

49/77

## SUPREME COURT OF VICTORIA

**WALLACE v PACIFIC FAR EAST LINE INC**

Nelson J

8 September 1976

**EXPLOSIVES – FOUND ON A SHIP – ARRANGEMENTS MADE FOR THE EXPLOSIVES TO BE REMOVED AND STORED – IMPORTATION PERMIT ISSUED – ACT AND REGULATIONS BREACHED – TERM "UNDER THE CARE AND DIRECTION" CONSIDERED – ARGUED THAT THE EXPLOSIVES WERE UNDER THE CONTROL OF THE GOVERNMENT NOT THE SHIPOWNER – SUBMISSION REJECTED – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: EXPLOSIVES ACT 1960 (CTH), S3.**

The defendant was convicted on several informations of offences either against sections of the *Explosives Act* 1960 or against regulations made under that Act. Evidence was given that a ship called "The Golden Bear" which was owned by the defendants, entered Port Phillip Bay on 26 January 1975 *en route* to the Port of Melbourne. Part of its cargo included explosives. The defendant was informed that the ship would not be allowed to enter the port with the explosives on board. Arrangements were made for the explosives to be removed in a barge which was brought alongside Port Wilson Explosives Jetty. An importation permit under the *Explosives Act* was issued on 29th January. The explosives were *en route* to Bougainville from America. While the explosives were at Port Wilson, the various features relating to their packing and condition which were the subject of a number of breaches of the Act and Regulations were observed.

It was conceded that there was no evidence that the Commonwealth Customs Department had at anytime taken any steps in relation to the explosives which could be interpreted as an exercise of control over them. Section 3 of *Explosives Act* 1960 provides:

- "3. The provisions of this Act shall not apply to any explosive being the property of or under the control or direction of any of the following:—
- (a)... or
  - (b) Her Majesty's Government of the Commonwealth of Australia; or
  - (c) ... or etc."

The defendant contended that the explosives were "under the control or direction" of the Commonwealth Government. Upon Order *Nisi* to review—

**HELD: Order nisi discharged.**

1. Having regard to the purpose to which the *Explosives Act* 1960 is directed, "control or direction" should be construed as meaning an actual or real and existing control or direction, the existence of which would enable the organisation concerned to take such steps in the interests of public safety that the application of the provisions of the Act for that purpose would be clearly inappropriate.

2. The fact that goods were "subject to the control of the Customs" for the purposes of the *Customs Act* did not necessarily mean that they were under the actual or real and existing or direction of the Customs Department for the purposes of the *Explosives Act*. Goods over which the Customs Department has not purported to exercise any control or direction, and, indeed, in respect of the existence of which the Department may have no knowledge, cannot in any real sense be said to be under its control or direction.

3. There was no suggestion that the explosives were under the actual control or direction of the Customs Department at the relevant time, and, accordingly, the provisions of the *Customs Act* were not made inapplicable by s3 of the Act.

**NELSON J:** ... The *Explosives Act* 1960 is obviously designed to control the handling of explosives in Victoria in the interests of public safety. That control is primarily exercised by a licensing system under which the manufacture, transportation, storage, sale or importation of explosives is prohibited except by licensed or permitted persons. The Act then contains a number of provisions, regulating the carrying on of each of these activities, and provides in some cases for the seizure and forfeiture of explosives.

The Act must, I think, be construed in the light of its obvious purpose. Section 3 requires for

its application the determination of a factual situation, namely, whether the explosives were the property of or under the control or direction of any of the named organisations. Having regard to the purpose to which the Act is directed, "control or direction" in my opinion should be construed as meaning an actual or real and existing control or direction, the existence of which would enable the organisation concerned to take such steps in the interests of public safety that the application of the provisions of the Act for that purpose would be clearly inappropriate.

The defendant relies upon the provisions of the Commonwealth *Customs Act* 1901-1973 as creating in this case the factual situation for which s3 of the *Explosives Act* provides. Section 30 of the *Customs Act* provides:

"Goods shall be subject to the control of the Customs as follows:—

(a) as to all goods imported

— from the time of importation until delivery for home consumption or until exportation to parts beyond the seas whichever shall first happen".

"Customs" means the Department of Customs and Excise, and it was admitted for the purposes of this case that the explosives were imported for the purpose of that section of the *Customs Act*. Section 31 provides:

"All goods, on board any ship boat or aircraft from parts beyond the seas shall also be subject to the control of limits of any port or airport in Australia".

The fact that goods are "subject to the control of the Customs" for the purposes of the *Customs Act* does not, in my opinion, necessarily mean that they are under the actual or real and existing or direction of the Customs Department for the purposes of the *Explosives Act*. I do not think that goods over which the Customs Department has not purported to exercise any control or direction, and, indeed, in respect of the existence of which the Department may have no knowledge, can in any real sense be said to be under its control or direction. The fact that they are subject to the control of the Customs means that certain consequences ensue. It is an offence to move alter or interfere with them except as authorised by the Act (s33); entries may be made and passed for them (s36), a collector of customs may give permission for them to be removed from one specified place to another (s40AA), officers of the Customs Department are given considerable powers in relation to goods which are subject to the control of the Customs by Part XII of the Act.

These provisions, however, can operate whether the goods were under the actual and effective control of the Customs Department or not. The Act itself recognises that goods which are subject to the control of the Customs may be in the possession, custody or control of other persons (s35A) and, of course, the very width of the description of goods which are so subject to control according to ss30 and 31 makes that position quite obvious.

The very exercise by the Customs officer of a power given to him may bring goods which are subject to control under actual control, and if, and as soon as that was done in the case of explosives, the *Explosives Act* would cease to apply to such goods. But it is, I think, a question of fact to be determined in each case whether the goods were under the control of a specified organisation so that the provisions of the *Explosives Act* did not apply.

In this case there was no suggestion that they were under the actual control or direction of the Customs Department at the relevant time, and, in my opinion, the provisions of the *Customs Act* were not made inapplicable by s3 of the Act.

From what I have said it follows that, in my opinion, the various orders of the Magistrates' Court which were sought to be reviewed could not be successfully challenged upon the ground upon which the order nisi was granted. No benefit could consequently ensue from my making any order upon the defendant's summons which would enable the review of each of the seven convictions to be brought before me. On the informant's summons I will therefore make an order setting aside the order nisi granted by the Master.