[HIGH COURT OF AUSTRALIA.]

HOUGH . . . . . APPELLANT;

AND

AH SAM . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

PERTH, *Nov.* 7, 8.

Griffith C.J., Barton and Higgins JJ.

Prohibited import—Evidence of importation—Admissibility of answers given by accused to questions put to him by officer—Customs Act 1901-1910 (*No.* 6 *of* 1901—*No.* 36 *of* 1910), *sec.* 233B (1) (*c*).

There is no rule that answers given by an accused person to questions put to him by an officer are *primâ facie* inadmissible.

R. v. *Berriman*, 6 Cox C.C., 1854, explained.

In coming to a conclusion whether prohibited goods have been imported since the date of prohibition, all the circumstances of the case, including the demeanour, statements and conduct of the accused, must be taken into consideration.

Decision of the Supreme Court of Western Australia (*McMillan* J.) reversed.

APPEAL, by special leave, from the Supreme Court of Western Australia.

The respondent's premises were searched by two Customs officers, who discovered that the place was fitted up with benches such as are used by opium smokers. The officers asked the respondent if he had any opium, and he replied that he never had any. On searching, they discovered in the fireplace, among the ashes, a horn container with a little opium in the bottom, and another container nearly full of fresh opium suitable for smoking. One

of the officers held up the full container and asked the respondent where he got it, and he replied, "Singapore man bring it from steamer."

The respondent was prosecuted before a police magistrate on a charge of having in his possession a prohibited import, to wit, opium suitable for smoking, and was convicted. The Supreme Court (*McMillan* J.) quashed the conviction, on the grounds that the answers of the accused to the questions of the officer as to how he got the opium were inadmissible, and that without them there was not sufficient evidence of importation in contravention of the provisions of the *Customs Act* 1901-1910.

From that decision the appellant now by special leave appealed to the High Court.

F. Unmack, for the appellant. The evidence of the officers as to the answers of the respondent is clearly admissible, and proves that the respondent had a guilty knowledge that the opium was imported. In any event the inadmissibility of this evidence cannot now be put forward by the respondent: *Purkis* v. *Huxtable* (1); *Britcher* v. *Williams* (2). The case of *R.* v. *Berriman* (3) was decided a very long time ago, and has since often been dissented from: *R.* v. *Rogerson* (4); *R.* v. *Tim Crown* (5); *Attorney-General for New South Wales* v. *Martin* (6). Unless some promise, threat or inducement had been made or held out to the accused in order to obtain his answer, it was admissible: *R.* v. *Silvester Thornton* (7); *R.* v. *Miller* (8); *R.* v. *Brackenbury* (9). There seems to be a distinction drawn in some of these cases between a question asked before and one asked after arrest, but according to the law of Western Australia it is immaterial. The evidence, however, shows clearly that in this case the question was put before arrest: *R.* v. *Best* (10) overruling *R.* v. *Gavin* (11). It cannot be contended that this was portion of a stock of opium which had been in Australia prior to the proclamation making it a prohibited import. The evidence

(1) 1 El. & E., 780.
(2) 5 Q.L.J., 39.
(3) 6 Cox C.C., 388.
(4) 9 S.C.R. (N.S.W.), 234.
(5) 6 Q.L.J., 283.
(6) 9 C.L.R., 713.
(7) 1 Moody C.C.R., 27.
(8) 18 Cox C.C., 54.
(9) 17 Cox C.C., 628.
(10) (1909) 1 K.B., 692.
(11) 15 Cox C.C., 656.

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shows that it was quite fresh, and the magistrate was entitled to take this fact into consideration.

Solomon and *Cowan*, for the respondent. The importation of opium suitable for smoking was prohibited in 1905. "Prohibited import" means a particular article, and if this opium could be shown to have been imported before sec. 233B applied, it would not be a prohibited import within the meaning of that section. In *Hill* v. *Donohoe* (1) the circumstances were very different; there the man was in the act of coming from the ship. The admission must be complete. Here the admission is that the opium came from Singapore, and that does not prove importation. This statement that the opium came from Singapore must also have been made from hearsay knowledge only, in that the man from whom the respondent had obtained it must have told the respondent that he had brought it from there: *R.* v. *Male and Cooper* (2).

[HIGGINS J. referred to *R.* v. *Coote* (3).]

The respondent was a foreigner not able to speak English very well, and it is quite possible that the officers may have misunderstood him. The fact that the opium was found on his premises by the officers was sufficient to cause fear in his mind and make him think that it would be better for him to make the statements: *R.* v. *Thompson* (4).

GRIFFITH C.J. In this case the respondent was charged under the provisions of the *Customs Act* with having in his possession a prohibited import, to wit, opium suitable for smoking. Two Customs officers went to his premises, which were in the port of Fremantle. They found them fitted up as a place for opium smoking. They found a bit of smoking opium lying on one of the benches, and found concealed in the ashes in the fireplace what is called a horn container, that is, a vessel for holding opium, which was nearly empty, with a little opium clinging to the bottom. They also found in the same place another horn container nearly full. The defendant was then asked where he got

(1) 13 C.L.R., 224.
(2) 17 Cox C.C., 689.
(3) L.R. 4 P.C., 599.
(4) 17 Cox C.C., 641.

it from, and he said, "Singapore man bring it from steamer" or "From Singapore man bring it from steamer." The magistrate sitting at Fremantle was, I think, entitled to take notice of the fact that ships trade from Singapore to Fremantle. That was the only evidence of importation. On appeal to *McMillan* J., he thought that the evidence was inadmissible, relying upon a supposed decision of *Erle* J. in the case of *R.* v. *Berriman* (1). I think that the learned Judge was misled by the headnote in that case. It did not decide that evidence of admissions made by a prisoner to a constable in answer to questions is inadmissible, although it contained a strong expression of opinion from that learned Judge as to the impropriety of asking such questions. There is no decision that I am aware of that such evidence is inadmissible. I should like to take the opportunity of saying on this Bench what I once said on the Bench of the Supreme Court of Queensland, that is to say, that I entirely accept the statement of the law made by Sir Alfred *Stephen* C.J. in the case of *R.* v. *Rogerson* (2) decided in New South Wales in 1870, where the same point was taken. Sir Alfred *Stephen* said:—"The first and second points are not arguable. There is nothing in law to prevent a constable from putting questions to a prisoner; and whatever the prisoner says in answer may be given in evidence against him, unless the constable has held out some threat or promise, or made some false representation to the prisoner before questioning him. The prudence or propriety of putting such questions is another matter. Some very eminent Judges have censured the practice, as an attempt to extract from the prisoner admissions which may ensure his conviction. Other Judges equally eminent have expressed opinions quite the other way. For my own part, looking to the true ends of justice,—the conviction of the guilty, and the protection of society—I cannot see in the practice anything inconsistent with the duty of a constable, or unfair to the prisoner. 'Where were you at such a time?' 'Where did you get these articles?' 'How do you account for the blood upon your clothes?' Such questions as these may, in my opinion, be properly put; and it is possible that the prisoner's answers may remove the suspicions on which he was arrested, and lead to his

(1) 6 Cox C.C., 388. (2) 9 S.C.R. (N.S.W.), 234, at p. 235.

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speedy liberation. I do not say that such questioning may not be carried to an improper length; but in law it does not affect the admissibility of the prisoner's answers, provided nothing has been done to entrap or mislead him." *Faucett* J. concurred in these remarks.

In my opinion, that was then, and is still, an accurate statement of the law. The recent decision of the Court of Criminal Appeal in England in the case of *R.* v. *Best* (1), is to the same effect. A judgment to the contrary effect had been given by *A. L. Smith* J. in the case of *R.* v. *Gavin* (2), but the Court of Criminal Appeal held that it was not good law. I think, therefore, that the ground upon which *McMillan* J. allowed the appeal was a mistaken one, and afforded no ground for quashing the conviction. Mr. *Solomon* now seeks to support the order on other grounds, and I think he is entitled to do so if he can. He contends that there is no evidence that the opium found in the defendant's possession, although there is evidence of its having been imported, was imported at a time when the importation was prohibited. The date of the prohibition was 30th December 1905, although sec. 233B of the Act was not made applicable to it until 31st December 1910. The question is whether the magistrate could reasonably come to the conclusion, on the facts before him, that the opium had been imported since 1905. As I have said, the premises were an opium smoking establishment, or den, as it is called, one tin of opium had been recently emptied, and another tin was nearly full. The importation of such opium had been prohibited for more than six years. Is it likely then that the opium found was old stores imported before 1906 and still unused? The magistrate was entitled to ask himself that question; he was entitled also to take into consideration the appearance of the opium, the fact of its being concealed, and the further fact that the accused at first strenuously denied having any opium, and said that the officer's predecessor, when he had searched the premises, had never been able to find any. Under these circumstances I think that the magistrate was entitled, if the defence that the opium had been imported before 1906 was set up before him (which seems doubtful), to come to the

(1) (1909) 1 K.B., 692. (2) 15 Cox C.C., 656.

conclusion that the conduct of the defendant and his answer to the officer were quite inconsistent with any such story, apart from its inherent improbability. He was therefore justified in finding that the opium had been imported at a time when it was a prohibited import. In my judgment there was no ground for quashing the conviction, and it should be restored.

BARTON J. We have to decide whether the statement that the accused made in this case was admissible, and, if we find it is, whether the evidence was such as to warrant the magistrate in convicting. We are not to try the case again. If the evidence was such that it would justify a jury in convicting, that is to say, if the verdict of a jury convicting would not have been against the evidence, then it is clear that the magistrate would be justified in his conclusion. First, then, as to the statement; I have looked carefully at all the evidence more than once, during the progress of the case, with a view of finding whether this statement was made voluntarily or not. If it were shown that it was induced by any threat of consequences, or promise of advantage, then it would be inadmissible. Apart from that it must be deemed to be voluntary. The Crown has not to prove a negative, that is, to prove that the statement of the accused person is not induced by threat or promise. If the circumstances surrounding a confession or statement give no room for any suggestion that it has been obtained by any threat or inducement, then the presumption is that it is free and voluntary. If a doubt is raised, then it is incumbent on the prosecution to remove that doubt. There is nothing in the evidence to suggest a doubt as to this statement being entirely voluntary on the part of the respondent. There is a certain degree of apprehension, perhaps, in the mind of a person whose proceedings come to be investigated by a searcher on his premises, but any apprehension of that kind is a fear common to all classes of society, and is not such a fear as is contemplated in the rule of law which renders incriminating statements by prisoners inadmissible where they are made under the influence of fear.

The statement, then, having been rightly admitted, what is its effect? The accused was asked where he got the opium. Prior

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to this, opium had been found on a smoking bench, and two horns containing opium had been found in the fireplace under such circumstances as pointed to concealment. One of these tins was nearly full. After that one had been handled by the prisoner, and some of the contents spilt, he was asked where he got the opium, and the question apparently referred to the opium in that horn. He said, "Singapore man bring it from steamer," or, according to another witness, "From Singapore, man bring it from steamer." It does not matter which is the actual expression, because either points in only one direction, that is to say, that the opium came from Singapore, and that a man brought it ashore from the steamer, or, that a Singapore man brought it ashore from the steamer. In either case, if that is a true confession, the opium was imported. Take the rest of the evidence. The place was fitted up with opium smoking benches; there is the fact of attempted concealment, of which I have already spoken; there is the fact, for what it is worth, of delay in admitting the officers, and there is, after the statement was made, an attempt by the accused to bribe the officers. He asked either one or both of them to come outside, and offered them two pounds each, which he afterwards increased to two pounds ten shillings. He does not say for what purpose, but he says, "If you will let me go," meaning, I suppose, "if you do not prosecute."

Now, the enactment under which the respondent was charged is sec. 233B of the *Customs Act*, sub-sec. 1, par. (*c*), which says that any person who "without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act," shall be guilty of an offence; and the penalty is imprisonment for not less than three months, and not more than two years. Take the circumstances I have detailed. No reasonable excuse is offered for the possession of the opium. If there were any reasonable excuse existing, it would be for the respondent to prove the facts which constituted it. He had evidently in his possession a prohibited import, because he had goods the importation of which is prohibited. That importation was prohibited in 1910, but prior to that it had been prohibited by proclamation in 1905, and it is to that pro-

clamation that we have to look. True, the proclamation was issued before the passage of sec. 233B, when the applicable section was 233 of the original Act—"No person shall smuggle or unlawfully import . . . or have in his possession any goods . . . ", that is to say, any goods unlawfully imported. Opium was a prohibited import so far back as 1905, and the offence of having it in his possession is one with which he might have been charged under the original sec. 233, because the importation of prohibited goods was, under that section, already unlawful, although there were other kinds of unlawful importation. The position, therefore, is that the accused has in his possession goods which come under a class of imports which have been prohibited, and which clearly have been imported into Australia in contravention of the *Customs Act*, if imported since the passing of the original sec. 233. Well, it is said that there is no evidence of importation in contravention of the Act because the opium may have been imported a very long time ago. It is perfectly true that there is the bare possibility that it was imported before 1905, but the question is this: Has this opium been lying about in Australia six or seven years, or has it been imported since the proclamation of 1905? I think the surrounding circumstances tend to show that if imported at all, it must have been imported since that time, and that the effect of the statement is that the Singapore man brought it down by the steamer; not that it found its way into Australia by some means, regular or irregular, ages ago, but that the accused was speaking of an importation within a reasonable time before the search.

Now, it was for the magistrate to decide whether this opium had been imported in contravention of the Act. He had before him, on the one hand, the circumstances pointing to its having been so imported, and had, on the other hand, the possibility of its not having been so imported; and he convicted. It was competent for the magistrate to find as he did on the facts. The statement is clearly admissible, and, taking it with the other facts, there is evidence that, without any proof of reasonable excuse, the accused had in his possession a prohibited import to which sec. 233B applies, and that that had been imported into Australia in contravention of the *Customs Act*. That being so, I do not

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see how it is possible to disturb the conviction. I therefore regret that I am unable to agree with the conclusion arrived at by *McMillan* J.

HIGGINS J. I am of the same opinion, and I shall merely quote another case in support of the view of my learned brothers as to the admissibility of the evidence. I refer to the case of *Rogers* v. *Hawken* (1). In that case an officer of the Royal Society for the Prevention of the Cruelty to Animals prosecuted a man for cruelly ill-treating animals. The officer said: "I saw the defendant. I was in uniform. I said to him: 'Is it true your carman told the police you sent the animal out, and knew it was lame?' to which the respondent replied: 'Yes, I sent Yost out with it.' I said nothing whatever to the defendant as to the likelihood of proceedings." I cite the case particularly because it contains comments on *R.* v. *Male and Cooper* (2), to which Mr. *Solomon* referred. Lord *Russell* C.J. in his judgment said (3):—"This is, of itself, a very simple point, and I think the evidence ought to have been admitted by the justices, but I must refer to the case of *R.* v. *Male and Cooper* (2), and to the judgment of *Cave* J. in that case. I must not be understood to say that the observations of the learned Judge in that case were not perfectly just and applicable to the circumstances of that case, but if they are to be taken as laying down the general proposition of law that a statement made to a policeman by a defendant who has not been previously cautioned, provided that statement has not been induced by fear of reward or punishment, is legally inadmissible, I must differ from the conclusions of the learned Judge." Speaking of the case before him, Lord *Russell* said (3):—"There is no question of any inducement of confession by any threat or promise of reward in this case. I think, therefore, the evidence is admissible, but if it goes no farther than it does, I think the justices would be slow to convict upon it." *Matthew* J. said (3): —"There is no trace here of any inducement of a confession by threat or promise of reward, and no evidence of any attempt on the part of the appellant to manufacture evidence. Nothing is

(1) 62 J.P., 279.
(2) 17 Cox C.C., 689.
(3) 62 J.P., 279, at p. 280.

more common than for a constable to say, 'Can you account for yourself last night?'" I must concur in the judgment.

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Appeal allowed. Order appealed from discharged, and appeal to Supreme Court dismissed. Conviction restored.

Solicitors, for appellant, *Unmack & Thomas.*
Solicitor, for respondent, *W. E. B. Solomon.*

N. McG.

[HIGH COURT OF AUSTRALIA.]

EDWARDS . . . . . APPELLANT;
PLAINTIFF,

AND

THE CURATOR OF INTESTATES ESTATES AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 4, 5.

Griffith C.J., Barton and Higgins JJ.

Practice—Appeal—Finding on question of fact—Parol evidence—Credibility of witnesses.

The Judge of first instance has the best opportunity of judging as to the credibility and demeanour of the witnesses, and his finding on a question of fact, as to which there was a direct conflict of parol evidence, will not be interfered with by a Court of Appeal.

Appeal from the Supreme Court of Western Australia dismissed.

APPEAL from the Supreme Court of Western Australia.