in respect either of that determination or of the later determination in August. If that be so, our jurisdiction to issue mandamus is not questioned, and I think our discretion will be wisely exercised by doing so.

*Order absolute for mandamus.*

Solicitors, for the appellant, *Eales & Miller.*

Solicitor, for the Crown and the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.



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[HIGH COURT OF AUSTRALIA.]

SYMONS . . . . . APPELLANT;

AND

SCHIFFMANN . . . . . RESPONDENT.

ON APPEAL FROM A COURT OF GENERAL SESSIONS OF VICTORIA.



MELBOURNE, *Sept.* 22.

Griffith C.J., Gavan Duffy and Rich JJ.

*Customs Law—Interference with goods in control of Customs—Evidence—Burden of proof—Averment in information—Customs Act* 1901-1914 (*No.* 6 *of* 1901—*No.* 19 *of* 1914), *secs.* 33, 255.

*Practice—High Court—Appeal from Court of General Sessions of Victoria—Case stated—Justices Act* 1890 (*Vict.*) (*No.* 1105), *sec.* 139—*Rules of the High Court* 1911, *Part II., Sec. IV., r.* 1.

On an information under sec. 33 of the *Customs Act* 1901-1914 for interfering without authority with certain goods subject to the control of the Customs, the Crown gave evidence to the effect that the goods had been imported into Australia, that duty was not paid on them, that they were not delivered to the importer, and that a month after importation they were found in the possession of the accused. No evidence was called for the accused.

H. C. OF A. 1915.

SYMONS v. SCHIFFMANN.

*Held*, that those facts did not establish conclusively an interference by the defendant with the goods while under the control of the Customs, and that the provision in sec. 255 of the *Customs Act* that the averment of the prosecutor contained in the information shall be deemed to be proved in the absence of proof to the contrary, had no application.

*Adelaide Steamship Co.* v. *The King*, 15 C.L.R., 65, applied.

Sec. 139 of the *Justices Act* 1890 (Vict.) provides that on an appeal from a Court of Petty Sessions to a Court of General Sessions "the Court of General Sessions before whom the same is heard and determined shall if so required by any party to such appeal state the facts specially for the determination of the Supreme Court thereon, in which case that Court may determine the same."

*Quære*, whether under the *Rules of the High Court* 1911, Part II., Sec. IV., r. 1, an appeal to the High Court from a Court of General Sessions exercising federal jurisdiction may properly be brought by way of a case stated under that section.

CASE STATED by the Chairman of a Court of General Sessions of Victoria.

At a Court of Petty Sessions of Victoria Leonard Peter Schiffmann was convicted on an information by Samuel Symons, Acting Collector of Customs, in which it was alleged that the defendant on or about 10th February 1915 at Melbourne did without authority within the meaning of the *Customs Act* 1901-1914 and not in accordance with the said *Customs Act* interfere with certain goods subject to the control of the Customs contrary to the said *Customs Act*.

From that conviction Schiffmann appealed to the Court of General Sessions at Melbourne. On the hearing of the appeal evidence was given on behalf of the prosecution that the goods in question, three hundred clocks, were imported into the Commonwealth about 10th February 1915, that Customs duty was not paid upon them, that they were not received by the importer, that about a month afterwards they were in Schiffmann's possession, and were sold by him in several lots to different purchasers, and that Schiffmann had said that he received them from another person for whom he was selling them. After the evidence for the prosecution was concluded the learned Chairman of General Sessions, at the request of counsel for the prosecution, stated a case for the High Court, in which, after setting out the evidence

at length, he made a statement to the following effect:—At the close of the case for the prosecution counsel for Schiffmann asked that the appeal should be allowed as there was no evidence to show either that the goods were not duly passed by the Customs or that they were uncustomed goods. Counsel for the prosecution contended that sec. 255 of the *Customs Act* applied, and that the onus was upon Schiffmann to show that the averment in the information was not true. The Chairman of General Sessions held that the informant, having elected to call evidence, could not then rely on sec. 255. He also was prepared to accept the evidence given for the prosecution, but held that the offence charged had not been proved, allowed the appeal and quashed the conviction. He then stated that the questions for the High Court were (*inter alia*) whether he was right in quashing the conviction, and whether he was right in holding that the prosecution, having elected to call evidence to prove the offence charged, was not entitled to rely upon the provisions of sec. 255 of the *Customs Act*.

*Bryant* (with him *Owen Dixon*), for the defendant Schiffmann. The case is not properly stated. The Chairman of General Sessions should set out his findings of fact, and not the evidence. The Chairman had no jurisdiction to state a case for this Court. A case stated under sec. 139 of the *Justices Act* 1890 for the opinion of the Supreme Court is not an appeal to that Court. The Supreme Court has no power to remit the case to the Court of General Sessions for rehearing: *Coughlin* v. *Thompson* (1).

*Starke* (with him *Eager*), for the informant Symons. A case stated under sec. 139 is an appeal. The Court of General Sessions makes its determination before stating the case, and the Supreme Court then determines whether that determination is right or wrong, and either affirms or reverses it. See *Fort* v. *Lane & Co.* (2); *Clunes United Co.* v. *Borough Council of Clunes* (3); *Batchelder* v. *Carden* (4); *Bain* v. *Ah Kee* (5). If there is power to affirm or reverse a judgment the proceeding is an appeal, and

(1) (1913) V.L.R., 304; 35 A.L.T., 1.
(2) 11 A.L.T., 11.
(3) 2 W.W. & aB. (L.), 96.
(4) 5 V.L.R. (L.), 45.
(5) 17 C.L.R., 433.

H. C. OF A. 1915.

SYMONS v. SCHIFFMANN.

may properly be adopted under the *Rules of the High Court* 1911, Part II., Sec. IV., r. 1, as the method of appeal to this Court. On the facts stated in the evidence, which the Chairman accepted as proved, the offence charged was established. Any person who without authority touches goods which are in the control of the Customs "interferes" with those goods within the meaning of sec. 33 of the *Customs Act*.

[GRIFFITH C.J. referred to *Hill* v. *Donohoe* (1).]

The informant was entitled to rely on sec. 255 of the *Customs Act*. The decision in *Adelaide Steamship Co.* v. *The King* (2) only applies where the whole of the facts are put before the Court. Here they were not. The section throws the burden of proof of his innocence upon the defendant (*Baxter* v. *Ah Way* (3)), and only where the evidence discharges him from implication in the offence charged is the section inapplicable.

*Bryant* was not called upon to reply.

The judgment of the COURT was delivered by

GRIFFITH C.J. Upon the evidence in this case (which, quite improperly, sets out evidence at length, instead of setting out the facts found by the Chairman of the Court of General Sessions) we think that he was not bound to come to the conclusion that the defendant here interfered with goods subject to the control of the Customs. The facts stated by Mr. *Starke*, and which we assume to have been accurately stated, tended to support that charge. They tended, if accepted by the learned Chairman, to show that the goods were imported into Australia, that duty was not paid upon them, and that about a month after their importation they were found in the possession of the defendant. That is as far as the evidence went. Upon it there may be found ground for suspicion as to the manner in which the goods came into the defendant's possession, but we cannot say that the learned Chairman was bound to come to the conclusion that the defendant interfered with them while under the control of the Customs.

Reliance was then placed upon sec. 255 of the *Customs Act*,

(1) 13 C.L.R., 224.

(2) 15 C.L.R., 65, at p. 102.

(3) 10 C.L.R., 212.

which provides that "in every Customs prosecution the averment of the prosecutor or plaintiff contained in the information declaration or claim shall be deemed to be proved in the absence of proof to the contrary."

This Court held in *Adelaide Steamship Co.* v. *The King* (1) that the term "averment" must be confined to pure allegations of fact, and does not include an allegation of a conclusion of mixed law and fact, and further that that section has no application where the prosecutor elects to put the actual facts before the Court.

The allegation that a man has interfered with goods subject to the control of the Customs is an allegation of mixed law and fact, namely, that certain facts not stated amount in law to interference, and that certain other facts, also not stated, show that the goods specified were in point of law subject to the control of the Customs within the meaning of sec. 33. The facts in this case were put before the Court, and failed to satisfy the learned Chairman of the defendant's guilt.

On both grounds, therefore, sec. 255 has no application. We cannot find the facts for the Chairman, or express any opinion as to what he ought to have found. This proceeding therefore fails. We express no opinion as to the other points argued. Treating the case as an appeal, but without expressing any opinion as to whether it is or is not properly brought as an appeal, we order that it be dismissed with costs.

*Appeal dismissed with costs.*

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

Solicitor, for the defendant, *W. G. Manchester*.

B. L.

(1) 15 C.L.R., 65, at p. 102.