Cons R v Tannous (1987) 10 NSWLR 303
Appl R v Tannous 32 ACrimR 301
Cons Singhong v Minister for Immigration & Ethnic Affairs (1988) 80 ALR 147
Cons R v Tannous 88 FLR 97
Foll Singhong v Minister for Immigration & Ethnic Affairs 15 ALD 172
Cons R v Aust Industrial Court: Ex parte CLM Holdings (1977) 136 CLR 235
Cons National Companies & Securities Commission v Falk (1993) 9 WAR 1
Cons R v Buckett (1995) 79 ACrimR 302
Cons R v Buckett (1995) 132 ALR 669
Appl Question of Law Reserved (No 2 of 1996) (1996) 67 SASR 63
Appl Question of Law Reserved (No 2 of 1996) (1996) 88 ACrimR 417

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

GOLDIE AND ANOTHER;

Ex parte PICKLUM.

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SYDNEY, *Aug.* 30, 31; *Sept.* 1; *Nov.* 26.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Immigration—Prohibited immigrant—"Found within the Commonwealth"—Transportation within the Commonwealth—Aider and abettor—Offence—Immigration Act 1901-1935 (*No.* 17 *of* 1901—*No.* 13 *of* 1935), *secs.* 7, 9A (1), (2), 9D—*Crimes Act* 1914-1932 (*No.* 12 *of* 1914—*No.* 30 *of* 1932), *sec.* 5.

P. was charged upon an information framed under sec. 5 of the *Crimes Act* 1914-1932 that on 2nd July 1937 at divers places in New South Wales he was knowingly concerned in the commission of an offence by W. in that W., being a prohibited immigrant, was, contrary to the *Immigration Act* 1901-1935, found in the Commonwealth in contravention or evasion of the Act. The evidence showed that W., a Chinese, was a stowaway on the s.s. *Willandra* and that he came ashore at night with other Chinese, at Geelong, Victoria. That same night P., who in pursuance of an arrangement had proceeded to Geelong, picked up W. and the other Chinese, who he knew had come off the s.s. *Willandra*, and arranged for them and himself to be driven in a car into New South Wales. Whilst being driven to Botany the car was stopped at Burwood, New South Wales, by the police, and W. failed to pass a dictation test administered to him by the informant, an officer of customs.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that P. was not guilty of the offence charged, because the evidence did not establish that at the time and places charged P. was concerned in the entry of W. into Australia or otherwise in the fact of his presence within its territorial boundaries.

ORDER NISI for prohibition.

Gordon Picklum of Alexandria, Sydney, New South Wales, was charged before Mr. Goldie, a stipendiary magistrate, upon an information framed under sec. 5 of the *Crimes Act* 1914-1932, by Herbert

Bede Cody, an officer of customs, that "on or about the second day of July 1937, at divers places in the said State you were knowingly concerned in the commission of an offence against a law of the Commonwealth, namely, an offence committed by one Gee Kee Way in that the said Gee Kee Way being a prohibited immigrant was, contrary to the . . . *Immigration Act* 1901-1935, being a law of the Commonwealth, found in the Commonwealth in contravention or evasion of the said Act, to wit, at Burwood in the said State on the second day of July 1937."

Picklum was convicted and sentenced to imprisonment for a period of two months.

From that conviction he appealed to the High Court by way of an order nisi for a writ of prohibition directed to the magistrate and the informant.

Further material facts appear in the judgments hereunder.

The respondent magistrate, Mr. Goldie, did not appear on the hearing of the application although served with notice thereof.

A. R. Taylor (with him *Allen*), for the applicant. Sec. 5 of the *Crimes Act* 1914-1932 does not itself create any substantive offence. If sec. 5 purports to extend beyond the limits of the legislative powers of the Commonwealth the operation of a statutory provision, in this case sec. 7 of the *Immigration Act*, which does itself create a separate substantive offence, to that extent it must, under sec. 15A of the *Acts Interpretation Act* 1901-1932, be read down so as not to exceed the legislative powers of the Commonwealth Parliament. A person cannot be found guilty under sec. 5 unless someone has committed a "principal" offence (*Archbold's Pleading, Evidence and Practice in Criminal Cases*, 28th ed. (1931), pp. 1467, 1468).

[DIXON J. referred to *Walsh* v. *Sainsbury* (1).]

Although referred to in that case in the dissenting judgment of *Isaacs* J., the point was not decided by the court. The Commonwealth Parliament has no legislative power to deem that a person, e.g., the applicant, who is not an immigrant shall be a prohibited immigrant. The parliament cannot enlarge its powers by simply

(1) (1925) 36 C.L.R. 464, at p. 477.

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deeming anything to be within those powers. The expression " prohibited immigrant " has a definite meaning under the *Immigration Act*. It is competent for the Commonwealth Parliament to make as a separate substantive offence the being knowingly concerned in this offence and that the offender should be punished, but it has not done so. Sec. 5 was intended to be an " aiding and abetting " section with regard to offences that might be committed by any person. Sec. 5 does not apply to the *Immigration Act*, as general provision has been made in secs. 12 and 12A of that Act for the purpose of punishing aiders and abettors. If sec. 5 of the *Crimes Act* is applicable to sec. 7 of the *Immigration Act*, it would follow that if the applicant had been charged directly with being a prohibited immigrant found in the Commonwealth in contravention of the *Immigration Act*, the defence that he had not committed that offence because he was not an immigrant would not be open to him (*Du Cros* v. *Lambourne* (1); *Gould & Co.* v. *Houghton* (2)), and, upon conviction, he would be liable to deportation at the direction of the minister without any order of the court. The meaning of the word " deemed " was considered in *Williamson* v. *Ah On* (3). There is no provision in the *Immigration Act* which prohibits the entry of a stowaway into the Commonwealth. Sec. 7 of that Act deals with every prohibited immigrant, but sec. 9A (2) does not deal with stowaways who are immigrants; it deals with every stowaway. Sec. 7 only deals with persons who have entered or are found within the Commonwealth in contravention or evasion of the Act; there is no prohibition on the immigration of a stowaway as such. When Way, the Chinese, landed he was not guilty of any offence under the Act. A stowaway is not necessarily a prohibited immigrant, and even although a stowaway may be " found within the Commonwealth," he must be so found in contravention of the Act. The word " stowaway " as used in sec. 9A (2) is wide enough to include a citizen of the Commonwealth. Sec. 9A (2) is not directed against stowaways but against the masters, owners and agents of vessels. Sub-sec. 2 was intended to be merely evidentiary to sec. 9A; this is shown by the removal of the words " for the purposes of this section."

(1) (1907) 1 K.B. 40.
(2) (1921) 1 K.B. 509, at pp. 514, 515, 518.
(3) (1926) 39 C.L.R. 95, at p. 111.

The quality of the sub-section has not been changed by the removal of those words. The concluding words of sec. 9D indicate that there may be two classes of prohibited immigrants. It is doubtful whether it is a proper exercise of the immigration power to administer the dictation test to a person who has lawfully entered the Commonwealth (*Griffin* v. *Wilson* (1)). There is no evidence that Way was a stowaway or that he failed to pass the dictation test administered to him.

E. M. Mitchell K.C. (with him *Bowie Wilson*), for the respondent Cody. Sec. 5 of the *Crimes Act* only deals with punishment inflicted by a court. The deportation which is incident to sec. 7 of the *Immigration Act* is not punishment but is a political precaution (*Ex parte Walsh and Johnson*; *In re Yates* (2); *Mahler* v. *Eby* (3)). The court's power under sec. 7 is exhausted when it pronounces the sentence of imprisonment. The use of the word " deemed " for the purpose of bringing within the category of certain statutory provisions people who, according to the actual facts of the case, do not fall within them, was considered in *Hocking* v. *Western Australian Bank* (4), *Muller* v. *Dalgety & Co. Ltd.* (5) and *Walsh* v. *Sainsbury* (6). Sec. 7 of the *Immigration Act* creates two offences in respect of prohibited immigrants, namely, (*a*) entering the Commonwealth, and (*b*) being found within the Commonwealth. The word " found " means " being and remaining " (See sec. 6). Here the principal offence was that the Chinese concerned, being a prohibited immigrant, was found within the Commonwealth in contravention of the Act. Such a person contravenes the Act the whole time he continues to be within the Commonwealth. The applicant aided, abetted and harboured the Chinese concerned so that he might remain within the Commonwealth. The applicant knowingly assisted the Chinese concerned to remain within the Commonwealth, the Chinese having come into the Commonwealth, and being therein, in contravention or evasion of the Act. The applicant took effective steps to ensure

(1) (1935) 52 C.L.R. 260, at p. 266.
(2) (1925) 37 C.L.R. 36, at pp. 94 et seq., 132, 133.
(3) (1924) 264 U.S. 32, at p. 39; 68 Law. Ed. 549, at p. 554.
(4) (1909) 9 C.L.R. 738, at p. 745.
(5) (1909) 9 C.L.R. 693, at pp. 696, 704, 705.
(6) (1925) 36 C.L.R. 464.

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that the prohibited immigrant should remain within the Commonwealth. Sec. 9A (2) prohibits the immigration of stowaways; therefore any stowaway who enters the Commonwealth is within the Commonwealth in contravention or evasion of the Act, and any person who assists him to knowingly contravene or evade that continuous prohibition is knowingly concerned in the commission by him of the offence of a contravention or evasion of the Act. The Chinese was, therefore, a prohibited immigrant within the meaning of sec. 9A (2) who was within the Commonwealth without authority, and who was knowingly assisted by the applicant to remain within the Commonwealth in contravention of the Act.

A. R. Taylor, in reply. The omission of the words "for the purposes of this section" has altered the ambit of sec. 9A (2), but it has not altered the quality or the nature of the provisions of that section. The provisions of sec. 9D should be applied before those of sec. 9A (2).

Cur. adv. vult.

Nov. 26.

The following written judgments were delivered :—

LATHAM C.J. The defendant Gordon Picklum moves for a writ of prohibition, directed to a stipendiary magistrate and the informant in a criminal prosecution, for the purpose of restraining further proceedings in respect of a conviction recorded against him. He was convicted of an offence which was stated in the information in the following terms :—"that on or about the second day of July 1937, at divers places in the said State you were knowingly concerned in the commission of an offence against a law of the Commonwealth, namely, an offence committed by one Gee Kee Way in that the said Gee Kee Way being a prohibited immigrant was contrary to the said *Immigration Act* 1901-1935, being a law of the Commonwealth, found in the Commonwealth in contravention or evasion of the said Act, to wit, at Burwood in the said State on the said second day of July 1937."

The evidence showed that Gee Kee Way, a Chinese, was a stowaway upon the s.s. *Willandra* and that he came ashore at night with nine

other Chinese at Geelong, Victoria. The defendant made arrangements for picking them up at Geelong. He arranged that they should be driven into New South Wales. When the car reached Liverpool Picklum hired a taxi and, with Gee Kee Way and two other Chinamen, was being driven to Botany when the taxi was stopped by the police at Burwood. There is no evidence that Picklum was concerned in the actual entry of Gee Kee Way into the Commonwealth—this proposition is the basis of this judgment—and he was not charged with being concerned in his entry into the Commonwealth.

The informant relied upon the fact that Gee Kee Way was a prohibited immigrant by virtue of sec. 9A of the *Immigration Act* 1901-1935. The offence alleged to have been committed by Gee Kee Way was created by sec. 7 of the *Immigration Act*, which imposes a penalty upon every prohibited immigrant found within the Commonwealth in contravention or evasion of the Act. Argument was submitted to the court upon several questions affecting the construction of these and other sections of the *Immigration Act*, but in my opinion it is unnecessary to decide them for the purposes of the present case.

The informant relied upon sec. 5 of the *Crimes Act* for the purpose of establishing the offence alleged against Picklum. That section is as follows: "Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly."

The alleged offence committed by Gee Kee Way was that he, being a prohibited immigrant, was found in the Commonwealth in contravention or evasion of the Act. His presence in the Commonwealth was the essence of his alleged offence. The offence alleged against Picklum was that he was concerned in Gee Kee Way so being in the Commonwealth. In my opinion, the evidence did not establish that Picklum had been in any way directly or indirectly concerned in Gee Kee Way being within the Commonwealth. The evidence showed that Picklum was concerned in Gee Kee Way

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Latham C.J.

being at Burwood, but not that he had anything to do with him being in the Commonwealth. In order that a person may be concerned in an immigrant being found within the Commonwealth, it is necessary to show that he had something to do with him being in the Commonwealth instead of being in some place outside the Commonwealth. It is not enough to show that he is concerned in him being in one place in the Commonwealth rather than in another place in the Commonwealth. Transportation within the Commonwealth of a person already in the Commonwealth does not amount to being concerned in him being in the Commonwealth. The court can consider only whether Picklum ought to have been found guilty of the particular offence with which he was charged. Any consideration of other possible offences is irrelevant.

In my opinion, there was no evidence that Picklum was concerned in the commission of the alleged offence, and the appeal should accordingly be allowed.

STARKE J. The applicant was charged upon information before a stipendiary magistrate of the State of New South Wales " for that on or about the second day of July 1937, at divers places in the said State you were knowingly concerned in the commission of an offence against a law of the Commonwealth, namely, an offence committed by one Gee Kee Way in that the said Gee Kee Way being a prohibited immigrant was contrary to the said *Immigration Act* 1901-1935, being a law of the Commonwealth, found in the Commonwealth in contravention or evasion of the said Act, to wit, at Burwood in the said State on the said second day of July 1937."

He was convicted and now appeals to this court by means of an order nisi for a writ of prohibition pursuant to the *Justices Act* 1902-1931 of New South Wales, sec. 112, and the Appeal Rules of this court, sec. IV.

The evidence before the stipendiary magistrate established the following facts :—

1. That Gee Kee Way, a Chinese, was a stowaway on the s.s. *Willandra* which arrived from places outside Australia at Newcastle in New South Wales on 27th June 1937 and then proceeded to Geelong in Victoria, where she arrived on 1st July 1937. He was

not a passenger on the vessel nor was he a member of the crew whose name was on the ship's articles.

2. That arrangements were made in New South Wales with the appellant that he should go to Geelong in the State of Victoria and pick up a number of stowaways from the s.s. *Willandra* and take them into New South Wales.

3. That the appellant proceeded to Victoria, hired a motor-car in Melbourne and on 1st July 1937 went to Geelong and picked up the Chinese stowaways including Gee Kee Way from the s.s. *Willandra* in a street in Geelong.

4. That the Chinese were picked up about 10 p.m. and the appellant and the Chinese were driven all through the night into New South Wales.

5. At Liverpool in New South Wales the appellant hired another motor car, took three of the Chinese in whom he was interested (including Gee Kee Way) and drove off towards Botany in New South Wales. But at Burwood in New South Wales the car was stopped by the police and the appellant and the Chinese in whom he was interested were arrested.

6. Gee Kee Way never passed the dictation test under the Act nor did any officer nor the master of the *Willandra* give him permission to land.

The *Immigration Act* 1901-1935 provides: "Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act and every person who, by virtue of this Act, is deemed to be a prohibited immigrant offending against this Act, shall be guilty of an offence against this Act" (sec. 7). "Every stowaway brought into any port on board a vessel shall be deemed to be a prohibited immigrant unless it is proved that he has passed the dictation test or that an officer has given him permission to land without restriction" (sec. 9A (2)). "Any person on board a vessel at the time of her arrival from any place outside Australia at any port in Australia who is not—(*a*) a bona fide passenger on the vessel, or (*b*) a member of the crew of the vessel whose name is on the articles, shall be deemed to be a stowaway, unless the master of the vessel forthwith after the arrival of the vessel at the port gives notice to an officer that the person is on board

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the vessel, and does not permit him to land until the officer has had an opportunity of satisfying himself that the person is not a prohibited immigrant" (sec. 9D).

The *Crimes Act* 1914-1932, sec. 5, provides: "Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly."

It was contended, in the first place, that Gee Kee Way was not a person whose immigration into the Commonwealth was prohibited. He was not within any of the classes of persons mentioned in sec. 3. And sec. 9A (2), it was suggested, related only to the provisions of sec. 9A (1). In the Act No. 25 of 1908 the words "for the purposes of this section" were contained in sec. 9A (2), but those words were omitted by the Act No. 10 of 1910, and sub-sec. 9A (2) stands in the Act as cited above.

The words of sub-sec. 9A (2) should be given their ordinary meaning in the English language unless there is something in the position of the words or in their context inconsistent with that meaning. The language of the sub-section is "clear, simple, unambiguous and intelligible," and I see no reason why it should not mean what it says, namely, that every stowaway brought into any port on board a vessel shall be deemed a prohibited immigrant. The provisions of sec. 9D were also referred to. That section, it has been held in this court, does not exhaustively define the term "stowaway" (*Muller* v. *Dalgety & Co. Ltd.* (1)). It is unimportant in this case, for the evidence warrants the conclusion that Gee Kee Way was an actual stowaway, and, if he were not, then he was what *O'Connor* J. in *Muller's Case* (2) describes as a "fictional stowaway" under the provisions of sec. 9D. In my opinion, therefore, Gee Kee Way is by force of the *Immigration Act* deemed to be a prohibited immigrant, which means that his immigration into the Commonwealth is prohibited (Cf. sec. 3).

(1) (1909) 9 C.L.R. 693.

(2) (1909) 9 C.L.R., at p. 710.

Then comes sec. 7, which provides that every prohibited immigrant found within the Commonwealth in contravention or evasion of the Act is guilty of an offence. A person who is a prohibited immigrant is found within the Commonwealth if he be actually present at any place within the Commonwealth (Cf. *R.* v. *Lopez* (1)). And if such person be present within the Commonwealth then he has contravened or evaded the Act because he is prohibited by the Act from entering or being within the Commonwealth.

The charge against the appellant is that he was knowingly concerned in the commission of that offence. It is based on the provision of sec. 5 of the *Crimes Act*. The section is an aiding and abetting section and it was necessary first that the commission of the principal offence should be established and next that the appellant was knowingly concerned in the commission of that offence (See *Walsh* v. *Sainsbury* (2)).

In my judgment the commission of the principal offence was established, namely, that Gee Kee Way, a prohibited immigrant, was found in the Commonwealth, to wit, at Burwood in contravention of the Act.

It is beyond question that the appellant assisted Gee Kee Way to land in the Commonwealth and surreptitiously took him to Burwood in the Commonwealth, where he was found, in the sense I attribute to that word, namely, that he was actually present at that place in the Commonwealth. It was the appellant who assisted him to enter the Commonwealth, and it was the appellant who took him to the place where he was found. " Entering or found within the Commonwealth " are the words of the section, and they do not mean the same thing. " Entering . . . the Commonwealth " is the act of passing into its territory, whilst " found within the Commonwealth " means actual presence in the Commonwealth which is established by the discovery or detection of the person within its territory wherever he may be and however remote the time may be from the time of his entry.

The appellant assisted the prohibited immigrant to enter the Commonwealth, and was knowingly concerned in that act. The

(1) (1858) 7 Cox C.C. 431, at p. 441.

(2) (1925) 36 C.L.R., at p. 477.

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charge however is that he was knowingly concerned in Gee Kee Way being found in the Commonwealth, to wit, at Burwood.

But the appellant took the prohibited immigrant to Burwood in the Commonwealth, and there he was actually present. In my opinion the appellant was knowingly concerned in the actual presence of the prohibited immigrant there, and therefore in his being found at that place as charged in the information. It is a fallacy, as it appears to me, to say that he was in the Commonwealth whether he was taken to Burwood or not. He was actually present or found within the Commonwealth at Burwood, and the fact was established when he was discovered or detected there. The appellant was knowingly concerned in his presence in the Commonwealth at Burwood, for he had taken him to that place.

Another argument relied upon for the appellant was that no Australian-born citizen could, under sec. 5 of the *Crimes Act* 1914-1932, be deemed to have committed an offence under sec. 7 of the *Immigration Act* 1901-1935 and that, if the Acts so provided, they are beyond the powers of the Commonwealth. It appears that the appellant is Australian-born and is resident in Australia though of Chinese race. But I see no constitutional objection to the Commonwealth prohibiting its citizens aiding and abetting the contravention of the *Immigration Acts* or any other laws of the Commonwealth under such sanctions as it deems expedient. It is a common expedient to make persons falling within the provisions of such a section principals participating in the offence and punishable accordingly, and I perceive no constitutional difficulty in such a provision. But it is said that sec. 7 authorizes the deportation of a person convicted of an offence against the section, and in the case of an Australian-born citizen is necessarily beyond the powers of the Commonwealth. I am by no means convinced that the argument is a sound one. But two answers may be made to it: one, that deportation is not punishment within the meaning of sec. 5 of the *Crimes Act* (Cf. *Mahler* v. *Eby* (1)); the other, and perhaps a more satisfactory one in this case, is that no order for deportation has been made. The appellant was sentenced to two months imprisonment with hard labour. It is only the responsible Minister who can order

(1) (1924) 264 U.S., at p. 39; 68 Law. Ed., at p. 554.

deportation in addition to or in substitution for such imprisonment and that provision is wholly distinct and severable in any case from the authority conferred upon the judicial tribunal under the section.

The appeal should be dismissed.

DIXON J. The s.s. *Willandra* arrived at Newcastle on 27th June 1937 carrying a Chinese crew. Thence she went to Geelong, where she arrived on 1st July. The appellant is Australian born of Chinese descent. On 29th June he left Sydney, where he resides, and journeyed by train to Melbourne. He did this at the request of an unnamed man in Sydney who told him that there were ten Chinese to pick up in Melbourne. On 30th June he went by train to Geelong and back. Next day, 1st July, he hired a large car at a tourist agency and drove down to Geelong again. He there met ten Chinese and stowed them and his unnamed principal in the car which was then driven all night into New South Wales. The appellant heard in Melbourne that the ship from which the Chinese came was the s.s. *Willandra*. On the afternoon of 2nd July the party arrived at Liverpool. There the Chinese were dropped by the tourist car. The appellant drove off in a taxi-cab towards Sydney, bearing three Chinese with him. At Burwood, the taxi-cab was stopped by the police who arrested all four passengers. Customs officers were summoned and they administered a dictation test to the Chinese, who, of course, failed to write down the passage read to them. They then became prohibited immigrants, if they already had not this status.

On behalf of the authorities it is said that they were prohibited immigrants before they left the vessel, because they were stowaways. Sec. 9A (2) of the Act says that every stowaway brought into any port on board a vessel shall be deemed to be a prohibited immigrant unless it is proved that he has passed the dictation test or that an officer has given him permission to land without restriction. It was determined, not unnaturally, that the appellant should be prosecuted for his participation in the events I have described. One of the Chinamen in the taxi-cab was chosen as the particular immigrant in respect of whom the appellant was to be charged with offending against Commonwealth law. His name was Gee Kee Way. Under

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sec. 12A of the *Immigration Act* every person who is concerned in the concealment of any immigrant with intent to prevent his discovery by an officer is guilty of an offence. Under sec. 6 of the *Crimes Act* any person who receives or assists any person who is to his knowledge guilty of an offence in order to enable him to escape punishment is guilty of an offence. The appellant was not charged under either of these provisions, and it may be that some uncertainty was felt as to their application to the facts. Nor was he charged in respect of what he did at Geelong, or, indeed, elsewhere in Victoria.

An information was laid against him for that on 2nd July at divers places in New South Wales he was knowingly concerned in the commission of an offence committed by Gee Kee Way in that the said Gee Kee Way, being a prohibited immigrant, was contrary to the *Immigration Act* found in the Commonwealth in contravention or evasion of the said Act, to wit, at Burwood. The information was framed under sec. 5 of the *Crimes Act* which enacts that any person who aids, abets, counsels or procures or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth shall be deemed to have committed that offence and shall be punishable accordingly. The information does not specify the precise act or omission by which the appellant was alleged to be knowingly concerned in Gee Kee Way's offence. But it may be taken that it covered accompanying that Chinaman upon this journey from the Victorian border in the tourist car, his transfer to the taxi-cab at Liverpool and the journey therein that was abruptly brought to an end at Burwood. Gee Kee Way's offence, that is, the principal offence, laid in the information is constituted by sec. 7 of the *Immigration Act*. So far as relevant to the charge, the elements in which the offence consists are, possessing the character of a prohibited immigrant, and being found in the Commonwealth of Australia in contravention or evasion of the Act. Another offence under sec. 7 is entering the Commonwealth, but that is not charged in the information. As a result of the amendment of 1935, sec. 7 also creates an offence consisting in no more than being deemed to be a prohibited immigrant offending against the Act. As stowaways are, under sec. 9A, persons deemed to be prohibited immigrants, as distinguished

from actually prohibited immigrants, if the Act really intends to draw such a distinction, it may be said that Gee Kee Way's presence in Australia has been made the subject of a charge under the less appropriate part of sec. 7. But perhaps this fine distinction is not really intended and the amendment of sec. 7 was redundant. The expression "found within the Commonwealth" has occasioned some difficulty in other cases. Does it mean that there must be a discovery of the immigrant, or is his mere presence in Australia enough to make him an offender? If an essential ingredient of the offence is a "finding," the appellant can hardly be said to be knowingly concerned in that constituent fact. The last thing he wanted was that Gee Kee Way should be found or discovered. But I think the word "found" does not look to the nature of the offence but merely to its disclosure. The offence of the immigrant consists in being within the Commonwealth. Here again, however, the prosecution encounters a difficulty. How, by any act or omission in New South Wales, was the appellant knowingly concerned in Gee Kee Way being within the Commonwealth? The offence is not being at Liverpool, or being at Burwood, or being in a taxi-cab. It is being within the territorial boundaries of Australia. Movement or other activity within the territory is no part of the offence. Concealment is no part of the offence. The words "in contravention or evasion of the Act" probably demand no further constituent element to make the offence than being a prohibited immigrant. It is said that really they mean "without authority or excuse," e.g., without permit or licence. But however that may be, it is clear that the condition expressed in those words is satisfied rather by the manner of Gee Kee Way's entry into the Commonwealth than his journey from the border of New South Wales to Burwood or any state or condition assumed by Gee Kee Way in that transit. He was no more and no less in the Commonwealth because of his transportation in New South Wales. How can it be said that the appellant was knowingly concerned by acts and omissions during that period in Gee Kee Way's existence within the geographical area called the Commonwealth? It is nothing to the point that at an earlier time the appellant may have facilitated Gee Kee Way's entry and, therefore, shared in the responsibility for his presence in

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Australia. That is not the charge against the appellant. Nor is it, I think, anything to the point that the appellant was endeavouring to make it less probable that Gee Kee Way would be compelled to depart from the Commonwealth. His activities may have tended to delay that event, but that is not the charge. Under sec. 5 of the *Crimes Act* the principal offence must actually be committed before the accessory is guilty. It is not a provision dealing with mere incitement independently of the commission of the offence incited. It is an aiding and abetting section (See per *Isaacs* J. in *Walsh* v. *Sainsbury* (1)). It is, therefore, necessary to see what, during the relevant interval of time and at the relevant place or places, the principal offender did as amounting to an offence. Then it can be found whether the abettor was knowingly concerned therein.

In my opinion the appellant cannot be said at the time and within the State mentioned in the information by act or omission to have been knowingly concerned in Gee Kee Way's offence, that is, in his then and there being within the Commonwealth.

On this ground, I think the appeal should be allowed and the conviction of the appellant quashed.

It is unnecessary to enter upon the many other contentions with which his counsel endeavoured to support his appeal.

EVATT J. This is an appeal by way of statutory prohibition from the decision of a stipendiary magistrate exercising Federal jurisdiction within the State of New South Wales. The magistrate convicted the appellant Picklum under sec. 5 of the Commonwealth *Crimes Act* for having, on or about July 2nd last, at divers places in New South Wales, been knowingly concerned in the commission of an offence against a law of the Commonwealth by a Chinese, one Gee Kee Way. The offence imputed to such Chinese was that specified in sec. 7 of the *Immigration Act*, viz., that on 2nd July last at Burwood, New South Wales, Gee Kee Way, a prohibited immigrant, was found within the Commonwealth in contravention or evasion of the *Immigration Act*.

At the hearing considerable time was taken up by objections to the admissibility of evidence. These objections have not been

(1) (1925) 36 C.L.R., at p. 477.

pursued on this appeal and the material facts of the case appear clearly from the admissions of the appellant and the evidence of the two Chinese stowaways who were called as witnesses by the Crown. The appellant neither gave nor called any evidence.

The New South Wales part of the narrative may now be recorded. On July 2nd last officers of police discovered a taxi-cab the passengers in which were the appellant (a half-caste Chinese, also known by the name of Wong) and three other Chinese including Gee Kee Way. The officers pursued the taxi along the Liverpool road and finally overtook it near the Enfield Post Office. On being questioned, the driver of the taxi said, in the defendant's presence, that the latter had engaged him to drive the defendant and the three other Chinese to Botany, a suburb of Sydney where Chinese do congregate. Of the three Chinese in the back of the car, none could speak a word of English. The defendant excused his conduct by asserting that the Chinese with him were his own flesh and blood and that he was going to stick to them. When asked where he had picked them up he replied: "On instructions I went to Melbourne, to Geelong, where I met another Chinese and we picked up ten Chinese there who had got off a boat and we conveyed them to Liverpool by car."

The defendant added that the name of the vessel at Geelong was the s.s. *Willandra*, and that, of the ten Chinese who had "got off" the vessel, three came with him in the taxi but the other seven were left by him at Liverpool with another Australian Chinese.

This brings us to the Victorian part of the narrative. According to the defendant's admissions, he had been especially engaged by another Chinese resident in Australia to visit Melbourne in order to smuggle ten Chinese stowaways from the eastern vessel berthed at the port of Geelong. The defendant left Sydney by train on Tuesday, 29th June, and met his fellow conspirator at the Spencer Street railway station, Melbourne, on the following morning. The defendant next proceeded to engage a large touring car for the purpose of bringing the Chinese from Geelong to Sydney. On the Wednesday 30th June, he paid a preliminary visit to Geelong, in order to spy out the land. On Thursday night, 1st July, he and his associate were driven to Geelong in the large touring car and the ten Chinese were picked up in the city at 10 o'clock at night. The car was driven

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throughout the night towards Sydney, a distance of some hundreds of miles, the object clearly being to obtain a permanent refuge in a large metropolis. The defendant's conscious breach of the immigration laws is evidenced by his statement: "I am in the soup and am prepared to take the blame." The defendant admitted that he knew that the Chinese who had left the vessel at Geelong were stowaways on board, a fact which is also proved by the other evidence called, including that of one of the actual stowaways.

From the above facts which are indisputable and were indeed hardly disputed, it appears that the appellant engaged in a scheme to defeat the immigration authorities by taking or receiving ten Chinese stowaways from the s.s. *Willandra* with a view to assisting them to remain within the Commonwealth contrary to the Commonwealth Act. The scheme was carried out with considerable daring. To some extent it seems to have succeeded for although three of the ten stowaways were apprehended and no doubt deported from the Commonwealth, seven seemed to have escaped capture at least temporarily and, for all that appears, they may still be unlawfully within the Commonwealth.

Several of the questions which arise on the appeal are of great importance in the administration of the Commonwealth law and it will be of advantage to consider them in order.

(1) The first question is—does sec. 5 of the Commonwealth *Crimes Act* apply in the case of the offence specified in sec. 7 of the *Immigration Act*, viz., the offence committed by a prohibited immigrant when he is found within the Commonwealth?

The answer must be in the affirmative. Sec. 5 intimates in the plainest terms that it is to be applicable in the case of *any* law of the Commonwealth whether such law is passed before or after the *Crimes Act*. It is quite impossible to argue that sec. 7 of the *Immigration Act* is excluded from the offences described in such universal terms. While this conclusion is plain, the implications of the conclusion will be of decisive importance in the present appeal. For the case must commence from a binding statutory postulate that in every case where an offence under sec. 7 is proved, the possibility of aiding, abetting or being knowingly concerned in such offence is also established. In other words it must also be accepted

that some cases exist where aiding, abetting or being knowingly concerned in offences under sec. 7 can be established. Further, a rational inquiry requires an understanding by the courts of the general nature of the kind of evidence which will prove that a person *has* aided, abetted, or been knowingly concerned in the commission of the offence specified in sec. 7 of the *Immigration Act*.

(2) The next question is—does sec. 5 of the *Crimes Act* make an aider and abettor &c. liable, not only to the punishment specified in sec. 7 of the *Immigration Act*, but also to be deported as an immigrant would be pursuant to sec. 7 ?

Sec. 5 of the *Crimes Act* provides that any person who aids, or abets, or is knowingly concerned in the commission of any offence against any law of the Commonwealth, is deemed to have committed that offence and is punishable accordingly. Therefore, before a person can be convicted under sec. 5, it must be proved against such person that he has aided &c. in the actual commission of an offence against Commonwealth law. Accordingly sec. 5 deems the aider &c. himself to have committed the offence which he has aided. But this " deeming " is for the purpose of making the aider punishable to the same extent as if he had committed the " principal " offence. If, for instance, the offence aided is a crime which can be committed only by a bankrupt, sec. 5 makes the aider liable to the same punishment as is provided in the case of a bankrupt committing the offence ; it does not attempt to perpetrate the absurdity of declaring the aider a bankrupt.

Nothing is better recognized in criminal jurisprudence than the principle that, although a person may even be incapable of being convicted of a principal offence, he may yet be convicted as a principal in the second degree. This is illustrated by the case of *R.* v. *Ram* (1), where, before *Bowen* L.J., two prisoners, husband and wife, were indicted jointly for rape, the wife having aided and abetted the husband in the perpetration of the offence.

Therefore, the fact that an offence under sec. 7 of the *Immigration Act* can be committed only by a prohibited immigrant does not convert into a prohibited immigrant the person who aids in the commission of such offence. The aider is made liable to the same

(1) (1893) 17 Cox's C.C. 609.

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punishment as that to which a prohibited immigrant is made liable. It follows that, if the conviction of the appellant is confirmed, he is not exposed to the liability of being deported.

(3) The next question is whether, when Gee Kee Way was at Burwood, New South Wales, on 2nd July, he was a prohibited immigrant.

The answer must be in the affirmative. Sec. 9A (2) of the *Immigration Act* provides that every stowaway shall be deemed to be a prohibited immigrant unless it is proved that he has passed the dictation test or that an officer has given him permission to land without restriction. In its original form this provision was limited to offences against sec. 9A of the Act. But this limitation has long since been removed by the parliament and it follows that the provision must be regarded as of general application. Something was made of the fact that, whereas sec. 3 of the *Immigration Act* prohibits the immigration into the Commonwealth of a large list of persons, which persons are to be called "prohibited immigrants," there is no provision which specifically prohibits the immigration of stowaways into the Commonwealth. It is true that the general form of sec. 3 has not been adopted but, in my opinion, that is of no material consequence. It is to be observed that sec. 3 does not create any summary offence but merely employs a general declaration (that the immigration of certain persons is prohibited) which commands no more but no less than would necessarily be implied by a declaration that certain persons are to be regarded as "prohibited immigrants." In other words a person who is made a "prohibited immigrant" for the purpose of the Commonwealth law is not only given a description or label. He is given a particular and significant label, informing him in the very plainest terms that his immigration is prohibited.

The appellant based an argument on sec. 9D of the *Immigration Act*. But that section deals only with the resolution of the question whether certain persons should be deemed to be stowaways, whether or not they are stowaways in fact. If they are stowaways in fact, then, under sec. 9A (2), they are deemed to be prohibited immigrants unless one of two facts is established. The words "unless it is proved that" in sec. 9A (2) are said to indicate that the provision

applies only to curial or procedural matters. But nowadays similar words are frequently employed to show that the onus of escaping from a prima facie statutory definition or description is cast upon the person affected. The words do not merely suggest that the provision here is purely procedural or curial although it is that also. But it does not matter that a curial or procedural form of language is employed if, as I think, it is plainly the object of the provision to add stowaways to the list of prohibited immigrants unless certain facts are established in the case of a particular stowaway.

In the present case Gee Kee Way, the Chinese referred to in the information, was proved to have been a stowaway on the s.s. *Willandra*. The appellant established no circumstance under sec. 9A (2) which would have terminated the liability of Gee Kee Way to be treated as a prohibited immigrant. The result is that Gee Kee Way was a prohibited immigrant (*a*) while on the s.s. *Willandra* at Geelong, (*b*) when the appellant received him on the tourist car at Geelong, (c) throughout the trip to Sydney, and also (*d*) at Burwood on 2nd July last.

(4) The next question is whether, on 2nd July at Burwood, Gee Kee Way was guilty of the offence specified in sec. 7 of being a prohibited immigrant found within Australia in contravention or evasion of the Act.

The purpose of sec. 7 is clear. If a person is a prohibited immigrant he has no right either to enter the Commonwealth, or to remain within the Commonwealth after entering. As the case of *Chia Gee* v. *Martin* (1) illustrates, the term " immigrant " as used in the Act does not necessarily connote any intention of becoming a permanent resident of the Commonwealth. *Griffith* C.J. pointed out that, for the purposes of the Act, " the term ' immigrant ' is clearly satisfied by the act of coming into the Commonwealth " (2).

In my opinion, if a person is a " prohibited immigrant " his mere presence within the Commonwealth at any and every time in respect of which an eye witness deposes to such presence constitutes the offence of being found within the Commonwealth in contravention or evasion of the Act. There is no limit to the number of times that the offence may be committed by a prohibited immigrant who

(1) (1905) 3 C.L.R. 649.

(2) (1905) 3 C.L.R., at p. 654.

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remains here, providing, of course, that in relation to the time and place charged, evidence is forthcoming from a person who observes the prohibited immigrant at such time and place. In practice, where the " finder " is an officer, no point is gained by any attempt to sheet home to the prohibited immigrant the commission of the offence on other occasions. The importance of making the commission of the offence synchronise with the time when the prohibited immigrant is actually observed is that, in the case of summary offences, more extended rights of apprehension exist when a person is actually seen committing such offence.

Accordingly I hold that Gee Kee Way committed an offence under sec. 7 at Burwood, New South Wales, on July 2nd, and, if similar evidence of his being " found " had been forthcoming, he might also have been convicted in relation to his unlawful presence in Australia on a very large number of prior occasions, both in Victoria and New South Wales.

(5) The next question which arises is as to the general nature of the evidence required to prove that a person has aided, abetted or been knowingly concerned in the commission of the offence established by proof that a prohibited immigrant is found within the Commonwealth in contravention or evasion of the Act. Sec. 5 of the *Crimes Act* being applicable, there may be a large variety of circumstances which will amount to aiding or abetting or being knowingly concerned within the meaning of sec. 5. What are they ? In my opinion, the answer to this question depends upon the essential element in the offence created by sec. 7. The gist of the offence created by sec. 7 is that his stay within the Commonwealth is unlawful. In my opinion, a person who, knowing that an immigrant is a prohibited immigrant, actively assists him to conceal himself here, is guilty of an offence under sec. 5 of the *Crimes Act*. It is obvious that, if a prohibited immigrant is unable to speak English, it will be almost impossible for him to hide himself from the immigration authorities unless he receives active assistance from persons already within the Commonwealth. In other words, active combination and concert will usually be essential to the successful continuance of the unlawful stay in Australia of the prohibited immigrant. I

think that any person will be guilty of being knowingly concerned in the offence committed by a prohibited immigrant under sec. 7 whenever the former person takes steps to remove the immigrant from one place to another within the Commonwealth with a view to enabling such immigrant to prolong his unlawful stay within the Commonwealth. The fact that, as in the present case, such abettor does not assist in the "finding" by an officer, but is endeavouring to prevent any such "finding," seems to me to be quite immaterial.

(6) The ultimate question is whether the appellant was guilty of being knowingly concerned in the offence under sec. 7 committed by Gee Kee Way at Burwood on July 2nd last.

In my opinion, the evidence against the appellant is overwhelmingly strong. He took one of the two principal parts in smuggling or welcoming the stowaways on shore with a view to their being taken to distant places within Australia where detection would or might be extremely difficult, and, as a result, their unlawful stay might be prolonged. He not only assisted in the conspiracy, but was at the head of it. By his knowledge of English and Chinese he was an invaluable instrument in the scheme which at the time of the intervention of the customs officers seemed on the point of succeeding. He enabled the stowaway Gee Kee Way to remain within the Commonwealth, and enabled and assisted him to be present at Burwood, New South Wales, in contravention of the immigration laws of the Commonwealth. The appellant was knowingly concerned in Gee Kee Way's unlawful presence within the Commonwealth, including his unlawful presence at Burwood, which is the main and essential, though not the sole, ingredient of the offence created by sec. 7. Perhaps it should be added that the fact that the appellant was responsible for the conveyance of the Chinese from Geelong to Burwood is not the basis of the charge against him. The prosecutor went into the history of the appellant's manœuvres solely in order to establish guilty knowledge on the appellant's part. As far as I can understand, the appellant's conviction is to be set aside upon the ground that, assuming every other matter of fact and law against the appellant, there is insufficient evidence to prove his being knowingly concerned in the unlawful presence of Gee Kee

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Way at Burwood. But the appellant was chief organizer in the scheme of enabling and assisting Gee Kee Way to remain within the Commonwealth, and it was in pursuance of that scheme and not otherwise that Gee Kee Way had been conveyed to and was at Burwood on the day charged.

The importance of the present case is that sec. 5 of the *Crimes Act*, though admitted to be applicable to the offence established when a prohibited immigrant is found in Australia contravening the continuing prohibition against his presence here, will be nullified in its practical application. Although the person charged under sec. 5 of the *Crimes Act* has entered into a conspiracy for the purpose of concealing the prohibited immigrant, and, in pursuance of such conspiracy, strategic withdrawals from one *pied à terre* to another may be essential, the mere fact of such withdrawals is said to prevent a conviction under sec. 5, the accused saying : " I did not knowingly assist the prohibited immigrant to remain within Australia, because he was already here (unlawfully) when I came across him, and all that I did was to prolong the period of such unlawful stay by carrying him from one hiding place to another." Although the sole object of such carrying about is to enable the immigrant to evade and defy the prohibition against his stay within Australia, it is supposed to create a practical immunity against conviction for being knowingly concerned in an offence the essence of which is the very disobedience of such prohibition.

The appeal should be dismissed.

McTIERNAN J. The applicant was convicted on an information that on or about the second day of July 1937 at divers places in New South Wales he was knowingly concerned in the commission by Gee Kee Way of the offence that the latter, being a prohibited immigrant, was, contrary to the *Immigration Act* 1901-1935, found in the Commonwealth in contravention or evasion of the Act at Burwood on the above-mentioned date. The information assumes that sec. 5 of the *Crimes Act* 1914-1932 is applicable to an offence created by sec. 7 of the *Immigration Act* which can only be committed by a prohibited immigrant. The applicant disputes that the

statutory fiction introduced by sec. 5 could apply so as to make a person born in Australia, as he was, guilty in law of an offence under sec. 7 of being a prohibited immigrant found in Australia in contravention or evasion of the Act. The logic of this argument is impressive. But sec. 5 of the *Crimes Act* is not to be dismissed as being inapplicable merely on that logical ground. The application of sec. 5 to sec. 7 depends upon the scope of the purposes for which the former section introduces the statutory fiction of deeming, it may be contrary to the fact, that a person has committed an offence. But there is a preliminary step to the examination of this objection. The statutory fiction does not in any event apply in the present case unless it is proved that the applicant was "knowingly concerned in" the commission of the offence which Gee Kee Way is alleged to have committed, that is, of being found in the Commonwealth in contravention or evasion of the *Immigration Act*. Now, the gist of this offence is that a prohibited immigrant is in Australia. The section attacks his presence in the Commonwealth. By being here he commits the offence. The facts of the case are that the applicant went from Sydney to Melbourne where he made arrangements to pick up in a street in Geelong a number of Chinese, of whom he had information that they were coming off the s.s. *Willandra*, and to have them driven to Sydney. He engaged a car in Melbourne in which the Chinese were driven to Liverpool in New South Wales, where three of the Chinese, in whom the applicant said he was interested, were transferred to a taxi-cab, which the applicant engaged in order to have them driven to Botany. This taxi-cab was intercepted by the police on its way at Burwood and the applicant and the three Chinese were brought to the Burwood police station. It was proved that these three Chinese, of whom Gee Kee Way was one, were stowaways. There is no evidence to show that the applicant was concerned in his landing here. The fact that the applicant drove him from one place to another, although furtively, does not establish that the applicant aided, abetted, counselled, procured or was concerned in this alleged prohibited immigrant being found in Australia. That was a state which was fully established when he was met by the applicant and nothing that was done

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by him can fasten him with any responsibility for the presence of the alleged prohibited immigrant in the country on the occasion alleged in the information, or before that time. It appears to me that the conviction should be quashed on that ground, and it is unnecessary to deal with the other questions which were argued in this appeal.

In my opinion the conviction should be set aside and the appeal allowed.

Appeal allowed. Conviction set aside. No order as to costs.

Solicitor for the applicant, *Harold F. A. James.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.