

08/87

## SUPREME COURT OF VICTORIA — FULL COURT

**R v WESCOMBE**

Murray, McGarvie and Nicholson JJ

11 March, 14 May 1987

[1987] VicRp 83; [1987] VR 1012; (1987) 79 ALR 357; (1987) 25 A Crim R 337

**CRIMINAL LAW – IMPOSITION UPON COMMONWEALTH AUTHORITY – UNTRUE REPRESENTATION WITH VIEW TO OBTAIN BENEFIT – TAXI VOUCHER MADE OUT IN NAME OF ANOTHER – WHETHER IMPOSITION ON COMMONWEALTH AUTHORITY – WHETHER NECESSARY TO PROVE AN INTENTION TO CHEAT OR DEFRAUD: CRIMES ACT 1914 (CTH.), S29B.**

Section 29B of the *Crimes Act* 1914 (Cth.)('Act') provides:

"Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation, made in any manner whatsoever, with a view to obtain money or any other benefit or advantage, shall be guilty of an offence.  
Penalty: Imprisonment for two years."

W. was employed by a Commonwealth Authority, and for the purpose of his employment, was entitled to issue vouchers for the use of taxis. On one occasion, W. filled in a voucher to enable a certain Arthur Jones to use a taxi; however, W. used the voucher himself and signed in the name of Jones. Subsequently, W. was charged with an offence against s29B of the Act and was convicted. Upon application for leave to appeal—

**HELD: (per Murray and McGarvie JJ, Nicholson J dissenting) Application for leave to appeal dismissed.**

**(1) Per Murray and McGarvie JJ: The offence of imposition under s29B of the Act is committed where a person knowingly makes a false representation to a Commonwealth Authority for the purpose of obtaining a benefit or advantage.**

*Bacon v Salamane* [1965] HCA 22; (1965) 112 CLR 85; (1985) ALR 842; 39 ALJR 27, applied.

*Lamb v Toledo-Berkel Pty Ltd* [1969] VicRp 43; [1969] VR 343; (1968) 14 FLR 181, explained.

**(2) Per McGarvie J: The words "impose upon" involve at least a wilful misleading. Accordingly, if it is established that a person knowingly made a false representation to a Commonwealth Authority then that person has wilfully misled the Authority and is guilty of imposition.**

**(3) Per Nicholson J dissenting: An essential ingredient of the offence of imposition under s29B of the Act is proof of an intention to cheat or to obtain an advantage to which the accused was not entitled.**

**MURRAY J:** [After setting out the charges, the nature of the evidence, relevant provisions of the Act, and part of the trial Judge's direction to the jury, His Honour continued]: ... [4] The point involved in this appeal is that it was submitted by Mr Wraith that His Honour was in error in his direction to the jury as to the meaning of the words "impose upon". Mr Wraith submitted that His Honour should have directed the jury that those words, as they are used in s29B, mean "cheated or defrauded". Mr Wraith relied on a passage in the judgment of Starke J in *Lamb v Toledo-Berkel Pty Ltd* [1969] VicRp 43; (1969) VR 343; (1968) 14 FLR 181 in which His Honour referred to the decision of the High Court in *Hansen v Archdall & Smith* [1930] HCA 16; (1930) 44 CLR 265; [1930] ALR 258 and said that it was held in that case that the expression "impose upon" meant "to cheat or to wilfully deceive". His Honour also referred to the decision of the High Court in *Bacon v Salamane* [1965] HCA 22; (1965) 112 CLR 85; (1965) ALR 842; 39 ALJR 27. His Honour went on to say:

[5] "Accordingly I have no doubt that *mens rea* is an essential element of the offence charged, and indeed, after some hesitation, Mr Nettlefold, for the informant, conceded as much."

But the issue in the present case is whether it was necessary for the Crown to prove that in using the voucher made out in the name of Jones (and the accused signed the voucher in the name of Jones) the accused was obtaining a benefit to which he was not entitled. If he was not

entitled to the benefit which he obtained by the use of the voucher he was, no doubt, endeavouring to cheat or defraud the Corporation.

In my opinion the decision of *Lamb v Toledo-Berkel Pty Ltd (supra)* does not go as far as Mr Wraith submitted that it does. The company in that case was charged under s29B in respect of lodging a claim for the cost of converting a machine to the decimal system. On the facts, an employee of the defendant whose duty it was to make the conversion wilfully failed to do so and pretended that the machine had been converted. This was not known to the secretary of the defendant who was responsible for lodging the claim. Starke J held that the offence created by s29B involves *mens rea* and, before a company could be convicted of any offence involving this element, it must be shown that its responsible officer, such as a director, secretary etc., had a guilty mind. His Honour held that it was not enough merely to show that a servant of the company had the requisite knowledge and it was necessary to look at the functions performed by that servant in order to ascertain whether he or she was a responsible officer of the company. The magistrate who [6] convicted the company did not give reasons but was asked by counsel who appeared for the company whether he found that there was any intention to cheat or wilfully deceive on the part of Mr Richardson (the secretary). The magistrate said: "I have no hesitation in saying that Mr Richardson acted with complete propriety." His Worship said that he found that there was no intention to cheat or wilfully deceive on Mr Richardson's part.

When carefully examined the decision of Starke J does not indicate that an intention to cheat or defraud is a necessary part of an offence under s29B in every case. The *ratio decidendi* of the case is that *mens rea* was a necessary element of the offence. If Mr Richardson had said that he did know that the machine had not been converted but another machine had in fact been converted in respect of which no claim had been made so that the Commonwealth was not in the end defrauded, I doubt very much whether Starke J would have quashed the conviction.

Whether this be so or not, the construction of s29B has been dealt with in other States and the section being a provision of the Commonwealth *Crimes Act* it is important, wherever possible, that the decision of State courts on the interpretation of Commonwealth legislation should be in harmony. See *R v Parsons* [1983] VicRp 109; (1983) 2 VR 499; (1983) 53 ALR 568; (1983) 71 FLR 416. Section 29B has been dealt with by the Court of Criminal Appeal in South Australia in *R v Lockett* (1980) 24 SASR 54; (1980) 41 FLR 164; (1980) 27 ALR 444; (1980) 2 A Crim R 374 in which Zelling J said (ALR p447):

"The elements of the offence are stated by Owen J in *Bacon v Salamane* [1965] HCA 22; (1965) 112 CLR 85 (1965); ALR 842; 39 ALJR 27 as follows:

"The necessary elements of [7] the offence in a case such as the present are (1) that the person charged imposed upon the Commonwealth or upon a public Authority under the Commonwealth by an untrue representation, that is to say untrue to the knowledge of the person charged; and (2) that the representation was made with a view to obtain, that is to say with the object or for the purpose of obtaining, money or some other benefit or advantage. If these facts are proved the offence is committed ..."

The trial judge was clearly following the exposition of the section by Starke J in *Toledo-Berkel Pty Ltd v Lamb* [1969] VicRp 43; [1969] VR 343; 14 FLR 181. I have no doubt that *mens rea* is an essential element of the offence charged, but I would doubt whether the *mens rea* should be defined as cheating or wilfully deceiving as Starke J thought it did. I think it is better to use the exact words used by the statute rather than other words which take their meaning from the use of the same words in other statutes".

See also *Bryce v Curtis* [1984] WAR 348; (1983) 78 FLR 434; (1983) 51 ALR 73 and *Jacobsen v Piepers* [1980] 2 Qd R 448; (1980) 51 FLR 247; (1980) 32 ALR 293; 48 ALT 30. In *Bacon v Salamane (supra)* the High Court considered a case in which the respondent Salamane was charged under s29B and the facts were that he made some untrue representations when applying for employment to an Authority under the Commonwealth. The High Court reversed the decision of the Supreme Court of New South Wales which had set the conviction aside and restored the conviction of the magistrate. Barwick CJ and Menzies J agreed with the reasons given by Windeyer J and Owen J in separate judgments. Windeyer J said (p89):

"In my opinion a person who seeks an office or employment under the Commonwealth and obtains

what he seeks must be taken to have obtained a benefit or advantage. If he obtained it by making an untrue representation, he may be said to have thereby imposed upon the Commonwealth. A person who makes an untrue representation and thereby imposes upon the Commonwealth ... is therefore in my opinion guilty of the offence created by s29B ...

[8] Owen J said (p92):

"The necessary elements of the offence in a case such as the present are (1) that the person charged imposed upon the Commonwealth or upon a public Authority under the Commonwealth by an untrue representation, that is to say untrue to the knowledge of the person charged; and (2) that the representation was made with a view to obtain, that is to say with the object or for the purpose of obtaining, money or some other benefit or advantage. If these facts are proved, the offence is committed ... and it does not appear to me to be relevant to enquire whether the representor obtained anything as the result of his representation. Nor does it seem to me to be relevant to consider whether what he obtained ... was beneficial to him. The question is, what was his purpose in making the false representation?"

It will be seen that the judgments of the High Court did not turn upon the question of whether the respondent cheated or defrauded the Commonwealth in the sense that he was not able to perform the work or that the Commonwealth suffered in some other way by reason of his employment. The High Court considered that the offence was established if it was proved that he made a false representation for the purpose of obtaining a benefit or advantage. It is also to be noted that s29B carries a maximum penalty of imprisonment for two years. The maximum penalty under s29D which reads "A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence" is a fine of \$100,000 or imprisonment for ten years or both.

It follows in my opinion that it was not necessary for the Crown to negative the claim by the applicant that he did not obtain a benefit or advantage to which he was not entitled by reason of the fact that if he [9] had not used the voucher in the name of Jones he could have issued a voucher in his own name and would have been entitled to do so. The directions given to the jury on the meaning of the section were consistent with the authorities and were correct. For these reasons the application should be dismissed.

**McGARVIE J:** [1] The facts and issues are stated in the judgment of Murray J which I have had the advantage of reading in draft. In my opinion it is not necessary for the prosecution under s29B of the *Crimes Act* 1914 to establish that the person charged cheated or defrauded or endeavoured to cheat or defraud the Commonwealth or a Commonwealth authority. Cheating or defrauding involves causing a detriment to the person cheated or defrauded. I assume, without stating an opinion, that if the circumstances were as the applicant swore, the Commonwealth authority was not cheated or defrauded. I discussed some similar issues in *R v Bonollo* [1981] VicRp 63; [1981] VR 633 at pp658-61; (1980) 2 A Crim R 431. For the applicant reliance is placed on what was said as to the meaning of "impose upon" in *Hansen v Archdall & Smith* [1930] HCA 16; (1930) 44 CLR 265; [1930] ALR 258 and in *Lamb v Toledo-Berkel Pty Ltd* [1969] VicRp 43; [1969] VR 343; (1968) 14 FLR 181. The meaning given to the words in those cases was not cheat or defraud. In the first case the meaning given was "cheat or wilfully deceive" (Isaacs CJ and Gavan Duffy J at p270) or "deceive or get the better of" (Rich J at p274). In the latter case [2] Starke J (at pp345-6) treated the words as meaning "cheat or wilfully deceive". (My underlining in each instance).

While cheating and defrauding import the causing of a detriment, wilfully deceiving does not ordinarily involve the imposition of a detriment. The words used in the cases above indicate that a person imposes upon the Commonwealth or authority either by cheating it or by wilfully deceiving it. Cheating involves both wilfully deceiving and causing a detriment to the Commonwealth authority. If the applicant did what he said he did, that clearly amounted to wilfully deceiving the Commonwealth authority in the sense of wilfully misleading it.

In s29B the words "impose upon" operate to require it to be established that the untrue representation was not made honestly but was known by the accused to be untrue. See the statement by Isaacs CJ and Gavan Duffy J in *Hansen v Archdall & Smith* [1930] HCA 16; (1930) 44 CLR 265 at p272; [1930] ALR 258 which refers to the first of the four branches of the provision which they set out at pp269-70. That inevitably follows if imposing upon involves at least wilful

misleading. It is established that the representation must be known by the accused to be untrue. See: *Bacon v Salamane* [1965] HCA 22; (1965) 112 CLR 85 at p92; (1965) ALR 842; 39 ALJR 27.

An examination and comparison of ss29A, 29B and 29C of the *Crimes Act* indicates that within the meaning of s29B a person who wilfully misleads the Commonwealth or authority imposes upon it. The change from the words "with [3] intent to defraud" used in the offences created in s29A(1) and (2) and punishable by five years' imprisonment, to the words "impose upon" in the offence punishable by two years' imprisonment created by s29B, strongly suggests that the latter expression involves different and less reprehensible conduct than the former. By s29C a person who in or in connexion with or in support of an application to the Commonwealth or a Commonwealth officer or authority for any grant, payment or allotment of money or allowance under a law of the Commonwealth makes, either orally or in writing, any untrue statement, is guilty of an offence punishable by two years' imprisonment. That is a similar order of offence to that created by s29B and its wording makes it very difficult to import into it any requirement of intent to defraud.

In *Lamb v Toledo-Berkel Pty Ltd* [1969] VicRp 43; [1969] VR 343; (1968) 14 FLR 181 Starke J held that a guilty mind is essential to the commission of the offence under s29B. If a person makes a statement known to be untrue with a view to obtaining money or any other benefit or advantage it is very difficult to think of any circumstances where the person is not intending to mislead the Commonwealth or authority. While intention to mislead is sufficient, often a person with that intention will also intend by misleading the Commonwealth or authority to cause it detriment – in other words will intend to cheat and defraud it.

In the present case and in at least the vast majority of cases it is sufficient to direct the jury in substantial accordance with the analysis of the offence [4] charged in *Bacon v Salamane* which was stated in that case by Windeyer J (at p89) and Owen J (at p92) in the passages quoted in the judgment of Murray J. In my opinion the application should be dismissed.

**NICHOLSON J:** (dissenting) [*After setting out the terms of ss29A and 29B of the Act, and referring to several authorities, His Honour continued*]: ... [7] However, for present purposes, it is appropriate that I repeat His Honour's direction as to the meaning of "impose upon". His Honour said:

"So far as (one) that the accused imposed upon the Australian Broadcasting Commission, what does impose upon mean? The words, and this is a matter of law and I direct you on it, impose upon in this count are used in their ordinary meaning. They mean here 'to place a burden upon', 'to inflict something on or upon', 'to levy on', 'to set on', 'to put upon', an imposition, 'to place an obligation upon', the ordinary natural meaning of the words impose upon."

In so directing the jury, His Honour appears to have adopted a somewhat selective dictionary definition of the expression "impose upon", and to have omitted a number of alternative meanings which might be regarded as more appropriate, having regard to the context in which the expression appears. It may be that His Honour adopted this course by reason of the expressions of opinion appearing in the judgments in the South Australian and Queensland cases to which I have referred.

In considering the meaning of the expression, it is of interest to consider the dictionary definitions. The *Oxford English Dictionary* gives no less than eight possible meanings for the word "impose", some of which were used by His Honour. However, possible meanings not adverted to by His Honour were "obtrude or put (a thing) upon (a person) by false representations". Another is "to practise imposture with, upon, on, to cheat or deceive by false representations". *Webster* adopts a similar range, which include "to lay or inflict cheatingly or deceptively, to pass off as to impose inferior goods on; to practise tricks or deception with on or upon".

It seems to me that when considered in the context of a penal statute, such meanings are more likely to have been intended by the legislature than the limited definition given by His Honour to the jury. If all that the legislature intended was to produce the meaning adopted by His Honour, it [9] is difficult to understand why the word "impose" was used at all, because the use of a more neutral expression such as "obtains or endeavours to obtain" would have been more than sufficient. I have great difficulty in accepting a construction of a section which leaves a citizen open to conviction for an offence involving imprisonment in circumstances where all

that he had done is to knowingly make a false statement in order to obtain a benefit to which he believes that he is entitled.

It may be that in many cases the fact of making the untrue representation knowingly would be sufficient to enable an inference to be drawn that there was an intention to impose, e.g. the knowing use of a credit card beyond the limits set, but this case was not one of them because the defence involved a claim of right. In my opinion, the direction given by His Honour may well have produced the effect in the jury's mind that no element of dishonesty at all was an ingredient of the offence, once they were satisfied that a knowingly untrue representation had been made in order to obtain an advantage or benefit.

I think that the approach to be adopted in relation to the construction of this section is somewhat analogous to that taken by the majority of the Full Court of this State in *R v Salvo* [1980] VicRp 39; (1980) VR 401; (1979) 5 A Crim R 1 in relation to s81(1) of the *Crimes Act* 1958. In that case, McInerney J said at p412:

"The section does not penalize the mere obtaining by deception of property belonging to another with the intention of permanently depriving that other of it. Those acts become offences within the section only if done dishonestly. The mere practising of a deception [10] is not enough, though it may be and in most cases is strongly evidentiary of whether the acts charged against the accused were done dishonestly. What has to be shown is that the accused person has dishonestly by a deception obtained property belonging to another with the intention of permanently depriving the other of it."

Similarly, in my opinion, an offence against s29B is not complete simply by obtaining proof of the benefit or advantage by means of an untrue representation. There must be an imposition, and I think that this means that the Crown must prove an intention to impose, involving an intention to cheat, or at the very least, to obtain an advantage to which one is not entitled, as well as the making of a knowingly untrue representation. In most cases, the making of that untrue representation would be strongly evidentiary of the intention to cheat or to obtain an advantage to which the person is not entitled, but for the reasons already stated, I do not think that the present case falls into that category.

It may be, as Jacobs J pointed out in *R v Lockett* (1980) 24 SASR 54; (1980) 41 FLR 164; (1980) 27 ALR 444; (1980) 2 A Crim R 374, that the offence contemplated by s29B involves something less than that contemplated by s29A, but I think that it nevertheless involves an element of dishonesty which, in the present case, was capable of being negated if the benefit or advantage obtained was one to which the applicant was entitled. I think that it was quite unsatisfactory for the jury to be directed in the terms that His Honour did as to the meaning of the expression, and I accordingly consider that the conviction should be set aside.

*[After deciding that the conviction could not stand on the basis of the trial Judge's general re-direction, His Honour allowed the appeal].*