IN THE HIGH COURT OF AUSTRALIA

THE KING

V.

HUGHES & ANOR.

EX PARTE SMITH.

ORAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on FRIDAY, 6th May, 1949.

H. E. Daw, Gov. Print., Melb.

C.12280/45

THE KING

v.

HUGHES & ANOR, EX PARTE SMITH.

ORDER.

Appeal dismissed.

THE KING v. HUGHES & ANOR., EX PARTE SMITH.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal to this Court by way of statutory prohibition in accordance with the procedure under the Justices Act of New South Wales from a conviction for an offence against sec. 227 of the Income Tax Assessment Act 1936-1947.

Sec. 227(1) provides that:-

> "Any person who makes or delivers a return which is false in any particular, or makes a false answer whether orally or in writing to any question duly put to him by the Commissioner or any officer duly authorised by him, shall be guilty of an offence."

The penalty is "not less than £2 or more than £100 and, in addition, the Court may order the person to pay to the Commissioner a sum not exceeding double the amount of tax that would have been avoided if the return or answer had been accepted as correct".

Sec. 233(2) permits a taxation prosecution to be instituted before a court of summary jurisdiction where the penalty sought to be recovered does not exceed £500, or the excess isabandoned.

The appellant, Frank Smith, was charged with this offence, that he did make a return of income for 12 months ended 30th June 1942 which return was false in a particular, to wit, the amount of £285, returned by the said defendant therein, as grand total of gross income was understated by an amount of not less than £1298, and the information concludes with an abandonment of any penalty in excess of the sum of £500.

Sec. 243 of the Act, upon which the prosecution relied, provides that:-

> "(1) In any taxation prosecution, every averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be prima facie evidence of the matter averred.

(2) /

(2) This section shall apply to any matter so averred although -

(a) evidence in support or rebuttal of the matter averred or of any other matter is given; ...."

The prosecution relied upon the averments. The defendant gave evidence himself, evidence was then called by the prosecution in rebuttal of the evidence given by the defendant. That evidence was evidence of investigating officers. The magistrate convicted the defendant and evidently considered the evidence of the defendant unsatisfactory, which evidence was vague on many points and was quite unconvincing on other points.

The magistrate was not bound to believe the evidence of the defendant, modified as it was by some of the evidence in rebuttal given by the investigating officers and inconsistent with itself on many points, as can readily be seen.

It is unnecessary to examine in detail the evidence. There was certainly evidence upon which the magistrate could convict the defendant of the offence of understating his income; indeed he admitted in evidence that he had understated it by failing to include an amount of £100 which he said he had derived from acting as agent for a starting price bookmaker. There was evidence, then, upon which the magistrate could find that the defendant was guilty of an offence under the section.

Various objections, however, are taken to the decision of the magistrate. In the first place the defendant applied for further particulars of the offence charged, which further particulars were not given. There is no procedure prescribed for the giving of particulars in proceedings in a Police Court but it is the duty of the magistrate to see that the defendant is placed in a position to understand what the charge made against him is. In the present case the particulars asked for were particulars for the purpose of establishing

omissions which it was alleged the defendanthad made from his return. The matters as to which particulars were asked were peculiarly within the knowledge of the prosecutor and they could only be obtained second-hand by the informant.

It was a matter for the magistrate to determine whether the interests of justice required particulars to be furnished and we are unable to see any reason for holding that the defendant was prejudiced in his defence by the failure in this case of the magistrate to order further particulars.

Another objection which is raised depends upon the alleged improper admission of evidence. The investigating officers interviewed the defendant and interrogated him about his financial affairs over a considerable past period. One of the officers reduced to writing what he alleged the defendant had said, the defendant refused to sign the document and the investigating officer went into the box and gave evidence as to the conversation. He said that he had made a note at the time and his note was put in evidence. If objection had been taken the note would have been excluded from evidence; the result then would have been only that the witness would have been entitled, if he had so desired, to refresh his memory by looking at his note. No injustice was done to the defendant by this method or this form of giving the evidence.

It is true that in criminal trials it is the duty of the tribunal, independently of objection, to exclude inadmissible evidence but, as was stated in the House of Lords in the case of Stirland v. Director of Public Prosecutions (1944 2 A.E.R. 13 at p. 19- it is also reported in 1944 A.C. 315):-

> "The Court must be careful in allowing an appeal on the ground of the section of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced".

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In this case no objection was taken to the admission of the document in evidence but it is plain that the accused was not prejudiced by the acceptance in evidence of the document.

It is further objected that an application was made to order witnesses out of Court, to which the magistrate did not accede. Such a matter is entirely within the discretion of the trial tribunal.

Finally, some comment has been made upon the amount of the penalty. That is a matter which, subject to the maximum prescribed by sec. 227, is within the discretion of the magistrate. He saw the defendant, heard his evidence and could form his own judgment as to the propriety of imposing a maximum penalty or a smaller penalty. The penalty which was imposed was within the limits which the Act imposes upon the discretion of the magistrate in relation to the amount of penalty.

The appeal therefore should be dismissed.

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JUDGMENT. DIXON J.

I agree that the appeal should be dismissed. The only matter upon which I have any misgiving is whether it was sufficiently established that double the amount of tax did exceed the £400. On the whole I think it was so established having regard to the averment section and the very unsatisfactory nature of the defendant's evidence and to the particulars of amounts which appear to have been in excess of those which he could justify.

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JUDGMENT WILLIAMS J.

I agree that the appeal should be dismissed.