

11/88

## SUPREME COURT OF WESTERN AUSTRALIA

**OLSEN v MCGILLVRAY**

Pidgeon J

26 April, 26 July 1985 — (1985) 87 FLR 26

**CRIMINAL LAW – CUSTOMS OFFENCE – MOTOR VEHICLE IMPORTED – FALSE STATEMENT FURNISHED TO CUSTOMS AGENT – MEANING OF "FURNISH" – WHETHER NECESSARY TO PROVE *MENS REA*: CUSTOMS ACT 1901 (Cth), s234(1)(e).**

Section 234(1)(e) of the *Customs Act* 1901 (Cth.) provides:

"A person shall not make in any declaration or document produced, given, delivered or furnished to any officer, any statement which is untrue in any particular or produce, give, deliver or furnish to any officer any declaration or document containing any such statement."

**1. The use of the word "furnish" in s234(1)(e) is intended to cover something further than a direct delivery to an officer. It is intended to cover the situation of the delivery of a document to a person further down the line with the intent that it be transmitted to an officer. Accordingly, where a person agreed to arrange clearance of a motor vehicle through customs and gave a form to a customs agent for the purpose of obtaining an assessment of duty which he ultimately paid, there was sufficient to establish a furnishing to an officer of customs.**

**2. Where a person assists to make a document, uses it for the purpose of obtaining an assessment of customs duty and breaches s234(1)(e) in so doing, proof of the existence of *mens rea* is not essential to the establishment of the offence.**

***Stephens v Robert Reid & Co Ltd* [1903] VicLawRp 14; (1903) 28 VLR 82, followed.**

[NOTE: See also the majority judgment in *Lee v Anderson* (1987) 2 Qd R 170; 70 ALR 575; 23 A Crim R 68; 85 FLR 154; MC 19/1987; and *Lanham v Coles* (1986) 40 SASR 390; 82 FLR 216; 21 A Crim R 340; MC 21/1986. Ed.]

**PIDGEON J:** *[After setting out the facts, the Magistrate's reasons for judgment and the grounds of the order nisi, His Honour continued]* ... [32] I shall deal first with that ground that claims that the learned magistrate erred in law in finding that the defendant did not furnish the document to an officer of the Customs Department. I do not consider his Worship did make this finding. He saw the possibility that the complaint may be deficient, but examined what he described as the main question first and resolved the matter by answering this question. However, whatever may be the position I would not see this as a ground for dismissing the complaint or querying its form. If the other elements are established then I consider that the offence would be complete on delivering the form to a Customs agent with the intent that the Customs agent deliver it to an officer of Customs. The section concerned must have been intended to have a very wide meaning by the use of four separate verbs namely "produce", "give", "deliver" and "furnish".

I consider this latter verb takes the meaning further and is intended to cover the situation of the delivery of a document to a person further down the line with the intent that it be transmitted to an officer. It is intended to cover something further than a direct delivery to an officer. I would refer to the meaning and history of the word "furnish" in the *Shorter Oxford English Dictionary* and in *Chambers Dictionary*. It can be traced back to the Latin work "formire — to further" or compared to the old high German verb "frummen — to further". Among its meanings in the *Oxford Dictionary* are "to accomplish" or "to ensure" or "to supply, provide, contribute and afford". The respondent's evidence is that he agreed to arrange the clearance of the vehicle. He gave the form to the Customs agent for the purpose of obtaining an assessment of duty which he ultimately paid. I consider that this would be sufficient to establish a furnishing to an officer of Customs.

The next element of the offence is that the form contained an untrue statement. There is obviously evidence of this. His Worship made no finding on this point. However, I consider the

finding that it was not true must be made independently of Mrs Paver's evidence having regard to the averments, the state of the evidence and the actual evidence of the respondent. The averment is that the price was £15,000. There is no evidence to rebut the *prima facie* fact thus established. The respondent's evidence is that he sent direct to the salesman money in excess of the price referred to in the form, and the amount sent was 15,500 pounds. This must lead to a finding that the form is untrue on this point.

Mr Brown on behalf of the appellant submitted that these are the only two elements required to establish the offence, namely the furnishing and the fact that the statement was untrue. His Worship was of the view that something more was required and expressed it by stating that it was necessary to show that the respondent was the prime mover. It is the appellant's submission that this is putting the test too high. On the appellant's submission there is no need to prove *mens rea* and there is no need to prove knowledge on the respondent's part. The offence, on the appellant's submission, is established simply by proving the delivery or furnishing of the document combined with the fact that it is untrue. On that basis it would appear that any person who delivered an untrue document, be it a postman or an innocent person delivering a message would be committing an offence. Counsel for the appellant submitted that this is the case and that reliance must be placed upon the discretion not to prosecute.

[33] The appellant quotes a number of cases in support of his proposition commencing with *Stephens v Robert Reid & Co Ltd* [1903] VicLawRp 14; (1903) 28 VLR 82 where it was held that *mens rea* was not an element and that a company was liable under s234(e) for an untrue statement innocently made by its clerk acting in the course of and within the scope of his employment. The case was applied by the Full Court of New South Wales in *Ex parte Falstein; Re Maher* (1948) 49 SR (NSW) 133; 66 WN (NSW) 52. It was held that individuals are liable for the acts of their agents done in the course of their authority contrary to the provisions of s234(c) and (d) and that proof of *mens rea* is not essential.

Mr Cannon on behalf of the respondent considered that agency was the answer to the difficulty to which I have earlier referred of a postman or innocent courier delivering such a form. If the deliverer was an agent then he is responsible but if he is not an agent he would not be so responsible and that was, it was submitted, the effect of the cases that were discussed before me. It was Mr Cannon's submission that the evidence of the respondent would indicate that he was not the agent of Mrs Paver and consequently could not be vicariously liable.

The view to which I have come is that his Worship did put the complainant's onus too high in his opening remarks and in his reference to the necessity to establish a prime mover. I come to that view for the following reasons. I would commence with the case of *Stephens v Robert Reid & Co Ltd* (*supra*). This case related to a prosecution under the first part of subs (e) and it was for making an untrue statement. The defendant was a company and an employee made a statement which was found to be untrue but the employee did not know it was untrue and it was not made with any fraudulent intent. Hodges J referred to the established facts, namely, that in a document produced to an officer there was a statement which was untrue. His Honour then dealt with the contention on behalf of the defendant that a *mens rea* must be shown. His Honour undertook an inquiry as to whether the statute required "a wicked mind to be an essential ingredient in the offence". His Honour said it was necessary to examine the particular words of the statute and also to consider the subject-matter and object to determine whether this is what the legislature meant. His Honour referred to the absence of words such as "wilfully", or "knowingly", or "fraudulently". He referred to such words being in a subsequent section and this led him to the view that the legislature did not mean the condition of mind to be an essential ingredient the subject-matter of the Act. His Honour then said (at 88-89):

"The information is to be supplied by persons who presumably know the facts to persons who presumably know little or nothing more than what they are told, and the fair and equal collection of the revenue depends, to a large extent, upon the accuracy of the information given. It is necessary to make people careful in the statements they make, and in the information they give. Incorrect information, innocently given and undiscovered, may, and will in some cases, lead to a loss of revenue, and to a benefit to the person whose information was not correct, and the legislature may say that untrue statements, innocently made, when discovered, must be paid for, both to balance the loss in cases in which the mistake has not been discovered and also to make people careful as to the information they give. I am of opinion that this s234 was intended to penalise mistakes."

[34] This case was applied by the Full Court of New South Wales in *Ex parte Falstein; Re Maher* (1948) 49 SR (NSW) 133 at 143; 66 WN (NSW) 52. *Falstein's case* was followed in *Schenker & Co (Aust) Pty Ltd v Sheen* 77 FLR 127; (1983) 48 ALR 693 where Enderby J held that proof of the existence of *mens rea* is not essential to the establishment of an offence under s234(d), that is, the previous subsection of the section I am considering, of making or giving any entry which is false. I would see *Stephens'* case applying to the situation where the defendant is the maker of the document. A distinction may well be open where the defendant transmits a document made by another person; where the defendant is not the agent of that person and has no interest in the subject-matter to which the document relates. The principles of protecting the revenue referred to by Hodges J would not apply to that situation. I do not consider this possible distinction is applicable in the present case. The respondent on his own evidence assisted in making the document. He undertook to arrange the clearance of the vehicle. He obtained the document form from a Customs agent to be filled in. He filled it in and delivered it to the Customs agent.

Since this matter was heard the High Court on 11 July 1985 published the reasons for judgment 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 where the Court considered the question as to what extent *mens rea* was an ingredient in the offences created by s233B of the *Customs Act* which are special provisions with respect to narcotic goods. Two questions among those considered was whether *mens rea* is an element and if so what mental state is imported by that expression. The offences being considered involved the importation and possession of heroin, offences carrying a penalty of life imprisonment and being described as of a kind that are truly criminal. Gibbs CJ (at 621–622) in a judgment with which Mason J agreed said that the relevant principle is stated in *Sherras v De Rutzen* (1895) 1 QB 918 at 921; 11 TLR 369 as follows:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."

His Honour referred to three matters that must be considered in deciding whether the presumption has been displaced and these were the words of the statute creating the offence; the subject-matter with which the statute deals and an inquiry as to whether putting the defendant under strict liability will assist in the enforcement of the regulations. The first two factors were considered by Hodges J in *Stephens' case* (*supra*) when he came to the view that *mens rea* in the sense he explained it of having a wicked mind was not required to be established in respect of the section that is the subject of the appeal before me. He considered the case of *Sherras v De Rutzen* (*supra*). I would refer particularly to his Honour's analysis of the subject-matter of the Act as being required to protect revenue and to make people careful of the statements they make. Dawson J in the case just decided made reference to this aspect when he said at 650 of his reasons:

"It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability".

The maximum penalty under the section I am considering (s234(1)(e)) is a [35] monetary penalty of \$5,000. The section commences by making an offence the evasion of the payment of duty which is payable and subsequently deals with the making of false entries and untrue statements in relation to the importation of goods. *Stephens' case* related to this particular section and I would see nothing in the decision of the High Court in *He Kaw Teh* (*supra*) to alter the principles in *Stephens' case* so far as it relates to that section. I would consider therefore that there is no element of *mens rea* in respect of an offence committed by a person who is involved in the transaction to the extent the respondent says he was and who assists to make a document and who uses it for the purpose of obtaining an assessment of duty and who breaches s234(1)(e) in so doing.

The respondent's evidence in summary was that he forwarded direct to the car salesman concerned a total sum of 15,500 pounds. He prepared a loan agreement indicating that 13,000 pounds was for the purchase of the car concerned. He was the one who caused to be inserted in the form the sum of 12,800 pounds as the purchase price by writing this figure out and asking the typist to complete the form. He arranged for the vehicle to be shipped to Australia and he

paid the freight direct to the shipping agency. He has had possession of the vehicle following its arrival and he said it has been kept in a garage to which he has had access. He inserted the advertisement for its proposed sale and this was done while the vehicle was in his possession. He stated that he was asked to obtain a clearance by Mrs Paver. He obtained the document referred to in the complaint for this purpose and arranged for it to be filled out. He delivered it to the Customs agent to obtain an assessment of duty which he paid. That in my view is more than sufficient evidence to establish that the respondent is guilty of the offence charged and I consider his Worship was bound to find the charge proved on the respondent's evidence alone having regard to the averments. I would therefore make the order absolute and would remit the matter to the Court of Petty Sessions at Perth with a direction to proceed on the basis that the charge has been proved.

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