[HIGH COURT OF AUSTRALIA.]

ADAMS . . . . . APPELLANT;
INFORMANT,

AND

CLEEVE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1935.

MELBOURNE, *March* 7.

SYDNEY, *March* 25.

Rich, Starke, Dixon and Evatt JJ.

*Sales Tax—Offence—Information—Dismissal—Appeal to High Court—Appeal as of right—Avoidance of tax—Court of summary jurisdiction—Authority to prosecute—Abandonment of excess over £500—Authority to abandon excess—Judiciary Act* 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *sec.* 39 (2) (*b*)*—*Sales Tax Assessment Act* (*No.* 1) 1930-1932 (*No.* 25 *of* 1930—*No.* 39 *of* 1932), *secs.* 49, 54, 55 (1), 58*.

The respondent was charged in a Court of Petty Sessions of Victoria with avoiding tax payable under the *Sales Tax Assessment Act* (*No.* 1) 1930-1932. The information was dismissed and the informant appealed by way of order to review to the High Court under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1933.

*Held* that sec. 58 of the *Sales Tax Assessment Act* (*No.* 1) did not take away the right of appeal to the High Court given by sec. 39 of the *Judiciary Act* 1903-1933, and that accordingly the appeal was brought as of right.

* The *Judiciary Act* 1903-1933, sec. 39 (2), provides: "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions: . . . (*b*) Wherever an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court."

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The information recited that the defendant had incurred a pecuniary penalty exceeding £500, but the excess over and above the sum of £500 was thereby abandoned. The authority to prosecute did not in express words authorize the abandonment of the excess of the pecuniary penalty over £500 which was necessary to bring the case within summary jurisdiction.

*Held* that the production of the authority to prosecute did not necessarily operate to show that except for the written authority the prosecution was conducted without the full cognizance and approval of the Deputy Commissioner of Taxation, and whether the formal authority was or was not wide enough to include the abandonment of the excess penalty, the presumption created by sec. 55 (1) of the Act, that the prosecution was instituted by the authority of the Deputy Commissioner, had not been rebutted.

APPEAL, by way of order to review, from a Court of Petty Sessions of Victoria.

Joseph Adams, the Deputy Federal Commissioner of Taxation, laid two informations against Percy Cleeve. One of the informations was substantially in the following form:—The information of Reginald Robert Kedge of Melbourne in the State of Victoria, an officer doing duty in relation to the *Sales Tax Assessment Act* (*No.* 1) 1930-1932 for and on behalf of Joseph Adams, Deputy Federal Commissioner of Taxation, who saith that the defendant on or about 23rd December 1932 at Melbourne did contrary to the *Sales Tax Assessment Act* (*No.* 1) 1930-1932 by a wilful act avoid tax chargeable under the said Act in that the defendant did in a

The *Sales Tax Assessment Act* (*No.* 1) 1930-1932, sec. 49, provides:—"Any person who, by any wilful act, default or neglect, or by any fraud, art or contrivance whatever, avoids or attempts to avoid tax chargeable under this Act, shall be guilty of an offence. Penalty: Not less than fifty pounds nor more than five hundred pounds and in addition treble the amount of tax payment whereof he has avoided or attempted to avoid." Sec. 54 provides: "Taxation prosecutions may be instituted in the name of the Commissioner by action, information or other appropriate proceeding . . . and when the prosecution is for a pecuniary penalty not exceeding £500 or the excess is abandoned, the taxation prosecution may be instituted in the name of the Commissioner or a deputy commissioner—(*c*) in a County Court, District Court, Local Court or Court of Summary Jurisdiction." Sec. 55 (1) provides: "Where any taxation prosecution has been instituted by an officer in the name of the Commissioner or Deputy Commissioner the prosecution shall, in the absence of evidence to the contrary, be deemed to have been instituted by the authority of the Commissioner or the Deputy Commissioner, as the case may be." Sec. 58 provides: "Subject to this Act the provisions of the law relating to summary proceedings before Justices in force in the State where the proceedings are instituted shall apply to all taxation prosecutions before a Court of Summary Jurisdiction in that State and an appeal shall lie from any conviction or order of dismissal to the Court, and in the manner, provided by the law of the State where such a conviction or order is made for appeals from convictions or orders of dismissal."

return of sales tax for the month of July 1932 furnished by the defendant on or about 23rd December 1932 to the informant wilfully show that for that month the aggregate amount for which taxable goods were sold in respect of which sales tax was payable was £799 17s. 2d. whereas the aggregate amount for which taxable goods were sold and in respect of which sales tax was payable was in fact a sum in excess of £799 17s. 2d. whereby the defendant has incurred a pecuniary penalty exceeding £500, but the excess over and above the sum of £500 is hereby abandoned. The information was signed by R. R. Kedge, for and on behalf of Joseph Adams, Deputy Commissioner of Taxation. Another information in similar terms was laid against Parkside Shoe Co. Pty. Ltd. in respect of the same omission. The other information against Percy Cleeve and that against the company were in respect of omissions to make returns of sales and of sales tax for the month of August 1932. The facts which are relevant to this appeal sufficiently appear in the judgments of the High Court below.

The police magistrate convicted the company on each of the two informations laid against it, and dismissed both the informations laid against Percy Cleeve.

The informant obtained an order nisi to review the orders of the police magistrate dismissing the informations against Percy Cleeve, and the order nisi was made returnable before the Full Court.

*Dean*, for the appellant.

*Coppel*, for the respondent, on a preliminary objection. This was a prosecution under the *Sales Tax Assessment Act* (*No.* 1), and the sole right of appeal is that granted by that Act. Sec. 58 of that Act provides that the local law shall apply and an appeal lies accordingly. Either there should have been an order to review to the Supreme Court or an appeal to General Sessions. Sec. 68 of the *Judiciary Act* is exclusive of the power as to appeals from summary jurisdiction given by sec. 39. The *Sales Tax Assessment Act* (*No.* 1), sec. 54, and not the *Judiciary Act*, confers jurisdiction on the police court. Therefore sec. 39 (2) of the *Judiciary Act* does not apply.

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*Dean.* The case falls within sec. 39 (2) (*b*) of the *Judiciary Act.* The provisions in the *Sales Tax Assessment Act* are supplementary, not exclusive. He referred to the *Justices Act* 1928 (Vict.), sec. 150. On the facts there should have been a conviction (*Baxter* v. *Ah Way* (1) ).

*Coppel.* On the merits there were two points taken in the Court below. First, the informant had no authority to lay the information, and secondly, there was not sufficient evidence to warrant a conviction of the present respondent. The only sales taxable under this Act are sales by the manufacturer to a person without a certificate (sec. 11). The informant should have proved that these were sales under which the company would have been charged sales tax under the *Sales Tax Assessment Act* (*No.* 1). The informant would have had to prove that informant was a manufacturer, but this was not done. There is no evidence that in relation to these concealed sales tax was payable by the company at all. There was no concealment by Cleeve of any matters relating to the subject matter of these charges. There was no proof that these sales were taxable, nor is there any evidence to implicate Cleeve in the transaction. There was no proper authority to lay the information. Sec. 55 of the *Sales Tax Assessment Act* provides either that there should be a specific authority, or, if that is not so, and a general authority may be given, that produced in this case was not sufficient to justify the prosecution. Sec. 55 (2), when read with sec. 55 (1), indicates that some specific authority is required in each case. Even if there may be a general authority, this authority is bad, because this case was not triable in a Court of Petty Sessions unless the excess over £500 was abandoned. An authority to bring the prosecution does not authorize the officer to abandon the excess made up of the penal tax and so bring the matter within the jurisdiction of the Court. There is nothing to show that that abandonment was done with authority.

*Dean*, in reply, referred to the *Justices Act* 1928 (Vict.), sec. 214.

*Cur. adv. vult.*

(1) (1909) 10 C.L.R. 212.

The following written judgments were delivered :—

RICH, DIXON AND EVATT JJ. This appeal is brought by the Deputy Commissioner of Taxation from an order of the Court of Petty Sessions dismissing an information against the respondent for an offence against sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1932, and sec. 5 of the *Crimes Act* 1914-1932. Sec. 5 of the *Crimes Act* provides 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, whether passed before or after the commencement of the Act, shall be deemed to have committed that offence and shall be punishable accordingly. Sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) provides that any person who by any wilful act, default or neglect or by any fraud, art or contrivance whatever avoids or attempts to avoid tax chargeable under the Act shall be guilty of an offence. The appeal has been brought as of right as under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1933. This paragraph states one of the conditions subject to which Federal jurisdiction is conferred by sub-sec. 2. It provides that, wherever an appeal lies from the decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court. The respondent raised the objection that no appeal from a decision given by a Court of Petty Sessions in a taxation prosecution under the *Sales Tax Assessment Act* (*No.* 1) lies as of right to this Court, but only by special leave. This objection is based primarily upon the provisions of sec. 58 of the Act, which provides that, in all taxation prosecutions before a court of summary jurisdiction in a State, the provisions of the law in force in the State relating to summary proceedings before Justices shall apply, and an appeal shall lie in the manner and to the Court provided by the law of the State for appeals from convictions or orders of dismissal. It is said that by reason of this special provision sec. 39 of the *Judiciary Act* does not apply. The argument is that sec. 58 confers the jurisdiction upon the Court of summary jurisdiction, either of its own force, or with the aid of sec. 54 (*c*), and that the right of appeal given by sec. 39 (2) (*b*) of the *Judiciary Act* applies only to the exercise of Federal jurisdiction conferred by

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sec. 39 itself. The fact that sec. 58 of the *Sales Tax Assessment Act* (*No.* 1) expressly gives a right of appeal to State Courts is also relied upon. An additional argument was advanced, based upon sec. 68 (2) of the *Judiciary Act*, which provides that the several Courts of a State exercising jurisdiction with respect to the summary conviction of offenders or persons charged with offences against the laws of the State and with respect to the hearing and determination of appeals arising out of any such . . . conviction shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth. This statement of the provision omits all but the words upon which the argument is based. The whole section has recently been examined in this Court for another purpose, and its history has been discussed (see *Williams* v. *The King* [*No.* 1] (1); *Williams* v. *The King* [*No.* 2] (2)). On the full terms of the section and its history there is something to be said for the view that the expression "appeals arising out of any such . . . conviction" relates only to trials upon indictment. But for the purposes of this case it is unnecessary to consider whether the assumption made during the argument that it related also to appeals from summary convictions is well founded. For neither the provisions of sec. 58 of the *Sales Tax Assessment Act* (*No.* 1) nor those of sec. 68 of the *Judiciary Act* appear to indicate any intention of excluding the operation of sec. 39 of the *Judiciary Act*. Among the purposes of sec. 39 are the exclusion of State jurisdiction and the substitution of Federal jurisdiction, subject to provisions relating to appeals from the Courts of the States to the Privy Council and to this Court and in the case of summary jurisdiction relating to the constitution of the Court. Sec. 39 is expressed in terms of perfectly general application, and such an application accords with the principles upon which the enactment proceeds. To exclude its operation upon any part of Federal jurisdiction, more is required than a special provision conferring part of the jurisdiction, either original or appellate, which sec. 39 also confers. If the special provision conferred a different authority, or imposed conditions or restrictions or otherwise disclosed an intention at variance with the full operation of sec. 39, an intention to exclude

(1) (1933) 50 C.L.R. 536. (2) (1933) 50 C.L.R. 551.

it might be inferred. In *Seaegg* v. *The King* (1) the Court took the view that secs. 72-77 of the *Judiciary Act*, which contain a code of procedure for an appeal by way of case stated upon a point of law raised at the trial of an indictable offence, showed an intention inconsistent with an application of sec. 39 (2) which would give jurisdiction over Federal offences to State Courts of Criminal Appeal. No inconsistency is involved in the present case between sec. 39 and the two provisions relied upon. Accordingly the appeal was properly brought as of right.

The facts of the case may be shortly stated. The respondent was manager of a company the business of which was boot manufacturing. His wife and two daughters were directors. One of his daughters was public officer of the company, and she drew up and signed the returns for sales tax. An investigation by taxation officers showed that the returns agreed with the entries of the company's books of account. Nevertheless, transactions had taken place with four customers of the company which did not appear in the books or the returns. The company had sold goods of considerable value to these customers, who held invoices and receipts with respect to the sales. Although no trace of these transactions appeared in the books, an invoice book was missing which may have contained counterfoils of the invoices. The respondent was required to attend at the taxation office, and he was there told by an investigation officer that he held the four invoices for sales which were not included in the sales journal, and that he also had evidence of other sales not appearing in the sales journal which were not covered by invoices and were paid for by open cheque. The respondent said :—" You are too good for me, you have got me. I had to do something to sell the goods to keep the wheels moving." In answer to questions as to what sales he had made for cash without invoices, he named three of the customers from whom the invoices and receipts had been obtained by the taxation officers. He said that he had sold about £3,000 worth of goods for cash without invoices, and that he had no record whatever made in this manner ; that he had traded in this way because he had stocks on hand and no money to pay wages, and his only means of getting money was to sell the goods

(1) (1932) 48 C.L.R. 251.

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free of sales tax. Upon a second visit to the taxation office, he said that his wife and one of his daughters who were directors took no active part in the company's affairs, that he constantly worked in the factory himself, and that it was practically his business. In respect of two monthly returns informations were laid under sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) against the company and against the respondent. The charges were in each case that the defendant did by a wilful act avoid tax in that the defendant did in a return of sales and of sales tax wilfully show that the aggregate amount for which taxable goods were sold was less than the amount for which such taxable goods were in fact sold. The magistrate convicted the company but dismissed the informations against the respondent upon the ground that there was no sufficient evidence to warrant a conviction. His view appears to have been that there was nothing to connect the respondent with the actual preparation of the returns. This view of the evidence cannot be supported. It is true that the admissions made by the respondent directly related to transactions in which no invoices were given, whereas the informations were based upon transactions in which invoices were given but records of the sales excluded from the company's books and returns. But the admissions afford abundant evidence that in the course of business adopted his was the guiding hand and his was the guilty mind. His daughter who made out the returns may or may not have been cognizant of their incorrectness, but there is at least prima facie evidence that she made them up as an intended consequence of his actions in selling free of sales tax and suppressing or concealing records of the transactions. This would amount to procuring or by act or omission being knowingly concerned in the commission of the offence. It was suggested that there was no evidence that the purchasers did not quote their certificates and thus relieve the company of responsibility for sales tax. This point can scarcely be taken now, because the purchasers were called in the Court below for the prosecution, but apparently were given no opportunity of giving evidence upon it. In any case, the admissions of the respondent and the non-appearance of the transactions in the books coupled with the failure to produce any quotation by the purchasers of their certificates supplies prima facie evidence. A point

was taken that the authority to prosecute did not extend to authorize the abandonment of the excess of the pecuniary penalty over £500 which was necessary to bring the case within summary jurisdiction. The production of the authority to prosecute does not necessarily operate to show that except for the written authority the prosecution was conducted without the full cognizance and approval of the Deputy Commissioner. Indeed, all the probabilities are to the contrary. Whether the formal authority is or is not wide enough to include the abandonment of the excess penalty, the presumption created by sec. 55 (1) of the Act, that the prosecution was instituted by the authority of the Deputy Commissioner, has not been rebutted.

For these reasons the appeal should be allowed, the order nisi made absolute with costs, and the information remitted to the Court of Petty Sessions for rehearing.

STARKE J. The respondent is the manager of a proprietary company known as the Parkside Shoe Co. Pty. Ltd. It is a family business, and is, as the respondent asserted, practically his business. Both the company and the respondent were charged, on separate informations, with avoiding sales tax imposed under the *Sales Tax Assessment Acts*, for the months of July and August 1932 respectively. There were four informations, two against the company and two against the respondent. The charge against the respondent in respect of the month of July was that he did contrary to the *Sales Tax Assessment Act* (*No.* 1) 1930-1932, sec. 49, by a wilful act avoid tax chargeable under the said Act in that he did in a return of sales and of sales tax for the month of July 1932 furnished by him . . . wilfully show that for that month the aggregate amount for which taxable goods were sold in respect of which sales tax was payable was £799 17s. 2d., whereas the aggregate amount for which such taxable goods were sold and in respect of which sales tax was payable was in fact a sum in excess of £799 17s. 2d. A similar charge was made against the respondent in respect of the month of August 1932, and also against the company in respect of both the months of July and August 1932. The company was convicted, and fined £60 in respect of the July charge and £75 in respect of the August charge. But the police magistrate who heard

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Starke J.

the informations dismissed the charges against the respondent. He said he was doubtful as to the respondent, but thought there was not sufficient evidence to warrant his conviction.

The law would have been amply vindicated, in my opinion, if the matter had been left there. The company—practically, the respondent—has been subjected to heavy penalties, in a sum of no less than £135, for its offences. But the Commissioner of Taxation appeals to this Court from the dismissal of the informations against the respondent. The ground of appeal is that on the evidence before the police magistrate the respondent ought to have been convicted. No question of public importance is involved in the appeal, but we have no discretion and must determine the matter according to law.

The respondent did not himself furnish the returns, but his daughter Amy Cleeve—the public officer of the company. However, 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 . . . shall be deemed to have committed that offence and shall be punishable accordingly." The returns were undoubtedly false. Sales of goods for cash were not returned, and tax was thus avoided. It was not a mistake, for the company under the direction and management of the respondent made these sales without delivering invoices and without entering the transactions in its books of account. The scheme was devised by the respondent for the purpose of concealing sales and hindering their discovery by the taxing authorities. It is undoubted that the returns concealing the sales were part, and indeed the aim, of the scheme, and that the respondent aided, abetted, counselled and procured the returns which were known to be false. The magistrate's determination therefore cannot be supported.

Mr. *Coppel*, counsel for the respondent, made a gallant attempt to save his client. He contended that an appeal to this Court was incompetent by reason of the provisions of sec. 58 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1934. But that section does not oust, or purport to oust, the appeal given to this Court under sec. 39 of the *Judiciary Act*. He also contended that the evidence did not

establish that the prosecution was instituted by the authority of the Commissioner. The information alleged that the respondent "has incurred a pecuniary penalty exceeding £500, but the excess over and above the said sum of £500 is hereby abandoned." (See *Sales Tax Assessment Act* (*No.* 1), sec. 54.) It was argued that the Commissioner had given a general and not a special authority to prosecute, and in any case had given no authority to abandon any excess over £500. A special authority to prosecute in the particular case is, however, not required by the Act, and a general authority to prosecute in the name of the Commissioner for the recovery of penalties under the *Sales Tax Assessment Act* (*No.* 1) 1930-1932 is sufficient. The other argument is met by the provisions of sec. 55 (1) of the Act.

The case must be remitted to the magistrate so that a penalty may be inflicted upon the respondent of not less than £50, nor more than £500, and in addition treble the amount of tax avoided, subject to the abandonment of any excess over £500.

But I protest against the injustice of this double penalty against practically the same party, the company and the respondent, for identically the same acts. The way of the wrongdoer must not be made easy, but he should not be oppressed. If the penalties inflicted on the company be recovered, those inflicted on the respondent should not, as I venture to think, be enforced, or they should be remitted by the proper constitutional authority.

*Appeal allowed. Order nisi made absolute with costs. Information remitted to the Court of Petty Sessions for rehearing.*

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

Solicitor for the respondent, *P. J. Ridgeway*.

H. D. W.