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the idea that a licence sentenced by the Special Court to be extinguished at a certain time can be revived again by a subsequent resolution in favour of continuing the number of licences. We are concerned here only with the interpretation of the Act, and not with the hardships it may bring about, and in these circumstances we should not be justified in granting special leave to appeal.

BARTON J. I agree.

O'CONNOR J. I am of the same opinion.

*Special leave to appeal refused.*

Solicitor, *C. A. Coghlan.*

B. L.

Cons *He Kaw Teh* v *R* 157 CLR 523

Dist *Poole* v *Wah Min Chan* (1947) 75 CLR 218

Appl *Police* v *Kennedy* (1998) 71 SASR 175

Cons *Kennedy* (1998) 100 ACrimR 377

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[HIGH COURT OF AUSTRALIA.]

EDGAR HILL . . . . . APPELLANT;
DEFENDANT,

AND

JOHN THOMAS TAMPLIN DONOHOE . RESPONDENT.
INFORMANT,

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

H. C. OF A. 1911.

SYDNEY, *August* 18.

Griffith C.J., Barton and O'Connor JJ.

*Customs Act* 1901-1910 (*No.* 6 *of* 1901, *No.* 36 *of* 1910), *sec.* 233B (c)—*Person in possession of prohibited imports—Evidence of importation—Validity of Commonwealth Statute.*

The defendant was found at night in a boat without a light, in Sydney harbour, coming from the s.s. *Taiyuan*, with opium, which was a prohibited

import, in his possession. He said to the arresting officer, "Can't we talk business?" *Held*, that it was competent to the Judge to find that the defendant knew that the opium in his possession had been imported in contravention of the *Customs Act* 1910.

It is an element of the offence constituted by sec. 233B (c) of the *Customs Act* 1910, that the defendant should know that the prohibited imports found in his possession have been imported into Australia in contravention of that Act. As so construed the section is *intra vires* the Constitution.

*Lyons* v. *Smart*, 6 C.L.R., 143, followed on this point.

APPEAL, by the defendant, by special leave, from the order of a District Court Judge at Quarter Sessions, upholding a conviction upon an information alleging that the appellant, without reasonable excuse, had in his possession certain prohibited imports, to which sec. 233B (c) of the *Customs Act* 1910 applies, which were imported into Australia in contravention of the said Act.

It appeared from the evidence that on 4th May, about 8.40 p.m., the defendant was in a boat without a light which was seen to come from the direction of the s.s. *Taiyuan* then lying at Dalgety's wharf in Sydney harbour. The boat was searched and 80 tins of opium were found in the stern. When the police found the opium the defendant said "Can't we talk business"? No evidence was called for the defence.

Upon the application for special leave to appeal it was stated that it had been admitted at Quarter Sessions that there was no direct evidence of importation of the opium, but that the learned Chairman had held that the issue of a proclamation (which was put in evidence), declaring that sec. 233B of the *Customs Act* 1910 should apply to opium suitable for smoking, so long as that article was a prohibited import, was evidence that the opium had been imported. Upon the hearing of the appeal counsel for the respondent did not admit that any such ruling had been given.

*Mack* and *Milner Stephen*, for the appellant. There was no evidence of importation. Sec. 233 B (c) of the *Customs Act* 1910 is unconstitutional. Under that sub-section it is an offence if any person "without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in

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contravention of this Act." Upon its literal construction the section would apply to goods which have become part of the common stock of the State and are found in the possession of an innocent holder for value. That might be made an offence by the criminal laws of the States, but is not within the legislative powers of the Commonwealth: *Lyons* v. *Smart* (1). The section purports to deal not only with acts of importation, but with the right to possession of imported articles which may have passed through several hands after importation.

*Flannery*, for the respondent. It was a reasonable inference from the facts proved in this case that the defendant knew that the opium had been unlawfully imported. If a defendant does not know that goods in his possession have been imported in contravention of the *Customs Act*, he has a reasonable excuse within the meaning of sec. 233. As so construed that section is not unconstitutional.

GRIFFITH C.J. Leave to appeal in this case was given principally on the suggestion made to us that the learned Chairman of Quarter Sessions had held that, when once a proclamation has been issued declaring certain goods to be prohibited imports, all goods of that kind found in possession of any person are to be conclusively deemed to have been imported. I think, however, that there must have been some mistake. I am sure that the learned Judge did not lay down any such proposition. Of course, if he did, it could not be sustained. Under the *Customs Act* the importation of certain classes of goods is prohibited; the goods are put in a class tabooed. If any goods of that class are imported there is a violation of the law. But two separate things have to be established—that the importation is prohibited, and that prohibited goods have been imported. It is now contended that in this case there was no evidence that the goods in question were imported at all. The appellant was found in a boat coming away in the dark from a ship called the *Taiyuan*, lying at a wharf in Sydney harbour. He was followed by a police officer, and in his possession were found a number of tins of

(1) 6 C.L.R., 143, at p 154, *per Barton* J.

opium. He said to the arresting officer: "Can't we talk business"? In my opinion it is a reasonable inference from that remark that the appellant knew that he had committed a breach of the law, and wished to compound his offence. It is true that no formal evidence was given that the ship regularly traded between Sydney and China. But I do not think it is going very far to say that the Judge was justified in acting on what everybody knew, that the ship was a regular trader between Sydney and China. We certainly did not give leave to appeal on that ground, and should not have given it. If that were the only objection, the leave should be rescinded. Another objection taken is that the section of the Act under which the appellant was convicted is *ultra vires* of the Federal Parliament law. Sec. 233 (B) (c) provides:—

"Any person who (*inter alia*) without reasonable excuse . . . has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act . . . shall be guilty of an offence against this Act."

It is contended that the language of this section applies to the case of any person who has in his possession prohibited goods which have in fact been imported, although he may be quite ignorant of the fact. For reasons which I gave in the case of *Lyons* v. *Smart* (1) I do not think that that is the meaning of the section. I think that the case of the *Queen* v. *Sleep* (2), which I there quoted, is applicable. In that case it was held that under a similar provision knowledge of the character of the goods is an element of the offence.

Whether the section would be *ultra vires* if read in the wider sense it is not necessary to consider. The section, as I am at present advised, means that any person who, without reasonable excuse, has in his possession any prohibited import which to his knowledge has been imported into Australia in contravention of the Act shall be liable, &c. And, so construed, it seems to me merely ancillary to the provision prohibiting the importation of certain goods. It is to punish an accessory after the fact. It cannot be suggested that the punishment of an accessory after

(1) 6 C.L.R., 143. (2) 30 L.J.M.C., 170.

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the fact is not ancillary to the prevention of the crime. So construed, the section is clearly not *ultra vires*. The same evidence which went to show that the goods had been imported showed also that when they came into the possession of the appellant he had knowledge of the fact. The appeal must therefore be dismissed.

BARTON J. I am of the same opinion.

O'CONNOR J. I agree.

*Appeal dismissed.*

Solicitor, for appellant, *B. A. McBride.*

Solicitor, for respondent, Crown Solicitor for the Commonwealth.

C. E. W.



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[HIGH COURT OF AUSTRALIA.]

WATERHOUSE . . . . . APPELLANT;
DEFENDANT,

AND

THE KING . . . . . RESPONDENT.
INFORMANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

MELBOURNE, *June* 1.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

*Criminal law—Larceny—Opium—Possession prohibited—Police Offences (Amendment) Act* 1908 (*N.S.W.*) (*No.* 12 *of* 1908), *secs.* 19, 20.

Sec. 19 (*a*) of the *Police Offences (Amendment) Act* 1908 provides that:—"No person shall (*a*) unless the holder of a certificate to deal in poisons, issued under the provisions of the *Poisons Act* 1902, or any Act amending the same, sell, or have in his possession, opium." Sec. 20 provides that—