**28/76**

## SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

# *R v SHIN NAN YONG*

**Street CJ, Taylor CJ at CL and Slattery J**

**29 August 1975 — (1975) 7 ALR 271**

**CRIMINAL LAW – IMPORTATION OF DRUGS – KNOWINGLY CONCERNED IN THE IMPORTATION OF PROHIBITED IMPORTS – "CONCERNED" – WHETHER RELEVANT THAT IMPORTER HAD NOT BEEN CONVICTED – WHETHER PROVEN CRIMINAL IMPORTATION REQUIRED – WHETHER 'CONCERN' MUST BE MADE MANIFEST IN A PHYSICAL SENSE WHILST IMPORTATION IS IN PROGRESS: *CUSTOMS ACT* 1901-74 (CIVIL), S233B(1)(d).**

The applicant and another man, Hew, were jointly tried by jury for offences under s233B of the *Customs Act*. The man Hew was charged with the importation into Australia of prohibited imports and the appellant was charged with being knowingly concerned in the said importation. The jury acquitted Hew and convicted the appellant. The appellant appealed on three grounds.

**HELD: Appeal dismissed.**
**1. The offence under s233B(1)(d) was not an accessory offence. All that needed to be established was the fact of the importation of a prohibited import in which the accused was knowingly concerned. Whether or not the importer had been convicted was irrelevant. The fact that the indictment referred to the 'said importation' did not mean that there had to be a proven criminal importation.**

**2. It is not an essential part of the offence under s233B(1)(d) of the C*ustoms Act* that the 'concern' be made manifest in a physical sense whilst the importation is in progress. It is sufficient if the 'concern' is manifested in the venture which centres upon the importation.**

**STREET CJ:** [Delivered the judgment of the Court]: This is an appeal against conviction and sentence on a charge of being knowingly concerned in the importation of prohibited imports, the relevant statutory provision being s233B(1)(d) of the *Customs Act*. The appellant, after a trial before a jury was convicted and sentenced to seven and a half years' penal servitude, a non-parole period being fixed to expire on 1 July 1978.

It appears that the appellant and another man named Hew had travelled on an aircraft from Kuala Lumpur to Australia. Hew had brought with him a red suitcase given into his custody at Kuala Lumpur by a third man who was the principal in the whole transaction. The suitcase in fact contained a large quantity of drugs. It had been arranged before the two men left Singapore that the appellant would take over the red suitcase in Sydney and hand it to a man, who would identify himself to the appellant in consequence of a particular garment the appellant was supplied with in Kuala Lumpur, in return for the sum of $10,000. The appellant and Hew were then to return to Kuala Lumpur. Hew was seen by the appellant to receive the red suitcase in Kuala Lumpur, The two men travelled to Sydney in the same aircraft in adjoining seats.

Hew was apprehended whilst passing through customs at the airport in Sydney. The bag was taken. The prohibited imports were found within it and in due course Hew was charged with importing prohibited imports. The appellant was apprehended when he was about to board an aircraft to return to Kuala Lumpur. He, in turn, was charged with the crime of which he was subsequently convicted.

It is material for present purposes to quote the terms of the indictments against the two men, they having been indicted together and their trials having proceeded concurrently before the same jury. Hew was charged: 'for that he on or about 26th December 1974 in Sydney in the State of New South Wales did import into Australia prohibited imports to which s233B of the *Customs Act* 1901-1974 applied, to wit narcotic goods consisting of a quantity of morphine hydrochloride and a quantity of diacetyl morphine.' The appellant was charged: 'for that he on or about 26 December 1974 in Sydney in the State of New South Wales was knowingly concerned in the said

importation into Australia by Hew Len Yon of prohibited imports to which s233B of the *Customs Act* 1901-1974 applied.'

We think it appropriate to deal with this appeal upon the basis that *mens rea* was an ingredient necessary to be established in the offence charged against Hew. In so assuming we are not, however, to be taken to be stating a conclusion or even an inclination to that effect.

The next ground with which it will be convenient to deal is the second; that is that the learned trial judge should have directed the jury that the charge against the present appellant was in the nature of an accessory offence and that in the event of acquittal of the principal, Hew, then the accessory, Yong, must also be acquitted. A more direct way of stating this ground is that the two verdicts, one of not guilty, are the other of guilty, are inconsistent.

The court has been referred to a number of authoritative observations upon the necessity for a principal offence to be proved to have been committed in order to sustain a charge and conviction of what might be described as a purely accessory offence. The present offence, however, is not of an accessory character. The charge brought against the appellant was under s233B(1)(d) which provides:—

> '233B(1) Any person who — (d) aids, abets, counsels or procures or is in any way knowingly concerned in the importation into Australia of any prohibited imports to which this section applies ... shall be guilty of an offence.'

Mr Sullivan QC has, with justification, contrasted this section with the terminology of s236, which provides:—

> "236. Whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly concerned in the commission of any offence against this Act shall be deemed to have committed such offence and shall be punishable accordingly.'

Clearly enough s233B(1)(d) is not of the same character in an accessory sense as is s236. The section does not depend for its operation upon what might be described as a principal or primary conviction. It is capable of operating in any circumstances where there has been an importation into Australia of any prohibited import.

The matter of concern in regard to this ground of appeal is that the two indictments might be said to be linked together so that acquittal on the former should lead inevitably to acquittal on the latter ...

Coming to the present appellant, the element of *mens rea* is imported directly by the adverb 'knowingly', and the jury was instructed on this point. All that is necessary to be established for the purpose of supporting a charge under s233B(1)(d) is the fact of importation of a prohibited import in which the accused was knowingly concerned. Whether the importer has been convicted of an offence constituted by s233B(1)(d).

There remains one further basis upon which it might perhaps be said the charge against Yong should have fallen in consequence of the acquittal of Hew, and that it is that the indictment against the present appellant made specific reference to 'the said importation'. This might be said to involve in the charge against Yong the concept of a criminal importation merely by reason of the terminology adopted in framing the indictment against the present appellant. After deliberation upon this point of construction of the second indictment we have reached the conclusion that it would involve an unduly technical and precise use of language. We do not consider that the charge against Yong involved as an ingredient in the matter of its formulation a conviction of a criminal importation. We accordingly do not uphold the second ground of appeal.

The last ground involves a challenge to the directions given by the learned judge on the ingredient of 'knowingly' in the indictment. His Honour instructed the jury

> 'Let me discuss with you those questions of what is involved in the word 'knowingly'. To begin with, gentlemen, I tell you that 'knowingly' involves the concept of design on the part of the accused person. Hence, if you are satisfied on the one hand that the accused Yong had actual knowledge of

> these drugs, or of some drugs being present in this red suitcase, and that he was upon his arrival in Sydney, as is the common fact, to hand the suitcase to someone else and get money for it, then if seems to me without hesitation you would find the accused guilty of the charge.'

It is said that this direction is deficient in that it does not adequately direct the jury's attention to the necessity of an involvement or concern with the actual importation, The part played by Yong might well, so the argument runs, have been totally distinct from the importation so far as that direction is concerned.

The court has been referred to authoritative decisions upon what is meant by 'importation', but it is unnecessary for present purposes to canvass those decisions. His Honour's direction was principally concerned in this regard with the word 'knowingly'. It was clear enough from the whole of the stated facts before the jury, most of which were uncontested, that the present appellant did understand that he was to hand over the bag in Sydney to an identified recipient. Equally it is clear enough that he had been told before leaving Kuala Lumpur what part he was to play and he had seen the red bag in the possession of his companion at Kuala Lumpur. The importation of the red bag was at the core of the whole transaction for which the appellant had been retained by the Kuala Lumpur principal.

Viewed in this light it does not seem that there was any necessity for his Honour to expand on physical participation as a necessary element in this aspect of the crime. It is by no means an essential part of the crime against s233B(1)(d) that the 'concern' be made manifest in a physical sense whilst the importation is actually in progress. It is sufficient if the 'concern' is manifested in the venture which centres upon the 'importation'.

The words 'aids, abets, counsels, or procures' lend force to this wider connotation in par (d). We are accordingly of the view that the passage which is sought to be challenged does not involve a misdirection such as to have given rise to a miscarriage in the present trial, and we do not uphold the appeal in so far as it is sought to be grounded on this head. In the result the appeal fails, and so far as it relates to conviction we shall in due course dismiss it.

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