[HIGH COURT OF AUSTRALIA.]

MAHER . . . . . APPELLANT;
INFORMANT,

AND

MUSSON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Nov.* 26, 27; *Dec.* 20.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Customs and Excise—Illicit spirits—Knowledge of accused—Whether ingredient of offence—Onus probandi—Distillation Act 1901-1931 (*No.* 8 *of* 1901—*No.* 3 *of* 1931), *sec.* 74 (4)*.

Held, by *Rich, Dixon, Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that a person charged with an offence under sec. 74 (4) of the *Distillation Act* 1901-1931, is entitled to be discharged if he proves that he neither believed nor had reason to believe that the spirits in respect of which he is charged were illicit.

CASE STATED.

George Francis Willoughby Musson, a chemist, was charged under sec. 74 (4) of the *Distillation Act* 1901-1931, on an information laid by James Bernard Maher, an officer of the Customs Department, that on 18th June 1934 at Sydney, he did have in his custody illicit spirits, namely, about one half-gallon of rectified spirit. It was not disputed that Musson had received the spirit, the subject of the charge, and that he had it in his possession. He, however, swore that he did not suspect that the spirit was illicit, and that he had received it from a third party upon the recommendation of a friend of long standing whose probity he had never had cause to, and did not, doubt. The spirit had, in fact, been stolen from a distillery before it came into the possession of the defendant.

* Sec. 74 of the *Distillation Act* 1901-1931, provides:—"No person shall— . . . (4) Receive, carry, convey, or conceal, or have upon his premises or in his custody or under his control any illicit spirit. . . . (7) Purchase any illicit spirits knowing them to be illicit spirits."

The magistrate dismissed the information. He said that his opinion was that *mens rea*, or knowledge that the spirit was illicit, was not a necessary ingredient of an offence under sec. 74 (4). But, he continued, the facts proved in the case were that the illicit spirit was purchased, and in view of sec. 74 (7) as to purchase, where knowledge was necessary, and in view of the fact that he had held that on the evidence he could not say the defendant had such knowledge, he did not think, in all the circumstances, that he should convict merely because the defendant was, upon those facts, charged under sec. 74 (4).

From this decision the informant appealed to the High Court by way of case stated.

Other material facts appear in the judgments hereunder.

[Subsequently to the hearing of the appeal the magistrate informed the Court, in response to an inquiry therefrom, that in dismissing the information he did not act under the provisions of sec. 556A of the *Crimes Act* 1900 (N.S.W.).]

Sugerman, for the appellant. The only question which arises is whether upon a charge brought under the provisions of sub-sec. 4. of sec. 74 of the *Distillation Act* 1901-1931, knowledge is an ingredient of the offence. The magistrate was in error in taking into consideration the fact that, upon the facts, the respondent could have been charged under sub-sec. 7 of that section. Even if knowledge is an ingredient of the offence charged, the onus of proving absence of guilty knowledge is upon the person charged. Sub-sec. 4 is absolute in its terms. This is emphasized upon a consideration of other sub-sections of sec. 74. Mere contravention of the clear words of sub-sec. 4 constitutes an offence (*R.* v. *Erson* (1); *Duncan* v. *Ellis* (2); *R.* v. *Woodrow* (3); *Irving* v. *Gagliardi* (4); *Irving* v. *Gallagher* (5); *Stephens* v. *Robert Reid & Co.* (6)), notwithstanding that hardship may occur in particular cases. The *Distillation Act*, which is an Act designed for the protection of the

(1) (1914) 17 C.L.R. 506, at p. 508.
(2) (1916) 21 C.L.R. 379, at pp. 383 *et seq.*
(3) (1846) 15 M. & W. 404; 153 E.R. 907.
(4) (1895) 6 L.J. (Q.) 155.
(5) (1903) S.R. (Q.) 121.
(6) (1902) 28 V.L.R. 82.

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revenue, is an exception to the general principle that *mens rea* is an ingredient of an offence (*Sherras* v. *De Rutzen* (1); *R.* v. *Prince* (2)).

Dovey (with him *Vincent*), for the respondent. The case was imperfectly stated by the magistrate. This Court is not entitled to draw inferences of fact (*Boese* v. *Farleigh Estate Sugar Co.* (3)). The point of law determined by the magistrate must be clearly set out. As the point of law was determined in its favour the Crown cannot be heard to say that it is aggrieved by the decision. *Mens rea* is an essential ingredient of the offence with which the respondent was charged, that is, it must be shown that the respondent knew the spirit was illicit (*Hill* v. *Donohoe* (4); *Lyons* v. *Smart* (5); *Frailey* v. *Charlton* (6)). A person cannot be guilty of an offence unless he knows that what he is doing is wrong. Although the onus may be upon a defendant to disprove or prove that he had not any knowledge of wrongfulness or otherwise, nevertheless if the Court is of opinion that he did not know, or unless the Court is left in doubt as to the state of his knowledge, the information must be dismissed.

Sugerman, in reply.

Cur. adv. vult.

Dec. 20.

The following written judgments were delivered :—

RICH J. For the reasons given in the judgment of my brother *Dixon* I am of opinion that the information should be remitted to the magistrate.

STARKE J. The only question in this case is whether knowledge of the wrongfulness of the act is an essential ingredient of the offence created by the *Distillation Act* 1901-1931, sec. 74 (4), or whether the offence is within the class that the Legislature has absolutely prohibited under a penalty. " There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence ; but that presumption is liable

(1) (1895) 1 Q.B. 918, at pp. 921, 922.
(2) (1875) L.R. 2 C.C.R. 154, at p. 163.
(3) (1919) 26 C.L.R. 477.
(4) (1911) 13 C.L.R. 224, at p. 227.
(5) (1908) 6 C.L.R. 143, at p. 151.
(6) (1920) 1 K.B. 147, at p. 154.

to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered" (*Sherras* v. *De Rutzen* (1)). The presumption is weak, and almost disappears, in the case of offences governed by Acts relating to the revenue or the public health (*R.* v. *Woodrow* (2); *Anglo-American Oil Co.* v. *Manning* (3)). The *Distillation Act* is an Act to protect the revenue, and in some cases requires knowledge as an ingredient of a particular offence (see, e.g., sec. 74 (7)). But sec. 74 (4) simply prohibits any person receiving, carrying, conveying or concealing, or having upon his premises or in his custody or under his control, any illicit spirits. The prohibition is absolute in terms, and, having regard to the subject matter of the Act, should be so interpreted. The information should be remitted to the magistrate, with the opinion of the Court that his determination was erroneous in point of law. The result is that the magistrate should convict the defendant and inflict such penalty as is appropriate in the circumstances.

DIXON J. Sec. 74 (4) of the *Distillation Act* 1901-1931 makes the following provision :—" No person shall—(4) Receive, carry, convey, or conceal, or have upon his premises or in his custody or under his control any illicit spirit." The respondent, who is a chemist, was charged under this provision for that he did have in his custody illicit spirits, namely, about one half-gallon of rectified spirit. It appeared from the evidence given on the hearing of the charge that some spirit was stolen from a licensed distillery by an employee, who handed it over to an accomplice to sell. The latter called at a chemist's shop and offered to sell two gallons. The chemist, who required no more than one gallon, telephoned to the respondent and asked him whether he could do with a gallon of spirit. The respondent asked the price and was told 32s. 6d. The price usually charged by the wholesale chemist with whom he dealt was 51s. a gallon. The respondent asked whether the spirit was " all right," and, on receiving an affirmative answer, asked that it should be sent down to look at. This was done, and the respondent then paid the

(1) (1895) 1 Q.B., at p. 921.
(2) (1846) 15 M. & W., at pp. 415-418 ; 153 E.R., at pp. 912, 913.
(3) (1908) 1 Q.B. 536, at p. 541.

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other chemist for it. He swore that he did not suspect that the spirit was illicit, that he referred to its quality when he asked whether it was " all right," and that he knew the chemist well who sold it to him and had no reason to suspect that he was concerned with illicit spirit or any goods improperly come by. The magistrate appears to have accepted the view that the respondent had no guilty knowledge, and he dismissed the charge, but not on the ground that the absence of guilty knowledge was an answer to a charge under sec. 74 (4), which he construed as imposing an absolute responsibility. In answer to an inquiry by the Court, he has informed it that he did not act as under sec. 556A of the *Crimes Act* 1900 (N.S.W.) as had been suggested. Upon the case stated it is not clear why he dismissed the information, but, whatever his reason may have been, it seems clear that the charge was fully established unless the defendant's ignorance that the spirits were illicit affords an answer. Spirits are illicit if they have been distilled, moved, altered, or interfered with, in contravention of the Act (sec. 6). The Act contains many provisions for the control of distillation, and the illicit character of spirits may arise from all kinds of violations of the Act of which persons may know nothing who, during the subsequent history of the spirits, receive, carry or convey them or have them upon their premises or in their custody or control. But the terms in which clause 4 of sec. 74 is expressed do not make knowledge of the illicit character of the spirits an essential element of the offence. To imply such a requirement would no doubt be possible, but in the case of a revenue statute of the tenor of that now in question, no presumption appears to arise in favour of that implication. Nevertheless, in the case alike of an offence at common law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances, which, if true, would make innocent the act for which he is charged (per *Cave* J., *R.* v. *Tolson* (1)). What grounds may exist for excluding this exception as a defence are discussed more at large by *Wills* J. in that case (2), and by *Wright* J. in *Sherras* v. *De Rutzen* (3), and it is clear

(1) (1889) 23 Q.B.D. 168, at p. 181. (2) (1889) 23 Q.B.D., at pp. 172-176.
(3) (1895) 1 Q.B.D. 918.

that inference from subject matter may readily be made a ground of implied exclusion. But, although in the present case the subject matter is revenue, I do not think this defence should be treated as excluded. The provision relates not to any act or omission which is directly connected with the machinery for collecting or safeguarding revenue. It relates to possession, custody or other physical relation to an article. Its nefarious character is not intrinsic, but arises from antecedent breaches of the law generally by other persons. The very description " illicit " means that the spirits have previously been illegally dealt with. It seems natural to treat ignorance upon reasonable grounds of their unlawful history as an exculpation. The legislative power, upon which the provision rests, is that to make laws with respect to taxation, and it may be suggested that an extreme construction would take the provision to the verge of the power. Further, " If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken into account " (per *Wills* J. (1)). But, in any event, authority appears to me to support the view that the absolute language of the statute should be treated as doing no more than throwing upon the defendant the burden of exculpating himself by showing that he reasonably thought the spirits were not illicit. In the case of an enactment making possession of marked government stores an offence, the interpretation adopted by Lord *Kenyon* in *R.* v. *Banks* (2) was, as *Wills* J. says (1) : " Prima facie the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned." Indeed, in *R.* v. *Sleep* (3), actual proof by the prosecution of the accused's knowledge was insisted upon ; see the jury's answers (4). Lord *Kenyon's* view is approved by *Wills* J. in *Tolson's Case* (1). I do not think such a case as *R.* v. *Woodrow* (5), although decided on an excise statute, is opposed to this conclusion, because the provisions were directed against trading

(1) (1889) 23 Q.B.D., at p. 175.
(2) (1794) 1 Esp. 144 ; 170 E.R. 307.
(3) (1861) 8 Cox C.C. 472 ; Le. & Ca. 44 ; 169 E.R. 1296.
(4) (1861) Le. & Ca., at pp. 46, 47 ; 169 E.R., at p. 1297.
(5) (1846) 15 M. & W. 404 ; 153 E.R. 907.

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in adulterated articles, and forbade possession of an article the adulterated character of which was not unascertainable. Such enactments are always considered to cast a special responsibility upon the trader to ensure that the goods are pure. (See *Blaker* v. *Tillstone* (1)).

In the present case, I think it was open to the magistrate to acquit the accused if he was affirmatively satisfied that the accused reasonably believed the spirits were not illicit. But it is by no means clear that he did reach this conclusion of fact. There is nothing to show that he considered the reasonableness of his belief or that he regarded the burden of proof as upon him. I think that the information should be remitted to the magistrate.

EVATT AND MCTIERNAN JJ. The magistrate made the following determination : " I am of opinion that *mens rea* or knowledge that the spirit was illicit is not a necessary ingredient of the offence under sec. 74, sub-sec. 4." The substantial question on this appeal is whether that decision is correct. Sec. 74 (4) of the *Distillation Act* 1901-1931 says " No person shall—Receive carry, convey, or conceal, or have upon his premises or in his custody or under his control any illicit spirit." The information on which the respondent was charged alleged that he had in his custody illicit spirits, namely, about half a gallon of rectified spirit. Any contravention of sec. 74 is punishable by a penalty not exceeding £500. The term " illicit spirits " means spirits distilled, moved, altered or interfered with in contravention of the *Distillation Act* 1901-1931. The Act provides that no person shall distil spirits by means of a still of a capacity exceeding one gallon unless he is licensed (sec. 12). It is provided by sec. 28 that " the distillation of spirits by distillers shall, for the protection of the revenue, be subject to the right of supervision by officers." No distiller shall distil spirits on any premises other than his distillery (sec. 34). Part V. of the Act prescribes the conditions upon which it is lawful to remove spirits from a distillery. Spirits cannot be removed without an entry made and passed authorizing their removal (sec. 39) ; no entry can be passed in respect of a smaller quantity than 10 gallons ; sec. 41 prescribes the hours for

(1) (1894) 63 L.J. M.C. 72, at p. 73.

removal, that is, between nine o'clock in the forenoon and five o'clock in the afternoon; the distiller is bound by sec. 48 to pay the duty on spirits to the Collector of Customs before the spirits are delivered for home consumption.

This brief examination of the Act indicates some of the measures taken to control the removal of spirits from the licensed premises of a distiller, the object being to prevent any evasion of duty. Any spirits which are removed in contravention of these measures become illicit. For example, if, without authority, a distiller removes spirits from his distillery after five in the afternoon and before nine in the forenoon, such spirits are declared by the Act to have the character of illicit spirits.

Part VIII., in which is included sec. 74, enacts what are described as the "Penal Provisions" of the Act. The section provides for the punishment of persons committing acts which may defeat the measures taken to control the distillation and removal of spirits from the licensed premises of the distiller. Hence sec. 74 (4) provides that no person shall—"Receive, carry, convey, or conceal, or have upon his premises or in his custody or under his control any illicit spirit."

It is obvious that a person may receive, carry, or have in his custody spirits which have assumed the character of illicit spirits before they came into his possession. Thus the custody of illicit spirits is not inconsistent with complete absence of any knowledge on the part of the person having custody, that they have been distilled, moved, altered or interfered with in contravention of the Act.

In *Sherras* v. *De Rutzen* (1), *Wright* J. said :—"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered." The words of sec. 74 (4) are silent on the question whether guilty knowledge is an ingredient of the offence. But sec. 74 (7) expressly declares that knowledge of the illicit character of the spirit is an ingredient of the offence created by that sub-section. The conclusion does not follow that the

(1) (1895) 1 Q.B., at p. 921.

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Legislature necessarily intended that any person having custody of spirits which are illicit, but no knowledge of their character, should be liable to the penalty prescribed by sec. 74, for in the case cited above, *Day* J. said :—" An argument has been based on the appearance of the word ' knowingly ' in sub-s. 1 of s. 16, and its omission in sub-s. 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2, the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word ' knowingly ' in the one sub-section and its omission in the other " (1).

Now the present Act may be described as a revenue Act. *Wright* J. (2) says that the subject matter of such a statute *may* displace the presumption that guilty knowledge is an ingredient of the offence which it creates. He says :—" The principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of *Lush* J. in *Davies* v. *Harvey* (3), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on revenue statutes, e.g., *Attorney-General* v. *Lockwood* (4), where the innocent possession of liquorice by a beer retailer was held an offence."

Having regard to the sanctions provided, we are unable to agree that the acts which are unlawful by sec. 74 (4) " are not criminal in any real sense." Moreover, it is not an inflexible rule that the legislature can never be presumed to intend that guilty knowledge is not an essential ingredient of an offence against a revenue statute (Cf. *Hill* v. *Donohoe* (5)).

In *Attorney-General* v. *Lockwood* (6) *Alderson* B. said :—" The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless

(1) (1895) 1 Q.B., at p. 921.
(2) (1895) 1 Q.B., at pp. 921, 922.
(3) (1874) L.R. 9 Q.B. 433.
(4) (1842) 9 M. & W. 378 ; 152 E.R. 160.
(5) (1911) 13 C.L.R. 224.
(6) (1842) 9 M. & W., at p. 398 ; 152 E.R., at pp. 168, 169.

that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

In our opinion it would be a palpable and evident absurdity to suppose that the Legislature intended to expose an innocent messenger or carrier of spirits which are in fact illicit, but of whose character as such it is impossible that he should be aware, to the drastic penalty prescribed by sec. 74. Neither the language of the statute, nor its subject matter, require such a conclusion. In our opinion, a person charged with an offence under sec. 74 (4) is entitled to be discharged if he proves that he neither believed nor had reason to believe that the spirits in respect of which he is charged were illicit (See *Sherras* v. *De Rutzen* (1), per *Day* J.).

The case should be remitted to the magistrate.

The appellant having failed in his contention of law, should pay costs.

Case remitted to the magistrate. Appellant to pay the costs of the appeal.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Biddulph & Salenger*.

J. B.

(1) (1895) 1 Q.B., at p. 921.