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ALEXANDER FERGUSON & Co. v. DANIEL CRAWFORD & Co. LTD.

Griffith C.J.

issue on which he fails, he runs the risk not only of not getting the costs of that issue, but of being deprived of other costs which he might perhaps otherwise have got. That seems to be the principle which the Law Officer might properly have applied, and which, in fact, he did apply. As, therefore, there has been neither a misapprehension of facts nor a disregard of principle, there is no reason for interfering with the exercise of his discretion.

O'CONNOR J. I am of the same opinion.

ISAACS J. I concur.

Appeal dismissed with costs. Respondents to pay costs of notice to vary the order.

Not Foll *Moore v Jack Brabham Holdings Pty Ltd* 67 ALR 561

Solicitor, for the appellant, *F. B. Waters.*

Solicitor, for the respondent, *E. Hart* for *A. de Lissa*, Sydney.

B. L.

[HIGH COURT OF AUSTRALIA.]

BAXTER . . . . . INFORMANT;

AND

AH WAY AND ANOTHER . . . . DEFENDANTS.

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SYDNEY, *April* 26, 27, 28, 29.

Higgins J.

Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 236, 255—*Customs prosecution—Burden of proof—"Averment."*

Sec. 255 of the *Customs Act* 1901 throws on a defendant in a Customs prosecution the burden of disproving the charge made against him, the word "averment" in that section covering the essential part of the offence and not merely technical averments preliminary or final.

Secs. 236 and 255 of the *Customs Act* 1901 discussed and applied.

United States v. *Arnold*, (1 Gallison, 348), applied.

Information for a penalty under the *Customs Act* 1901.

The defendant was charged on information before a Court of summary jurisdiction in Sydney, New South Wales, for that he (*a*) did unlawfully have in his possession certain goods, namely, 867 tins of opium suitable for smoking, contrary to the Act in such case made and provided; (*b*) did unlawfully import certain prohibited imports, namely, 867 tins of opium suitable for smoking, contrary to the Act in such case made and provided. The information was, pursuant to sec 246 of the *Customs Act* 1901, tried in the High Court before *Higgins* J.

The learned Judge reserved for the Full Court a question of law the decision of which has already been reported (*Baxter* v. *Ah Way*) (1).

The facts are sufficiently stated in the judgment hereunder.

Wise K.C., *Blacket* and *Bavin*, for the informant.

Garland and *Flannery*, for the defendant.

Higgins J. This is an information for a penalty under the *Customs Act* 1901. The defendant, a Chinese, is charged with importing opium fit for smoking. The importation of such opium is prohibited by proclamation made under sec. 52 (*g*) of the *Customs Act* 1901. The defendant contends that the Federal Parliament had no power to authorize such a proclamation; and as both parties wish me to leave this point to the High Court, I do so; but I decided to hear all the evidence in this and the following cases before dealing with any of the points of law.

The defendant says that he sells vegetables and sometimes groceries to Chinese on board certain steamers. On the morning of 27th January last he was on board the *Empire*, a steamer belonging to the Eastern and Australian line trading to China. He says that on the wharves he met a man whose name he does not know, but who had frequently done several menial jobs for him for payment. This man has been referred to as "the white man," "Fiji," or, as the defendant called him, "Georgie." According to the defendant, "Georgie" asked him

(1) 8 C.L.R., 626.

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(the defendant) to go out fishing. Ah Way had fishing lines on his person at the time—a curious coincidence—but he says that the sea-sickness which ensued when he got outside the Heads prevents him from remembering whether he also had sinkers, for deep sea fishing. He had £32 in money in his pocket. "Georgie," although he was the person inviting Ah Way to take the trip, did not provide refreshments, but suggested that Ah Way should do so, and Ah Way gave him about 5s. to obtain some provisions. "Georgie" bought, *inter alia*, several bottles of lemonade and beer. At the horse ferry at Dawes Point they got on board the launch *Warreemba*, worked by one Merchant, who gets £3 a week wages from his employers, and sometimes a bonus. Merchant says that no agreement was made for the cost of the trip, but Ah Way says he understood from "Georgie" that something had to be paid. On board of the launch there were Merchant, his son, "Georgie" and Ah Way. I take it that Ah Way was the real controller of the expedition, and the employer of Merchant. Ah Way says that when he got outside the Heads he was so sick that he begged "Georgie" to put back, but "Georgie" was cruel enough to refuse. When outside the Heads it seems that the party did some fishing. They were watched by the signal master at South Head, with the aid of a powerful glass, and, according to him, when the *Empire* came through the Heads, the launch got under weigh, and came into the wake of the *Empire* at a distance of between 200 and 300 yards, and a white signal was put out from the *Warreemba*. The launch circled about, and certain bags were picked up within the area of the rotatory movement. These bags contained 36 tin packages, each holding 20 half-pound tins of opium suitable for smoking. There were also 147 loose tins. The bags were kept afloat by the artificial aid of varnish tins. Whether the bags dropped from the sky or from the ship, they would have sunk without this apparatus. The boat passed an hour going round for these bags. Merchant says he did not know what these bags contained, and that he was not curious enough to ascertain their contents. If one of the statements is to be believed, I do not believe the other. The *Warreemba* came slowly up to the Heads; she remained outside for some time, and then came into the harbour. She was subse-

quently pursued by the Customs launch. She first made for Bradley's Head, then towards Neutral Bay, then towards Kirribilli Point, then to Milson's Point, then towards Dawes Point, and finally towards Blue's Point. "Georgie" and young Merchant then jumped out and ran off up hill. "Georgie" was fat, and presumably scant of breath, but both got away. Merchant says they ran to an hotel to get a drink, but it does not appear that their necessities could not have been met with by the drink which was on board. Some of the Customs officers came on board the *Warreemba*. Customs officers McManus and Bragge followed the fugitives, but did not succeed in overtaking them. Ah Way and the elder Merchant stayed on board, the one on his couch of sickness, the other at his post of duty. I am not satisfied that Ah Way understood or even heard what was said in the conversation that took place between McManus and Merchant. I treat that conversation as not being evidence against Ah Way. Then McManus asked Ah Way what his name was, what he was doing on board, and what was the name of the man who ran away, but Ah Way made no answer. McManus says that Ah Way understands English, and I think that he does, imperfectly. I do not, however, attribute his silence to ignorance of what was wanted.

The evidence is meagre, and but for sec. 236, perhaps I should not find it proved that Ah Way was the person actually importing—the importer of—this opium. "Georgie" has not been called by the defendant, and there is no satisfactory explanation given why he has not been called. Mr. *Wise* is willing to assume that the opium was picked up within the three mile limit, but however that may be he relies on secs. 236 and 255. I find as a fact that, for the purposes of sec. 236, and apart from sec. 255, the defendant procured, and by his acts was directly and indirectly concerned in, the importation of this opium which is a prohibited import, and he is therefore by virtue of the section to be deemed to have committed the offence charged in the information. If I had any doubt as tc the defendant being an active participant in this matter—active so far as his physical condition allowed him—I am of opinion that, by virtue of sec. 255, the facts

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as alleged are deemed to be proved until there is proof to the contrary; and I see no proof to the contrary.

It was urged that the *Empire* was responsible for the importation, and not Ah Way and those in the launch. Some very nice questions of law might be opened up by such a contention, but for present purposes it is sufficient for me to say that these goods were not produced in Australia, and must have come from abroad, and that Ah Way was concerned in getting these goods in. I consider that the decision in *United States* v. *Arnold* (1), is an authority on this point. I think that secs. 236 and 255 are sufficient grounds for holding Ah Way liable for the penalty.

It was also urged that the averment, which in sec. 255 is to be deemed to be proved, covers only such matters as used technically to be called averments, general or particular, in special pleadings, as stated in *Co. Litt.*, p. 691. It is urged that the word does not cover any statement of law such as is involved in the word "unlawfully." Neither the informant nor the defendant desired me to refer this point of law to the Full Court, so I simply state my opinion and leave it to the defendant to appeal if he is so advised. In my opinion, sec. 255 was meant to throw the burden of proof on the defendant in Customs cases of disproving the charge. In all Customs Acts such provisions, apparently subversive of the first principles of justice, are to be found, for experience has shown them to be necessary in consequence of the peculiar difficulty of proving offences against the Customs. In sec. 255 the words are "the averment," meaning that which is averred—all that is averred collectively; not "any averment" or "all averments." Looking at the rest of the section, the exceptions in sub-secs. (*a*) and (*b*), the exceptions to the rule prove the rule. Sub-sec. (*a*) provides that "when an intent to defraud the revenue is charged the averment shall not be deemed sufficient to prove the intent." This means that but for the express exception the intent to defraud the revenue would be deemed to be proved by the averment—in other words, that the word "averment" covers the essential part of the offence, and not merely technical averments, preliminary or final. But it is urged that an allegation of an intent to defraud is a technical aver-

(1) 1 Gallison, 348.

ment. Well, take the next sub-section: "In all proceedings for an indictable offence or for an offence directly punishable by imprisonment the guilt of the defendant must be established by evidence." That is to say the whole guilt, all the elements which go to make up this guilt; and these elements are all covered by the word "averment." If there is need for further authority on the point, it is to be found in *Maxwell on Statutes*, 3rd ed., p. 77, where there is a long list of cases in which the Court has not felt itself bound by a remote technical meaning. The Court is not bound to assume here a remote technical meaning, but to take it as having the general meaning of common parlance. Under these circumstances I am prepared to find in favour of the informant, subject to that point which I have reserved for the High Court, and the order which I propose to make in pursuance of sec. 18 of the *Judiciary Act* is to reserve for the consideration of the Full Court this question:—Is the proclamation of 29th December 1905, which appears in the *Commonwealth Gazette* of 30th December 1905 (Exhibit A) valid so far as it prohibits the importation of opium suitable for smoking? Then what I propose to do is to reserve liberty to apply. If the answer should be in favour of the informant, I suppose he will apply to fix the penalty, and for judgment, and as to costs. I shall reserve liberty to apply after the Full Court's decision.

Order accordingly.

On 22nd May 1909, the question having been answered by the High Court in the affirmative, the penalty was fixed at £500 against Ah Way, and at £50 against Merchant; but an order was made under sec. 258 for the release of the defendants on their respectively giving security for the payment of the penalties.

Solicitor, for the informant, *Charles Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for the defendant, *J. J. Carroll.*

B. L.