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## SUPREME COURT OF SOUTH AUSTRALIA

***R v DEAN***

Mitchell J

17, 20 February 1981 — (1981) 26 SASR 437; (1981) 50 FLR 252

**CUSTOMS OFFENCE – POLICE OFFICER EMPOWERED TO DETAIN AND SEARCH ANY PERSON SUSPECTED UPON REASONABLE GROUNDS TO BE UNLAWFULLY CARRYING PROHIBITED IMPORTS – SUSPECTED PERSON ENTITLED TO REQUIRE THAT HE BE TAKEN BEFORE JUSTICE OF THE PEACE BEFORE BEING SEARCHED – WHETHER POLICE OFFICER MAKING ARREST OBLIGED TO INFORM PERSON ARRESTED OF RIGHT TO BE TAKEN BEFORE JUSTICE OF THE PEACE: CUSTOMS ACT 1901 (CTH), S196.**

Section 196 of the *Customs Act* 1901 ('Act') empowers a police officer to detain and search any person whom he has reasonable cause to suspect is unlawfully carrying any prohibited imports. Section 196(2) provides that before the suspected person shall be searched he may require to be taken before a justice of the peace or collector of customs. Upon the trial of an accused for an offence against the provisions of s233B (i)(b) of the Act it appeared that police officers who had arrested the accused pursuant to powers given by s210(1) of that Act failed to bring the accused before a justice of the peace without undue delay, as required by s212. The accused after the arrest had been taken by the police officers to police headquarters, and then to his home, where a search was made. Upon returning to police headquarters, the accused was interrogated and a record of the interrogation was signed by the accused.

**HELD:**

- 1. Section 196(2) of the Act imposes no obligation upon the officer detaining to inform the person to be detained of the right which s196(2) gives him. Accordingly, no illegality arises by reason of the failure to give such information, and that evidence of the search of the person of the accused is admissible.**
- 2. In the present case the undesirability of giving encouragement or approval to the practices which the law does not regard as lawful, outweighs any possible advantage by the admission of the alleged confessions. Accordingly, the evidence of confessions made by the accused should be excluded.**

**MITCHELL J:** The accused was charged with importation of prohibited imports, namely narcotic goods, contrary to s233B(1)(b) of the *Customs Act* 1901 (Cth), as amended. On 31st May 1980, the accused hurriedly left the house of one Vadasz at Norwood and was apprehended by members of the Australian Federal Police Force after he had entered his motor car. The vehicle was brought to a halt by a police vehicle which blocked its passage. He was forcibly prevented from removing from his pocket an article wrapped in newspaper and the newspaper package was removed from him. It eventuated that the package contained cylindrical blocks of heroin. Constable Atkinson cautioned the accused and questioned him. He was then taken back to police headquarters at Eastwood and was searched. Later he was taken to his home where a further search was conducted and he was then taken back to Eastwood where he was further cautioned and then interrogated, the questions and answers being typewritten and the record of interview later being signed by the accused.

After the accused had first been intercepted by the police he was handcuffed by Constable Guelzow with his hands behind his back. Those handcuffs remained upon his hands for about fifteen minutes. It is clear that he was arrested when he was handcuffed: see *R v Stafford* (1976) 13 SASR 392 at p399, *R v Killick* (1979) 21 SASR 321 at p232. The interview with the accused at which the statement was taken on the typewriter concluded at 8.40 pm. The accused was then charged with an offence against the Act and was placed in the cells. He was brought before a court the next morning.

Section 196 of the *Customs Act* empowers any police officer to detain and search any person whom he suspects upon reasonable grounds to be unlawfully carrying any prohibited imports. Sub-section (2) provides that before the suspected person shall be searched he may require to be taken before a justice of the peace or the collector of customs. The accused made no request in

that regard, but Mr Abbott submitted that it was the duty of the officer intending to detain and search the accused to inform him of his right to require to be taken before a justice or the collector. In support of that proposition he relied upon a comment made by Sangster J during argument upon the hearing of the prosecution *R v Harris*, unreported (Criminal Sessions, July 1979). It is clear however, from perusal of the transcript in that matter, that the learned judge held the view, with which I respectfully agree, that s196(2) imposes no obligation upon the officer detaining to inform the person to be detained of the right which s196(2) gives him. I therefore find that no illegality arises by reason of the failure to give such information, and that evidence of the search of the person of the accused is admissible.

Section 210(1) of the *Customs Act* empowers any police officer without warrant to arrest, *inter alios*, any person who he has reasonable ground to believe is guilty of being concerned in the commission of certain offences, including the offence of unlawfully having in his possession any prohibited imports. The police officers who intercepted the accused had reasonable grounds for believing that the accused was concerned in the commission of at least such an offence and therefore were entitled to arrest him. Section 212 provides: "Every person arrested may be detained until such time as he can without undue delay be taken before a Justice".

Mr Abbott submitted that there was undue delay in taking the accused before a justice of the peace first after he had been arrested by being handcuffed and later after he had been charged. I do not regard the failure to take a person charged after 8.40 p.m. before a justice of the peace until the sittings of the court at 10 a.m. as ordinarily constituting undue delay, although there may be some circumstances in which the delay may be undue. Certainly in this case I do not find that there was undue delay in that circumstance. However, there was a considerable delay from when the accused was arrested at 2.15 pm until he was finally brought before the court at 10 am the next morning. The question is whether it was undue. In *Drymalik v Feldman* (1966) SASR 227, the Full Court considered s78(1) of the *Police Offences Act* 1953 (SA), as amended, under which a person apprehended without a warrant under the Act is to be "forthwith delivered into the custody of the member of the Police Force who is in charge of the nearest Police Station, in order that that person may be secured until he can be brought before a Justice to be dealt with according to law". The court said:

"The requirement is – and it follows that the immediate purpose of the arrest must be – to bring the person arrested forthwith before the justice. The word forthwith must of course be reasonably understood and applied. But it clearly prohibits an arrest for the purpose of interrogating the person arrested, as a preliminary to bringing him before the justice. In our opinion there is no power to arrest under s75, merely as a convenient preliminary to an interrogation". (1966) SASR at p234.

In *R v Killick* (1979) 21 SASR 321, I had to consider s352 of the *Crimes Act*, 1900 (NSW). That section empowers any constable without warrant to arrest certain persons and provides that any person so arrested shall be taken before a justice to be dealt with according to law. In *Killick's case* I referred to *Ex parte Evers; Re Leary* (1945) 62 WN (NSW) 146, and *Clarke v Bailey* (1933) 33 SR (NSW) 303 at p309; 50 WN (NSW) 104, in which that section had been interpreted as imposing upon the police officer an obligation to take the prisoner before a justice of the peace without unreasonable delay. I see no different obligation under s212 of the *Customs Act* which requires the person arrested to be taken before a justice without undue delay. It was, in my view, undue delay to hold him for the purposes of questioning him and searching his home before taking him before a justice of the peace, and I therefore find that the arrest was illegal.

In *R v Killick* I discussed the various authorities in this Court and I reached the conclusion that "the undesirability of giving encouragement or approval to the following practices which the law does not regard as lawful, outweighs any possible advantage by the admission of the alleged confessions." (1979) 21 SASR at pp327-328 and hold that I should exclude the evidence of confessions. I hold a similar view in the present case. This opinion is fortified by the fact that in *R v Harris* (unreported (Criminal Sessions, July 1979), Sangster J excluded questioning of an accused person made after his arrest upon a charge under the *Customs Act* and before he was taken before a justice of the peace. I was informed by counsel that Constable Atkinson was the arresting officer in that case so that it could not be said that his conduct in the present matter was occasioned by inadvertence. I therefore excluded the evidence.

I should add that I have considerable sympathy with police officers in the position in

which Constable Atkinson found himself. It was reasonable to detain the accused who, as events showed, had in his possession a substantial quantity of heroin. It was reasonable to wish to question him and not practicable to attempt to do so until after he had been forcibly restrained. I draw attention to the recommendations in the *Second Report of the Criminal Law and Penal Methods Reform Committee of South Australia* (ch 6 par 2.3) that the police should be given the power to detain a suspect for a limited time for the purpose of interrogating him before bringing him before a justice of the peace. This recommendation could be put into effect only by amendment of statutory provisions such as s212 of the *Customs Act*.

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