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SUPREME COURT OF SOUTH AUSTRALIA

LANHAM v COLES

O'Loughlin J

27 March 1986 — [1986] 40 SASR 390; 82 FLR 216; 21 A Crim R 340

CRIMINAL LAW – CUSTOMS OFFENCE - PROHIBITED IMPORT – PRODUCING CUSTOMS STATEMENT WITH UNTRUE PARTICULAR – IMPORT PLACED IN LUGGAGE BY UNKNOWN PERSON – WHETHER DEFENCE OF "WRONGFUL ACT OF A STRANGER" AVAILABLE – WHETHER OFFENCE ABSOLUTE OR STRICT LIABILITY: *CUSTOMS ACT* 1901 (CTH) S234(e).

C. was charged with importing prohibited imports namely, 2 spring-bladed knives and producing to a Customs officer a statement which was untrue in a particular namely, that his baggage did not contain spring-bladed knives. C. pleaded not guilty. He gave evidence to the effect that one of his friends had placed the knives in his luggage as a practical joke. The Magistrate accepted this evidence and dismissed both charges. In respect of the charge concerning the untrue statement, the Magistrate took the view that the defence of the "wrongful act of a stranger" was available to C. On appeal—

HELD: Appeal allowed. Dismissal in respect of the untrue statement charge set aside and conviction recorded.
Having regard to the fact that the *Customs Act* 1901 (Cth) is a revenue Act in that s234 deals, in part, with evasion of the payment of duty and the need for the traveller and importer to make a true disclosure at all times to Customs officials, the offence provided for under s234(1)(e) is not an offence of strict liability but an absolute offence and accordingly, the defence of "act of a stranger" is not available.

O'LOUGHLIN J: [1] The respondent, Donald John Coles, faced two charges under the *Customs Act* 1901 (the "Act") in the Adelaide Magistrates' Court. First, it was alleged that on or about the 15th July 1984, at Adelaide, he produced to a customs officer a statement which was untrue in a particular; contrary to s234(e) of the Act. The particulars in respect of this charge were that in an unaccompanied baggage statement Coles untruly stated that his baggage did not contain spring-bladed knives. Secondly, he was charged with having, on about the same day, 15th July 1984, at Adelaide, imported a prohibited import; contrary to the provisions of s233(1)(b) of the Act. The prohibited imports were particularized as two spring-bladed knives. Coles pleaded not guilty to both charges and after evidence was taken and judgment was reserved, the learned stipendiary magistrate dismissed both charges.

The learned stipendiary magistrate found that on the day in question at Adelaide International Air Terminal, Coles produced to a customs officer a statement which was untrue in a material particular. This was the unaccompanied baggage statement and in it Coles untruly stated that his baggage did not contain spring-bladed knives; a search by the customs officer revealed two knives located in each of a pair of boots which had been packed in Coles' luggage and into which had been pushed items of small clothing which effectively concealed each of the knives. Coles told an unusual story but the learned stipendiary magistrate accepted it. Coles explained that on the evening before leaving France *en route* to Australia he had contracted **[2]** dysentery and had spent a great deal of time out of his room. A large number of his friends had called on him to farewell him and in his evidence before the lower court, Coles suggested that there would have been ample opportunity for anyone of them to place the knives in his luggage as a practical joke while he was absent from his room. Coles had visited Europe as part of a group and he was aware that other members of the group had purchased such knives; in fact, he stated that he was openly critical of those members of the party who had purchased the knives, apparently as souvenirs of their trip.

The learned stipendiary magistrate accepted Coles as a witness of truth and he acquitted him of both charges. In particular, he accepted the evidence of Coles whereby he denied that he had placed the knives in his luggage and offered the explanation that it must have been the act of a

mischievous third party. Having regard to the character evidence given on behalf of the defendant, I must say that one could hardly criticize the findings of the learned stipendiary magistrate.

In rationalizing that both charges should be dismissed, the learned stipendiary magistrate commenced his considerations in the following manner:-

> "The defence is based on principally two arguments, firstly, that the intention to commit a crime, or *mens rea*, is an ingredient of each of these offences and that the defendant simply did not possess this intent. However, secondly, if I should find against the defendant and hold that both of these offences are of the nature of strict liability type offences, then he had a defence of 'wrongful act of a stranger' as **[3]** expounded by Napier CJ and Hogarth J in *Norcock v Bowey* (1966) SASR 250, at pages 266 to 268 inclusive."

Ultimately the learned stipendiary magistrate concluded that the first count – the alleged offence against the provisions of s234(e) of the Act (the untrue statement) – did not require *mens rea* as an ingredient of the offence but that the defence of the "wrongful act of a stranger" was available to Coles. With respect to the second count, the importation of the prohibited import contrary to the provisions of s233(1)(b) of the Act, the learned stipendiary magistrate found that *mens rea* was an essential ingredient of such an offence, that the defendant did not possess the necessary intent and that therefore that charge should, for those reasons, be dismissed.

Initially the Crown appealed against the dismissal of both counts and the award of costs in the respondent's favour but when the appeal was called on for hearing Mr Fairbank, who appeared for the appellant, informed me that the appeal, so far as it related to the dismissal of the second count (the importation of the prohibited import) was abandoned. The Crown, however, desired to pursue its appeal in respect of the dismissal of the first count (the untrue statement).

In considering the first count the learned stipendiary magistrate concluded that the offence created "is an offence of strict liability" but, as I have said he relied upon the judgments of the former Chief Justice, Napier CJ, and Hogarth J in *Norcock v Bowey* (*supra*). Napier CJ said, at page 266:-

> **[4]** "But I desire to add that, in my opinion, it would have been a good answer to the charge if the owner had been able to prove how the animal came to be upon the road, and had shown that it was due to circumstances beyond his control, that is to say to the act of God or some wrongful act of a stranger whom the owner had no means of controlling or influencing. If either of those things had been proved, I should say – as Barton J said in *Ferrier v Wilson* [1906] HCA 77; (1906) 4 CLR 785 at page 796 – that any construction that made that an offence would be 'so monstrous to my mind' that it could not be contemplated as the meaning of the enactment."

At page 268 Hogarth J said -

> "In the words of Dixon J which I have already cited, the section casts upon the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced; but the section does not impose any greater responsibility on the owner of animals than to conduct his affairs in this way. It does not require him to ensure against the result of acts or occurrences which he has no power to control ... I therefore agree with the Chief Justice that the section is not to be interpreted as subjecting a man to punishment if he establishes that the presence of his animal on the road is entirely the result of something over which he had no control, such as the wrongful act of a stranger or act of God ...but that if the defendant is able to establish, on the balance of probabilities, that the escape of the animal was the result of some **[5]** extraneous cause such as I have mentioned, then he is not to be held liable."

The learned stipendiary magistrate then concluded by saying:-

> "Although *Norcock v Bowey* was concerned with the interpretation of a State Act regulating the control of cattle, I am satisfied that the general principles as to defences which may be raised in relation to prosecutions for breaches of statutes held to be statutes creating offences of strict liability, apply in this case and accordingly that the defence of 'act of stranger' applies."

It is clear, by inference, that the learned stipendiary magistrate was of the opinion that the mischievous conduct of the third party, in deliberately placing the knives in Mr Coles' luggage, occurred in circumstances beyond his control and were properly classified as the wrongful act of

a stranger whom Mr Coles had no means of controlling or influencing. Mr Fairbank mounted two arguments; first he said that s234(e) of the *Customs Act* is an absolute offence and not an offence of strict liability as found by the learned stipendiary magistrate. Therefore, said Mr Fairbank, the act of a stranger was not a defence which was available to the respondent. Secondly, if the appellant was wrong in his first submission, then the appellant submitted that the learned stipendiary magistrate erred on the facts before him for the reason that the facts of the case showed that the defence of "act of a stranger" was not available. To sustain his second argument Mr Fairbank would have been required to satisfy me that the findings of fact **[6]** as made by the learned stipendiary magistrate were incorrect. Having reviewed the evidence I am far from so satisfied; indeed, I would go so far as to say that I would have come to the same conclusion.

I return, therefore, to the first argument advanced by Mr Fairbank which, as it transpired, was the argument upon which he most strongly relied. He commenced by saying that there are three categories of offences to be considered and momentarily I will abbreviate them by describing them as "mens rea", "strict liability" and "absolute liability". In support of this classification he referred to the judgments of Gibbs CJ and Dawson J in *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. Referring to the reasons of Dickson J, who delivered the judgment of the Supreme Court of Canada in *Reg v Sault Ste. Marie* [1978] 2 SCR 1299; 3 CR (3d) 30, Gibbs CJ said, at p210, that Dickson J held that offences could be classified into three categories as follows:-

> "1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will **[7]** be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may property be called offences of strict liability.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

Dawson J, at p252, recognized these three categories when he said:-

> "In relation to the offence of importing narcotic goods into Australia, the question which arises is whether the prosecution has to prove any mental state accompanying the importation. In other words, the question is whether *mens rea* is an ingredient of the offence to be proved by the prosecution. If it is not, the further question arises whether the offence is one of strict liability which, whilst not requiring the prosecution to prove *mens rea* in order to make out a case, allows the accused to raise honest and reasonable mistake by way of exculpation. To that extent a mental element is imported into an offence of strict liability short of requiring proof of *mens rea* by the prosecution. The mistake must involve a belief in a state of affairs which, if true, would make the act of the accused innocent. If the statute in neither of these ways requires any mental state to accompany the importation, then the offence is an absolute one and is complete once the prohibited act of importation is **[8]** proved. Offences of strict or absolute liability are creatures of statute. The terms 'strict liability' and 'absolute liability' are not always used precisely and sometimes interchangeably, but used as I have used them, they are a convenient way of drawing the distinction to which I have referred."

This classification of offences into three categories is not new. For example, the three categories can be recognized by having regard to what Wells J said in *Boucher v GJ Coles & Co* (1974) 9 SASR 495 at 500; (1974) 32 LGRA 87:-

> "Mr Bollen QC, for the appellant, submitted an argument that can, I think, be epitomised thus: even if it is conceded that the defence of act-of-a-stranger (as it is labelled) applies to a charge under this section, the facts of this case do not bring the respondent within the ambit of the defence; s111 should be construed as creating an offence of strict liability which does not, in law, accommodate a *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536) type defence; but even if that defence is open, no evidence was introduced, or can be pointed to, upon which such a defence could be founded. The reply of Mr Rice QC to the appellant's argument was that, clearly, the defence of act-of-a-stranger did apply, and that the respondent had brought itself within it, because, whatever else would be

> said about the can of peas, the respondent's employees had received no warning that anything was amiss with the can or its contents, and the person responsible for the unsoundness could only **[9]** be the processor, who was a 'stranger' to the respondent. The arguments were well presented on both sides and, although commendably concise, ranged far amongst the authorities – of which there are now many – and the principles that have to do with the construction of statutes that create offences but do not, *ex facie*, incorporate an element of *mens rea*."

What may be regarded as new by some is the express nomenclature used to identify the separate classifications. In particular, as Dawson J said at p252:-

> "The terms 'strict liability' and 'absolute liability' are not always used precisely and sometimes interchangeably ..."

Hence, with the benefit of hindsight the passage in the judgment of Wells J which I have quoted should not have read:-

> "S111 should be construed as creating an offence of strict liability which does not, in law, accommodate a *Proudman v Dayman* type defence."

Applying the terminology used in *He Kaw Teh's case*, the passage should read:

> "S111 should be construed as creating an offence of absolute liability which does not, in law, accommodate a *Proudman v Dayman* type defence."

Care must therefore be taken in relying too heavily upon the actual words used in many of the judgments which were cited during the course of argument. With this warning I turn first to consider the decision **[10]** of Bollen J in *R & D Engineers v Lanham* 49 ALR 351. The appellants were charged with various offences under the provisions of s234 of the Act. One of the charges was that they had made an entry which was false in a particular: contrary to the provisions of s234(d) of the Act. The offences arose out of the circumstances under which the appellants imported a tractor base from Japan. They described it as an agricultural base but the collector of customs considered that this was not a correct description. In deciding that the appellants were guilty of making an entry which was false, Bollen J said at p367:

> "By Ground 4 the appellants assert that the 'alleged incorrect classification ... was no more than an inquiry to the Customs officials and therefore not to be treated as a statement false in a particular'. This is directed to count (3) (false entry: Ex CIO). The evidence shows that Coghlan raised a query on another sheet of paper. The answer to this submission lies in the fact that the entry in CIO was false. The legislation casts on the person importing the duty of giving correct information ..."

Then again at p369 His Honour said of s234:-

> "That section creates, in my opinion, absolute offences. The nature and object of the legislation so dictates. Therefore, anyone who in fact makes a false entry or produces, etc., any document containing a false statement is guilty of an offence or offences. Thus a person or company may be charged with an offence against s234. On proof of guilt the **[11]** person or company becomes liable to a fine to be paid to the court."

Not only is it to be noted that His Honour used the expression "absolute offences", but also it is clear, in my opinion, from the context in which he used this expression, that he regarded offences against s234 of the Act as "absolute offences" as that term is used in the terminology in the judgments in *He Kaw Teh's case* (*supra*).

> "Section 234 of the *Customs Act* creates an absolute offence. It would, therefore, have been no answer to the charge for the respondent to say that he committed the offence unwittingly. I do not accept Mr O'Halloran's submission that this means that inadvertence can never be an extenuating circumstance in the case of a s234 prosecution. Whether the respondent had an innocent or guilty mind was obviously relevant, however, to the question of penalty."

To the extent to which His Honour qualified his comments by the use of the word "inadvertence", I feel that he was directing his mind to questions of penalty: perhaps also to such possibilities as dismissing the charge on the grounds of triviality. In *Boucher v GJ Coles & Co* (*supra*), Wells J, at p502, sought to describe the legislation which creates absolute offences in

these terms:-

> **[12]** "In my opinion, legislation setting irreducible standards is more likely to be found where, within a well-defined area of business, scientific, communal or other identifiable activity, it has become established, and is accepted by all that a failure to comply with certain precautions, or with other predetermined practices or precepts, will have, for a known class of persons, adverse consequences, the nature and extent of which may be predicted with some precision. In such circumstances, the legislation has found its way onto the statute book, and is accepted by the community, because the stringency of its controls is regarded as more important, on balance, than adherence to the tradition embodied in the maxim *actus non facit reum nisi mens sit rea*: see generally *Lim Chin Aik v R* [1962] UKPC 34; [1963) AC 160 at pages 174-175; [1963] 1 All ER 223; (1963) 2 WLR 42. If the above analysis is sound, it is not surprising that legislation by prescribed standards is found in the realms of public health, industrial and road safety, the handling of dangerous substances (including drugs), and public nuisance (using that word in its widest, and not only its historical, sense): compare Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, at page 540. It also follows, from the same analysis, that whether an enactment exhibits the characteristics of legislation that prescribes standards in that way and with those consequences must depend on the results of an examination, not **[13]** just of one section in isolation, but of the enactment as a whole, its history, and, where appropriate, other legislation *in pari materia*."

Aided by this description and bearing in mind the judgments of Bollen and Cox JJ to which I have just made reference, it would seem to me that one must have regard to the fact that the *Customs Act* is a revenue act in that s234, in part, deals with evasion of the payments of duty and elsewhere deals with the need for the traveller or the importer to make, and fill out, a true disclosure at all time to customs officials – to assume, thereby, the responsibility of making certain that facts (of which customs officials have no knowledge or have no means of obtaining knowledge) are properly presented to the authorities. Viewed in this manner, and notwithstanding that from time to time hardship may be created, I have come to the conclusion that the offence for which provision is made in s234(1)(e) of the Act is an absolute offence and that the learned stipendiary magistrate was therefore incorrect in holding that the defence of "act of a stranger" was available to the respondent. In my opinion, therefore, the appeal must be allowed.

I accordingly set aside the order of dismissal with respect to count 1 in the complaint and in lieu thereof I record a conviction. It follows that I must also allow the appeal for the purposes of setting aside the learned stipendiary magistrate's order as to costs. I will hear argument from counsel as to such further or consequential matters arising out of my decision and, in particular, whether I should fix penalty or whether the matter should be remitted to the lower court for **[14]** imposition of penalty.
