

[HIGH COURT OF AUSTRALIA.]

THE KING AND ANOTHER . . . PLAINTIFFS;

AND

TUCKETT . . . DEFENDANT.

H. C. OF A. *Customs Prosecution—Penalties for offences—Facts affecting amount—Customs Act*
 1914. 1901-1910 (No. 6 of 1901—No. 36 of 1910), secs. 33, 233, 234, 240, 241, 243.

MELBOURNE,
 Oct. 28, 29.

Isaacs J.

In determining the amount of the penalty to be imposed on a person who commits an offence against the *Customs Act* 1901-1910 for which a maximum penalty is provided, the Court may take into consideration the fact that the offence was an isolated one—that it was not part of a system, or typical of a class of business operations frequently recurring and requiring stringent repression by way of deterring others.

Lewis v. The King, 14 C.L.R., 183, followed.

TRIAL OF ACTION.

An action was brought in the High Court by His Majesty the King and the Minister of State for the Commonwealth administering the Customs, against Joseph Tuckett, a member of the firm of Tuckett & Son, carrying on business as auctioneers and salesmen of (*inter alia*) paintings at Melbourne in Victoria, to recover penalties in respect of offences against secs. 33, 233, 234 and 241 of the *Customs Act* 1901-1910.

The facts shortly were that the defendant was a passenger on board the s.s. *Otranto* from England to Australia, and arrived at Port Adelaide, in South Australia, on the 18th October 1913, and brought with him 101 oil and water colour paintings. Of these, 96 were in a trunk which a baggage agent brought ashore, and the defendant brought the pictures to Melbourne without

disclosing them to a Customs officer, and evaded duty thereon. The goods were dutiable under item 419 (b) of the *Customs Tariff* 1908-1911, were seized by the Customs Department, and forfeited. The duty, amounting to £139 5s., was paid by the defendant.

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The defendant, in his defence and by letter, admitted all the offences charged in the statement of claim, and also that he committed each and every of the said offences with intent to defraud the revenue. Other material facts appear from the judgment hereunder.

Schutt, for the plaintiffs.

Mann, for the defendant.

Cur. adv. vult.

ISAACS J. read the following judgment:—This is a Customs prosecution for penalties for conduct amounting technically to four offences charged, namely, smuggling, unlawfully conveying and having in possession smuggled goods, evading payment of duty, and moving goods under the control of the Customs without authority. Intent to defraud is also charged.

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The various offences, which are different legal phases of the same act, are admitted, as is also the intent to defraud.

The value of the goods was £423, so that the penalty provided is "less than three times their value," and therefore the maximum penalty is thrice the value of the goods, or £1,269. By sec. 241, the fraudulent intent doubles that maximum—the defendant being consequently liable to a possible maximum penalty of £2,538. The Act also prescribes a minimum penalty which is "one-twentieth of the maximum which is prescribed in pounds," that is not of the final maximum, but of the sums of £100 stated in money at the foot of the sections.

The question here is what penalty within those limits ought to be imposed as fair and just in the circumstances.

There is no doubt the smuggling and evasion were deliberately thought out and persistently concealed. Discovery was due to no act on defendant's part, but to accident.

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The Crown, however, does not press for severity, but leaves the whole matter to the Court; and in this case that attitude carries weight with me. There may be cases where even the Crown's view ought to be disregarded by the Court, but this is not one of them.

It has been laid down in this Court in previous cases that the particular circumstances of the offence or offences proved must be taken into consideration in fixing the penalties. I did so in *The King v. Harris, Scarfe & Co. Ltd.* (1).

In *Lewis v. The King* (2) the learned Chief Justice, delivering the judgment of the whole Court, said:—"When the legislature allows such a large range of punishment, I read it as an instruction to the Court to consider in each case the particular circumstances under which the offence was committed. If it is a very bad offence indeed, committed with deliberation and part of a system of fraud, the Court may well impose the maximum penalty. If it is an isolated offence and not likely to be repeated, the Court may apply a different rule."

In *The King v. Tarrant* (3) I imposed the maximum penalties in view of the general conduct of the defendants, and having regard to the fact that the offences were not isolated acts, but were, so to speak, of a typical business nature.

In this case, I apply the principles so laid down to the facts. On these facts I find the offence was certainly an isolated one—that is, although many articles were the subject of the offence, the occasion was single. It was not part of a system, it was not typical of a class of business operations frequently recurring, and requiring stringent repression by way of deterrent to others; and, altogether, I believe it was neither intended, nor likely, to be repeated.

In addition, I bear in mind as a most exceptional feature that something in the nature of personal reparation has been made. If the defendant has on this occasion culpably attempted to defraud his country's revenue, he has since patriotically gone forward to defend her honour and her safety.

The goods themselves have been forfeited, this in itself a

(1) 8 C.L.R., 225.

(2) 14 C.L.R., 183, at p. 191.

(3) 15 C.L.R., 172, at p. 182.

considerable penalty. The duty has been paid, amounting to £139 5s.

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On the whole, I think justice will be done and, in this case, the law sufficiently vindicated, if, in addition to the forfeiture, I inflict a penalty of £25 for the offences charged, with a further penalty of £25 for the fraud.

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The defendant is convicted, and fined accordingly, and is ordered to pay the costs of the action.

Defendant convicted. Penalty of £50 imposed. Defendant to pay costs of action.

Solicitor, for the plaintiffs, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the defendant, *W. H. Croker & Croker*.

B. L.

[HIGH COURT OF AUSTRALIA.]

ROOM AND OTHERS APPELLANTS;

AND

BAIRD AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Res Judicata—Order on originating summons—Trustee Act 1898 (Tas.) (62 Vict. No. 34), sec. 45.

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A testatrix by her will gave a certain sum to trustees upon trust to pay the income to her husband for life, and after his death to pay and divide the income equally between her five children for their respective lives, with a power to appoint the capital of their respective shares by deed or will. On an originating summons under sec. 45 of the *Trustee Act* 1898, to which

HOBART,
Feb. 15.
Griffith C.J.,
Isaacs and
Gavan Duffy JJ.