REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

POOLE . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR THE COMMONWEALTH . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1955.

MELBOURNE, *March* 17;

SYDNEY, *March* 28.

Dixon C.J., Kitto and Taylor JJ.

Bankruptcy—Offences—Failure to deliver property to trustee—Material omission in statement of affairs—Defence—No intent to defraud creditors &c.—Absence of demand for delivery—High Court—Appeal as to sentence—Principles governing —Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *ss.* 76 (1) (*c*), (2), 210 (1) (*b*), (*d*), (6).

Section 76 (2) of the *Bankruptcy Act* 1924-1950 provides: "If a bankrupt wilfully fails to perform the duties imposed on him by this section, or to deliver up possession of any part of his property which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, to the official receiver or the trustee, or to any person duly authorized to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of contempt of court."

Held, that the sub-section does not create an obligation to deliver property but merely provides an additional sanction for a wilful failure to perform an obligation existing independently.

Section 210 (1) (*b*) of such Act provides that any bankrupt who does not deliver up to the trustee, or as he directs, all parts of his real and personal property which are in his custody or under his control, and which he is required by law to deliver up shall be guilty of an offence. A bankrupt was convicted of offences against s. 210 (1) (*b*) and s. 210 (1) (*d*) and sentenced to a term of imprisonment on each charge, to be served concurrently. The bankrupt had deliberately abstained from mentioning his ownership in a concrete mixer, worth ninety pounds, in his statement of affairs because he

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felt that a friend, who had contributed money towards its purchase, was morally entitled to more favourable treatment than the bankruptcy law would allow. Subsequently the bankrupt informed the official receiver of his interest in the mixer but neither then, nor later, was any direction given to him to deliver up the mixer to the bankruptcy authorities. Later the bankrupt sold the mixer and, after paying his friend portion of the proceeds, disbursed the remainder. The statement of affairs disclosed a substantial balance of assets over liabilities by reason of the inclusion therein of a debt allegedly due to the bankrupt. The official receiver refused to take legal proceedings necessary for the recovery of this debt in the absence of an indemnity for costs. It was not suggested that, at the time of signing the statement of affairs, the bankrupt did not believe that the debt was recoverable. In deciding upon the sentences to be imposed the trial judge treated the two offences as forming part of a planned course of fraudulent conduct.

Held, that the conviction and sentence in respect of the offence against s. 210 (1) (*b*) could not stand in the absence of proof of an obligation on the bankrupt to deliver up the mixer to the bankruptcy authorities.

Held, further, that the conviction in respect of the offence against s. 210 (1) (*d*) was proper on the evidence and no defence had been established by the bankrupt under s. 210 (6) of the Act.

Held, further, that in the circumstances the sentence of imprisonment imposed in respect of the offence against s. 210 (1) (*d*) should be set aside and the bankrupt released on giving security to be of good behaviour etc.

House v. *The King* (1936) 55 C.L.R. 499, *Cranssen* v. *The King* (1936) 55 C.L.R. 509, *Harris* v. *The Queen* (1954) 90 C.L.R. 652 referred to.

Conviction and sentence in respect of two offences by the Federal Court of Bankruptcy (*Clyne* J.) quashed as to one offence and sentence varied as to the other offence.

APPEAL from the Federal Court of Bankruptcy (District of Victoria).

Robert Clifford Poole was charged before the Federal Court of Bankruptcy sitting at Melbourne with that, being a bankrupt, he did not deliver up to the trustee all parts of his personal property which were in his custody or under his control and which he was required by law to deliver up, namely, a $2\frac{1}{2}$ cubic feet trailer type concrete mixer fitted with a Ronaldson-Tippett 2 h.p. petrol engine, and was further charged with that, being a bankrupt, he made a material omission in a statement relating to his affairs, namely, he omitted to disclose in his statement of affairs his interest in a $2\frac{1}{2}$ cubic feet trailer type concrete mixer fitted with a Ronaldson-Tippett 2 h.p. petrol engine valued at ninety pounds. The charges were laid under the *Bankruptcy Act* 1924-1950, ss. 210 (1) (*b*) and (*d*) respectively. The accused pleaded not guilty to each charge.

The trial took place before *Clyne* J. who in a judgment delivered on 22nd October 1954 found that the bankrupt had been the owner of the said concrete mixer for a number of years, that he had been well aware of his ownership at the date of his statement of affairs, that he had deliberately failed to include it therein, that he had deliberately failed to deliver it to the trustee and had, about a fortnight after the date of his statement of affairs, sold it and retained the proceeds. His Honour accordingly convicted the bankrupt on each charge and sentenced him to be imprisoned in Pentridge Gaol for a period of ten weeks, in respect of each offence, such sentences to be concurrently served. By further orders dated 22nd October 1954 and 11th November 1954 execution of the said sentences was stayed pending the determination of the appeal herein.

The bankrupt appealed to the High Court against the convictions and sentences.

C. P. Jacobs, for the appellant.

M. V. McInerney, for the respondent.

Cur. adv. vult.

March 28.

THE COURT delivered the following written judgment :—

This appeal comes before the Court under s. 26 (2) of the *Bankruptcy Act* 1924-1950 (Cth.). It is an appeal from an order of the Federal Court of Bankruptcy (*Clyne* J.), by which the appellant, a bankrupt, having been tried summarily, was convicted and sentenced to imprisonment on each of two charges. The charges were laid under pars. (*b*) and (*d*) of s. 210 (1) of the *Bankruptcy Act*, which provide that a bankrupt is guilty of an offence who (*b*) does not deliver up to the trustee, or as he directs, all parts of his real and personal property which are in his custody or under his control, and which he is required by law to deliver up, or (*d*) makes any material omission in any statement relating to his affairs. To any such charge it is a defence, by virtue of s. 210 (6), if the accused proves that the act or omission charged was done or made without intent to defraud his creditors or dishonestly conceal the state of his affairs or otherwise violate or defeat the law.

The first charge was framed in these terms: " that being a bankrupt you did not deliver up to the trustee all parts of your personal property which were in your custody or under your control and which you were required by law to deliver up, namely, a $2\frac{1}{2}$ cubic feet trailer type concrete mixer fitted with a Ronaldson-Tippett 2 h.p. petrol motor ". The second charge was " that being

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a bankrupt you made a material omission in a statement relating to your affairs, namely, you omitted to disclose in your statement of affairs your interest in a 2½ cubic feet trailer type concrete mixer fitted with a Ronaldson-Tippett 2 h.p. petrol engine valued at £90 0s. 0d.".

It will be seen that under the first charge the prosecution had the onus of proving that at some point of time the appellant owned the concrete mixer, had it in his custody or under his control and was required by law to deliver it up. The point of time, however, was not specified, and the facts relied upon as having given rise to the assumed obligation to deliver up were not stated. At the trial there was no evidence of any demand by the trustee for delivery of the concrete mixer to him or to anyone else. The only evidence which the respondent now relies upon to found a contention that there was a time at which the appellant was required by law to make delivery was evidence to the effect that the existence of the concrete mixer, as property which the appellant either owned or had an interest in, was disclosed by the appellant to the trustee on 19th May 1954, and that the trustee then told him that the concrete mixer was an asset in the estate which would have to be realized for the benefit of the creditors. In this situation, the first charge should have been dismissed for want of proof that the appellant was at any time required by law to make delivery to the trustee. We were referred to s. 76 (1) (*c*) and s. 76 (2), but these provisions do not oblige a bankrupt to deliver his property to the trustee in the absence of a demand. The delivery and receipt of possession must be bilateral not unilateral. Section 76 (2) and s. 210 (1) (*b*) include real property. How could a bankrupt deliver up possession of land to the official receiver or trustee except on an occasion when the latter entered into possession ? It was not the duty of the bankrupt to bring the concrete mixer to the office of the official receiver unsolicited and leave it somewhere within an area to which he might imagine the control of the official receiver extended. Section 76 (1) (*c*) provides that every bankrupt shall, unless prevented by sickness or other sufficient cause, do a number of things unrelated to the delivery of property, " and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as is reasonably required by the . . . trustee, or as is prescribed, or directed by the Court . . . " This provision has no application here, for there was no relevant requirement by the trustee, and delivery was neither prescribed by any rule or regulation nor directed by any court. Section 76 (2), so far as it is relied upon, provides that if a bankrupt

wilfully fails to deliver up any part of his property which is divisible amongst his creditors under the Act, and which is for the time being in his possession or under his control, to the official receiver or to the trustee, or to any person duly authorized to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of contempt of court. This provision clearly does not create any obligation to deliver property ; it only provides an additional sanction for a wilful failure to perform an obligation existing independently. The appeal must therefore be allowed insofar as it relates to the conviction on the first charge.

The second charge, it will be remembered, did not allege that the concrete mixer was the bankrupt's ; it alleged that he had an interest in it, without specifying the nature or extent of the interest. The appellant's statement of affairs was in the prescribed form and was verified by an affidavit sworn by him on 3rd July 1953 as being a full, true and complete statement of his affairs on the date of the sequestration order, 29th June 1953. In this document his unsecured debts were shown at £974 4s. 1d. (apart from a contingent liability of £249 for damages claimed in a county court action for dog-bite), and his assets as consisting of stock-in-trade worth £100 and book debts amounting to £2,196 8s. 5d. There was no reference to the concrete mixer or any interest therein.

The appellant does not deny that he had a proprietary interest of some kind in the concrete mixer at the date of the sequestration order. The learned trial judge said in his judgment that he thought it clearly evident that the appellant was the owner of the mixer and had been the owner of it for years. This finding was open to his Honour on the evidence, and, in any case, there is no denying that the appellant made a material omission in his statement of affairs whatever his interest in the mixer may have been. But at the trial the appellant set up a defence under sub-s. (6) of s. 210, and it has been necessary for us to consider the whole of the evidence, including the evidence as to the nature of his interest in the concrete mixer, in order to deal with a contention advanced before us that he should have been found to have discharged the onus of proving facts which entitled him to the protection of that sub-section.

The appellant swore that in omitting the mixer from his statement of affairs he had no intention of defrauding his creditors, but his own evidence at the trial made it clear that he acted in order to prevent the law from taking its course, even if only because he thought the course of the law would prejudice Heywood's moral claim. One explanation which he offered both at the trial and in his public examination was that the omission was due to his never

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having been asked; but this evidence cannot be treated seriously. The statement of affairs was prepared for him by his own solicitor, and the omission was due entirely to his own failure to tell the solicitor anything about the concrete mixer. His other attempts to explain the omission are more worthy of attention. There seems no reason to doubt that he bought the mixer from a company called Welling & Crossley Pty. Ltd., in 1946 or thereabouts, being accompanied at the time of the purchase by Heywood. He was then working in the building trade and Heywood was working with him. In his public examination he described the relationship as more or less one of partnership, apparently meaning that he and Heywood were carrying out contracts, sometimes together and sometimes separately. At the trial he denied that they were in partnership at that particular time. He said they were then working on wages, and the understanding was that if Heywood could get a job to earn a few extra pounds above wages he was to use the mixer. "We were mates", he said, "just mutual agreement". The arrangement made between them about the mixer he called a gentlemen's agreement. Heywood provided twenty-five pounds towards the purchase price of the mixer, but whether by way of loan to the appellant or by way of contribution to the purchase of an asset to be owned in undivided shares is a question on which the appellant has told contradictory stories. On the one hand, he mentioned the mixer to Mr. Jones, the assistant official receiver, as being his own property, saying that he had paid fifty pounds of which twenty-five pounds was advanced by Heywood; and he represented it as his own to Mr. Lakeman who ultimately bought it from him. On the other hand, he said in cross-examination at the trial that he left it out of his statement of affairs because he did not think it was his duty to disclose it, and added "It wasn't mine". He is found asserting at one time that he and Heywood had interests in it in the proportion of 60 to 40; at another time that Heywood had a half share in it; at another that it was a part asset of his; and at still another that Heywood was entitled to get back his twenty-five pounds out of the proceeds of its sale. He emphasized sometimes Heywood's financial interests with respect to it, and at other times his practical interest under an arrangement made between them that he should be entitled to use it in his work when the appellant was not using it. When he ultimately sold it, he repaid Heywood his twenty-five pounds—he said at the trial that he "owed Heywood money" and repaid the loan—and at one point in his evidence he said he paid him another twenty pounds. But whatever may have been the exact legal relation between them, even

if the appellant's story be given the utmost credence and the most favourable interpretation, its uncertainties and apparent inconsistencies being accounted for by attributing them to a hazy recollection of an indefinite arrangement between unbusinesslike people, the conclusion is inescapable that the appellant abstained from mentioning the concrete mixer in his statement of affairs because he felt that Heywood was morally entitled to more favourable treatment than the bankruptcy law would allow, and that therefore he himself was morally justified in preventing the full operation of the law. That this was so appears clearly from the following passage in the appellant's evidence at the trial: "Were you frightened that if it were seized by the Official Receiver and sold, that Mr. Heywood wouldn't get his £25?—That is what I was concerned about.—You were concerned about that?—Exactly—we were mates.

Consequently, to protect Mr. Heywood, did you omit—did you decide that the best thing to do was to omit any reference to this concrete mixer?—Exactly.

So that your omission of the concrete mixer from your statement of affairs was done with the motive of protecting your friend Mr. Heywood?—Well, he had to have his share of it.

It was done to protect his rights?—It was done to protect his share of the cost.

His Honour: Was it done to protect him?—To look after him.

Mr. McInerney: To look after his chance of getting back the £25?—Exactly."

It is evident that whatever may be said about intent to defraud his creditors or dishonestly conceal the state of his affairs, it is quite hopeless for the appellant to contend that he has proved an absence of intent otherwise to violate or defeat the law. To defeat the law in the interests of his friend was, in fact, the very thing that he was out to do; and that, clearly enough, was what *Clyne* J. meant when he said in his judgment that the failure to mention the mixer in the statement of affairs was deliberate.

The conviction on the second charge must therefore stand. There remains the question of the sentence, which is attacked as excessive. On each charge the appellant was sentenced to be imprisoned for ten weeks, the terms of imprisonment to be served concurrently. The principles which this Court applies in deciding appeals against sentences have been stated in *House* v. *The King* (1); *Cranssen* v. *The King* (2) and *Harris* v. *The Queen* (3). In the present case it

(1) (1936) 55 C.L.R. 499.
(2) (1936) 55 C.L.R. 509.
(3) (1954) 90 C.L.R. 652.

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seems clear that the learned trial judge, in deciding upon the sentences which he imposed, treated the two offences of which he had convicted the appellant as forming parts of a planned course of fraudulent conduct, which achieved its end when the appellant sold the mixer, gave part of the proceeds to his friend and applied the rest to his own purposes. Whether his Honour would have sentenced the appellant to ten weeks' imprisonment on the second charge alone if he had acquitted him on the first is fairly open to doubt. Moreover, there are important considerations which appear not to have received attention.

In the first place, the appellant was entitled to have it remembered that the omission of the mixer from his statement of affairs was remedied by his telling the official receiver about the mixer while it was still unsold and in his possession. He subsequently acted wrongfully, no doubt, in selling the mixer and disbursing the proceeds, but it should be recognized that he was not then disposing surreptitiously of a concealed asset. Then, again, a degree of extenuation may be found in the fact that the statement of affairs asserted a substantial balance of assets over liabilities by including as an asset a sum of £2,131 said to be owing to the appellant by D. V. & J. M. Smith & Sons. A question asked from the Bench during the argument of the appeal as to what had happened with regard to this alleged debt elicited only a reply that in the absence of an indemnity for costs the official receiver had not taken the legal proceedings necessary for its recovery. No suggestion was made, and there has been none throughout the case, that when the appellant signed his statement of affairs he did not believe that the debt was recoverable. Unless it is assumed that he had no such belief, it is difficult to see that his omission to include a concrete mixer, worth only ninety pounds, as an additional asset in his estate, animated as it was by a concern for the interests of a friend whose money had gone into the purchase of the article, could reasonably be regarded as calling for punishment by imprisonment.

In our opinion the case is one in which, upon the principles to which we have referred, the sentence imposed at the trial should be set aside. Bearing in mind the consequences which the appellant's conduct has already brought upon him, it seems to us that the interests of justice will be fully served in the circumstances of the case if, under s. 20 of the *Crimes Act* 1914-1950 (Cth.), the appellant is released without any sentence being passed upon him, upon his giving security by his own recognizance in the sum of fifty pounds to be of good behaviour for the period of six months from the date of this order and to comply in all respects until his discharge

with the provisions of the *Bankruptcy Act* and with all such directions as may be given to him by orders of the Federal Court of Bankruptcy.

The appeal will be allowed. The conviction of the appellant on the first charge and the sentence imposed upon him in respect thereof will be quashed. The sentence imposed in respect of the second charge will be set aside, and in lieu thereof an order will be made for the release of the appellant on the terms above-mentioned.

Appeal allowed.

Conviction and sentence of the appellant on the charge under s. 210 (1) (*b*) *of the Bankruptcy Act* 1924-1950 *quashed.*

Sentence of the appellant on the charge under s. 210 (1) (*d*) *set aside. In lieu thereof order that, upon the appellant giving security by his own recognizance in the sum of fifty pounds to be of good behaviour for the period of six months from the date of this order and to comply in all respects until his discharge with the provisions of the Bankruptcy Act* 1924-1954 *and with all such directions as may be given to him by orders of the Federal Court of Bankruptcy, he be released without any sentence being passed upon him in respect of the said charge. Order that he appear before the Court of Bankruptcy at a time and place to be fixed by that court for the purpose of giving such recognizance.*

Solicitor for the appellant, *R. H. Dunn.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.