his Worship expressed the view that the only jurisdiction which he possessed to order condemnation was derived from s262 of the *Customs Act* which reads:-

"Where the committal of any offence causes a forfeiture of any goods the conviction of any person for such offence shall have effect as a condemnation of the goods in respect of which the offence is committed."

He stated that, accordingly, in a situation in which no conviction had been recorded, no order could be made. He rejected an argument that power to condemn the goods arose from the inter-action of ss244 and 245 of the Act.

[4] Subsequently, upon application's being made by the applicant to a master of this court for an order to review the magistrate's decision, an order was granted in the following terms:-

"1. That the respondent SHOW CAUSE why the order of Mr MW Gerkens, Stipendiary Magistrate, dismissing an order for condemnation of the goods, the subject of information, should not be reviewed upon the following grounds:-

(a) that the stipendiary magistrate erred in law in holding that his only power to grant condemnation was derived from s262 of the *Customs Act* 1901 (as amended);

(b) that the stipendiary magistrate erred in law in holding that having released the defendant on a recognisance pursuant to s19B of the *Crimes Act* 1913 (Commonwealth) he had no power to order condemnation;

(c) that the stipendiary magistrate erred in law in declining to hold that s244 of the Act together with the claim for condemnation in the information and summons gave him power to condemn the goods the subject of the information;

(d) that the stipendiary magistrate erred in law in holding that although the goods were forfeited, he had no power to condemn the goods;

(e) that the stipendiary magistrate erred in law in refusing to condemn the goods."

and, for reasons which elude the court and which could not be provided by the applicant's counsel, the order nisi was made returnable in this court. Whilst the form of the order suggests that a number of questions arises for consideration it is clear that they are simply different presentations of the same issue. There is accordingly little point in attempting to deal with them separately.

There was no appearance on behalf of the respondent before this court and we were advised by [5] Mr D Meagher QC, who appeared as senior counsel on behalf of the applicant, that the respondent did not desire to attempt to support the magistrate's decision. This of course did not remove from the court the obligation to determine the question whether the magistrate had erred in refusing to make the order sought.

The substantive submission made on behalf of the applicant was that s262, rather than providing the jurisdictional basis for the making of an order for condemnation of goods, simply obviates the necessity for any proceedings in cases in which a person has been convicted of an offence, the commission of which has caused their forfeiture. There is a number of situations in which the possibility could exist that the vindication of the title of the Crown to forfeited goods could be required by the making of an order for condemnation, as even a relatively cursory consideration of the *Customs Act* and the area of its operation would demonstrate. For example, there are many possible combinations of circumstances in which, whilst breaches of the Act may have been committed, no prosecution is possible. It would be somewhat surprising to find that no legislative provision has been made for such contingencies. The possibility of the institution of proceedings for condemnation of goods in such situations is clearly contemplated in s244 which reads:

"244. Proceedings by the Customs for the recovery of penalties other than a pecuniary penalty referred to in section S438 under this Act or for the condemnation of ships, aircraft or goods seized as forfeited are herein referred to as Customs Prosecutions."

[6] The two other relevant provisions are s245 and s247, which provide:-

"245(1) Customs prosecutions may be instituted in the name of the Comptroller by action, information or other appropriate proceeding—

- (a) in the Supreme Court of a State;
- (b) in the Supreme Court of the Australian Capital Territory;
- (c) in the Supreme Court of the Northern Territory;
- (d) in a County Court of District of a State; or
- (e) in a Local Court, being a Local Court of full jurisdiction, of South Australia or of the Northern Territory.

(2) Where a Customs Prosecution for a pecuniary penalty that, but for this section, would exceed \$20,000 is instituted in a Court referred to in paragraph (1)(d) or (e), the amount of that penalty that exceeds \$20,000 shall be taken to have been abandoned.

(3) Customs Prosecutions may be instituted in the name of a Collector by action, information or other appropriate proceeding in a court of summary jurisdiction of a State, of the Australian Capital Territory or of the Northern Territory.

(4) Where a Customs Prosecution for a pecuniary penalty that, but for this sub-section, would exceed \$5,000 is instituted in a court referred to in sub-section (3), the amount of that penalty that exceeds \$5,000 shall be taken to have been abandoned."

"247. Every Customs Prosecution in a court referred to in sub-section 245(1) may be commenced prosecuted and proceeded with in accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge."

[7] The succeeding sections of Part XIV could be loosely described as establishing the necessary machinery for this and other matters which are generally described as "Customs Prosecutions". A number of these provisions specifically refers to proceedings for condemnation. Yet if the approach adopted by the magistrate was correct those sections would have no available area of operation to applications for condemnation as there could be no such proceedings under the Act.

After consideration of the position at common law, Dixon J in *Willey v Synan* [1937] HCA 85; (1937) 57 CLR 200 at 214-215 expressed the view that ss244, 245 and 247 did indeed provide a basis upon which the Crown could institute proceedings to obtain condemnation, and consistently with this interpretation, in a later judgment delivered in *Burton v Honan* [1952] HCA 30; (1952) 86 CLR 169; [1952] ALR 553, his Honour when dealing with s262 said of that provision:-

"Its purpose is to make the conviction of the offender decisive on all matters of fact upon which the forfeiture of the goods depends. In the absence of that provision, if there was a contest as to the occurrence of the matters of fact upon which the forfeiture depended, it would be necessary to have the issue of fact decided, ..."

(per Dixon CJ at p179 CLR).

With great respect to the learned Chief Justice such an interpretation must be correct. The section was, by its language, obviously intended to have the effect of securing an automatic condemnation of the goods in the specified circumstances. This would not preclude the possibility that condemnation may be obtained by the adoption of the other procedures contemplated by the Act. In the present matter where the magistrate has not proceeded [8] to conviction, and accordingly the provisions of s262 were not applicable, it was open to the Crown to seek such an order, which was done in the present case by adopting a procedure which is acceptable in the Magistrates' Court, of including such a claim in the information served upon the respondent. It would also appear clear in the circumstances under consideration that no proper basis existed upon which such an application could be refused. The matter is therefore, in our opinion, appropriate for final determination at this stage.

An order will be made in accordance with the following minutes:

1. Order nisi is made absolute.
2. Order of the Magistrates' Court, insofar as it refuses the application for condemnation, is set aside.
3. In lieu, it is ordered that the goods specified in the schedule annexed to the amended information be condemned as having been forfeited to the Crown under and by virtue of the provisions of the *Customs Act 1901*.