18/88

SUPREME COURT OF VICTORIA

GALLAGHER v CENDAK

Vincent J

29-30 September, 1 October, 10 November 1987 — [1988] VicRp 70; [1988] VR 731

CUSTOMS PROSECUTION – SMUGGLING/ATTEMPTING TO EVADE PAYMENT OF DUTY – IMPORTATION OF MOTOR VEHICLES – ACTUAL PRICES UNDERSTATED BY IMPORTER – AVERMENTS IN INFORMATIONS TO THAT EFFECT – USE OF AVERMENTS – LIMITATIONS ON USE – WHETHER CASE TO ANSWER: *CUSTOMS ACT* 1901 (CTH.) SS4, 36, 153, 157, 159, 233(1)(c), 234(1)(a)(d)(e); 255; *CUSTOMS TARIFF ACT* 1982 S18(1);

C. imported several motor vehicles into Australia. In relation to the relevant documentary material required to be lodged by C. with the Customs officers, it was alleged that C. understated the value of the vehicles. Subsequently, charges were laid in respect of breaches of the *Customs Act* 1901, and the informations contained a number of averments in respect of each vehicle. One of the averments related to the understatement of the price of each vehicle by at least a certain amount. When the matters came on for hearing, the magistrate upheld a submission of no case to answer on the basis that the prosecution had failed to establish a specific customs value in respect of each vehicle. Upon orders nisi to review—

HELD: Orders absolute. Remitted for further determination by the magistrate.
1. Averments constitute *prima facie* evidence of the matters alleged within them and accordingly, must be drawn with care and precision. Nonetheless, averments are mere allegations, and courts should remain sensitive to the possibility of injustices arising from their use and to the risk that there may be a defacto reversal of the onus of proof.
***R v Hush; Ex parte Devanny* [1932] HCA 64; (1932) 48 CLR 487;**
***Ex parte O'Sullivan; Re Craig* (1944) SR (NSW) 291; and**
***Charlton v Rogers; Ex parte Charlton* (1985) 82 FLR 40; 20 A Crim R 238, applied.**

2. In the present case, it was not necessary for the prosecution to establish that the amount of duty payable had been calculated at the time of importation or that the precise customs value of the goods had been determined. As the averments claimed that the actual money price of each vehicle had been understated by no less than a specified amount, it was open to the magistrate to find that the defendant had a case to answer.
***Cendak v Crawford* (1986) 86 FLR 190, distinguished.**

VINCENT J: *[After setting out the details of the charges, a summary of the evidence before the Magistrate, the averments in each information, the magistrate's reasons for judgment and the grounds of the orders nisi, His Honour continued]:* ... **[11]** In essence it has been contended on behalf of the applicant that the learned magistrate fell into error, partly based on a misunderstanding of the effect of the judgment of White J of the Supreme Court of South Australia in *Cendak v Crawford* (delivered 21st August 1986) in that he failed to give proper effect to the various averments which have been previously set out.

Averments in proper form are admissible pursuant to the provisions of s255 of the *Customs Act* which reads:-

> "255. (1) In any Customs prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred.
>
> (2) This section shall apply to any matter so averred although—
> (a) evidence in support or rebuttal of the matter averred or of any other matter is given by witnesses; or
> (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only.
>
> **[12]** (3) Any evidence given by witnesses in support or rebuttal of a matter so averred shall be considered on its merits and the credibility and probative value of such evidence shall be neither increased nor diminished by reason of this section.

(4) The foregoing provisions of this section shall not apply to
(a) an averment of the intent of the defendant; or
(b) proceedings for an indictable offence or an offence directly punishable by imprisonment.

(5) This section shall not lessen or affect any onus of proof otherwise falling on the defendant."

It will be observed that it is not possible to aver any matter of law, or by this means to provide evidence of the intention of a defendant. The effect of averments has been considered in a number of cases including *R v Hush; Ex parte Devanny* [1932] HCA 64; (1932) 48 CLR 487 where Dixon J stated:-

> "It is to be noted that this provision ... does not place upon the accused the onus of disproving the facts upon which his guilt depends, but, while leaving the prosecution the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect that the allegations of the prosecutor shall be sufficient in law to discharge that onus."

However, as the High Court said in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 657; [1955] ALR 671:-

> "... even though the defendant remains silent after a *prima facie* case has been launched against him, it may very well be that he ought be acquitted."

Applying this principle in *Simmons v Venning* (1969) 1 SASR 403 at p405; (1969) 17 FLR 468, Bray CJ, (referring to his earlier decision of *Lemmer v Considine* [1969] SASR 211) expressed the view that:-

> **[13]** "... it is not enough for a court to find that a *prima facie* case has been made out, whether by statutory presumption or by any other means, and that this case is unanswered by credible evidence, and that therefore there must be a conviction. The court must still decide whether in that state of affairs it is satisfied of the guilt of the accused beyond reasonable doubt."

Nonetheless, averments do constitute *prima facie* evidence of the matters alleged within them, and accordingly there are repeated warnings throughout the authorities emphasizing the care with which they must be approached. In *R v Hush* (*supra*) at p500 it was held that:-

> "The facts and circumstances constituting the offence ... should be stated fully and with precision"

while in *Ex parte O'Sullivan; Re Craig* (1944) SR (NSW) 291 at p299, Jordan CJ said that:-

> "The function of an information is to aver, that is, to allege, against the accused matters which, as alleged, constitute an offence. ... That which the accused may reasonably require by way of particulars is the measure of what may with propriety be included in the averment of the information in addition to the allegation of the offence. It is not permissible to stuff an averment with a statement of detailed facts which it is hoped to prove in evidence."

and later, when dealing with a mixed question of fact and law at p303:

> "I think that, except in cases where the disengagement of the law from the facts can be clearly and easily accomplished, the safe course, especially in cases tried with a jury, is to place no reliance upon mixed averments, lest a slip in doing so should invalidate a conviction which could otherwise be supported."

Davidson J gave a strong warning in relation to their use in *Ex parte Ryan & Ors; Re Johnston and Anor* (1943) 60 WN (NSW) 106 at 109-110:

> **[14]** "Unfortunately the practice is developing of attempting by a dimly concealed device to throw upon accused persons the burden of proving their innocence, when there is apt to be difficulty in establishing guilt in certain classes of offences in respect of which convictions are earnestly desired ... The simple expedient is therefore adopted of transforming a description of such conduct into presumptive guilt of a criminal offence merely by making a charge in an information in carefully framed language."

The following year, His Honour again made some strong comments in the case of *Ex parte*

Gerard and Co Pty Ltd; Re Craig (1944) 44 SR (NSW) 370 at 380-1; 61 WN (NSW) 232:-

> "Perhaps the modern types of legislation which have been mentioned and which tend toward the abrogation of those principles [referring to the presumption of innocence] may be pointed to by future legal historians as a first stage in a retrogression to the past when government departments found it too tedious to procure evidence of the guilt of persons charged with crimes."

In the more recent case *Charlton v Rogers; Ex parte Charlton* (1985) 82 FLR 40; 20 A Crim R 238, where the Supreme Court of Queensland also examined the nature of the averment, Derrington J, although upholding the use and purpose of this device in customs prosecutions, stated at p41 that:-

> "The use of averments in this way is a powerful weapon which is given to the prosecution and accordingly must be exercised with due precision. This does not mean that it will be defeated by excessive or artificial scrutiny, but on substantive points a proper standard of accuracy is essential, in default of which the averment will fail."

With great respect to each of the learned judges whose views have been set out above, in my opinion they are entirely correct in requiring that averments be drawn with care and precision and that the courts should remain sensitive to the possibility of injustices arising from **[15]** their use. It must not be forgotten that although they are ascribed the status of *prima facie* evidence, averments are nonetheless mere allegations. Their employment can create a risk that a conviction may be recorded against an individual where there is actually no evidence adduced against the alleged offender other than the making of such an allegation.

As indicative of the difficulty presented by reliance upon averments to establish the facts necessary to support a conviction for a criminal offence, the remarks of Bray CJ who stated in *Simmons v Venning* (1969) 1 SASR 403; (1969) 17 FLR 468 that:-

> "I agree that when the *prima facie* case is made out solely by virtue of a statutory presumption it is a difficult and perhaps a baffling task to discover appropriate criteria by which to judge whether that *prima facie* rase has been converted into satisfaction beyond reasonable doubt."

possess considerable force. A little later and with what appears to have been an understandable measure of unease about the situation, His Honour went on to state in relation to the particular case before him at p406:-

> "But the learned Special Magistrate said that he achieved the conversion and I do not think I can say that he ought not to have done so."

The convenience which averments bring to prosecuting authorities needs to be carefully balanced against the possible unfairness of their use to a defendant and the risk that there may be, whatever the authorities may say, a defacto reversal of the onus of proof.

Turning then to the first of the four offences alleged to have been committed in respect of each car, it should be pointed out that for the purposes of the present **[16]** matter it would appear that no significant distinction can be drawn between the different vehicles and none has been advanced by counsel in the course of argument.

Smuggling

"Smuggling" the offence of which is created by s233(1)(a) is defined in s4 as:-

> "...any importation, introduction or exportation or attempted importation, introduction or exportation of goods with intent to defraud the revenue."

The breadth of this definition indicates a clear intention to encompass a wide variety of schemes and activities which may be adopted in an attempt to defraud the revenue. These could range from the primitive concealment of the presence of goods, or the making of false statements in respect of them, to the employment of high sophisticated techniques directed to this end. (See *Vogel and Sons Pty Ltd v Anderson* [1968] HCA 90; (1968) 120 CLR 157; 41 ALJR 264;). The expression "intent to defraud the revenue" in similar legislation was considered by Hodges J in *Stephens v Abrahams* [1902] VicLawRp 123; (1902) 27 VLR 753; 8 ALR 112 to mean:-

> "to get out of the revenue something that was already in it, or to prevent something from getting into the revenue which the revenue was entitled to get."

In this context he also said that (at p767):-

> "I take the 'revenue' to be moneys which belong to the Crown, or moneys to which the Crown has a right, or moneys which are due to the Crown..."

This approach was later approved by the High Court in *R v Australasian Films Ltd* [1921] HCA 11; (1921) 29 CLR 195; 27 ALR 297.

It is not, I think, necessary for the purposes of the present proceedings, to attempt to provide any detailed **[17]** analysis of the *Customs Act*, the *Customs Tariff Act* 1982, or of the relationship between them, as although the complexities created by international trade present difficulties in operation, the scheme established by this legislation for the imposition, assessment, and collection of customs duties is not itself particularly complicated.

Section 18(1) of the *Customs Tariff Act* 1982 states that:-

> "Subject to this Act, duties of Customs are imposed, in accordance with this Part, on goods imported into Australia, whether before, on or after the commencing date."

The obligation to pay duty on imported goods arises at the time of importation and, with some exceptions which are not relevant to the present matter, at the rate in force when the goods are entered for home consumption, although, of course, the actual amount of duty attracted may remain uncertain until a determination in relation to it has been made by the Collector of Customs in accordance with the provisions of s157. Liability to pay such duties is imposed by s153 upon the "owner" of the goods concerned, as defined in s4, and they are assessed on the "value" of the goods which, by reason of s156 means, in general, "the customs value" as determined pursuant to the provisions contained in Division 2 of the Act.

Section 157(1) states that:-

> "Subject to sub-section (2), the customs value of goods to be valued is the transaction value of the goods."

The following sub-sections set out a code for the calculation of the customs value in circumstances where the "comptroller", now "collector", considers that this value cannot be determined in accordance with sub-s(1).

[18] However, the collector whose role in such matters is to implement the statutory scheme and to recover the proper duties to which the revenue is entitled, is under an obligation pursuant to s159(1) to make such a determination where it is possible so to do. The transaction value therefore provides the initial basis for the calculation of customs value and in the context of the present case the only basis upon which it could be properly fixed. Indeed it is clear from the evidence as to the conduct of the parties and the very nature of the present proceedings that at no stage has there been any doubt or even question raised that the transaction value was not properly to be regarded as the customs value of the goods concerned in this importation. The transaction value is defined in s159 which reads: *[His Honour set out the provisions of the section and continued]* ... **[20]** In the present matter it has been argued that there was a deliberate understatement by the respondent of the true price and the free on board price of goods, the customs value of which, must have been anticipated by him to have been related to their transaction value, and that the obvious, and indeed the only purpose of such conduct was to evade the additional duty which was payable upon their importation.

At the stage of proceedings, when the issue of the existence or otherwise of a case to answer arose for consideration, the prosecutor was required to demonstrate that there was evidence which was capable of supporting such a finding. (See *May v O'Sullivan* [1955] HCA 38; (1954) 92 CLR 654; [1955] ALR 671). The applicant averred that the price of each vehicle, which was stated by the respondent as a free on board price, had been falsely and knowingly understated in the entry required by s36 of the *Customs Act* and that a supporting cash memo which was known to be

false had been produced to a customs officer. **[21]** Reference to the judgment of the magistrate and to the grounds contained in the Order Nisi, indicates that the prosecution was almost, if not entirely, reliant for the necessary evidence of the falsity of the statements made and information provided, upon averments of what was said to be the "true price" of the vehicle and its free on board price. Whilst no specific figure was advanced as being the actual purchase price, it was averred in respect of each car that the price was higher than that specified by the respondent, by at least a particular amount, for example, in the case of the vehicle described as the first motor car, a cash memo provided by Mr Cendak, as establishing the amount paid by him, stated the price at HK$18,000 (A$2,543) whilst that contained in the averments was said to be "not less than HK$22,300 (A$3,150)."

There was therefore, in that instance, an averment of the understatement of the price of the vehicle concerned by at least A$607, which, whilst incapable of providing evidence of any greater difference, would have effect to the extent of the minimum difference alleged. The prosecution also contended that in a situation in which the value for duty and hence the duty payable on goods was related to the transaction price of the goods, a deliberate understatement of that price must be regarded as providing strong evidence of the presence in the mind of the respondent of the necessary intention to avoid the payment of the proper duty arising from the importation of the goods concerned.

Counsel for the respondent argued before the magistrate, as he did in this court, that the value for **[22]** duty of goods imported into this country was still to be determined by the Collector of Customs under s157, and that until this was done it could not be said that any duty at all was payable and hence none could be evaded. Such argument involves, in my opinion, misconceptions both as to the time at which the liability to pay duty in respect of imported goods arises, and as to the role of the Collector in relation to the determination of the actual amount so payable.

Although before any conviction could be properly entered it would be necessary for the prosecution to show that the defendant acted as it is alleged he did with the intention of defrauding the revenue of at least some duty to which it was entitled in the circumstances, I do not consider that it would be necessary for the prosecution to establish that the calculation of the actual amount of duty payable had already been made at the time he so acted, or that there was not some further act to be performed before it could be ascertained, or that the precise customs value of the goods had been determined at the time of importation.

There would be an obvious absurdity about an interpretation of the section which resulted in a situation where the adoption of a device preventing the ascertainment of the precise customs value of goods, but where it was clear that some duty was being evaded, was not encompassed by it. Whilst there is a certain lack of clarity in the language employed by the magistrate, it would appear that he was of the view that the prosecution was required to **[23]** establish the "correct customs value" and, as I have indicated, I consider that such an approach was incorrect. However, His Worship also made a finding that there was no evidence at all before him of the value for duty of any of the vehicles concerned. Accordingly he determined that there was no evidence that there was any additional duty payable.

His Worship purported to act on the basis of the principles set out in the judgment of White J in the matter of *Cendak v Crawford* (*supra*) which was a case arising directly out of the same transactions as the present one. In that matter, the prosecution case was presented on the basis that the transaction value of a number of vehicles was arrived at by adding the cost of repairs claimed to have been carried out to the vehicles, to their purchase price. White J was of the view that such an argument was fallacious and stated, relying on a number of authorities, that it was well recognized that there may be no increase whatever in the value of an article by reason of the carrying out of expensive repairs to it. Accordingly, he held at the prosecution case which depended upon averments and other evidence to this effect must fail.

It is important to bear in mind when considering this decision that the prosecution case was based upon the averment of a specific customs value which was calculated on a basis properly regarded by His Honour as being unsound. Once that deficiency was exposed there was no foundation on either the averments, or the evidence before **[24]** the Court, upon which a case against the defendant could be based. There was in fact no evidence of the value of the goods

other than that provided by the defendant himself.

The situation in the present matter is quite different, as here the averments claim that the actual money price of each of the vehicles concerned had been understated by no less than a specified amount. That difference, as it appears to have been conceded by counsel for the respondent in argument, would be represented by a difference in the duty attracted which, it was open to the magistrate to find, was by the making of a false statement intended to be denied to the revenue, if, of course it was also supported by evidence capable of carrying the inference that such an intention was present.

Whether or not such an inference was open would depend upon the surrounding evidence, as, of course, it could not be the subject of an averment. This possibility has been specifically excluded by s255(4)(a). In the event, the learned stipendiary magistrate, by reason of the view which he found as to the necessity for the prosecution to establish a specified customs value, did not address himself to this question. Before this Court, Mr Batt, QC who appeared as Senior Counsel on behalf of the applicant, submitted that it was open on the basis of the evidence, including the averment of the making of a knowingly false statement as to the price of each vehicle, for the magistrate to make the necessary finding for conviction, of the existence of an intention on the part of the respondent to defraud the revenue.

[25] A clear but possibly difficult distinction in some situations, can be drawn between an averment of the fact of the possession of knowledge by a person which is admissible, and one of intention which is not. Certainly evidence of knowledge may provide a very stable platform on which to base the inference of intention. It does appear to me that it was open to the magistrate in the present matter to make a finding adverse to the respondent on this issue dependent upon the view he took of the evidence before him.

Accordingly, I am of the view that the learned stipendiary magistrate was in error in determining that no case for the respondent to answer had been made out in relation to each of the four charges of smuggling contrary to s233(1)(a) of the *Customs Act* 1901.

[His Honour then reached the same conclusion in respect of the remaining charges].
