[HIGH COURT OF AUSTRALIA.]

SCHIFFMANN . . . . . APPELLANT;
DEFENDANT,

AND

WHITTON . . . . . RESPONDENT.
INFORMANT,

APPEAL FROM A COURT OF GENERAL SESSIONS OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *Sept.* 20; *Oct.* 17.

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

Customs Law—Evidence—Burden of proof—Averment in information—Allegation of matters of evidence in information—Customs Act 1901-1914 (*No.* 6 *of* 1901—*No.* 19 *of* 1914), *secs.* 33, 255.

Where an information which followed the language of a section of the *Customs Act* 1901-1914 creating an offence was prefaced by a number of allegations of matters of evidence from which, if they had been proved in the ordinary way, the guilt of the accused might have been inferred,

Held, following *Adelaide Steamship Co. Ltd.* v. *The King*, 15 C.L.R., 65, and *Symons* v. *Schiffmann*, 20 C.L.R., 277, that such allegations were not "averments" within the meaning of sec. 255 of the Act, and, therefore, that in the absence of any evidence for the prosecution, the accused person was improperly convicted.

APPEAL from a Court of General Sessions of Victoria.

At the Court of Petty Sessions at Melbourne an information by Percy Whitton against Leonard Peter Schiffmann was heard, which was as follows :—

The information of James Gleeson, Detective Inspector of Customs of Melbourne in the State of Victoria, for and on behalf of Percy Whitton, Collector of Customs for the said State, who avers as follows :—

1. That the *Customs Act* 1901 of the Commonwealth of Australia was, by Proclamation gazetted on 3rd October 1901, fixed to commence on 4th October 1901, and did so commence on the said day.

2. That on 22nd November 1914 certain goods, namely, (*a*) three cases branded L. S. & Co. and numbered 1, 2 and 3 respectively and each containing 50 Pirate alarm clocks, and (*b*) one case branded $\frac{\text{M. \& M.}}{3}$ and containing 50 Pirate alarm clocks, were imported into Australia, at Melbourne, from the United States of America by the s.s. *Matoppo*.

3. That the said goods were dutiable goods under Item 339 of the *Customs Tariff* 1908-1911.

4. That part of the said goods, namely, the said three cases branded L. S. & Co. containing the clocks as aforesaid, was entered at the Customs for transhipment to Hobart on 1st December 1914 in the words and figures following :—(The entry for transhipment was then set out).

5. That the balance of the said goods, namely, the said one case branded $\frac{\text{M. \& M.}}{3}$ containing the clocks as aforesaid, was entered (with other goods) at the Customs for home consumption on 24th November 1914 in the words and figures following :—(The entry for home consumption was then set out).

6. That the said goods were unshipped and were landed on or about 22nd November 1914 from the said steamship on the wharf at Melbourne at No. 21 Shed, North Wharf.

7. That the said goods were not transhipped or delivered for home consumption or exported to parts beyond the seas or warehoused.

8. That the Collector of Customs did not, nor did any officer of authority of Customs, part with control of the said goods.

9. That on or about 23rd November 1914 the said goods were removed from the said wharf at Melbourne without the authority of any officer of Customs and without the authority required by the *Customs Act* 1901-1914.

10. That the defendant had possession of the said goods on 24th November 1914, and has ever since remained in possession of the said goods save as to the portion sold as hereinafter averred.

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11. That the defendant knew at the time the defendant obtained possession of the said goods that the said goods were not delivered for home consumption, and had not been exported to parts beyond the seas, and had not been warehoused, and that no authority had been given by any officer of Customs for the removal of the said goods from the wharf aforesaid, and that the said goods were removed from the said wharf without the authority required by the *Customs Act* 1901-1914.

12. That on 7th December 1914 the defendant sold and delivered to John Campbell Waterstion of 729 Nicholson Street, North Carlton, ironmonger, 100 clocks forming portion of the said goods.

13. That on 14th December 1914 the defendant sold and delivered to Walter Emery of Burns Lane, Melbourne, on behalf of the said John Campbell Waterstion, 60 clocks forming further portion of the said goods.

14. That on 14th December 1914 the defendant sold and delivered to the said John Campbell Waterstion 30 clocks forming further portion of the said goods.

And so the informant saith that the defendant did, contrary to the said *Customs Act* 1901-1914, between 24th November 1914 and 14th December 1914 at Melbourne aforesaid interfere with goods subject to the control of the Customs without authority and not in accordance with the said Act.

On the hearing of the information the Crown called no evidence but relied on the provision in sec. 255 of the *Customs Act* 1901-1914 that in every Customs prosecution the averment of the prosecutor contained in the information shall be deemed to be proved in the absence of proof to the contrary. No evidence was called for the defendant, and he was convicted, the form of the conviction being that the defendant did, contrary to the *Customs Act* 1901-1914, between 24th November 1914 and 14th December 1914 at Melbourne interfere with goods subject to the control of the Customs without authority and not in accordance with the said Act. From that conviction the defendant appealed to the Court of General Sessions at Melbourne but the appeal was dismissed.

From the decision of the Court of General Sessions the defendant now, by special leave, appealed to the High Court.

Bryant, for the appellant. The statements in pars. 1 to 14 of the information are not pure allegations of fact but some of them are allegations of mixed fact and law, and therefore sec. 255 of the *Customs Act* has no application : *Symons* v. *Schiffmann* (1); *Adelaide Steamship Co. Ltd.* v. *The King* (2). That section does not enable the prosecutor to set out in the information the evidence which supports the charge and then rely on the evidence so set out as averments.

Starke (with him *Eager*), for the respondent. The statements in *Symons* v. *Schiffmann* and *Adelaide Steamship Co. Ltd.* v. *The King* that the term "averment" in sec. 255 is limited to averment of pure fact are dicta only, and this Court should reconsider the question. The word "averment" in sec. 255 is used in its technical sense as meaning a statement of the offence charged, such as appears in the last paragraph of the information of the present case. See *Archbold's Criminal Pleading*, 22nd ed., p. 76; *Bullen and Leake's Precedents of Pleading*, 3rd ed., p. 61. An ordinary information contains no averments which are not averments of mixed law and fact. If the dicta referred to are correct, then the whole of the statements in the present information are rightly called averments and all of them are pure allegations of fact. The fact that goods which are subject to the control of the Customs are found in the possession of a person shortly after they have been removed without authority is evidence that that person interfered with the goods within the meaning of sec. 33 of the *Customs Act*.

Bryant, in reply.

GRIFFITH C.J. We are all agreed that we are bound by the decisions in *Adelaide Steamship Co. Ltd.* v. *The King* and *Symons* v. *Schiffmann*, and we do not think that the prefacing to an information which follows the language of the Statute creating the offence of a number of allegations of matters of evidence makes

(1) 20 C.L.R., 277.

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

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Griffith C.J.

any difference in its legal effect. We do not think that that is what is meant by the term " averment " in sec. 255 of the *Customs Act*. That being so, on the authority of those cases the appellant is entitled to succeed.

But it is said that those decisions may be reviewed. I venture to say for myself, after the arguments I have heard, that it is fitting that they should be reviewed in a proper case. On the other hand, here is an appellant who comes to this Court and asks for a ruling to which, on the law as it has been twice declared, he is entitled. It is now asked that this right should be denied to him on the suggestion that a Full Bench might overrule the decisions on which he relies, and that the case should be adjourned for argument before a Full Bench accordingly. That is a matter of discretion. Personally I do not think it right to allow a prosecutor to mend his hand after judgment. The proceedings in this case were taken in a particular form in order to raise a particular question, and the respondent, having failed on that question, now seeks to raise quite a different question. As a matter of discretior I do not think that this should be allowed.

BARTON J. I am of the same opinion.

GAVAN DUFFY J. I think that this case is within *Adelaide Steamship Co. Ltd.* v. *The King* (1) and *Symons* v. *Schiffmann* (2), which followed it, and that the Court as at present constituted is bound by those decisions. It seems to me that this is a very suitable opportunity to have them reconsidered, and I think that they should be reconsidered by a Full Bench ; but, as the Chief Justice and my brother *Barton* are of a different opinion, I suppose that opinion must prevail.

RICH J. We are no doubt bound by the previous decisions, but, as the question is one of great importance in the administration of the *Customs Act* and is raised in this case in a neat form, it should be referred to the Full Bench, subject to the payment of all costs—a condition to which Mr. *Starke* has offered to submit.

(1) 15 C.L.R., 65. (2) 20 C.L.R., 277.

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Appeal allowed. Conviction set aside. Respondent to pay costs of appeal and of proceedings before the Magistrates.

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

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

B. L.

[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;

AND

CUMMING AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1916.

BRISBANE, *July* 27.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Practice—High Court—Appeal from Supreme Court of a State—Complaint—Breach of statutory duty—Order by police magistrate for defendant to comply with statutory requirements—Costs awarded to complainant—Prohibition granted by Supreme Court as to the costs—Costs against complainant——Special leave to appeal to High Court—Death of respondent—Joinder of administrator—Shearers and Sugar Workers Accommodation Acts 1905-1906 (*Qd.*) (5 *Edw.* VII. *No.* 9 —6 *Edw.* VII. *No.* 31), *secs.* 6, 12, 15.

The defendant having been ordered by a police magistrate to pay certain sums for costs by an order made upon a complaint against him (the defendant) for neglecting to comply with certain requirements of the *Shearers and Sugar Workers Accommodation Acts* 1905-1906 (Qd.), the Supreme Court of Queensland made absolute an order *nisi* for prohibition in respect of some of such sums and ordered the complainant to pay part of the costs of the prohibition proceedings. After the complainant had, pursuant to special leave, instituted an appeal to the High Court from this decision the defendant died, and the complainant